

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

THE UNITED STATES OF
AMERICA, ET AL.

versus

BLUEWAVE HEALTHCARE
CONSULTANTS, INC., ET AL.

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Case No. 9:14-cv-230

January 24, 2018

REPORTER'S OFFICIAL TRANSCRIPT OF THE JURY TRIAL - DAY SEVEN
HELD BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE
January 24, 2018

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9 : 1 0 A M 1 (Call to order of the Court.)

9 : 1 0 A M 2 **THE COURT:** Good morning. Please be seated.

9 : 1 0 A M 3 Okay. Any matters we need to address before we
9 : 1 1 A M 4 bring in the jury?

9 : 1 1 A M 5 **MR. LEVENTIS:** No, thank you, Your Honor.

9 : 1 1 A M 6 **MR. COOKE:** Nothing, Your Honor. Thank you.

9 : 1 1 A M 7 **THE COURT:** Very good. Bring in the jury.

9 : 1 1 A M 8 Good morning, Miss Eunice.

9 : 1 1 A M 9 **THE DEPUTY CLERK:** Good morning. How you doing?

9 : 1 2 A M 10 (Whereupon the jury entered the courtroom.)

9 : 1 3 A M 11 **THE COURT:** Please be seated. Good morning.

9 : 1 3 A M 12 **JURY:** Good morning.

9 : 1 3 A M 13 **THE COURT:** Cross-examination to continue.

9 : 1 3 A M 14 **MS. SHORT:** Yes, sir.

9 : 1 3 A M 15 **FLOYD CALHOUN DENT, III,**
9 : 1 3 A M 16 one of the defendants herein, called as a witness on his own
9 : 1 3 A M 17 behalf, being first duly sworn, was examined and testified as
9 : 1 3 A M 18 follows:

9 : 1 3 A M 19 **CROSS-EXAMINATION (CONTINUED)**

9 : 1 3 A M 20 **BY MS. SHORT:**

9 : 1 3 A M 21 **Q.** Good morning, Mr. Dent.

9 : 1 3 A M 22 **A.** Good morning.

9 : 1 3 A M 23 **Q.** All right. I want to take us back to where we finished up
9 : 1 3 A M 24 yesterday. We were talking about the compliance training that
9 : 1 3 A M 25 you and Mr. Johnson did at BlueWave.

9 : 1 3 A M 1 Do you remember that?

9 : 1 3 A M 2 A. Yes.

9 : 1 3 A M 3 Q. Okay.

9 : 1 3 A M 4 And let's pull up Plaintiffs' Exhibit 1221.

9 : 1 3 A M 5 Mr. Dent, do you remember testifying about this legal
9 : 1 3 A M 6 conference call test yesterday with your counsel?

9 : 1 3 A M 7 A. Yes.

9 : 1 3 A M 8 Q. And the first question asked, "Can you give gift cards to
9 : 1 3 A M 9 physicians or phlebotomists," et cetera. The answer is?

9 : 1 3 A M 10 A. No.

9 : 1 3 A M 11 Q. Looking at Question Number 8, "Can you send a physician on
9 : 1 3 A M 12 a cruise?" The answer is no; right?

9 : 1 3 A M 13 A. Yes, the answer is no.

9 : 1 4 A M 14 Q. Correct, the answer is no.

9 : 1 4 A M 15 Going back up to Question Number 3, "Can you supply a
9 : 1 4 A M 16 hotel and pay for travel for your doctors to attend a
9 : 1 4 A M 17 conference?" Your answer was?

9 : 1 4 A M 18 A. No.

9 : 1 4 A M 19 Q. And if we could look at the next page of this compliance
9 : 1 4 A M 20 test, Question Number 22, "Can you give comp tests to offices?"
9 : 1 4 A M 21 And the answer you gave was?

9 : 1 4 A M 22 A. No.

9 : 1 4 A M 23 Q. Okay. And you understand the answer to all of those
9 : 1 4 A M 24 questions is no because giving those items to a doctor would be
9 : 1 4 A M 25 a violation of the Anti-Kickback Statute; isn't that right?

9 : 1 4 A M 1 A. I believe that is correct, yes.

9 : 1 4 A M 2 Q. Those are all pretty straightforward; right?

9 : 1 4 A M 3 A. Yes.

9 : 1 4 A M 4 Q. Okay. And you testified yesterday that you like it when
9 : 1 4 A M 5 things are black and white; correct?

9 : 1 4 A M 6 A. I do.

9 : 1 4 A M 7 Q. I want to pull up a demonstrative that we've prepared and
9 : 1 5 A M 8 ask you, do you recognize this as the language of the
9 : 1 5 A M 9 Anti-Kickback Statute?

9 : 1 5 A M 10 A. I'd have to read it, but I wouldn't disagree with you --

9 : 1 5 A M 11 Q. Okay.

9 : 1 5 A M 12 A. -- that that's the language of the Anti-Kickback Statute.

9 : 1 5 A M 13 Q. All right. Well, it doesn't say anything in there about
9 : 1 5 A M 14 gift cards, does it?

9 : 1 5 A M 15 A. I don't believe it does, no.

9 : 1 5 A M 16 Q. Doesn't say anything about hotels, does it?

9 : 1 5 A M 17 A. I don't believe it would specifically name hotels.

9 : 1 5 A M 18 Q. And it doesn't say anything specific about cruises; right?

9 : 1 5 A M 19 A. I don't believe it says anything specific about cruises.

9 : 1 5 A M 20 Q. Or complimentary testing?

9 : 1 5 A M 21 A. I would agree with you, it doesn't say anything about
9 : 1 5 A M 22 complimentary testing.

9 : 1 5 A M 23 Q. All right.

9 : 1 5 A M 24 we can take that down. Thanks, Peter.

9 : 1 5 A M 25 Also yesterday, do you remember testifying about

9 : 1 5 A M 1 paragraph 5 of the P&H agreement between HDL and its
9 : 1 6 A M 2 physicians?

9 : 1 6 A M 3 why don't we pull up -- it's U.S. Trial Exhibit 1144.

9 : 1 6 A M 4 Do you remember talking about that provision of the
9 : 1 6 A M 5 P&H agreement yesterday?

9 : 1 6 A M 6 A. I do.

9 : 1 6 A M 7 Q. All right. And I believe you testified that Bluewave
9 : 1 6 A M 8 really had to trust the doctors not to bill -- not to double
9 : 1 6 A M 9 dip in their billing; is that correct?

9 : 1 6 A M 10 A. I believe that's correct.

9 : 1 6 A M 11 Q. When you were talking to doctors about the P&H agreement
9 : 1 6 A M 12 and selling HDL's tests, did you specifically tell the doctors
9 : 1 6 A M 13 that they couldn't bill for their office visits?

9 : 1 6 A M 14 A. If that came up, yes, we would -- we would make it very
9 : 1 6 A M 15 clear the difference between a \$3 draw fee and the \$17
9 : 1 6 A M 16 processing and handling fee.

9 : 1 7 A M 17 Q. All right. In your --

9 : 1 7 A M 18 THE COURT: I don't think that was responsive to the
9 : 1 7 A M 19 question. Be more precise in your question.

9 : 1 7 A M 20 BY MS. SHORT:

9 : 1 7 A M 21 Q. Okay. When you were selling HDL's tests and talking to
9 : 1 7 A M 22 your physician clients about this P&H agreement, did you point
9 : 1 7 A M 23 out to them that this paragraph meant that they couldn't bill
9 : 1 7 A M 24 for their office visits?

9 : 1 7 A M 25 A. At times, yes. And can I explain?

9 : 1 7 A M 1 The laboratory oftentimes would send these agreements
9 : 1 7 A M 2 directly to the physician practice to get them signed. The
9 : 1 7 A M 3 sales representative wasn't necessarily presenting it unless it
9 : 1 7 A M 4 came up and we were asked about it. Then we would present it,
9 : 1 7 A M 5 give it to the physician to read over it.

9 : 1 7 A M 6 Q. Mr. Dent, in your experience, physicians bill for their
9 : 1 7 A M 7 office visits; correct?

9 : 1 7 A M 8 A. Absolutely they bill for their office visits.

9 : 1 7 A M 9 Q. The same physicians who are accepting P&H fees billed for
9 : 1 7 A M 10 their office visits, didn't they?

9 : 1 7 A M 11 A. Yes, ma'am, physicians will bill for office visits.

9 : 1 8 A M 12 There's a big legal difference of opinion whether there's a P&H
9 : 1 8 A M 13 fee -- or a draw fee, for that matter -- included in an office
9 : 1 8 A M 14 visit. There was testimony about the CPT 99000 code which we
9 : 1 8 A M 15 learned about in the investigation, but the testimony was it
9 : 1 8 A M 16 reimburses zero dollars.

9 : 1 8 A M 17 Q. Mr. Dent, do you remember your testimony yesterday about
9 : 1 8 A M 18 an HDL employee named Anna McKean?

9 : 1 8 A M 19 A. I remember seeing the name on an email and testifying that
9 : 1 8 A M 20 Anna McKean was an HDL employee, yes.

9 : 1 8 A M 21 Q. Okay.

9 : 1 8 A M 22 MS. SHORT: Your Honor, may I approach?

9 : 1 8 A M 23 THE COURT: You may.

9 : 1 8 A M 24 THE WITNESS: Thank you.

9 : 1 8 A M 25 BY MS. SHORT:

9 : 1 9 A M 1 Q. Mr. Dent, I've had this document marked as U.S. Trial
9 : 1 9 A M 2 Exhibit 7009. Do you recognize this document? The middle of
9 : 1 9 A M 3 the page, there's an email from Tonya Mallory, looks like to a
9 : 1 9 A M 4 bunch of people at HDL, and copied are you and Mr. Johnson?

9 : 1 9 A M 5 A. Myself and Mr. Johnson are copied on the email, yes.

9 : 1 9 A M 6 Q. Okay. Do you recognize this document?

9 : 1 9 A M 7 A. It's seven years old. I can't say I recognize it, but I
9 : 1 9 A M 8 don't deny that I'm copied on the email.

9 : 1 9 A M 9 Q. Okay.

9 : 1 9 A M 10 MS. SHORT: Your Honor, I'd like to move for the
9 : 1 9 A M 11 admission of U.S. Trial Exhibit 7009.

9 : 1 9 A M 12 THE COURT: Any objection?

9 : 1 9 A M 13 MR. COOKE: No objection.

9 : 1 9 A M 14 MR. ASHMORE: May I see that?

9 : 1 9 A M 15 MS. SHORT: Oh, I'm sorry.

9 : 1 9 A M 16 MR. ASHMORE: No objection, Your Honor.

9 : 1 9 A M 17 THE COURT: Very good. Plaintiffs' Exhibit 7009
9 : 1 9 A M 18 admitted without objection.

9 : 1 9 A M 19 BY MS. SHORT:

9 : 2 0 A M 20 Q. Mr. Dent, in her email in which you are copied,
9 : 2 0 A M 21 Ms. Mallory talks about Anna McKean. Do you see that in the
9 : 2 0 A M 22 first paragraph?

9 : 2 0 A M 23 A. I do.

9 : 2 0 A M 24 Q. Okay. And do you recall that Ms. McKean had prepared a
9 : 2 0 A M 25 report for HDL after she had interviewed a number of HDL

9 : 2 0 A M 1 doctors and she was making recommendations about what HDL could
9 : 2 0 A M 2 do to improve its relationships with its physician clients?

9 : 2 0 A M 3 A. I don't recall that.

9 : 2 0 A M 4 Q. Okay. If you flip through the document, do you remember
9 : 2 0 A M 5 seeing the report from Ms. McKean?

9 : 2 0 A M 6 A. What page is the report?

9 : 2 0 A M 7 Q. I think the report begins on page 3 of the document that
9 : 2 0 A M 8 you have in front of you.

9 : 2 1 A M 9 A. There's a long report attached to the document, yes.

9 : 2 1 A M 10 Q. I'd like to turn your attention to page 16 of the report.
9 : 2 1 A M 11 The control number on the bottom, if it helps, is HDLDOJ bunch
9 : 2 1 A M 12 of numbers ending 78403.

9 : 2 1 A M 13 A. I'm on page 16.

9 : 2 1 A M 14 Q. Okay. Do you see the section titled "financial"?

9 : 2 1 A M 15 A. Yes. In the middle?

9 : 2 1 A M 16 Q. Yes.

9 : 2 1 A M 17 And Ms. McKean writes, "The financial implications
9 : 2 1 A M 18 for the patient and the physician for HDL testing should not be
9 : 2 1 A M 19 underestimated."

9 : 2 1 A M 20 Do you see that?

9 : 2 1 A M 21 A. I do see that first sentence, yes.

9 : 2 1 A M 22 Q. Okay. Do you remember seeing this report back in February
9 : 2 1 A M 23 of 2011?

9 : 2 1 A M 24 A. Ma'am, I don't recall seeing this report, but I don't deny
9 : 2 2 A M 25 that it was sent to me.

9 : 2 2 A M 1 Q. Okay. Turning to the next page, the first full paragraph
9 : 2 2 A M 2 that begins "For the former Berkeley physicians who were
9 : 2 2 A M 3 interviewed, all listed billing of their patients by Berkeley
9 : 2 2 A M 4 as the reason for switching to HDL."

9 : 2 2 A M 5 Do you see that?

9 : 2 2 A M 6 A. I see that.

9 : 2 2 A M 7 Q. In your experience, that was one of the reasons that you
9 : 2 2 A M 8 were able to be so successful in converting those Berkeley
9 : 2 2 A M 9 patients to HDL; correct?

9 : 2 2 A M 10 A. What was one of the reasons?

9 : 2 2 A M 11 Q. Because Berkeley had begun billing their -- billing the
9 : 2 2 A M 12 patients for the testing.

9 : 2 2 A M 13 A. The physicians don't bill the patients for the testing;
9 : 2 2 A M 14 the lab does.

9 : 2 2 A M 15 Q. Correct. Berkeley had begun to bill its patients for
9 : 2 2 A M 16 testing, and that was one of the things that the physicians
9 : 2 2 A M 17 were frustrated about; correct?

9 : 2 3 A M 18 A. Berkeley began billing patients way before we left
9 : 2 3 A M 19 Berkeley.

9 : 2 3 A M 20 Q. Okay. Okay. And that was one of the reasons that
9 : 2 3 A M 21 physicians who had been using Berkeley switched to HDL, because
9 : 2 3 A M 22 HDL promised that it would not bill patients; correct?

9 : 2 3 A M 23 A. I'd like to explain that. No, that's not correct.

9 : 2 3 A M 24 what happened at Berkeley, there was an instance
9 : 2 3 A M 25 where Berkeley billing department had billed patients the

9 : 2 3 A M 1 entire retail bill minus what the insurance company had paid.
9 : 2 3 A M 2 So if you have a retail charge, then there's a max allowable.
9 : 2 3 A M 3 There's a copay deductible. They billed the patient the entire
9 : 2 3 A M 4 cost of it by accident. And that's what happened. And it
9 : 2 3 A M 5 really put a lot of mud on the faces of the sales
9 : 2 3 A M 6 representatives because you had explained to the physician
9 : 2 3 A M 7 practices up front what the billing policy was. You had given
9 : 2 3 A M 8 them tearoff sheets so they had a copy in writing and a sheet
9 : 2 3 A M 9 that they could give the patient. And then all of a sudden
9 : 2 3 A M 10 patients started calling in saying, "I got an enormous bill."
9 : 2 4 A M 11 So that's what's being referenced is the time that they
9 : 2 4 A M 12 retail-billed patients.

9 : 2 4 A M 13 Q. Okay. So you just -- either Ms. McKean had it wrong or
9 : 2 4 A M 14 you just disagree with her conclusion here; is that right?

9 : 2 4 A M 15 A. Ma'am, I don't think I could speak to that.

9 : 2 4 A M 16 Q. Okay. Looking at the bottom of that page, under
9 : 2 4 A M 17 "diagnosis codes." Do you see that?

9 : 2 4 A M 18 A. I do.

9 : 2 4 A M 19 Q. And Ms. McKean says, "Most physicians requested
9 : 2 4 A M 20 information about which diagnosis codes, ICD-9, they should use
9 : 2 4 A M 21 to make sure that insurance covered the test."

9 : 2 4 A M 22 Do you see that sentence?

9 : 2 4 A M 23 A. I see that sentence.

9 : 2 4 A M 24 Q. Okay. An ICD-9 is what the doctor uses, that shorthand
9 : 2 4 A M 25 code, to describe what the patient's condition is; correct?

9 : 2 4 A M 1 A. That is correct.

9 : 2 4 A M 2 Q. Okay. And Ms. McKean notes that it is included at the
9 : 2 4 A M 3 bottom of the HDL requisition form; is that right?

9 : 2 4 A M 4 A. There are a lot of them on the bottom of the HDL
9 : 2 4 A M 5 requisition form. Most practices were asked to send the
9 : 2 4 A M 6 patient demographic sheet along with the requisition because
9 : 2 5 A M 7 most of the time -- or a lot of the time, they'd come in and
9 : 2 5 A M 8 there wasn't even a code checked on the bottom. So you'd have
9 : 2 5 A M 9 to put the requisition with the billing summary sheet and the
9 : 2 5 A M 10 demographic sheet that came along with the requisition to see
9 : 2 5 A M 11 all the codes that applied to that patient.

9 : 2 5 A M 12 Q. Okay. Looking at the next page, top of the page,
9 : 2 5 A M 13 Ms. McKean writes, "Dr. Richard" --

9 : 2 5 A M 14 A. Are we on page 18?

9 : 2 5 A M 15 Q. We're on page 18, yeah. Do you see where we're going,
9 : 2 5 A M 16 second line down?

9 : 2 5 A M 17 A. I'm on page 18, yes.

9 : 2 5 A M 18 Q. Okay. "Dr. Richard said that he does not always know
9 : 2 5 A M 19 which diagnosis codes correspond to which test and may not know
9 : 2 5 A M 20 which labs are appropriate for certain conditions."

9 : 2 5 A M 21 Do you see that?

9 : 2 5 A M 22 A. I see that.

9 : 2 5 A M 23 Q. That was your experience out in the field too, wasn't it?

9 : 2 5 A M 24 A. No.

9 : 2 5 A M 25 Q. So you just disagree with what Ms. McKean is reporting

9 : 2 5 A M 1 here?

9 : 2 6 A M 2 A. I'll try to explain this. We wanted and the lab wanted
9 : 2 6 A M 3 the requisition to come in with every single ICD-9 code that
9 : 2 6 A M 4 was accompanied for that particular patient. For example, I'll
9 : 2 6 A M 5 use me. I'm obese, I have hypertension, I have hyperlipidemia,
9 : 2 6 A M 6 I have insulin resistance. I could go on. That's four codes.
9 : 2 6 A M 7 Quite often, whoever is drawing the blood in the laboratory,
9 : 2 6 A M 8 they have to search through all those codes down at the bottom.
9 : 2 6 A M 9 And sometimes they would only check 272.2, for example, which
10 is mixed or unspecified hyperlipidemia.

9 : 2 6 A M 11 When the lab goes to bill for that particular set of
9 : 2 6 A M 12 tests that have been ordered for that patient, they want to
9 : 2 6 A M 13 have all the codes that apply to that patient so they can
9 : 2 6 A M 14 properly bill for the right diagnosis. And, yes, it helps with
9 : 2 6 A M 15 their reimbursement too. They may bill with just the one code
9 : 2 6 A M 16 and it get denied, which is why you want to have all applicable
9 : 2 7 A M 17 codes for that patient.

9 : 2 7 A M 18 Q. Okay. Mr. Dent, isn't it true that you helped HDL prepare
9 : 2 7 A M 19 its requisition form?

9 : 2 7 A M 20 A. I wouldn't deny helping HDL to prepare a requisition form.
9 : 2 7 A M 21 I helped with the requisition forms and layout with Berkeley as
9 : 2 7 A M 22 well.

9 : 2 7 A M 23 Q. Did you do that with Singulex as well?

9 : 2 7 A M 24 A. Don't recall it, but I would help. I mean, if they had
9 : 2 7 A M 25 asked me to look at their requisition form and proofread it, I

9 : 2 7 A M 1 would be more than happy to do that for them.

9 : 2 7 A M 2 Q. Okay. Let me go down to the bottom of page 18, the
9 : 2 7 A M 3 section that's -- starts with "generating a positive ROI."

9 : 2 7 A M 4 Do you see that?

9 : 2 7 A M 5 A. I do.

9 : 2 7 A M 6 Q. All right. And ROI stands for return on investment;
9 : 2 7 A M 7 correct?

9 : 2 7 A M 8 A. I've seen that acronym used for return on investment
9 : 2 7 A M 9 before, yes.

9 : 2 7 A M 10 Q. All right. Do you believe that's what it's talking about
9 : 2 7 A M 11 in this report?

9 : 2 7 A M 12 A. I'd have to read it, but if you say that it does, yes.

9 : 2 8 A M 13 Q. Okay. All right. So looking now at page 19, the next
9 : 2 8 A M 14 page, Ms. McKean gives an example of return on investment on
9 : 2 8 A M 15 this page. And I want to focus on her example at the middle of
9 : 2 8 A M 16 the page. She says --

9 : 2 8 A M 17 Actually, just a little bit above that, Peter, if you
9 : 2 8 A M 18 don't mind.

9 : 2 8 A M 19 -- an example of the revenue potential?

9 : 2 8 A M 20 A. Are you in the very top paragraph?

9 : 2 8 A M 21 Q. It's in the middle of the page.

9 : 2 8 A M 22 A. I see that paragraph, yes.

9 : 2 8 A M 23 Q. I think the CPT code chart in there shows what Medicare
9 : 2 8 A M 24 reimburses for various office visits?

9 : 2 8 A M 25 A. I see a table for non-Medicare and Medicare reimbursements

9 : 2 8 A M 1 for particular CPT codes, yes.

9 : 2 8 A M 2 Q. Okay. And then, right below that, Ms. McKean says "an
9 : 2 8 A M 3 example of the revenue potential for practices can be given by
9 : 2 8 A M 4 estimating the number of visits that could be generated from
9 : 2 8 A M 5 testing 100 patients. For every 100 patients tested,
9 : 2 9 A M 6 approximately 82 percent will have a condition that requires
9 : 2 9 A M 7 physician follow-up at three-month intervals. On an annual
9 : 2 9 A M 8 basis, this could generate almost \$30,000 in additional revenue
9 : 2 9 A M 9 per 100 patients tested."

9 : 2 9 A M 10 Do you see that?

9 : 2 9 A M 11 A. I do see that.

9 : 2 9 A M 12 Q. And if you look at the calculations that she provides
9 : 2 9 A M 13 right underneath that, she includes in her calculations what
9 : 2 9 A M 14 the physician would charge for an initial office visit where
9 : 2 9 A M 15 the test is ordered. Do you see that?

9 : 2 9 A M 16 A. I see calculations where it says "initial test, 100 times
9 : 2 9 A M 17 75 equals 7500."

9 : 2 9 A M 18 Q. Okay. 75 roughly corresponds to a physician office visit
9 : 2 9 A M 19 payment?

9 : 2 9 A M 20 A. I have no idea.

9 : 2 9 A M 21 Q. Okay. Do you see follow-up test, 80 percent -- the 80?

9 : 3 0 A M 22 A. I see 80 times 75 times 3 equals \$18,000.

9 : 3 0 A M 23 Q. Yeah. So 80 percent of the patients, office visit three
9 : 3 0 A M 24 times a year; right?

9 : 3 0 A M 25 A. I don't know if 80 is representing 80 percent. I'm not

9 : 3 0 A M 1 familiar with these calculations or this report.

9 : 3 0 A M 2 Q. Okay. The next line, P&H. She calculates what the
9 : 3 0 A M 3 physicians would receive in P&H fees; correct?

9 : 3 0 A M 4 A. I'm not sure. It's reflecting where it says processing
9 : 3 0 A M 5 and handling, but it's got sometimes \$12.50. That's not the
9 : 3 0 A M 6 processing and handling fee. I believe that's the processing
9 : 3 0 A M 7 and handling fee in the state of Virginia that was testified
9 : 3 0 A M 8 earlier in this trial.

9 : 3 0 A M 9 Q. Correct. So if Ms. McKean had been using the process and
9 : 3 0 A M 10 handling fee that BlueWave was offering to HDL physicians, that
9 : 3 0 A M 11 number wouldn't be 12.50; it would be \$20. Is that right?

9 : 3 1 A M 12 A. It would be 17 for processing and handling, 20 if you
9 : 3 1 A M 13 included the draw fee along with it, yes.

9 : 3 1 A M 14 Q. Okay. So the 12.50 that was paid in Virginia, that was
9 : 3 1 A M 15 just the process and handling fee, or did that also include the
9 : 3 1 A M 16 \$3?

9 : 3 1 A M 17 A. Again, I didn't have responsibility for Virginia.

9 : 3 1 A M 18 Q. Okay.

9 : 3 1 A M 19 A. I've heard testimony that it was a \$12.50 processing and
9 : 3 1 A M 20 handling fee.

9 : 3 1 A M 21 Q. All right.

9 : 3 1 A M 22 A. So it is certainly possible that it could have the \$3 draw
9 : 3 1 A M 23 fee added to that. I don't know.

9 : 3 1 A M 24 Q. All right. So you don't know if Ms. McKean in her
9 : 3 1 A M 25 calculations included or excluded that \$3 venipuncture fee; is

9 : 3 1 A M 1 that right?

9 : 3 1 A M 2 A. That's correct. I don't know.

9 : 3 1 A M 3 Q. Okay. And then she reaches -- the conclusion of her
9 : 3 1 A M 4 calculations, she notes roughly a \$30,000 increase in annual
9 : 3 1 A M 5 revenue; is that right?

9 : 3 1 A M 6 A. The last line is adding some numbers together and showing
9 : 3 1 A M 7 increase in annual revenue, yes.

9 : 3 1 A M 8 Q. And in the next paragraph down, Ms. McKean says
9 : 3 2 A M 9 essentially, if you extrapolate this sample out to a typical
9 : 3 2 A M 10 primary care physician who has at least a thousand patients and
9 : 3 2 A M 11 who follow this same routine and order testing on all of their
9 : 3 2 A M 12 patients, the physicians could generate \$295,625 in annual
9 : 3 2 A M 13 revenue; is that correct?

9 : 3 2 A M 14 A. You might have to repeat your question. I understood you
9 : 3 2 A M 15 to say Ms. McKean says if you extrapolate this. I don't see
9 : 3 2 A M 16 that anywhere.

9 : 3 2 A M 17 Q. Okay. Well, let's just look at the language. I
9 : 3 2 A M 18 apologize. I shouldn't paraphrase.

9 : 3 2 A M 19 She says, "Typical primary care physicians have at
9 : 3 2 A M 20 least 1,000 patients in their panel. So if they followed this
9 : 3 2 A M 21 routine on all 1,000, their physicians could generate \$295,625
9 : 3 2 A M 22 in annual revenue."

9 : 3 2 A M 23 Do you see that?

9 : 3 2 A M 24 A. I do see that.

9 : 3 2 A M 25 Q. Okay. So this report, Ms. McKean's report, came from

9 : 3 3 A M 1 Tonya Mallory, was prepared by -- at the direction of
9 : 3 3 A M 2 Ms. Mallory; correct?

9 : 3 3 A M 3 A. I can't speak to that either. I think that's a rational
9 : 3 3 A M 4 assumption, yes.

9 : 3 3 A M 5 Q. Okay. And Ms. Mallory sent it to you and to Mr. Johnson?

9 : 3 3 A M 6 A. This report apparently was attached to this email that,
9 : 3 3 A M 7 yes, was sent to myself and Brad Johnson.

9 : 3 3 A M 8 Q. So you and HDL were both aware that physicians were
9 : 3 3 A M 9 billing for their office visits. They weren't doing that in
10 lieu of the P&H fees; correct?

9 : 3 3 A M 11 A. I'm not sure of your question. It seems like two
9 : 3 3 A M 12 questions tied together again.

9 : 3 3 A M 13 Q. All right. Based on Ms. McKean's report, it appears that
9 : 3 3 A M 14 HDL and you and Mr. Johnson were put on notice that physicians
9 : 3 3 A M 15 were going to bill for office visits in addition to receiving
9 : 3 3 A M 16 P&H; correct?

9 : 3 3 A M 17 A. I don't believe we're put on notice for anything, but
9 : 3 3 A M 18 absolutely physicians bill for office visits. That's how they
9 : 3 4 A M 19 get reimbursed for the services they perform.

9 : 3 4 A M 20 Q. Very good. All right. Switching gears a bit.

9 : 3 4 A M 21 Mr. Cooke talked to you yesterday about the
9 : 3 4 A M 22 negotiation period, that end period where you were negotiating
9 : 3 4 A M 23 Bluewave and HDL's sales agreement. Do you remember talking
9 : 3 4 A M 24 about that yesterday?

9 : 3 4 A M 25 A. Yes.

9 : 3 4 A M 1 Q. And if we can pull up U.S. Trial Exhibit 1288. Do you
9 : 3 4 A M 2 remember talking about this email from Ms. Mallory?

9 : 3 4 A M 3 A. I believe this is one of the emails we talked about
9 : 3 4 A M 4 yesterday. There's been a lot of them.

9 : 3 4 A M 5 Q. There were a lot, right. And in this one in particular, I
9 : 3 4 A M 6 think Mr. Cooke was making the point that this was an agreement
9 : 3 4 A M 7 that was negotiated at arm's length. You had your lawyers; HDL
9 : 3 4 A M 8 had its lawyers. Is that right? Do you remember that?

9 : 3 4 A M 9 A. Yes, I remember talking about that.

9 : 3 5 A M 10 Q. Okay. What we didn't get into -- and if we could turn to
9 : 3 5 A M 11 the second page of that email, there were a bunch of issues
9 : 3 5 A M 12 that Ms. Mallory tells you and Mr. Johnson we need to discuss
9 : 3 5 A M 13 and work these things out; right?

9 : 3 5 A M 14 A. I wouldn't deny that we were working out a sales contract
9 : 3 5 A M 15 agreement, yes.

9 : 3 5 A M 16 Q. Okay. One of the -- she lists it as a smaller issue, but
9 : 3 5 A M 17 I want to focus our attention on paragraph 2 there under
9 : 3 5 A M 18 "smaller issues."

9 : 3 5 A M 19 Ms. Mallory says to you and Mr. Johnson, "We" -- HDL
9 : 3 5 A M 20 -- "are not going to agree that we cannot change any of the
9 : 3 5 A M 21 fees or any other operational thing like P&H without your
9 : 3 5 A M 22 approval. I realize that the P&H is a critical door opener,
9 : 3 5 A M 23 but if there are regulatory or legal reasons that we have to
9 : 3 5 A M 24 change that, we will. We can agree to give you advance
9 : 3 5 A M 25 notice."

9 : 3 5 A M 1 Is that right?

9 : 3 5 A M 2 A. I would agree with that statement.

9 : 3 6 A M 3 Q. And Ms. Mallory was -- understood from you, didn't she,
9 : 3 6 A M 4 that P&H was, in her words, a critical door opener; correct?

9 : 3 6 A M 5 A. I think that's a loaded question. You're saying she
9 : 3 6 A M 6 understood from me that that's a critical door opener? I never
9 : 3 6 A M 7 recall using that verbiage.

9 : 3 6 A M 8 Q. Did Ms. Mallory ever have a sales function while she
9 : 3 6 A M 9 worked at Berkeley HeartLab?

9 : 3 6 A M 10 A. I'm unaware of any sales function that Ms. Mallory had at
9 : 3 6 A M 11 Berkeley HeartLab.

9 : 3 6 A M 12 Q. Okay.

9 : 3 6 A M 13 A. She worked at the lab.

9 : 3 6 A M 14 Q. Okay. So who opens the door to physicians' offices? Who
9 : 3 6 A M 15 gets in the door?

9 : 3 6 A M 16 A. The salespeople are -- is that what you want me to say?
9 : 3 6 A M 17 The salespeople are the face of the lab and we're the ones that
9 : 3 6 A M 18 go to the physician practice and make the sales calls, yes.
9 : 3 6 A M 19 You used the expression "open the door." I don't want to open
9 : 3 6 A M 20 the door to the physician practice in the morning. I'm not
9 : 3 6 A M 21 trying to be funny. I'm just asking for clarity.

9 : 3 6 A M 22 Q. Okay. And I'm simply trying to understand your testimony,
9 : 3 7 A M 23 so thank you. Thanks.

9 : 3 7 A M 24 Let's look at Mallory Exhibit 42. This is the
9 : 3 7 A M 25 opinion letter from Mr. Root. You testified about this fairly

9 : 3 7 A M 1 extensively yesterday, didn't you?

9 : 3 7 A M 2 A. I'm very familiar with the opinion letter from Greg Root
9 : 3 7 A M 3 for Berkeley HeartLab, yes.

9 : 3 7 A M 4 Q. Let's look at page 3. This is December of 2007; is that
9 : 3 7 A M 5 right?

9 : 3 7 A M 6 A. This is dated December 27th, 2007, that's correct.

9 : 3 7 A M 7 Q. Okay. And I think your testimony yesterday was that you
9 : 3 7 A M 8 saw this letter in 2008 when Berkeley changed its P&H amounts,
9 : 3 7 A M 9 sent out a compliance bulletin. Do you remember that
9 : 3 7 A M 10 testimony?

9 : 3 7 A M 11 A. I don't remember specifically assigning a date to it.
9 : 3 7 A M 12 It's very possible I saw it three or four days later, 2008. We
9 : 3 7 A M 13 were given a copy of this opinion letter at Berkeley, yes.

9 : 3 7 A M 14 Q. Okay. As a result of this opinion letter, Berkeley
9 : 3 8 A M 15 changed its P&H fee to -- I believe you said 11.50; is that
9 : 3 8 A M 16 right?

9 : 3 8 A M 17 A. That's not correct.

9 : 3 8 A M 18 Q. Berkeley changed its P&H fee -- I remember seeing two
9 : 3 8 A M 19 numbers in that document. There was 11.50 and \$10.

9 : 3 8 A M 20 A. Yeah, the fee when I went to Berkeley -- and before I went
9 : 3 8 A M 21 to Berkeley -- as I've testified to, was \$20. That was later
9 : 3 8 A M 22 reduced down to \$10. And Jonathan wolin, the attorney, had
9 : 3 8 A M 23 built in a 15 percent annual increase to 11.50. So there was a
9 : 3 8 A M 24 time that I was at Berkeley that it was 11.50. There was a
9 : 3 8 A M 25 time that I was there it was 10. And there was a time that I

9 : 3 8 A M 1 was there that it was 20.

9 : 3 8 A M 2 Q. Okay. The 20 was first, though; right? And they reduced
9 : 3 8 A M 3 the fee; is that right?

9 : 3 8 A M 4 A. Yes. The 20 was there before 2005. It was there for me
9 : 3 8 A M 5 in 2005, 2006, 2007, I believe parts of 2008.

9 : 3 8 A M 6 Q. Okay.

9 : 3 8 A M 7 A. There's a little bit of overlap there.

9 : 3 8 A M 8 It was reduced to 10 for a very brief period of time
9 : 3 9 A M 9 and then went back up to 11.50.

9 : 3 9 A M 10 Q. Okay. And that movement back up was based upon Mr. Root's
9 : 3 9 A M 11 opinion in part?

9 : 3 9 A M 12 A. I can't say that it's based upon Root's opinion. That's
9 : 3 9 A M 13 certainly what the executive team there approved.

9 : 3 9 A M 14 Q. Okay. I'd like to focus your attention on page 3 of
9 : 3 9 A M 15 Mr. Root's opinion. It's -- 227 is the control number.

9 : 3 9 A M 16 And in the middle of that page, the paragraph that
9 : 3 9 A M 17 starts "assuming 30 percent," if we can pull that out so it's
9 : 3 9 A M 18 easier to read.

9 : 3 9 A M 19 In this paragraph, Mr. Root is referencing a new time
9 : 4 0 A M 20 and motion study that Berkeley had conducted; is that right?

9 : 4 0 A M 21 A. I don't think he's referencing the new time and motion
9 : 4 0 A M 22 study in that particular paragraph.

9 : 4 0 A M 23 "Assuming 30 percent additional costs for benefits
9 : 4 0 A M 24 and utilizing the newly developed time of 32 minutes needed for
9 : 4 0 A M 25 task completion, BHL's analysis determines that on average its

9 : 4 0 A M 1 specimen process and handling costs Berkeley HeartLab \$9.47.

9 : 4 0 A M 2 Berkeley HeartLab is employing the same hourly rate, \$13.67 per
9 : 4 0 A M 3 hour, that it used in its 2005 time and motion study."

9 : 4 0 A M 4 I do see a reference to the 2005 time and motion
9 : 4 0 A M 5 study showing that they used that hourly rate in a newer time
9 : 4 0 A M 6 and motion study, correct.

9 : 4 0 A M 7 Q. Okay. And the newer time and motion study resulted in
9 : 4 0 A M 8 analysis of \$9.47 as being the fair market value for that
9 : 4 1 A M 9 process and handling function; is that right?

9 : 4 1 A M 10 A. No. I think you're taking one portion. It continues on
9 : 4 1 A M 11 to give you the total amount that Berkeley is approving as a
9 : 4 1 A M 12 processing and handling fee for this point in time going
9 : 4 1 A M 13 forward. That's a portion of it.

9 : 4 1 A M 14 Q. Well, let's look at the next paragraph because I think
9 : 4 1 A M 15 that gets to what you're talking about.

9 : 4 1 A M 16 Actually, Peter, can we pull up those two paragraphs
9 : 4 1 A M 17 together because they do kind of go together. I don't want us
9 : 4 1 A M 18 to get confused. Let's look at the whole thing.

9 : 4 1 A M 19 And I think this is what you're talking about,
9 : 4 1 A M 20 Mr. Dent.

9 : 4 1 A M 21 Berkeley is now proposing to compensate physician
9 : 4 1 A M 22 practices \$8.50 for specimen processing and handling; correct?

9 : 4 1 A M 23 A. That's correct.

9 : 4 1 A M 24 Q. Okay. And he says that amount is approximately 11 percent
9 : 4 1 A M 25 less than the amount determined by Berkeley's analysis.

9 : 4 1 A M 1 A. Correct. So they did an analysis, and they paid less than
9 : 4 1 A M 2 what that analysis said.

9 : 4 1 A M 3 Q. Right. The analysis itself said that \$9.47 was the
9 : 4 2 A M 4 appropriate amount; correct?

9 : 4 2 A M 5 A. For that particular component, yes.

9 : 4 2 A M 6 Q. Okay. Now, we talked -- you testified yesterday about
9 : 4 2 A M 7 time and motion studies.

9 : 4 2 A M 8 Remember that?

9 : 4 2 A M 9 A. I remember a lot of discussion about time and motion
9 : 4 2 A M 10 studies yesterday, yes.

9 : 4 2 A M 11 Q. We talked about that a lot.

9 : 4 2 A M 12 Now, you yourself have never conducted a time and
9 : 4 2 A M 13 motion study, have you?

9 : 4 2 A M 14 A. I've never conducted a time and motion study. I believe
9 : 4 2 A M 15 you need to hire a company to do that --

9 : 4 2 A M 16 Q. Okay.

9 : 4 2 A M 17 A. -- somebody experienced with those processes.

9 : 4 2 A M 18 Q. Yeah, you've seen enough of this type of information and
9 : 4 2 A M 19 discussion to know that a time and motion study really looks at
9 : 4 2 A M 20 how much time it takes to process a lab sample; correct?

9 : 4 2 A M 21 A. I find that ironic because, on one hand, we're saying I've
9 : 4 2 A M 22 seen enough time and motion studies to say it's okay but I
9 : 4 2 A M 23 haven't seen enough legal opinions to say it's okay. But I
9 : 4 3 A M 24 have seen many time and motion studies that have supported the
9 : 4 3 A M 25 values that the labs represent are justifiable.

9 : 4 3 A M 1 Q. Okay. My question to you is, in your experience, when
9 : 4 3 A M 2 you've seen the results of a time and motion study, you
9 : 4 3 A M 3 understand that the time and motion study focuses on the amount
9 : 4 3 A M 4 of time that it takes someone to process a lab sample; correct?

9 : 4 3 A M 5 A. The time and motion studies that I have seen and have read
9 : 4 3 A M 6 in excruciating detail not only address the time, they address
9 : 4 3 A M 7 the cost of the overhead, they address the cost of the
9 : 4 3 A M 8 equipment, they address the employees and what their
9 : 4 3 A M 9 credentials are and what their salaries would be.

9 : 4 3 A M 10 I think they're very well conducted. And you have to
9 : 4 3 A M 11 recall the time and motion study not only at Berkeley, where I
9 : 4 3 A M 12 worked as an employee, but also at HDL, just to give one
9 : 4 3 A M 13 additional example, said the value was \$36 plus. And HDL
9 : 4 4 A M 14 conservatively established a value of 17 because they're also
9 : 4 4 A M 15 trying to take into account what the market value is.

9 : 4 4 A M 16 So they're trying to prevent an argument that, if you
9 : 4 4 A M 17 went out there and paid \$36, that's not in keeping with the
9 : 4 4 A M 18 market, although the time and motion study said that was a
9 : 4 4 A M 19 justifiable reimbursement for the time and energy, to your
9 : 4 4 A M 20 point, to pay for that service.

9 : 4 4 A M 21 Q. Correct. And that was really my only point.

9 : 4 4 A M 22 In the time and motion studies that you have studied,
9 : 4 4 A M 23 they don't talk about the number of tubes that need to be
9 : 4 4 A M 24 processed, do they?

9 : 4 4 A M 25 A. I would disagree with that.

9 : 4 4 A M 1 Q. Regardless -- and I think you just said this -- based on
9 : 4 4 A M 2 Mr. Root's opinion letter, you understood that it was important
9 : 4 4 A M 3 for a lab to conduct an unbiased time and motion study, didn't
9 : 4 4 A M 4 you?

9 : 4 4 A M 5 A. I believe it's very important for them to conduct an
9 : 4 5 A M 6 unbiased time and motion study, yes.

9 : 4 5 A M 7 MS. SHORT: Okay. And, Peter, can we pull that
9 : 4 5 A M 8 letter up again. I want to look at the last paragraph, the
9 : 4 5 A M 9 conclusion of Mr. Root's letter. Yeah, let's blow that up, if
9 : 4 5 A M 10 we can.

9 : 4 5 A M 11 BY MS. SHORT:

9 : 4 5 A M 12 Q. All right. Mr. Root concludes his opinion letter by
9 : 4 5 A M 13 saying --

9 : 4 5 A M 14 A. Can we slide it a little to the right? I'm cut off.

9 : 4 5 A M 15 MS. SHORT: Oh, I think we're back to center. Try
9 : 4 5 A M 16 one more time.

9 : 4 5 A M 17 BY MS. SHORT:

9 : 4 5 A M 18 Q. All right. Mr. Root concludes his letter, "As previously
9 : 4 5 A M 19 stated, the safeguards implemented by Berkeley HeartLab in 2005
9 : 4 6 A M 20 should minimize the risk that either Berkeley or an ordering
9 : 4 6 A M 21 provider that enters into an arrangement to collect, process,
9 : 4 6 A M 22 and handle specimens will violate either federal anti-kickback
9 : 4 6 A M 23 provisions or the civil False Claims Act."

9 : 4 6 A M 24 Do you see that?

9 : 4 6 A M 25 A. I do see that.

9 : 4 6 A M 1 Q. Okay. So based on Mr. Root's letter, you understood a
9 : 4 6 A M 2 couple of other things.

9 : 4 6 A M 3 You understood that the payment of P&H, processing
9 : 4 6 A M 4 and handling, fees presented a risk under the Anti-Kickback
9 : 4 6 A M 5 Statute; correct?

9 : 4 6 A M 6 A. I don't disagree with that.

9 : 4 6 A M 7 Q. Also the civil False Claims Act; correct?

9 : 4 6 A M 8 A. Again, as previously stated, the safeguards implemented by
9 : 4 6 A M 9 Berkeley HeartLab in 2005 should minimize the risk that either
9 : 4 6 A M 10 Berkeley HeartLab or an ordering provider that enters into an
9 : 4 6 A M 11 arrangement to collect, process, and handle specimens will
9 : 4 6 A M 12 violate either the federal anti-kickback provision or the civil
9 : 4 6 A M 13 False Claims Act.

9 : 4 6 A M 14 I interpret that as giving reassurance that what they
9 : 4 6 A M 15 are doing is proper but there's risk. I would also testify
9 : 4 7 A M 16 there's risk in anything that anybody does.

9 : 4 7 A M 17 Q. That's likely true. You understood, though, at least two
9 : 4 7 A M 18 key takeaways from Mr. Root's letter.

9 : 4 7 A M 19 You understood that a lab would want to have an
9 : 4 7 A M 20 unbiased time and motion study; correct?

9 : 4 7 A M 21 A. Correct.

9 : 4 7 A M 22 Q. And that a lab would really want an opinion letter talking
9 : 4 7 A M 23 about how the lab tried to minimize the risk; correct?

9 : 4 7 A M 24 A. Correct.

9 : 4 7 A M 25 Q. So, in fact, when you started working with HDL, you

9 : 4 7 A M 1 recommended to Ms. Mallory that she have a time and motion
9 : 4 7 A M 2 study done; didn't you?

9 : 4 7 A M 3 A. When I first went to represent HDL, Tonya Mallory had
9 : 4 7 A M 4 already done an internal time and motion study that she
9 : 4 7 A M 5 referenced to us. And I absolutely suggested that she get an
9 : 4 7 A M 6 outside company to conduct one so that it could not be
9 : 4 7 A M 7 interpreted as being biased.

9 : 4 7 A M 8 And I compliment her for doing such. They're very
9 : 4 8 A M 9 expensive, and it takes a long time for them to get them back
9 : 4 8 A M 10 to you.

9 : 4 8 A M 11 And that was based off my experience at my previous
9 : 4 8 A M 12 employer -- which, again, this is a legal opinion letter from
9 : 4 8 A M 13 my previous employer that had three legal opinions and multiple
9 : 4 8 A M 14 time and motion studies to make sure that they were operating
9 : 4 8 A M 15 in accordance with the law to minimize any risk of breaking the
9 : 4 8 A M 16 law.

9 : 4 8 A M 17 Q. Right. So the time and motion study -- I just want to
9 : 4 8 A M 18 make sure I'm clear on this -- so you're saying the time and
9 : 4 8 A M 19 motion study that had been done at HDL when you started working
9 : 4 8 A M 20 with Ms. Mallory at HDL was an internal time and motion study
9 : 4 8 A M 21 that -- did Ms. Mallory perform that herself?

9 : 4 8 A M 22 A. Again, it's my understanding -- you'd asked me earlier if
9 : 4 8 A M 23 I'd ever conducted a time and motion study, and I answered no.

9 : 4 8 A M 24 Tonya Mallory, on the other hand, was involved in
9 : 4 8 A M 25 time and motion studies and involved in the time and motion

9 : 4 9 A M 1 studies done at Berkeley HeartLab. And she had indicated to us
9 : 4 9 A M 2 she had also done one starting at HDL.

9 : 4 9 A M 3 There were other things to consider, for example,
9 : 4 9 A M 4 four tubes of blood versus two tubes of blood with different
9 : 4 9 A M 5 processing instructions, which could take more time to process.

9 : 4 9 A M 6 So, again, I absolutely suggested that she get a
9 : 4 9 A M 7 professional opinion from those that are certified and
9 : 4 9 A M 8 qualified to conduct such and tell her the value. And she did
9 : 4 9 A M 9 from Exponent.

9 : 4 9 A M 10 Q. Ms. Mallory never showed you a copy of her internal time
9 : 4 9 A M 11 and motion study, did she?

9 : 4 9 A M 12 A. No. The only thing Ms. Mallory showed us -- and she
9 : 4 9 A M 13 testified to that -- in our discussion was writing down on a
9 : 4 9 A M 14 napkin what she believed it to be based off her experience in
9 : 4 9 A M 15 the industry.

9 : 4 9 A M 16 But I think it's important to clarify this. Again,
9 : 4 9 A M 17 I've always been taught it's fair market value. To me, that's
9 : 4 9 A M 18 what the market would bear.

9 : 4 9 A M 19 Going and doing the time and motion studies is above
9 : 4 9 A M 20 and beyond that, which, again, I think that demonstrates we
9 : 5 0 A M 21 were taking every precaution whatsoever to be compliant with
9 : 5 0 A M 22 every rule, law, and regulation out there.

9 : 5 0 A M 23 If it was a scheme not to do that, then why would we
9 : 5 0 A M 24 have all these legal opinions and all these time and motion
9 : 5 0 A M 25 studies to justify what we're doing?

9 : 5 0 A M 1 And I remind everybody, the dollar amounts that these
9 : 5 0 A M 2 time and motion studies are showing is fair market value on
9 : 5 0 A M 3 their analysis. Take HDL, for example, it's more than double
9 : 5 0 A M 4 what HDL paid. It's \$35 plus, and they paid 17.

9 : 5 0 A M 5 Q. Let me ask you, when you started working with HDL in
9 : 5 0 A M 6 2009-2010, Berkeley HeartLab was paying \$11.50 in process and
9 : 5 0 A M 7 handling; correct?

9 : 5 0 A M 8 A. No. I've testified repeatedly, when I started working for
9 : 5 1 A M 9 Berkeley HeartLab, which was 2005 --

9 : 5 1 A M 10 Q. No, no, no. Exactly. When you started working with HDL
9 : 5 1 A M 11 in -- when you started talking to Ms. Mallory, 2009-2010;
9 : 5 1 A M 12 right? When you first started talking to her, you were still
9 : 5 1 A M 13 working at Berkeley; correct?

9 : 5 1 A M 14 A. Correct.

9 : 5 1 A M 15 Q. Okay. At that time, Berkeley HeartLab was paying P&H fees
9 : 5 1 A M 16 of \$11.50; correct?

9 : 5 1 A M 17 A. When I left Berkeley HeartLab, which I believe it was the
9 : 5 1 A M 18 last day of 2009 when I resigned, they were paying an \$11.50
9 : 5 1 A M 19 processing and handling fee. And I can explain my
9 : 5 1 A M 20 understanding of why that value was lower. I've done that
9 : 5 1 A M 21 already in testimony.

9 : 5 1 A M 22 Q. I think we have heard that already, Mr. Dent.

9 : 5 1 A M 23 A. Yeah.

9 : 5 1 A M 24 Q. And I don't want to cut you off, but I want to keep us
9 : 5 1 A M 25 focused.

9 : 5 1 A M 1 The other takeaway from Mr. Root's letter -- and you
9 : 5 1 A M 2 brought this to Ms. Mallory's attention as well -- is that HDL
9 : 5 2 A M 3 really needed to get a written legal opinion letter; isn't that
9 : 5 2 A M 4 right?

9 : 5 2 A M 5 A. I didn't bring that to Ms. Mallory's attention from Greg
9 : 5 2 A M 6 Root's letter. However, I've had knowledge of this letter.
9 : 5 2 A M 7 And based upon my experience in the industry and what I was
9 : 5 2 A M 8 trained, I thought it to be very important to get an outside
9 : 5 2 A M 9 company to do a time and motion study. And she did.

9 : 5 2 A M 10 Q. Okay. You made that recommendation to Ms. Mallory, didn't
9 : 5 2 A M 11 you?

9 : 5 2 A M 12 A. I would not deny that I made that recommendation to her.

9 : 5 2 A M 13 Q. And we talked yesterday about the position statement that
9 : 5 2 A M 14 Ms. Mallory drafted for HDL.

9 : 5 2 A M 15 Do you remember talking about that?

9 : 5 2 A M 16 A. We talked about the 2010 position statement for HDL, yes.

9 : 5 2 A M 17 Q. Okay. This was essentially a placeholder until a more
9 : 5 2 A M 18 formal legal opinion could be put together?

9 : 5 3 A M 19 A. Ma'am, those are your words that it's a placeholder. We
9 : 5 3 A M 20 could refer to it however. I called it a position statement by
9 : 5 3 A M 21 the lab.

9 : 5 3 A M 22 Q. All right. Let's pull up U.S. Trial Exhibit 1289. I want
9 : 5 3 A M 23 to look at the very top of the page. This is an email string
9 : 5 3 A M 24 involving Ms. Mallory, yourself, and Tony Carnaggio.

9 : 5 3 A M 25 Who is Tony Carnaggio?

9 : 5 3 A M 1 A. Tony Carnaggio was the sales representative, independent
9 : 5 3 A M 2 contractor that worked with me in South Carolina, parts of
9 : 5 3 A M 3 North Carolina, and parts of Georgia.

9 : 5 4 A M 4 Q. And the email just below this one, if we can blow that up.

9 : 5 4 A M 5 Here you ask Tonya Mallory, "Did you have a chance to
9 : 5 4 A M 6 make the changes we discussed to the OIG letter? If so, please
9 : 5 4 A M 7 forward. I handed you the hard copy with suggested changes
9 : 5 4 A M 8 outside the conference room at the hotel. Thanks, Cal."

9 : 5 4 A M 9 Do you see that?

9 : 5 4 A M 10 A. I do.

9 : 5 4 A M 11 Q. The OIG letter referenced Ms. Mallory's 2010 position
9 : 5 4 A M 12 statement; is that right?

9 : 5 4 A M 13 A. I think I testified earlier that it was commonly called
9 : 5 4 A M 14 by -- the OIG opinion but it was referencing the OIG Opinion
9 : 5 4 A M 15 Letter 05-08 in her position statement. So those are one and
9 : 5 4 A M 16 the same, that document.

9 : 5 4 A M 17 Q. Okay. And, in fact, the back of this exhibit, we can see
9 : 5 5 A M 18 Ms. Mallory's position statement.

9 : 5 5 A M 19 So you had some input into this position statement,
9 : 5 5 A M 20 didn't you?

9 : 5 5 A M 21 A. I wouldn't say I had input on the position statement at
9 : 5 5 A M 22 all. I would say that we talked about the need of having one.

9 : 5 5 A M 23 Q. Uh-huh.

9 : 5 5 A M 24 A. And if I had been asked to provide information on that, I
9 : 5 5 A M 25 would. I guess you could call that input. And we're asking,

9 : 5 5 A M 1 Hey, have you completed this? Can we get it so we can have it.

9 : 5 5 A M 2 Q. All right. So when you referenced handing hard copy with
9 : 5 5 A M 3 suggested changes to Ms. Mallory, do you know what you were
9 : 5 5 A M 4 referring to?

9 : 5 5 A M 5 A. I can only assume that we're talking about the Greg Root
9 : 5 5 A M 6 letter, possibly this document she gave me to look at, review
9 : 5 5 A M 7 it, make sure it's okay, and send it back.

9 : 5 5 A M 8 Q. So you don't think you made any changes to Ms. Mallory's
9 : 5 5 A M 9 position statement?

9 : 5 5 A M 10 A. I don't think I made any changes to that. It says, "Did
9 : 5 5 A M 11 you have a chance to make the changes that we discussed that
9 : 5 5 A M 12 the OIG -- or to the OIG letter?" So we obviously discussed
9 : 5 6 A M 13 the OIG letter.

9 : 5 6 A M 14 Q. Is that -- I thought you said that's one and the same with
9 : 5 6 A M 15 Ms. Mallory's.

9 : 5 6 A M 16 A. Ma'am, I don't want somebody to try to trip me up. I
9 : 5 6 A M 17 have --

9 : 5 6 A M 18 THE COURT: Mr. Dent, just answer the question.
9 : 5 6 A M 19 Don't argue with the lawyer.

9 : 5 6 A M 20 THE WITNESS: I don't deny this email. I don't deny
9 : 5 6 A M 21 what it says, "Did you have a chance to make the changes that
9 : 5 6 A M 22 we discussed?"

9 : 5 6 A M 23 BY MS. SHORT:

9 : 5 6 A M 24 Q. Okay.

9 : 5 6 A M 25 A. So we obviously discussed some changes to the OIG letter.

9 : 5 6 A M 1 I believe that OIG letter to be that position statement. "If
9 : 5 6 A M 2 so, would you please forward it. I handed you the hard copy
9 : 5 6 A M 3 with the suggested changes outside the conference room at the
9 : 5 6 A M 4 hotel."

9 : 5 6 A M 5 So obviously I probably had a copy of it, and I must
9 : 5 6 A M 6 have looked at it and made some changes. So this is an
9 : 5 6 A M 7 approved document from their attorneys. I don't approve it. I
9 : 5 6 A M 8 was probably asked to look at something, and I did. And I
9 : 5 6 A M 9 cannot even tell you what suggested changes those were, but I
10 wouldn't deny looking at it.

9 : 5 6 A M 11 Q. Okay. Yeah, because then she responds and said, "Sorry,
9 : 5 7 A M 12 here it is," basically?

9 : 5 7 A M 13 A. Yes. Much like a contract negotiation, there's numerous
9 : 5 7 A M 14 materials being looked at and reviewed. We're going back and
9 : 5 7 A M 15 forth. Then they go to the legal department for final approval
9 : 5 7 A M 16 before it can be distributed.

9 : 5 7 A M 17 Q. If I understood what you were just saying, you believe
9 : 5 7 A M 18 that Ms. Mallory had attorneys looking at this position
9 : 5 7 A M 19 statement?

9 : 5 7 A M 20 A. I do believe that, yes.

9 : 5 7 A M 21 Q. All right. You weren't involved in those discussions
9 : 5 7 A M 22 between Ms. Mallory and her attorneys, though, were you?

9 : 5 7 A M 23 A. I couldn't say that either. There were times that I was
9 : 5 7 A M 24 in rooms with Ms. Mallory and Charles Sims. I don't ever
9 : 5 7 A M 25 recall being in a room with Dennis Ryan, but Charles Sims from

9 : 5 7 A M 1 LeClairRyan was involved in various discussions.

9 : 5 7 A M 2 I can't say for sure if it's one about this letter or
9 : 5 7 A M 3 not. I wouldn't deny it. If somebody showed me an agenda that
9 : 5 7 A M 4 I was a room with an attorney with Ms. Mallory, I would say
9 : 5 7 A M 5 yes, I was.

9 : 5 7 A M 6 Q. Okay. You don't necessarily know what Ms. Mallory
9 : 5 7 A M 7 disclosed to her attorneys as she was drafting this letter, do
9 : 5 7 A M 8 you?

9 : 5 7 A M 9 A. I couldn't speak to what Ms. Mallory disclosed to her
9 : 5 8 A M 10 attorneys, no, ma'am.

9 : 5 8 A M 11 Q. Okay. And I want to turn to one of the -- one, two -- the
9 : 5 8 A M 12 third page of this email exchange and the genesis of this
9 : 5 8 A M 13 email.

9 : 5 8 A M 14 If we can blow up the bottom of the page, Peter.

9 : 5 8 A M 15 It appears that Ms. Mallory was responding to a
9 : 5 8 A M 16 request from a Dr. Singhi.

9 : 5 8 A M 17 Do you know Dr. Singhi?

9 : 5 8 A M 18 A. I don't believe I know a Dr. Singhi.

9 : 5 8 A M 19 Q. And this is in July of 2010; correct?

9 : 5 8 A M 20 A. July of 2010, yes.

9 : 5 8 A M 21 Q. All right. This is -- so just after -- just a couple of
9 : 5 8 A M 22 months after the do-not-call order was lifted on Bluewave and
9 : 5 8 A M 23 HDL; is that right?

9 : 5 9 A M 24 A. Our -- I believe the injunction that we entered into ended
9 : 5 9 A M 25 April 2011.

9 : 5 9 A M 1 Q. Okay. Ms. Mallory copies both you and Tony Carnaggio on
9 : 5 9 A M 2 her response to Dr. Singhi, doesn't she?

9 : 5 9 A M 3 A. Yes.

9 : 5 9 A M 4 Q. All right.

9 : 5 9 A M 5 A. So I do believe that Dr. Singhi is my customer. I know
9 : 5 9 A M 6 Dr. Shah. He was in the first line.

9 : 5 9 A M 7 Q. Oh, very good. Okay. And moving up the chain, Dr. Singhi
9 : 5 9 A M 8 responds to Ms. Mallory. And he says, "Tonya, thanks for the
9 : 5 9 A M 9 letters. We will need more explanation on \$20 reimbursements
9 : 5 9 A M 10 for handling and processing in our lab."

9 : 5 9 A M 11 Do you see that?

9 : 5 9 A M 12 A. I do.

9 : 5 9 A M 13 Q. All right. If we go further up the chain -- so it's on
9 : 5 9 A M 14 page 2. And if we can blow up the email from Ms. Mallory to
9 : 5 9 A M 15 Cal Dent and Tony Carnaggio.

1 0 : 0 0 A M 16 And she says, "I don't know what they need. Please
1 0 : 0 0 A M 17 let me know."

1 0 : 0 0 A M 18 Do you see that?

1 0 : 0 0 A M 19 A. I do.

1 0 : 0 0 A M 20 Q. All right. Going further up the chain, you do respond to
1 0 : 0 0 A M 21 her, "The OIG summary from you and a copy of the P&H letter we
1 0 : 0 0 A M 22 established with the practice - sent as one consolidated email
1 0 : 0 0 A M 23 to Dr. Shah and Dr. Singhi."

1 0 : 0 0 A M 24 A. Correct.

1 0 : 0 0 A M 25 Q. Do you remember this exchange?

10:00AM 1 A. I vaguely remember this exchange, yes.

10:00AM 2 Q. So when Dr. Singhi was raising questions about the \$20
10:00AM 3 reimbursement, was he -- he was referring to the P&H fees;
10:00AM 4 correct?

10:00AM 5 A. Dr. Shah was the point of contact for the practice. He
10:00AM 6 was very excited to do advanced testing. This is a cardiology
10:00AM 7 group.

10:00AM 8 And when Tony or I -- again, we're talking eight
10:00AM 9 years ago now -- met with them, I recall when he sent it to the
10:01AM 10 lead physician on the executive board, which I believe that to
10:01AM 11 be Dr. Singhi, there were questions about the processing and
10:01AM 12 handling fee. So when these questions were posed, he's coming
10:01AM 13 back as saying, Hey, can you get me all the information again
10:01AM 14 so I can give it to Dr. Singhi? Because they had attorneys,
10:01AM 15 too, that would review this.

10:01AM 16 They became a customer. So we provided the
10:01AM 17 information. It was given to them. I assume this OIG summary
10:01AM 18 is the position statement that addresses the OIG opinion
10:01AM 19 letter. So that's what's being referenced and was given. They
10:01AM 20 became a customer of ours.

10:01AM 21 Q. Okay. They asked that question in July of 2010; correct?

10:01AM 22 A. Correct.

10:01AM 23 Q. Okay. I want to move on to U.S. Trial Exhibit 1266. I
10:01AM 24 think we reviewed this document a number of times.

10:01AM 25 Do you remember talking about it yesterday?

10:01AM 1 A. I can't see it unless you expand it, and then I can tell
2 you.

10:01AM 3 Q. All right. Let's blow it up. At the top of the page is
10:02AM 4 the top of another email string from Kyle Martel, copying -- or
10:02AM 5 to you -- or I'm sorry -- to Brad Johnson. This is now in
10:02AM 6 December of 2010.

10:02AM 7 Mr. Martel -- this is the one, "Please forward on to
10:02AM 8 Tonya for her review. I had spoken with Cal about this
10:02AM 9 already. We definitely have to address this."

10:02AM 10 Does this ring a bell?

10:02AM 11 A. I recall looking at this one yesterday, yes.

10:02AM 12 Q. Okay. If we go to the second page of the email, this is
10:02AM 13 the piece that we talked about quite a bit. This forwarded the
10:02AM 14 comments from Lester Perling to his client, Dr. Reddy.

10:02AM 15 Do you remember talking about that?

10:02AM 16 A. I don't recall talking about this one yesterday with
10:02AM 17 Dr. Reddy. I do recall some conversations about Lester Perling
10:02AM 18 yesterday.

10:02AM 19 Q. Okay. This was the initial email from Dr. -- or from
10:03AM 20 Mr. Perling advising his client that the P&H arrangement was
10:03AM 21 "as blatantly illegal as anything that I have seen in a long
10:03AM 22 time."

10:03AM 23 Do you remember that?

10:03AM 24 A. I believe this was the initial communication that's been
10:03AM 25 testified to earlier that Lester Perling, the attorney for

1 Dr. Reddy, had expressed concerns. And his verbiage is he
2 believes it to be blatantly illegal to have -- I assume he's
3 talking about processing and handling fees.

4 It's my understanding this was forwarded to the lab,
5 to their attorneys. Their attorneys had discussions with
6 Mr. Perling. Mr. Perling, in turn -- I'm assuming he was
7 working with his client -- changed his initial opinion because
8 his client became a customer.

9 Q. I want to ask you about that one, too.

10 A. Okay.

11 Q. But just continuing to focus on this, this put you on
12 notice that there were questions being raised about P&H fees
13 and potential violations of the Anti-Kickback Statute; didn't
14 it?

15 A. I don't see it that specific in there. I don't see it
16 saying --

17 Q. It would be --

18 A. I'm not denying he had some concerns. He obviously had
19 concerns. I just don't want you to say that it specifically
20 addresses -- it talks about the Stark Law and federal and state
21 kickback laws.

22 Q. Okay. All right. Let's go ahead -- because I think you
23 had started to move on. We talked about it yesterday, Bluewave
24 Exhibit 68. Can we pull that one up.

25 This is the email exchange you remember discussing

10:04 AM 1 yesterday in the middle of the page. Ms. Mallory gives you an
10:04 AM 2 update on Mr. Perling.

10:04 AM 3 Do you remember that?

10:04 AM 4 A. Yes.

10:04 AM 5 Q. Okay. And this email is basically the same time, December
10:04 AM 6 of 2010; right?

10:04 AM 7 A. It's dated 16 December 2010, yes.

10:05 AM 8 Q. And it's from Ms. Mallory to you, Mr. Johnson?

10:05 AM 9 A. No. It's to Kyle Martel with a copy to me and
10:05 AM 10 Mr. Johnson, yes.

10:05 AM 11 Q. I apologize. Okay. So you were copied on this.

10:05 AM 12 I want to take a look at the second page of this
10:05 AM 13 document, which is a continuation of Ms. Mallory's email to
10:05 AM 14 Kyle Martel and copying you and Mr. Johnson.

10:05 AM 15 In the first full paragraph there -- can we pull that
10:05 AM 16 up -- Ms. Mallory says, "I've also asked, if the P&H amount is
10:05 AM 17 reduced to a smaller amount, would it make a difference."

10:05 AM 18 Do you know what she's talking about there?

10:05 AM 19 A. This is a paragraph from Ms. Mallory?

10:05 AM 20 Q. It is.

10:05 AM 21 A. Okay. Can I read it?

10:05 AM 22 Q. Oh, yes.

10:05 AM 23 A. Do you want me to read it out loud or just to myself?

10:05 AM 24 Q. Whichever you're more comfortable with.

10:05 AM 25 A. "One thing I can think of now is to start thinking about

1 putting a draw site into strategic locations where you have the
2 greatest concentrations of doctors. I've also asked, if the
3 P&H amount is reduced to a smaller amount, would it make a
4 difference. I have asked them to think about every possible
5 way to help us solve this problem, and they are working on it."

6 Q. So when Ms. Mallory says, "I've also asked, if the P&H
7 amount reduced to a smaller amount, would it make a
8 difference," do you know what she was referencing there?

9 A. I can make an assumption. I mean, we're talking about a
10 processing and handling fee where she has fair market analysis.
11 So, to me, it's a fair market value question. Is he concerned
12 about the dollar amount or is he concerned about the payment
13 itself being inappropriate?

14 I can only conclude from the discussions that it may
15 be the dollar amount. You know, he's probably familiar with
16 P&H fees from other labs. Maybe the lab that he is using,
17 maybe it's less, and he wants to understand why this one is
18 more.

19 Q. Looking at the next line, if we could blow that up so that
20 it's readable, Ms. Mallory says, "Therefore, Dr. Reddy can send
21 us samples, but he may not want to legitimately sign the P&H
22 agreement at this time."

23 A. Correct.

24 Q. Do you see that?

25 And Dr. Reddy didn't sign a P&H agreement with HDL,

10:07AM 1 did he?

10:07AM 2 A. I don't know. I've been told that he later became a
10:07AM 3 customer. And if he received P&H fees, he would have
10:07AM 4 absolutely had to sign a P&H letter of agreement.

10:07AM 5 But the point being made here, if the doctor doesn't
10:07AM 6 want P&H fees and they want to order from Health Diagnostic
10:07AM 7 Laboratories, they are certainly allowed to do that. In fact,
10:07AM 8 we would prefer that. That's less expense for the lab if they
10:07AM 9 want to send it in without collecting a processing and handling
10:07AM 10 fee.

10:07AM 11 Q. Okay. Let's look at the last paragraph of Ms. Mallory's
10:07AM 12 email. She asks, "would he be interested in doing clinical
10:07AM 13 research and we pay him to retrieve electronic data from his
10:07AM 14 EMR? \$20 per patient for chart data for our research in the
10:07AM 15 development of our portals and health score is certainly a
10:08AM 16 bargain for us. Such research information typically goes for a
10:08AM 17 lot more."

10:08AM 18 So Ms. Mallory was suggesting, well, if we can't get
10:08AM 19 the \$20 to Dr. Reddy in P&H fees, we can just pay him \$20 to do
10:08AM 20 some studies for us; is that right?

10:08AM 21 A. Ma'am, I think that's an enormous leap on your behalf to
10:08AM 22 say that.

10:08AM 23 Ms. Mallory has been involved in clinical research
10:08AM 24 all along. I don't know what discussions Ms. Mallory or her
10:08AM 25 attorneys had with Mr. Perling or Dr. Reddy.

1 Perhaps he expressed an interest in research. Maybe
2 he does research. I don't know. But there is certainly
3 permissible activities for them to pay for collecting research.

4 Q. Okay. You do know Dr. Reddy did wind up doing some work
5 for HDL, didn't he?

6 A. Again, Dr. Reddy is not in my geographic area of
7 responsibility. It is my understanding that Dr. Reddy did in
8 fact become a customer of HDL, yes.

9 Q. And while you've raised that again, because you've said a
10 couple of times that certain doctors or sales reps weren't in
11 your area of responsibility; right?

12 A. Yes.

13 Q. But Bluewave, your company, had all the territory for
14 representing HDL outside the state of Virginia; correct?

15 A. That is correct, yes.

16 MS. SHORT: Your Honor, may I approach?

17 THE COURT: Go ahead.

18 THE WITNESS: To clarify, what I'm saying is, I'm not
19 most knowledgeable of this particular doctor. I'm not saying
20 that he wasn't a Bluewave customer or in a territory that is
21 Bluewave responsibility; I'm trying to just say I don't have
22 the specific knowledge on this doctor. I didn't call on him.

23 Q. Understood.

24 MS. SHORT: I'd like to pull this exhibit up. I've
25 handed it to the witness because it's a couple-page email

10:10 AM 1 exchange. It's U.S. Trial Exhibit 1257.

10:10 AM 2 THE COURT: Is it in evidence?

10:10 AM 3 MS. SHORT: I think so, but let's double-check.

10:10 AM 4 THE COURT: I wasn't suggesting -- just from the way
10:10 AM 5 you handed it to the witness --

10:10 AM 6 MS. SHORT: It is, Your Honor.

10:10 AM 7 THE COURT: Very good. Thank you.

10:10 AM 8 MS. SHORT: I think I have good notes on that, but I
10:10 AM 9 appreciate the question.

10:10 AM 10 BY MS. SHORT:

10:10 AM 11 Q. Mr. Dent, do you recognize the document that's been handed
10:10 AM 12 to you?

10:10 AM 13 A. I'm trying to find something that jogs my memory.

10:10 AM 14 Q. Okay. Let's go ahead and --

10:10 AM 15 Peter, let's pull out the top, the first couple -- go
10:10 AM 16 down a little bit. There we go. Thank you.

10:11 AM 17 Do you recognize this as an email exchange involving
10:11 AM 18 yourself, Mr. Johnson, and Ms. Mallory?

10:11 AM 19 A. I recognize it. There's something from me at the very
10:11 AM 20 top. That's my email address to Mr. Johnson and Kyle Martel.
10:11 AM 21 And then I see there's a -- something below from Tonya to me,
10:11 AM 22 the subject "P&H letter," with verbiage "more on the same."

10:11 AM 23 Q. Okay. And do you want to focus your -- this is July of
10:11 AM 24 2011. So we're jumping forward. We were just talking about
10:11 AM 25 Dr. Reddy, Mr. Perling. There was an exchange in December of

1 2010; right? So now we're fast-forwarding about six or seven
2 months.

3 If we look at the second page of this email exchange,
4 do you see Mr. Martel's comment to you and Ms. Mallory? "This
5 is the practice that had Lester Perling advising them so
6 strongly against the acceptance of P&H."

7 Do you see that?

8 A. I see that.

9 Q. Okay. And the second paragraph, Mr. Martel comments,
10 "Additionally, he shared with me that the other providers in
11 his practice are pressuring him for a letter to make sure all
12 is okay. He said the numbers were down due to the fact that
13 the other providers were gun-shy after Perling's comments."

14 Do you see that?

15 A. I do see that.

16 Q. All right. And he forwards -- if you scroll down the
17 page, he's forwarding a comment from a Tabitha Henley. Did you
18 know Tabitha Henley?

19 A. Tabitha Henley was eventually the manager over client
20 services. Before that, she was a client service representative
21 at HDL, yes.

22 Q. Okay. And Ms. Henley comments, "I sent the P&H position
23 for field information, but the practice is really looking for
24 more. They are requesting a letter on our lawyer's letterhead
25 basically saying it's legal."

1 And this is all in July of 2011. HDL didn't have a
2 formal legal opinion in July of 2011, did it?

3 A. No, they had the position statement at this particular
4 point in time. It was common for practices to ask for the
5 documentation, legal opinion letters, that you may have. And
6 this may have been a Berkeley customer and they had that stuff
7 before, so they're asking for it.

8 Q. Right. And it appears the position statement didn't
9 satisfy Dr. Reddy's practice. They were looking for more; is
10 that correct?

11 A. I couldn't speak to that.

12 Q. Okay. I want to get us -- move us back in the timeline a
13 little bit. So we had the exchange about doctor -- or with
14 Mr. Perling and Dr. Reddy back in December of 2010.

15 I want to move forward to January of 2011 and pull up
16 Plaintiffs' Exhibit 1236.

17 MS. SHORT: I'm sorry, Your Honor. This one is not
18 in evidence, so I'm going to pull that one down.

19 THE COURT: Okay.

20 MS. SHORT: Once again, I've only done one extra copy
21 for you guys.

22 And if I may approach?

23 THE COURT: You may.

24 THE WITNESS: Thank you.

25 BY MS. SHORT:

10:15 AM 1 Q. Mr. Dent, do you recognize the document that's been marked
10:15 AM 2 Exhibit 1236?

10:15 AM 3 A. I do.

10:15 AM 4 Q. Okay.

10:15 AM 5 MS. SHORT: Your Honor, I'd move for the admission
10:15 AM 6 of --

10:15 AM 7 THE COURT: Could you describe it just so I'll know
10:15 AM 8 what it is?

10:15 AM 9 MS. SHORT: Yeah.

10:15 AM 10 BY MS. SHORT:

10:15 AM 11 Q. would you describe it for us so we know what it is.

10:15 AM 12 A. I'm looking at the front page. It's an email from me to
10:15 AM 13 Tonya Mallory and Brad Johnson dated the 31st of January 2011.
10:15 AM 14 And there's an attachment to it. The subject says "Guidelines
10:15 AM 15 for no-balance billing materials; waiver of patient balances,
10:15 AM 16 New Jersey; and waiver of patient balances, Texas; and waiver
10:15 AM 17 of patient balances overview version B."

10:15 AM 18 So I believe there were three different attachments
10:15 AM 19 that came along with this email.

10:15 AM 20 THE COURT: Thank you, Mr. Dent.

10:15 AM 21 Any objection from the defense?

10:15 AM 22 MR. COOKE: No objection.

10:15 AM 23 MR. ASHMORE: No, sir.

10:15 AM 24 THE COURT: Plaintiffs' 1236 admitted without
10:15 AM 25 objection.

10:16AM 1 MS. SHORT: Okay. And I apologize. I jumped the gun
2 on that one a little bit.

10:16AM 3 BY MS. SHORT:

10:16AM 4 Q. So you were just looking, Mr. Dent, at the header
5 information on the email. The subject matter of this email is
6 actually "important"; right?

10:16AM 7 A. Oh, I'm sorry. I was reading the attachment. That's
8 correct. The subject says "important."

10:16AM 9 Q. And it does have several attachments.

10:16AM 10 You say to Ms. Mallory and Mr. Johnson, "These were
11 forwarded to me by an ex-Berkeley employee today. Very
12 interesting. A must-read."

10:16AM 13 And I do want to look at the attachments. I want to
14 turn your attention -- there are essentially three memos
15 attached; correct?

10:16AM 16 A. There's guidelines for -- I'll take your word for it,
17 there's three attachments. There's a bunch of pages there.

10:16AM 18 Q. Let me focus your attention on the one that's a little bit
19 in the middle. The control number at the bottom ends in 737.
20 There we go. This appears to be on law firm letterhead.

10:17AM 21 Do you see that?

10:17AM 22 A. That's correct.

10:17AM 23 Q. All right. The subject is "routine waivers of patient
24 balances by laboratories." Do you see that?

10:17AM 25 A. I do.

10:17AM 1 Q. Okay. If you turn to -- well, actually, let's focus on
10:17AM 2 the second paragraph of this McDonald Hopkins memo. They say,
10:17AM 3 "The risks associated with insurance-only billing have received
10:17AM 4 increased attention recently by the filing of high-profile
10:17AM 5 litigation."

10:17AM 6 Do you remember seeing that back in January of 2011?

10:17AM 7 A. I do.

10:17AM 8 Q. And below there, McDonald Hopkins lays out some potential
10:17AM 9 risks. Do you see that? They list, in numeric order,
10:17AM 10 referring provider, and they talk about the kickback statute,
10:17AM 11 co-conspirator, harm to reputation, so forth.

10:18AM 12 Do you see that?

10:18AM 13 A. I see those three paragraphs. I was looking for the
10:18AM 14 verbiage where you said these are potential risks. I see
10:18AM 15 "referring provider."

10:18AM 16 Q. Okay. So we can go to the paragraph right above that.

10:18AM 17 "Below are some of the specific legal and regulatory
10:18AM 18 risks that may be encountered by referring providers and
10:18AM 19 laboratories who engage in the practice of insurance-only
10:18AM 20 billing."

10:18AM 21 Do you see that?

10:18AM 22 A. I see that now, yes.

10:18AM 23 Q. All right. And then he lists them out.

10:18AM 24 And then, on the second page of this memo, the firm
10:18AM 25 lists out the risks to laboratories; correct?

10:18 AM 1 A. I -- yes, I see laboratories.

10:18 AM 2 Q. All right. One risk is "kickback, possible civil and/or
10:18 AM 3 criminal penalties."

10:18 AM 4 Do you see that?

10:18 AM 5 A. I see that.

10:18 AM 6 Q. And "false claims." Do you see that?

10:18 AM 7 A. I see that.

10:18 AM 8 Q. All right. So January of 2011, you were put on notice
10:19 AM 9 that there was a -- the waiver of patient responsibility,
10:19 AM 10 waivers of copays and deductibles put laboratories at risk for
10:19 AM 11 violations of the Anti-Kickback Statute; right?

10:19 AM 12 A. I disagree with that.

10:19 AM 13 Q. This notifies you as well that laboratories were at risk
10:19 AM 14 of violating the False Claims Act if they waived the patient's
10:19 AM 15 copays and deductibles.

10:19 AM 16 A. No. And I'll explain.

10:19 AM 17 You said I was put on notice that something was
10:19 AM 18 inappropriate. There was a Berkeley HeartLab sales
10:19 AM 19 representative in the field that found these documents. These
10:19 AM 20 were the documents that the ex-CEO of Berkeley HeartLab, Frank
10:19 AM 21 Ruderman and Scott Davis, were distributing to customers,
10:19 AM 22 ex-Berkeley customers, primarily ones that had already switched
10:19 AM 23 over to HDL. It was a legal opinion that they had sought and
10:20 AM 24 they had received that they were leveraging for their benefit,
10:20 AM 25 trying to insinuate that HDL's billing policies were

1 inappropriate.

2 The irony of this is it's the exact same billing
3 policies that Berkeley had. And I found it to be very
4 interesting, which is why I put in there "very interesting" and
5 sent it to Tonya so she could send it to her attorneys.

6 We've also heard testimony that her attorneys
7 immediately contacted McDonald Hopkins and -- with the cease
8 and desist. And they in turn contacted Mr. Ruderman, who
9 stopped the activity from these being distributed in the field.

10 So I feel like it's being made out to be a law office
11 putting me on notice for something. That's why I said no, I
12 disagree with you.

13 Q. All right. But you saw it; correct?

14 A. I did see it.

15 Q. You read it; correct?

16 A. I read it from beginning to end.

17 Q. You just disagreed with it; correct?

18 A. I did disagree with the part about the billing. And,
19 again, zero-balance billing is forbidden by law for Medicare
20 and Medicaid patients. We had been trained the same for
21 TRICARE. That's why I disagreed with it.

22 Q. All right.

23 A. And then when it gets to commercial insurances, it depends
24 upon whether that insurance company is in network or out of
25 network with the lab or what particular state it's in as to

1 whether you have to make attempts to collect copay and
2 deductible.

3 So, again, that's why I'm sending it to the CEO of
4 the laboratory that was being targeted with this document so
5 that she could have her legal team review it, because this is
6 completely contrary to what our billing practices were now and
7 what they were at Berkeley.

8 Q. A couple months later, in April of 2011 -- I want to pull
9 up another email exchange. This is Exhibit 1191.

10 And we've spent a fair amount of time discussing this
11 email exchange during this trial. Do you remember discussion
12 of this email chain between Kyle Martel, Tonya Mallory, Brad
13 Johnson, and yourself?

14 A. I'm not sure which email this is. Is this the specimens
15 from -- I'm not sure which email this is.

16 Q. Okay. Well, if we go to the middle of the page, this
17 is -- do you remember this email from you to Tonya Mallory?
18 This is now April of 2011. You say, "Hey, Tonya, can you help
19 Kyle with this request? Timing is of the" --

20 THE COURT: Ms. Short, why don't you show us the
21 request --

22 MS. SHORT: Okay.

23 THE COURT: -- so Mr. Dent can understand what this
24 is about.

25 MS. SHORT: Yeah, we can go through it.

10:23 AM 1 **BY MS. SHORT:**

10:23 AM 2 **Q.** So the initial email, it starts on page 3 of the document.
10:23 AM 3 This is Cristy Kaibigan, and she writes, "Below is the opinion
10:23 AM 4 from our lawyer which is self-explanatory."

10:23 AM 5 **A.** I haven't seen this before until now. We didn't talk
10:23 AM 6 about this yesterday, but I'm happy to read it.

10:23 AM 7 **Q.** Okay. But you have seen it before just now; right?
10:23 AM 8 Because you forwarded it -- or you responded to the email
10:23 AM 9 exchange, asking Ms. Mallory if she could help Kyle with this
10:23 AM 10 request?

10:23 AM 11 **A.** If this email is part of this chain, I wouldn't deny
10:23 AM 12 having seen it before. You were asking it's something we
10:23 AM 13 talked about yesterday. I don't recall seeing this yesterday.

10:23 AM 14 **Q.** Okay. And I apologize if I misspoke. This has been
10:23 AM 15 discussed at the trial in this case, not necessarily yesterday.
10:24 AM 16 Okay?

10:24 AM 17 **MS. SHORT:** I think it would help if I can hand the
10:24 AM 18 witness the document.

10:24 AM 19 **THE COURT:** Very good.

10:24 AM 20 **THE WITNESS:** Thank you.

10:24 AM 21 **THE COURT:** Ms. Short, it might just be helpful,
10:24 AM 22 you're talking about a lawyer -- opinion of a lawyer. Just
10:24 AM 23 focus on that, and then that might trigger his memory and he
10:24 AM 24 can testify whether he's seen that or not. Okay?

10:24 AM 25 **MS. SHORT:** Yes. I think it helps to have the

1 document in front of him.

2 **BY MS. SHORT:**

3 Q. Does that help refresh your recollection about the
4 testimony we've had regarding this email exchange?

5 A. I disagree that I don't recall -- I mean, there's been a
6 lot discussed in here. I don't recall anything about a villa
7 Medical Group or a Life Family Practice. This is the first
8 time I've heard of these two practices.

9 Q. Okay. Well, let's talk about this. We'll start -- the
10 first email, the formatting is a little bit funky, but on
11 page 2 of the document, you'll see at the bottom of the page an
12 email from -- whoops -- Kyle Martel to Ms. Kaibigan, subject
13 "HDL contract."

14 A. I see where you start on page 2 with that email.

15 Q. Okay. And it appears Mr. Martel is saying, "The attached
16 document should put all your concerns to rest. Please feel
17 free to contact me."

18 The next page of this document, it looks like part of
19 this string was the request from Ms. Kaibigan? She says, "Hi,
20 Kyle. Below is the opinion from our lawyer which is
21 self-explanatory."

22 Do you see that?

23 A. I see -- kind of where it's double-spaced?

24 Q. Uh-huh.

25 A. I do see an email that appears to come from a Cristy

1 Kaibigan, I guess is how you pronounce it. And it does say,
2 "Hi, Cal -- Kyle."

3 Q. Okay. And you see the part where she's referencing the
4 opinion from her lawyer?

5 A. Can you draw me to it?

6 Q. Just under, "Hi, Kyle."

7 A. Can I just read it out loud, and that way we'll get it?

8 Q. Sure. Yeah.

9 A. It says, "Hi, Kyle. Below is the opinion from our lawyer
10 which is self-explanatory. These tests are being ordered for
11 patients of Villa Medical Group and Life Family Practice LLC,
12 then I suspect that, when the tests are ordered, you are
13 billing for an office visit."

14 I don't understand what that means. The lab --

15 **THE COURT:** Mr. Dent, just continue with your reading
16 right now.

17 **THE WITNESS:** Okay.

18 "If that is the case, then there is a potential
19 problem in this arrangement. If the government were to review
20 this, the government would take the position that the
21 processing and handling" -- there's a bunch of garble on the
22 copy I have. Is that on the screen?

23 -- "that the processing and handling functions
24 are already paid for in the office visit. In other words,
25 apportioning the specimen into vials, labeling the vials,

1 running the centrifuge, cooling and packaging, shipping, and
2 obtaining insurance information are all part of the office
3 visit and are included in the payment to the medical practice
4 by the patient" -- garble -- "payer. The laboratory is not
5 allowed to pay the medical practice for functions that are
6 already paid for. If the laboratory" -- excuse me -- "pays you
7 for processing and handling but those functions are already
8 paid for in the office visit payment, then the additional \$17
9 that the laboratory is paying would be considered to be a
10 kickback paid to the medical practice to get the medical
11 practice to use HDL rather than another lab.

12 "With respect to the \$3 payment, the medical
13 practice is allowed to bill Medicare and other payers for CPT
14 36415 specimen draw, but the laboratory should not be paying
15 the medical practice for that draw. Medicare and other payers
16 should pay that because it is a service being provided to the
17 patient.

18 "Obviously, if the \$17-per-test payment is
19 legitimate or if there is an argument supporting payment of the
20 \$3 by the laboratory rather than by a payer, I would like to be
21 able to say that it is okay to accept the payments. Perhaps
22 I'm missing something in the agreement. If there is a
23 different way of looking at this which represents a good
24 argument that the payment is not a kickback, my guess is that
25 HDL would have an opinion letter from a reputable health care

1 lawyer laying out the argument for why it is not a kickback.

2 "We would appreciate if you could send us an
3 opinion letter which explains why the payments are appropriate
4 under federal and Florida law.

5 "Best regards, Cristy V. Kaibigan."

6 **BY MS. SHORT:**

7 **Q.** All right. So it looks like, from Ms. Kaibigan's letter,
8 their attorneys are raising questions about the P&H fee
9 possibly being a double payment if the -- did you agree with
10 that?

11 **A.** I would agree with that.

12 **Q.** Okay. Because that processing and handling function is
13 part of the office visit fee; correct?

14 **A.** You're asking me if I believe the processing and handling
15 fee is part of an office visit?

16 **Q.** Just that their attorney said that that was the case.

17 **A.** Well, I don't know that for a fact either. I mean, you've
18 got Cristy, which I'm assuming is in some management position
19 at this practice. I thought originally you said it does
20 reference an attorney that they have spoken with, but I don't
21 have that attorney's opinion.

22 **Q.** Okay.

23 **A.** And there's a lot of confusion in here from her and --
24 with differentiating between the draw fee and a venipuncture
25 fee versus the processing and handling fee, and she's seeking

10:29 AM 1 clarity.

10:29 AM 2 Q. Okay. And, in response, Mr. Martel, as we saw earlier,
10:29 AM 3 attaches a document, sends it to them, and says "this should
10:30 AM 4 lay your concerns to rest."

10:30 AM 5 Remember we just looked at that?

10:30 AM 6 A. "Hi, Christy. The attached document should put all your
10:30 AM 7 concerns to rest. Please feel free to contact me with any
10:30 AM 8 questions that you may have."

10:30 AM 9 And this date is April 2011. I can only guess that
10:30 AM 10 he's given her the 2010 position statement from HDL.

10:30 AM 11 Q. Okay. And then if you look at page 1 and page 2.

10:30 AM 12 So bottom of page 1, Peter.

10:30 AM 13 This is an email that goes across two pages. He
10:30 AM 14 does -- it looks like Ms. Kaibigan responds.

10:30 AM 15 "Hi, Kyle. Here's another concern from our lawyer."

10:30 AM 16 And on page 2, same email, Ms. Kaibigan says, "The
10:30 AM 17 attached document does not adequately address the kickback
10:30 AM 18 concern. The letter does not really explain how the HDL
10:30 AM 19 payment is different from the payment described in the OIG
10:30 AM 20 advisory opinion. The OIG advisory opinion does not
10:31 AM 21 distinguish process and handling from the specimen collection
10:31 AM 22 fee. I understand HDL's attempt to distinguish the two
10:31 AM 23 functions, but the HDL letter does not address the primary
10:31 AM 24 concern of the advisory opinion, which is what I initially
10:31 AM 25 posed; that is, whether the payment is paid as an inducement to

1 the physician to refer patients to the laboratory."

2 Do you see that?

3 A. I do see that.

4 Q. All right. So there were additional questions raised by
5 this practice?

6 A. I believe that to be accurate.

7 Q. Okay. And he goes on -- or Ms. Kaibigan, repeating her
8 lawyer's advice, goes on to say, "There's a substantial risk
9 that the lab would be offering the blood draw remuneration to
10 the physicians in exchange for referrals to the lab."

11 And he goes on -- I want to skip a couple of lines
12 just to cut this short -- "Where a laboratory pays a referring
13 physician to perform blood draws, particularly where the amount
14 paid is more than the laboratory receives in Medicare
15 reimbursement, an inference arises that the compensation is
16 paid as an inducement to the physician to refer patients to the
17 laboratory, particularly in the circumstances presented here."

18 And there, I think he -- would you understand that
19 he's talking about the payment of processing and handling fees;
20 correct?

21 A. I would say that this attorney -- first of all, the OIG
22 advisory opinion that they're referencing would be the 05-08,
23 I'm assuming, because that's the only one that's out at that
24 particular time.

25 So to put it in perspective -- the timeline is

1 important -- we had seen and had access to opinion letters at
2 Berkeley even that specifically addressed the OIG opinion
3 05-08. This says that it's not these things that this attorney
4 is suggesting that it is. So I would say there appears to be a
5 difference of opinion here and what Kyle has provided them from
6 HDL is not sufficient to alleviate this attorney's opinion; he
7 wants more.

8 Q. In fact, he asks at the bottom of that, "Does HDL have an
9 opinion letter from a health care attorney"; right?

10 A. That is, in fact, what is being asked by the practice
11 manager on behalf of, I assume, the attorney.

12 Q. Okay. And that's what -- this email exchange is what
13 prompts you then to get involved and to ask Tonya for
14 additional help with this; correct?

15 A. Well, I think when it gets to me --

16 Q. Mr. Martel forwards that to you, and you --

17 A. Yeah. So what I say on April 29th, 2011, to Tonya with a
18 copy to Brad, "Hey, Tonya. Can you help Kyle with this
19 request? Timing is of the utmost importance. I'm sure you
20 could easily put this to rest with the many opinions and
21 letters HDL has obtained. Thanks, Cal."

22 Q. Okay. So what opinion letter did HDL have as of April of
23 2011?

24 A. Well, I can't speak to all the ones that HDL had, but
25 certainly Tonya would have knowledge of the Greg Root opinion

1 letter because she was an employee at Berkeley as well. And we
2 had it. It had been distributed out in the field, so it was a
3 readily available document. I know she was working on getting
4 her own at that particular time, but she did have her position
5 statement approved by LeClairRyan.

6 Q. In April of 2011, HDL did not have its own opinion letter
7 from an attorney?

8 A. No, I don't believe HDL had a opined -- opined, I learned
9 yesterday -- letter from a law firm at 2011. They were in the
10 process of getting the time and motion study complete to make
11 sure that that verified the one that was done internally so
12 that all that information could be given to LeClairRyan to
13 review before drafting an opinion letter.

14 Q. Okay. I just want to -- since this came up again right
15 here, you're talking about OIG advisory opinions; right?

16 You were just talking about OIG advisory opinions?

17 A. I referenced OIG Advisory Opinion 05-08, yes.

18 Q. Okay. And you know that an OIG advisory opinion is a
19 letter that the office of counsel for the Office of Inspector
20 General will provide to a health care provider if a request is
21 made; right?

22 A. I'm familiar with that. I'm also familiar that the only
23 person that's supposed to rely on it, the only time it's
24 supposed to be used as evidence, is for the individual that
25 actually requested the opinion letter. Yes, I'm very familiar

1 with that.

2 Q. Exactly right. So you understand if a health care
3 business is trying to set up an arrangement that might
4 implicate the Anti-Kickback Statute, they can apply to the
5 Office of Inspector General to get an advisory opinion;
6 correct?

7 A. I think anybody could apply to get the OIG's opinion on
8 things, yes.

9 Q. Okay. And you talked about some of the caveats that come
10 along with these OIG advisory opinions. It's a formal written
11 document; right?

12 A. The ones I've seen are usually a page, a few paragraphs.
13 And there's some verbiage down at the bottom that I was
14 referencing, yes.

15 Q. All right. And those provide a fairly thorough analysis
16 of how the Anti-Kickback Statute might apply to the business
17 arrangement that the requestor, the business, has requested of
18 the OIG feedback on "We'd like to do this in our business.
19 OIG, can you give us some advice on this?"

20 That's generally what they do; right?

21 A. Well, that's a broad general term. It also goes in there
22 to say again you can't rely on this because you're not the ones
23 submitted. There's a lot of things that were taken into
24 account for this particular request. But the one that we
25 reviewed, here's an overview of what we reviewed and this is

1 10:37AM our opinion on that particular --

2 Q. Right.

3 A. Yes.

4 Q. The only person or the only entity that can rely on --
5 formally rely on that OIG advisory opinion is the business
6 that's requesting it; correct?

7 A. That's my understanding, yes.

8 Q. Right. And the business that makes one of those requests
9 of the OIG, basically, they say, "Here's the business
10 arrangement that we would like to enter into; and we want to
11 get your view, Office of Inspector General, as to whether this
12 business arrangement could potentially violate the
13 Anti-Kickback Statute"; right?

14 A. Well, I think that could be an example where they're
15 asking beforehand, before they enter into a business relation.
16 There may be an existing business relation that's out there
17 that's coming under scrutiny, and then somebody's now asking
18 also for the OIG opinion.

19 Q. Yeah. Exactly right. Yeah. So -- and to your point,
20 when a company does -- goes through that process and says,
21 "Here's what we're planning to do or here's what we're doing.
22 We have some concerns about the Anti-Kickback Statute. Will
23 you give us an opinion?" When the OIG issues that opinion and
24 says, "Here's what we think," the person making the request can
25 then rely on that OIG advisory opinion; correct?

10:38 AM 1 A. It's my understanding that the person that made such a
10:38 AM 2 request can rely on the opinion they received from the OIG,
10:38 AM 3 yes.

10:38 AM 4 Q. BlueWave never sought an advisory opinion from the OIG;
10:38 AM 5 did you?

10:38 AM 6 A. I didn't have a reason for BlueWave to seek an advisory
10:38 AM 7 opinion from the OIG. BlueWave doesn't pay processing and
10:38 AM 8 handling fees, so I wouldn't be seeking an opinion from them.

10:38 AM 9 Q. HDL never sought an advisory opinion from the OIG; did it?

10:39 AM 10 A. I disagree with that statement, the way you worded it,
10:39 AM 11 because they've seen plenty of OIG advisory opinions, including
10:39 AM 12 the 05-08.

10:39 AM 13 Q. Okay. I think you misunderstood me.

10:39 AM 14 HDL never sought an OIG advisory opinion?

10:39 AM 15 A. I'm unaware if HDL sought an OIG opinion letter. I know
10:39 AM 16 when they came under scrutiny, they worked diligently with OIG
10:39 AM 17 and DOJ to get an opinion so that they could operate properly.
10:39 AM 18 So that's another example that you said you could use OIG
10:39 AM 19 for --

10:39 AM 20 THE COURT: Mr. Dent, let me just clear up the
10:39 AM 21 record. Did -- to your knowledge, did HDL ever request a
10:39 AM 22 formal OIG opinion on its practices?

10:39 AM 23 THE WITNESS: I'm unaware of any request made by HDL
10:39 AM 24 to OIG at this point in time on that.

10:39 AM 25 THE COURT: Thank you. Please --

10:39 AM 1 MS. SHORT: Your Honor, this would be a good time to
2 take a break if you wanted to.

10:39 AM 3 THE COURT: Very good. I think we are.

10:39 AM 4 Let's take our morning break.

10:40 AM 5 (Whereupon the jury was excused from the courtroom.)

10:40 AM 6 THE COURT: Very good. Anything else we need to
7 address?

10:40 AM 8 MR. LEVENTIS: No. Thank you, Your Honor.

10:40 AM 9 THE COURT: Very good. We'll take a 10-minute break.

10:40 AM 10 (Recess.)

10:54 AM 11 THE COURT: Please be seated.

10:54 AM 12 Any matters we need to take up before we bring
13 in the jury?

10:54 AM 14 MR. LEVENTIS: No, Your Honor.

10:54 AM 15 THE COURT: From the defense?

10:54 AM 16 MR. COOKE: No, Your Honor.

10:54 AM 17 THE COURT: Bring in the jury.

10:55 AM 18 (Whereupon the jury entered the courtroom.)

10:56 AM 19 THE COURT: Please be seated.

10:56 AM 20 Continue cross-examination.

10:56 AM 21 MS. SHORT: Thank you, Your Honor.

10:56 AM 22 BY MS. SHORT:

10:56 AM 23 Q. All right. Mr. Dent, I'd like to pull up another document
10:56 AM 24 we talked about yesterday. It's Plaintiffs' Exhibit 1122. I
10:56 AM 25 think that we can look at the third page of the document. It's

1 actually the part that we talked about yesterday. I'm sorry,
2 fourth page of the document.

3 Do you remember talking about this letter that came
4 from Pathology Laboratories yesterday?

5 A. Yes.

6 Q. All right. You noted, I think, yesterday that this is
7 from a competitor of HDL's; right?

8 A. I've never heard of Pathology Laboratories. I've never
9 considered them a competitor of HDL's, no.

10 Q. Okay. You would agree with me this letter addresses both
11 the Anti-Kickback Statute and the federal False Claims Act; is
12 that right?

13 A. Yes, it appears to address both of those.

14 Q. And it also addresses P&H fees, the laboratory's proposal
15 to provide -- I'm sorry -- the -- let me back up and just do
16 this.

17 "Blood draw remuneration would be intended to induce
18 referrals. Based on that conclusion, the OIG determined that
19 paying physicians to collect samples would potentially place
20 the laboratory and the physician in violation of the federal
21 Anti-Kickback Statute and the federal False Claims Act"; is
22 that right?

23 A. I see those sentences, yes.

24 Q. Okay. And the fourth paragraph of this document, where
25 they say, "We are aware of another suspect activity of this

1 particular laboratory as it relates to the writeoff of patient
2 copays and deductibles to minimize self-pay balances."

3 Do you see that sentence?

4 A. I see that sentence, yes.

5 Q. All right. And in this letter, PathLab says, "This
6 activity also has significant ramifications in terms of
7 potential fraudulent insurance practices."

8 Do you see that?

9 A. Yes.

10 Q. All right. And this letter is dated March of 2012; is
11 that right?

12 A. Yes.

13 Q. And if we look back at page 1 of the exhibit, you
14 forwarded this PathLabs letter to Tonya Mallory and Brad
15 Johnson; didn't you?

16 A. Yes.

17 Q. I want to look at an exhibit that's been marked
18 Plaintiffs' 1123. This has not yet come into evidence, so I'm
19 going to hand it up to you.

20 A. Thank you.

21 Q. Uh-huh. Mr. Dent, do you recognize Plaintiffs'
22 Exhibit 1123?

23 A. I do not, but I'd have to read it.

24 Q. Certainly.

25 THE COURT: Give him a moment to read it.

(Pause.)

THE WITNESS: Yes, I recognize it.

BY MS. SHORT:

Q. Okay. And what is it?

A. John Coffman is another Bluewave contractor, and he is sending a letter that he received out in the field to myself and Brad, a memorandum regarding waivers of fees. And attached is the same McDonald Hopkins letters that we reviewed earlier in that email.

MS. SHORT: Your Honor, I'd move for the admission of Plaintiffs' Exhibit 1123.

THE COURT: Is there any objection?

MR. COOKE: No objection.

MR. ASHMORE: No objection.

THE COURT: Plaintiff 1123 admitted without objection.

MS. SHORT: Let's go ahead and put that up on the screen.

BY MS. SHORT:

Q. And this is the email -- if we look at sort of in the middle of the page or the first email in the stream, this is what you were referencing, Mr. Coffman sent an email to you and also to Mr. Johnson about a memo that he had seen out in the field?

A. Yes.

11:01AM 1 Q. Mr. Coffman was a BlueWave independent contractor?

11:01AM 2 A. Yes.

11:01AM 3 Q. And if we look at the attachment to that email, is this
11:01AM 4 the same McDonald Hopkins memo that we discussed earlier today?

11:01AM 5 A. It appears to be the same one, yes.

11:01AM 6 Q. Okay. This is the same memo that -- I believe your
11:01AM 7 testimony was you understood that HDL's attorneys had sent a
11:01AM 8 cease and desist letter?

11:02AM 9 A. This is the same one, yes.

11:02AM 10 Q. All right. And looking back at Mr. Coffman's email to
11:02AM 11 you, this is now May of 2012, and he says, "Hi, Cal. Recently
11:02AM 12 I finally got in front of a difficult access account that was
11:02AM 13 still ordering a few Berkeley's."

11:02AM 14 Skipping down -- well, and I'm sorry, we don't need
11:02AM 15 to go into the rest of it.

11:02AM 16 So it appears from this that this Berkeley memo is
11:02AM 17 still being circulated out into the field; is that correct?

11:02AM 18 A. I would absolutely disagree with you.

11:02AM 19 Q. Okay. Let's look at what Mr. Coffman has to say. I'm not
11:02AM 20 sure if you disagree with me or disagree with him.

11:02AM 21 It says, "Hi, Cal. Recently I finally got in front
11:02AM 22 of a difficult access account that was still ordering a few
11:03AM 23 Berkeley's. They have eight providers. It's Southern Medical
11:03AM 24 Group in Knoxville. They ordered their first six tests last
11:03AM 25 week, and a Berkeley rep brought by the attached memorandum of

1 a legal position offered by some McDonald Hopkins discussing
2 routine waivers of patient balances by laboratories. I wanted
3 you to have it."

4 A. I see that.

5 Q. Okay. So it appears that the McDonald Hopkins opinion was
6 still being circulated out in the field in May of 2012;
7 correct?

8 A. I disagree with that, and I can explain why I'm answering
9 that way.

10 I have no way of knowing if the Berkeley reps are
11 still distributing that memorandum or not, and I think you're
12 trying to tie it to a cease and desist letter that was worked
13 out between HDL's attorneys and the Berkeley attorneys to stop
14 it.

15 It sounds to me like it's a difficult-to-access
16 practice. This doctor could have had this letter. I don't
17 know when that rep distributed it to them. He obviously has
18 the letter, and he's giving it to the sales rep. But I don't
19 know the timing of it, how long he's had it or anything, or if
20 Berkeley reps are still distributing it.

21 **THE COURT:** Mr. Dent, let me explain something to
22 you.

23 When the lawyer asks a question, you simply
24 answer the question. And I want you to listen to the question,
25 because we're going to be here a long time if you just don't

1 directly answer the question.

2 Reask the question, please.

3 **BY MS. SHORT:**

4 **Q.** It appears, doesn't it, that the McDonald Hopkins memo was
5 still being circulated out in the field as of May 2012, doesn't
6 it?

7 **A.** It could be interpreted that it appears that way, yes.

8 **Q.** All right. Thank you.

9 **MS. SHORT:** Your Honor, I'd like to hand up another
10 exhibit.

11 **THE WITNESS:** Thank you.

12 **BY MS. SHORT:**

13 **Q.** Mr. Dent, do you recognize what's been marked as
14 Government Exhibit 7010?

15 **A.** I'm reading it.

16 The bottom email is an email from Heather Lockhardt,
17 dated 6 October 2012, sent to myself and Brad Johnson and then
18 copying some BlueWave contractors.

19 **MS. SHORT:** Your Honor, I'd move for the admission of
20 Government Exhibit 7010.

21 **THE COURT:** Any objection?

22 **MR. COOKE:** No objection.

23 **MR. ASHMORE:** No objection.

24 **THE COURT:** Plaintiff 7010 admitted without
25 objection.

11:05 AM 1 BY MS. SHORT:

11:06 AM 2 Q. And as you were just saying, Mr. Dent, on the first page,
11:06 AM 3 you see your email forwarding the exchange with Ms. Lockhardt
11:06 AM 4 to Ms. Mallory and to Brad Johnson in October of 2012; is that
11:06 AM 5 right?

11:06 AM 6 A. Yes.

11:06 AM 7 Q. All right. And I want to look at the substance of
11:06 AM 8 Ms. Lockhardt's email. And she says at the top, "This is what
11:06 AM 9 I've been told from my physicians that they are saying." This
11:06 AM 10 is LabCorp phlebotomists.

11:06 AM 11 Do you see what I'm talking about at the very top of
11:06 AM 12 the page?

11:06 AM 13 THE COURT: Who is Ms. Lockhardt? Do we know who
11:06 AM 14 that is?

11:06 AM 15 BY MS. SHORT:

11:06 AM 16 Q. Was Ms. Lockhardt a Bluewave sales representative?

11:06 AM 17 A. Ms. Lockhardt is a Bluewave sales contractor in Texas.

11:06 AM 18 THE COURT: Okay. Good.

11:06 AM 19 BY MS. SHORT:

11:06 AM 20 Q. Okay. You see at the very top of the second page of the
11:06 AM 21 exhibit where she says, "This past week, the regional manager
11:07 AM 22 of LabCorp was in several of my accounts. This is what I've
11:07 AM 23 been told from my physicians they are saying."

11:07 AM 24 Do you see that part?

11:07 AM 25 A. I see that.

11:07AM 1 Q. Okay. I want to focus on Number 2. "It is illegal for us
11:07AM 2 to pay a draw fee because it is a kickback."

11:07AM 3 Do you see that?

11:07AM 4 A. I do. This is what the -- if you go to the very beginning
11:07AM 5 of the email, "Brad and Cal, I'm sure you're all aware of the
11:07AM 6 smackdown we are getting from LabCorp. A corporate initiative
11:07AM 7 is underway" -- so a corporate initiative of LabCorp -- "to
11:07AM 8 stop all LabCorp phlebotomists from drawing blood for HDL.
11:07AM 9 This past week, the regional manager of LabCorp was in several
11:07AM 10 of my accounts, and this is what I have been told from my
11:07AM 11 physicians that the LabCorp folks are saying" -- they.

11:07AM 12 "Number 1, patients will have to start paying for
11:07AM 13 their labs as of October 2012.

11:07AM 14 "Number 2, it is illegal for us" -- I'm assuming
11:07AM 15 they're saying HDL -- "to pay a draw fee because it is a
11:07AM 16 kickback.

11:07AM 17 "3, Cigna will no longer pay for labs done through
11:08AM 18 HDL.

11:08AM 19 "4, Cigna dropped physicians in Florida because they
11:08AM 20 used us.

11:08AM 21 "5, it is against the law for you not to bill the
11:08AM 22 patient.

11:08AM 23 "I'm sure that others are hearing" --

11:08AM 24 Q. Okay. I don't mean to interrupt, but I don't know that we
11:08AM 25 need to --

11:08 AM 1 A. well, I'm just trying to make sure --

11:08 AM 2 THE COURT: Go ahead and ask your next question.

11:08 AM 3 BY MS. SHORT:

11:08 AM 4 Q. I'm trying to focus us so that we can keep going,
11:08 AM 5 Mr. Dent.

11:08 AM 6 If you would look at the bottom of Ms. Lockhardt's
11:08 AM 7 email to you, she also says, "I received an email from one of
11:08 AM 8 my physicians," and she repeats the email there.

11:08 AM 9 Do you see that?

11:08 AM 10 A. I see that.

11:08 AM 11 Q. Okay. The middle of that email, it looks like Francisco
11:08 AM 12 Velazquez is the author.

11:08 AM 13 Do you see that?

11:08 AM 14 A. I see that.

11:08 AM 15 Q. All right. And Mr. Velazquez says in the middle of his
11:08 AM 16 message, "In the long run, HDL attorneys should really know
11:08 AM 17 what they're doing. These companies, LabCorp and Quest, are
11:09 AM 18 going at you full force and they are mad and they will stir the
11:09 AM 19 shit until you get investigated. As long as we are covered for
11:09 AM 20 the anti-kickback law, then we are fine, but we better be more
11:09 AM 21 than sure."

11:09 AM 22 Do you see that?

11:09 AM 23 A. I see that.

11:09 AM 24 Q. So this was yet another question being raised about
11:09 AM 25 potential violations of the Anti-Kickback Statute?

11:09AM 1 A. This is a letter from a physician saying that LabCorp and
11:09AM 2 Quest are engaged in activities to disrupt HDL's business, and
11:09AM 3 it does reference the anti-kickback law in that last sentence.

11:09AM 4 Q. All right. And specifically LabCorp was saying, Hey, the
11:09AM 5 payment of P&H is a kickback; isn't that right?

11:09AM 6 A. I don't see that. If you can point it out to me, I can
11:09AM 7 confirm or deny it.

11:09AM 8 THE COURT: Show it to the witness.

11:09AM 9 BY MS. SHORT:

11:09AM 10 Q. Yeah, Number 2.

11:09AM 11 A. Okay. This is what the LabCorp rep was saying is illegal
11:09AM 12 for us to pay a draw fee, not P&H. It says a draw fee. That's
11:10AM 13 the \$3 venipuncture fee, which is commonly referred to as a
11:10AM 14 collection fee.

11:10AM 15 Q. Sure. They're also saying it's against the law for you to
11:10AM 16 not bill the patient; correct?

11:10AM 17 A. Number 5 says it is against the law for you not to bill
11:10AM 18 the patient, correct. That's what it says.

11:10AM 19 Q. All right. This is all -- this email exchange occurs in
11:10AM 20 October of 2012; is that right?

11:10AM 21 A. That first email from Heather Lockhardt is October 2012,
11:10AM 22 yes.

11:10AM 23 Q. Okay. So the next thing that happens in our time line,
11:10AM 24 January of 2013 is when Bluewave received a subpoena from the
11:10AM 25 United States; is that right?

11:10 AM 1 A. Yes.

11:10 AM 2 Q. All right. You retained the law firm of White Arnold &
11:10 AM 3 Dowd to represent you?

11:10 AM 4 A. Yes.

11:10 AM 5 Q. And in June of 2013, do you recall talking about that
11:11 AM 6 meeting that occurred in Richmond to discuss HDL's payment of
11:11 AM 7 P&H fees?

11:11 AM 8 A. Yes.

11:11 AM 9 Q. And you remember testifying yesterday about what you
11:11 AM 10 understood from that meeting; is that right?

11:11 AM 11 A. I testified to parts of that meeting yesterday, yes.

11:11 AM 12 Q. Isn't it true, Ropes & Gray told you to stop relying on
11:11 AM 13 the LeClairRyan letter, didn't they?

11:11 AM 14 A. I don't recall that being the verbiage, to stop relying on
11:11 AM 15 the LeClairRyan letter. But we were told do not distribute
11:11 AM 16 that letter anymore and to make sure all of our contractors
11:11 AM 17 were not distributing the letter anymore.

11:11 AM 18 And I think I testified I asked a clarifying question
11:11 AM 19 as to why, and they said it violated attorney-client privilege.
11:11 AM 20 And I made the comment, "Hasn't that already been violated?
11:11 AM 21 HDL has given it to the field and the contractors. They've
11:11 AM 22 have given it to the field."

11:12 AM 23 And they said, "Yes, but don't distribute it
11:12 AM 24 anymore."

11:12 AM 25 Q. Okay. But they also explained that, as part of that, the

1 P&H fee that HDL was providing did not fit within an
2 anti-kickback safe harbor.

3 They told you that, didn't they?

4 A. They didn't say they were looking at the safe harbor to
5 determine if that was appropriate or not. They did talk about
6 the safe harbor requirement, yes.

7 Q. All right. And they further told you that the P&H
8 payments needed to stop.

9 The real question at that meeting was the timing,
10 wasn't it?

11 A. That is not correct. They did not say that P&H payments
12 needed to stop.

13 I think you've heard a lot of testimony that they
14 were wanting to move away. And they said they had relayed to
15 the government that HDL was moving away from P&H fees, which I
16 responded whoa, whoa, whoa, wait a minute, because this is the
17 first time we'd ever heard about that. They never said stop
18 paying P&H fees.

19 In fact, I testified that later -- that was in June
20 of 2013. In the fall of 2013, Ropes & Gray and Derek Kung
21 rewrote the HDL processing and handling letter of agreement to
22 pay P&H fees. So that shows that they did not say stop paying
23 P&H fees. Again, Bluewave doesn't pay P&H fees.

24 Q. I don't want to quibble with you.

25 If you get advice from a lawyer, you're not required

1 to follow it; are you?

2 A. I follow every bit of advice I've ever been given by a
3 lawyer, so I wouldn't necessarily -- I guess you, as a client,
4 could choose not to follow advice.

5 Q. And when we keep referencing "move away from P&H fees,"
6 that meant stop, didn't it?

7 A. No. What was -- they said they had relayed to the U.S.
8 government that HDL was moving away from P&H fees. I also
9 testified, and it was in Linda Flipppo's notes, Tonya Mallory
10 stood up and said that is not what was said.

11 We said if we get clarification and P&H fees can no
12 longer be paid by the laboratories, we absolutely would lead
13 the way and stop paying P&H fees. That's what was said.

14 Q. Well, hold on a second.

15 That was in June of 2013?

16 A. That is correct.

17 Q. When did Berkeley HeartLab stop paying P&H fees?

18 A. I have no idea. I wasn't at Berkeley HeartLab then.

19 Q. Didn't they stop paying P&H fees in January of 2012?

20 A. I just said I have no idea. I know that we have a P&H
21 letter of agreement on behalf of Berkeley through Quest after
22 we left paying \$21 for those same two tubes of blood.

23 Q. Do you remember sending an email to Tonya Mallory and Brad
24 Johnson in August of 2012 saying Berkeley, Celera, Quest no
25 longer pays P&H that was effective 31 January 2012?

11:15 AM 1 A. I wouldn't deny that.

11:15 AM 2 Q. All right. So you reported to Ms. Mallory and to
11:15 AM 3 Mr. Johnson that Berkeley had stopped paying P&H fees in
11:15 AM 4 January of 2012; correct?

11:15 AM 5 A. Apparently, I did.

11:15 AM 6 Q. Back to the June 2013 meeting with your attorneys.

11:15 AM 7 You didn't want P&H payments to stop, did you?

11:15 AM 8 A. Not true.

11:15 AM 9 Q. BlueWave had three attorneys present at that meeting,
11:15 AM 10 didn't it?

11:15 AM 11 A. At least. If my memory serves me correctly, Gene Sellers
11:15 AM 12 was there. Mark White was there. Linda Flippo was there. And
11:15 AM 13 I don't even think she remembers if Augusta Dowd was there or
11:15 AM 14 not.

11:15 AM 15 Q. Okay. BlueWave never asked any one of those lawyers to
11:16 AM 16 give an opinion about whether paying P&H fees was appropriate,
11:16 AM 17 did it?

11:16 AM 18 A. No, ma'am, I wouldn't have. BlueWave didn't pay P&H fees.

11:16 AM 19 Q. BlueWave told physician clients about the P&H fees, didn't
11:16 AM 20 it?

11:16 AM 21 A. We would have talked about P&H fees with physician
11:16 AM 22 clients, yes.

11:16 AM 23 Q. That was one of the things that you could offer on behalf
11:16 AM 24 of HDL to your physician clients; correct?

11:16 AM 25 A. Yes.

11:16 AM 1 Q. And it was the same for Singulex; right?

11:16 AM 2 A. Yes.

11:16 AM 3 Q. Now, if I remember your testimony from yesterday, your
11:16 AM 4 takeaway from the June meeting was, number one, don't hand out
11:16 AM 5 the LeClairRyan letter anymore; right? We discussed that?

11:16 AM 6 A. That was one of the action items, yes.

11:16 AM 7 Q. And so you didn't share the LeClairRyan letter after that
11:16 AM 8 point, did you?

11:16 AM 9 A. No.

11:17 AM 10 Q. You continued to rely on it, didn't you?

11:17 AM 11 A. Did I continue to rely on the LeClairRyan letter? Yes.
11:17 AM 12 We were just asked not to distribute it any longer.

11:17 AM 13 Q. The second takeaway, I think you said, was that you were
11:17 AM 14 going to collect and send P&H agreements and legal opinions
11:17 AM 15 from other labs that you thought were paying P&H.

11:17 AM 16 You were going to send those on to HDL and to your
11:17 AM 17 attorneys; is that right?

11:17 AM 18 A. They asked us if we could get our hands on those and, if
11:17 AM 19 we could, would we provide them to them. And we had reminded
11:17 AM 20 them that we had given all the processing and handling letter
11:17 AM 21 of agreements from other labs previously, and we would try to
11:17 AM 22 get our hands on time and motion studies and legal opinion
11:17 AM 23 letters. But those are more difficult to get your hands on
11:17 AM 24 because labs keep those close to their chest.

11:17 AM 25 Q. All right. And, in fact, you didn't send any more -- you

11:17 AM 1 didn't send any more P&H agreements certainly; is that right?

11:17 AM 2 A. I don't recall. I mean, it would be so easy just -- we
11:18 AM 3 would pick up the phone to Sandra and say, Sandra, the
11:18 AM 4 processing and handling letter of agreements that you have sent
11:18 AM 5 previously to Tonya, would you resend them?

11:18 AM 6 Q. Okay. You didn't send any P&H agreements from other labs
11:18 AM 7 to your own attorneys, did you?

11:18 AM 8 A. Not if we didn't find any additional ones. They already
11:18 AM 9 had them.

11:18 AM 10 Q. You didn't send any legal opinions from other labs to your
11:18 AM 11 attorneys, did you?

11:18 AM 12 A. Not that I recall.

11:18 AM 13 Q. All right. So we go from June -- the very next month,
11:18 AM 14 September of 2013, Emily Barron's attorney, Brian Dickerson,
11:18 AM 15 warned BlueWave that P&H fees violated the Anti-Kickback
11:18 AM 16 Statute, didn't he?

11:18 AM 17 A. I think that's a fair statement.

11:18 AM 18 Q. And in addition, Mr. Dickerson questioned the very
11:18 AM 19 structure of BlueWave; correct?

11:18 AM 20 A. I don't recall that, but I wouldn't deny. Mr. Dickerson
11:18 AM 21 was saying a lot of things, and we turned him over to our
11:19 AM 22 attorneys to have the attorneys work out their differences.

11:19 AM 23 Q. Okay. He was specifically concerned about the commission
11:19 AM 24 structure that was in BlueWave's agreement with his client's
11:19 AM 25 company, wasn't he?

1 A. I heard his testimony the other day, and I believe that
2 that was one of the things he addressed, yes.

3 Q. Yeah. And that's something that he addressed back in
4 September of 2013; correct?

5 A. I don't know if I could testify to the exact date of when
6 he did that, but I'm sure his emails would that show that. I
7 wouldn't deny that.

8 Q. Okay. That was in 2013 though; right?

9 A. I wouldn't deny that.

10 Q. Let me go ahead and pull up U.S. Trial Exhibit 1002.

11 Mr. Dent, you spent some time yesterday testifying
12 about this document and Ms. DeMoss -- Ms. DeMoss's review of
13 that compliance questionnaire that we started the day out with
14 today. Do you remember that testimony from yesterday?

15 A. I recall talking about Lauren DeMoss yesterday, yes.

16 Q. Okay. All right. You also talked about Ms. DeMoss's
17 comments during your deposition; is that right?

18 A. Yes.

19 Q. Okay. You remember yesterday when we watched the video of
20 your deposition and we were talking specifically -- you talked
21 specifically about Ms. DeMoss's comments?

22 A. I believe those were on the video, yes.

23 Q. Okay. And I think yesterday you testified that you and
24 Mr. Johnson had had at least a conference call about
25 Ms. DeMoss's comments back in November of 2013; is that right?

1 A. Yes.

2 Q. All right. And I believe you said that either you had
3 this package in front of you during that conversation or, if
4 you were on the phone, Mr. Johnson had it in front of him; is
5 that right?

6 A. Yes.

7 Q. And that's at a point in time when White Arnold & Dowd was
8 in the process of collecting documents from Bluewave to produce
9 to the United States; is that right?

10 A. Yes. I believe November 13. I can't say when they
11 provided what, but there was several discovery requests for
12 different reasons. So I can't say the exact date.

13 Q. You remember Ms. Flipppo's testimony at trial that the
14 investigation and her efforts -- the United States
15 investigation and her efforts to collect documents went well
16 into 2014? Do you remember that testimony?

17 A. I do recall that, yes.

18 Q. Okay. And do you remember in the video clip from your
19 deposition that we watched yesterday, the attorney for the
20 United States mentioned that she was just handed this document
21 at the beginning of that deposition.

22 Do you remember that?

23 A. I don't recall that. I wouldn't deny it.

24 Q. All right. The top of the very first page of the exhibit,
25 do you remember talking yesterday -- actually, I don't know

1 if -- it was either yesterday during your direct or it was
2 during your video clip deposition.

3 Can we focus in on that? Can we pull that out?
4 Thanks.

5 You see this packet was sent from Brett King? Who is
6 Brett King?

7 A. Brett King is an attorney in Alabama.

8 Q. Is he a friend of Brad Johnson's?

9 A. I think that's a fair and accurate description, yes.

10 Q. And he forwarded this May 26th, 2017, to Brad Bantias?

11 A. Yes.

12 Q. Who is Mr. Bantias?

13 A. He's an attorney at Barnwell Whaley.

14 Q. Was he present at your deposition on May 31st, 2017?

15 A. Ma'am, I can't recall. I was deposed for 14 hours on
16 different days, and numerous attorneys were in there. Dawes
17 Cooke was present at both of my depositions.

18 Q. Okay. Fair enough.

19 Now, I believe you said yesterday that you don't know
20 Lauren DeMoss, do you?

21 A. I do not.

22 Q. You've never spoke to her; is that correct?

23 A. I've never spoken with her.

24 Q. Did you ask either Mr. King or Ms. DeMoss to advise you on
25 whether P&H fees violated the Anti-Kickback Statute?

1 A. I did not.

2 Q. Did you ask them to advise you about whether waivers of
3 copays and deductibles, zero-balance billing, was appropriate?

4 A. No.

5 Q. Did you ask Ms. DeMoss to advise you on the commission
6 structure of BlueWave and whether that might have violated the
7 Anti-Kickback Statute?

8 A. No.

9 Q. In fact, Ms. DeMoss's advice was limited to her review of
10 that compliance questionnaire that you and Mr. Johnson put
11 together; is that right?

12 A. It's my understanding that's all she was asked to do.

13 Q. All right. I want to focus on -- we looked at some of
14 Ms. DeMoss's comments through your video deposition yesterday.
15 I want to focus on just a couple of others.

16 If we turn to -- Peter, it's page 91.

17 Are you there? I want to focus in on Question 12.
18 And this is your question from your questionnaire. Number 12,
19 "Do we bill for copays and deductibles?"

20 Do you see that?

21 A. Yes.

22 Q. All right. And Ms. DeMoss's answer, you want to read that
23 for us?

24 A. "It is our understanding that a physician's office where
25 the test was ordered should be the entity collecting the

1 patient's copayments and/or deductible. In the case of
2 Medicare and Medicaid patients, the routine waiver of
3 copayments and deductibles is prohibited by the Anti-Kickback
4 Statute."

5 Q. Do you agree with Ms. DeMoss on that?

6 A. No.

7 Q. Looking at Question 15 at the bottom of that page, and
8 let's pull out the footnote as well --

9 A. Can I elaborate?

10 Q. I'd prefer if we keep focused. Is it relevant?

11 THE COURT: You know, he has a right -- he has to
12 answer yes or no -- I've been fussing with him about that --
13 but then he has a right to explain.

14 MS. SHORT: And that's fine.

15 THE COURT: You have a right to explain, yes, sir.

16 THE WITNESS: I think we've testified numerous times
17 there's a law forbidding -- copay and deductibles don't exist
18 for laboratory services for Medicare and Medicaid. I think
19 that was an oversight that she made.

20 BY MS. SHORT:

21 Q. Okay. Looking at your Question 15, your question is, "Do
22 we have a legal document for the P&H?" She doesn't respond to
23 that one, does she?

24 A. No.

25 Q. Okay. In fact, she just puts a footnote. And the

1 footnote says "To be discussed."

2 You never discussed that with her, did you?

3 A. No. And can I elaborate?

4 Q. Sure.

5 A. Brad Johnson -- this is in the middle of the investigation
6 at the same time when HDL's attorneys are discussing things
7 with the Department of Justice. And he called me up and said,
8 "Hey, I'd like to take our exams and send those to another law
9 firm, just have them look at it and see if they respond the
10 same way that the other attorneys are responding." Because
11 there were a lot of different answers out there.

12 I said, "I think that's a good idea." And he drafted
13 some additional questions to put on there. He intentionally
14 didn't contact a health care attorney. He asked Brett King to
15 find somebody because there was a lot of press out there about
16 BlueWave, HDL, Singulex in Forbes Magazine, Wall Street
17 Journal, New York times. So we wanted a fresh look, without
18 anybody knowing BlueWave, to just look at these legal questions
19 and give what their opinion was of it. That's why we did this.

20 Q. If I understand you correctly, you just said you didn't
21 want a health care attorney to look at this?

22 A. No, that's not what I said. I said we didn't want to go
23 and pick the health care attorney so that it's coming from
24 BlueWave.

25 Q. I understand.

1 A. So he sent it to his friend Brett King and asked Brett
2 King to find a health care attorney to review the test because
3 we just wanted to see what somebody else would say that wasn't
4 in the middle -- in the midst of all this stuff, get a fresh
5 look at it and see -- there was risk for us too in doing that;
6 right? I mean, they could say, "You're absolutely 100 percent
7 breaking the law. You're going to prison."

8 Q. Let's turn to page 93, question -- your Question 26.

9 And the question that you asked in your compliance
10 quiz is, "Can HDL place a phlebotomist in a practice and the
11 practice still receive the P&H fee?"

12 Ms. DeMoss responds, "These two issues are not
13 connected. The provision of a phlebotomist is allowed in
14 certain circumstances" -- and she references Question 6 above.
15 "However, the P&H fee appears to be prohibited." And she
16 references a discussion that we talked about yesterday in
17 Question 17.

18 Did you ever follow up with Ms. DeMoss on her
19 comments?

20 A. Ma'am, I've testified that we didn't follow up with -- I
21 don't even know who Ms. DeMoss is other than Brett King reached
22 out to her.

23 The question is, "Can HDL place a phlebotomist in a
24 practice and the practice still receive the P&H fee?" That
25 question is intentionally to address you can't have a double

1 payment. You can't have a scenario where there's a
2 phlebotomist in there drawing the blood that works for another
3 company and then the physician practice is also collecting a
4 P&H fee. That would be overlap.

5 So that's the question being posed to her. And she
6 responds, "These two issues are not connected." I would
7 disagree with that. I would say they are connected. You know,
8 if you have the two happening at the same time, they're
9 connected.

10 And then she says, "The provision of a phlebotomist
11 is allowed in certain circumstances." I would agree with her.
12 And you have to refer back to the Question Number 6 to get the
13 answer to that one.

14 Q. Uh-huh.

15 A. Can we do that?

16 Q. If you would like.

17 **THE COURT:** No, respond to the question. You may
18 continue to read --

19 **THE WITNESS:** Right. But when Brad and I discussed
20 this in great detail, we referred back to the previous answers
21 of the previous questions. And there was some confusion on her
22 behalf. So there's been confusion on everybody's behalf about
23 these questions. That's why we're trying to seek clarity.

24 **BY MS. SHORT:**

25 Q. So this is the first and the only feedback that you had

1 gotten from a health care attorney; is that right?

2 A. No. I testified earlier that these test questions have
3 been given to Singulex and their compliance team and HDL and
4 their compliance team, so they have been reviewed by attorneys
5 in the health care arena before. This is the first time
6 Bluewave had ever specifically asked somebody to look at them.
7 And, again, you have to put this in perspective. This practice
8 has been going on as early as 1982. None of these laboratories
9 paying these processing and handling fees have ever heard that
10 there was anything inappropriate with it until this
11 investigation started.

12 Yes, there were times where a physician would inquire
13 about it, but those were also linked to competitive activity
14 out there where other laboratories are going in and stating
15 things are illegal. There was no change. So we were relying
16 on legal counsel to say what it was. And there hadn't been a
17 change until this point.

18 Q. So if you and Mr. Johnson were confused by some of
19 Ms. DeMoss's comments, you didn't follow up with her, did you?

20 A. No, we did not.

21 Q. Did you follow up with White Arnold & Dowd?

22 A. White Arnold & Dowd was working directly with Ropes & Gray
23 at the time that it was working with the Department of Justice
24 and the OIG. So, no, I don't think we ever forwarded this to
25 White Arnold & Dowd or anybody else.

11:32AM 1 Q. You didn't --

11:32AM 2 A. This was something we wanted to look at for our own
11:32AM 3 clarification. Does another attorney not involved in this have
11:32AM 4 a difference of opinion? These opinions are in alignment with
11:32AM 5 the opinions that we're hearing on both sides of the argument
11:32AM 6 at that time.

11:32AM 7 Q. Did you follow up with Mr. Sellers? Did you ask him to
11:32AM 8 take a look at this?

11:32AM 9 A. I would doubt it.

11:32AM 10 Q. And you didn't follow up with Mr. Galese on these either?

11:32AM 11 A. No. I wouldn't have sent this to a litigation attorney,
11:32AM 12 no.

11:32AM 13 Q. You didn't follow up on your confusion because you didn't
11:32AM 14 want to hear what another attorney would have to say about
11:32AM 15 this, did you?

11:32AM 16 A. I didn't want to hear what another attorney had to say?
11:32AM 17 we reached out to another attorney to hear what they had to
11:32AM 18 say.

11:32AM 19 Q. When she told you and you were confused, you let it drop,
11:32AM 20 didn't you?

11:32AM 21 A. No, ma'am. I'm not confused. I'm not confused. I said I
11:32AM 22 believe she's confused on the issue. And I gave an example
11:32AM 23 where she ignored a law.

11:32AM 24 So there's some things there -- and, again, we wanted
11:32AM 25 a fresh look at this, somebody not involved, to see what their

1 answers were. I think that adds to the fact there's a
2 tremendous amount of ambiguity out there about this.

3 Q. Mr. Dent, let's go ahead and look at U.S. Trial
4 Exhibit 1497. I believe you talked about this yesterday as
5 well.

6 In March of 2014, Ms. Flipppo forwards to you a letter
7 that she received from the Department of Justice; is that
8 right?

9 A. Yes.

10 Q. All right. Did you discuss this letter with Tonya
11 Mallory?

12 A. I don't recall if I discussed this with Tonya or not.

13 Q. And I believe you testified yesterday that at this point,
14 when the Department of Justice had said we're looking at this,
15 it looks like there's a potential Anti-Kickback Statute
16 violation, I believe you said that, at that point, you had two
17 legal opinions in hand that said P&H fees were okay. Is that
18 right?

19 A. Yes. And I'll clarify.

20 Q. Uh-huh.

21 A. There were three legal opinions done at Berkeley HeartLab.
22 I had one of those legal opinions in hand, and that was the
23 Greg Root legal opinion. I had never been given the other two
24 legal opinions, but I had been trained on those. They were
25 discussed. They were presented, but I was not given those.

1 At this point in time, I had a second legal opinion,
2 the 2012 one from LeClairRyan, in hand. So I think that's very
3 accurate. I had two legal opinions in hand at this point in
4 time.

5 Q. Let's just look at the first page of the attachment, the
6 second page of the document.

7 All right. So I think I understand you correctly.
8 One of the letters that you had in hand was the 2007 letter
9 that Greg Root had prepared for Berkeley HeartLab; is that
10 right?

11 A. Yes.

12 Q. All right. And the other was the 2012 letter that
13 Mr. Ruggio had prepared for Health Diagnostic Laboratory; is
14 that correct?

15 A. Yes.

16 Q. Okay. BlueWave itself didn't have any legal opinions in
17 hand, did you?

18 A. No, ma'am, nor would I have sought one. Bluewave didn't
19 pay processing and handling fees.

20 Q. Now, there's been some testimony -- we can go ahead and
21 take that down. I just -- there's been testimony about the
22 June 2014 special fraud alert. Do you remember talking about
23 that yesterday?

24 A. Yes.

25 Q. Okay. And you testified that that fraud alert was when

1 the government finally took the position -- took a position on
2 P&H fees; is that right?

3 A. Yes.

4 Q. It was the Office of Inspector General that issued that
5 special fraud alert, wasn't it?

6 A. I believe that is correct, yes.

7 Q. It wasn't the Department of Justice; right?

8 A. I may have misspoke. I actually kind of view y'all as one
9 and the same. Y'all are all right there, Department of Justice
10 and Office of the Inspector General, yes.

11 Q. Did you look at the special fraud alert?

12 A. Absolutely I looked at it.

13 Q. Uh-huh. And when you looked at it, you understood, didn't
14 you, that that OIG special fraud alert provided information or
15 advice to the industry generally; is that right?

16 A. Yes.

17 Q. It didn't call out HDL, didn't call out Berkeley, didn't
18 call out any other labs; correct?

19 A. I don't recall it naming a specific lab, no.

20 Q. Okay. So in that way, it's different, isn't it, that the
21 OIG advisory opinions that we talked about earlier today?

22 A. Yes.

23 Q. Okay. But same entity; right? Office of Inspector
24 General; right?

25 A. It's drafted by the Office of the Inspector General, yes.

11:37 AM 1 Q. You also talked yesterday, a little bit today, about all
11:37 AM 2 the new legal terms that you're learning in the course of this
11:37 AM 3 case. You remember a couple of times commenting on that?

11:37 AM 4 A. Yes.

11:37 AM 5 Q. All right. And in the course of talking to your
11:37 AM 6 lawyers -- white Arnold & Dowd, Mr. Galese, Mr. Sellers -- they
11:37 AM 7 explained to you, didn't they, that when the Department of
11:37 AM 8 Justice investigates a company, it's not because the Department
11:37 AM 9 of Justice is going to give advice to a company, is it?

11:37 AM 10 A. I don't think that was ever specifically explained. And
11:37 AM 11 white Arnold & Dowd is the group that handled the Department of
11:38 AM 12 Justice for us. That was their specialty. Gene Sellers and
11:38 AM 13 John Galese referred us to them.

11:38 AM 14 Q. Okay. So white Arnold & Dowd, they explained to you,
11:38 AM 15 didn't they, that when the Department of Justice investigates a
11:38 AM 16 company, it's looking at whether that company has already
11:38 AM 17 violated the law, isn't it?

11:38 AM 18 A. I don't think that was explained to me. We hired them to
11:38 AM 19 represent us when we received a subpoena. And I'm not sure if
11:38 AM 20 the subpoena came from the Department of Justice or the Office
11:38 AM 21 of the Inspector General. I'm sure somebody could explain that
11:38 AM 22 to me. But that was turned over to them to represent us when
11:38 AM 23 we received that, yes.

11:38 AM 24 Q. Okay. Fair enough.

11:38 AM 25 MS. SHORT: That's all I have.

11:38 AM 1 THE COURT: Very good.

11:38 AM 2 Mr. Ashmore?

11:38 AM 3 MR. ASHMORE: Thank you, Your Honor. May it please
11:38 AM 4 the Court.

11:38 AM 5 THE COURT: Yes.

11:38 AM 6 CROSS-EXAMINATION

11:38 AM 7 BY MR. ASHMORE:

11:38 AM 8 Q. Good morning, Mr. Dent.

11:39 AM 9 A. Good morning, sir.

11:39 AM 10 Q. Along with Tonya Mallory, who started HDL?

11:39 AM 11 A. Russ Warnick and Dr. Joe McConnell.

11:39 AM 12 Q. And who owned HDL?

11:39 AM 13 A. I believe Russ Warnick, Joe McConnell, Tonya Mallory, and
11:39 AM 14 Tipton Golias, but I believe he had assigned shares to a lot of
11:39 AM 15 family members.

11:39 AM 16 Q. During the relevant times we've been discussing, who was
11:39 AM 17 on the board of directors for HDL?

11:39 AM 18 A. When we started, it was representing them. There were
11:39 AM 19 only three people on the board of directors there.

11:39 AM 20 Q. And who --

11:39 AM 21 A. And that was Russ Warnick, Joe McConnell, and Tonya
11:39 AM 22 Mallory.

11:39 AM 23 Q. And is it fair to say that the three of them ran HDL?

11:39 AM 24 A. Absolutely.

11:39 AM 25 Q. The June 24, 2013, meeting we discussed so much in

11:39 AM 1 Richmond, you were there?

11:40 AM 2 A. Yes.

11:40 AM 3 Q. A number of people were there?

11:40 AM 4 A. Yes.

11:40 AM 5 Q. Was Joe McConnell there?

11:40 AM 6 A. Yes.

11:40 AM 7 Q. Was Russ Warnick there?

11:40 AM 8 A. Yes.

11:40 AM 9 Q. Did they participate in the meeting just like everybody
11:40 AM 10 else?

11:40 AM 11 A. They did.

11:40 AM 12 Q. They were fully aware of all the issues and circumstances
11:40 AM 13 concerning that meeting. Is that fair to say?

11:40 AM 14 A. Yes.

11:40 AM 15 Q. And it was at that meeting where you first heard that HDL
11:40 AM 16 was going to move away from paying P&H; is that correct?

11:40 AM 17 A. Yes.

11:40 AM 18 Q. And you were here during the course of the trial, and we
11:40 AM 19 know that, of course, Nick Pace was actually hired to do just
11:40 AM 20 that; correct?

11:40 AM 21 A. Yes.

11:40 AM 22 Q. Project Twilight?

11:40 AM 23 A. Yes.

11:40 AM 24 Q. Okay. And -- and you knew that to be the case, that
11:40 AM 25 Project Twilight was being implemented?

11:40 AM 1 A. No.

11:40 AM 2 Q. Well, let me ask a better question. Did you know whether
11:41 AM 3 or not HDL was, in fact, over time moving away from the payment
11:41 AM 4 of P&H fees?

11:41 AM 5 A. Yes. They had been working to put phlebotomists in the
11:41 AM 6 practice, whether they were part-time, full-time. They had
11:41 AM 7 researched and explored various opportunities for draw centers
11:41 AM 8 in and outside of physician practices in the course of doing
11:41 AM 9 business prior to that meeting, yes.

11:41 AM 10 Q. And so once you got a phlebotomist in the practice, you've
11:41 AM 11 got the means to get the blood to the lab for testing; correct?

11:41 AM 12 A. Correct.

11:41 AM 13 Q. And there's no need to pay any type of P&H fees in that
11:41 AM 14 scenario?

11:41 AM 15 A. That's correct.

11:41 AM 16 Q. And that's what HDL was trying to accomplish?

11:41 AM 17 A. That is correct.

11:41 AM 18 MR. ASHMORE: would the government be kind enough to
11:41 AM 19 pull up 7010?

11:42 AM 20 BY MR. ASHMORE:

11:42 AM 21 Q. You just talked about Government Exhibit 7010. Do you
11:42 AM 22 remember that? I'm trying to pull it up. Do you have this box
11:42 AM 23 in the middle of your screen that says "video" --

11:42 AM 24 A. Yeah, the box is blocking it out, parts of it. I can see
11:42 AM 25 other parts. There we go.

1 11:42AM 1 Q. Thank you. Thanks so much. Can we go to the bottom of
2 this first page. Thank you.

3 Now, it occurs to me that there -- there seemed to be
4 a process in place when the issue arose as to whether or not
5 P&H fees were appropriate or legal. And I want to -- I want to
6 walk you through this email to make sure I understand it
7 correctly.

8 A. Okay.

9 Q. When such an issue arose -- and, in this instance, it was
10 LabCorp saying bad things; right?

11 A. They're saying bad things about HDL, yes.

12 Q. Sure they are. Sure they are. And so what happens --
13 whenever that would happen, did the Bluewave sales rep talk to
14 the doctor's practice and talk them through the issues, I
15 assume?

16 A. On legal matters? No.

17 Q. Well, when the issue arose -- as in here, this Heather
18 Lockhardt, she was a Bluewave sales rep?

19 A. She is a Bluewave contractor, yes.

20 Q. Sure. And so she would contact you and/or Mr. Johnson?

21 A. Yes.

22 Q. And that's -- that's the first step in the process, is
23 that she would bring it to your attention; correct?

24 A. Yes.

25 Q. Okay. And then what would you and/or Mr. Johnson do in

1 that scenario?

2 A. If I assess it to be of a legal nature, I would send it to
3 the lab's CEO in question, whether that was HDL or Singulex.

4 Q. Okay. And in this case, it's HDL, so you did -- if we can
5 move up a little bit, please -- you sent it to Tonya Mallory;
6 correct?

7 A. Yes, sir.

8 Q. Okay. And it looks like, from that point forward -- if we
9 can go all the way to the top -- you're sort of out of the
10 loop, Dennis and HDL communication; correct?

11 A. That's correct.

12 Q. Yeah. And so what Tonya Mallory does, we know from this
13 document, is she engages her legal team; correct?

14 A. Correct.

15 Q. Is that your understanding of what normally took place?

16 A. Yes, sir.

17 Q. Okay. And she does just that in this document, by
18 including Dennis Ryan. Who was he?

19 A. Dennis Ryan was one of the founders of LeClairRyan. And
20 he was later hired as counsel -- I don't know what his official
21 title was at HDL. It might have been general counsel. I'm not
22 sure.

23 Q. He was a lawyer for HDL?

24 A. Yes.

25 Q. And then same with Derek W.H. Kung; correct?

1 A. Yes. And Derek Kung was an attorney for HDL too.

2 Q. Sure. So she gets the two attorneys involved. And then
3 of course she copies Mr. Warnick and Mr. -- or Dr. McConnell;
4 correct?

5 A. Correct.

6 Q. And is that -- to the best of your knowledge, is that a
7 process in all of these instances whenever, in the field, a
8 question was raised about the legality of P&H fees?

9 A. I'm unaware of any time that we did not follow that exact
10 process.

11 Q. And then once that happened, you counted on the lawyers to
12 engage with other lawyers and work through the issue; is that
13 correct?

14 A. Yes, sir.

15 MR. ASHMORE: That's all I have, Your Honor. Thank
16 you.

17 THE COURT: Very good.

18 Mr. Cooke?

19 MR. COOKE: I do have a few questions on redirect.
20 Thank you for your patience.

21 THE COURT: Yes, sir.

22 REDIRECT EXAMINATION

23 BY MR. COOKE:

24 Q. I'm going to take you back to some of the questions you
25 were actually asked yesterday on cross-examination about the --

1 the work that's involved in process and handling the specimens.
2 And I want to understand, you talked about -- and you talked
3 about the day the phlebotomist came in and was crying because
4 he or she couldn't get the work done.

5 Do you remember that conversation?

6 A. I do.

7 Q. So in the customers that you dealt with, the clients, the
8 physicians, what was your observation as to whether their
9 offices were generally busy before they started working with
10 HDL or Singulex?

11 A. We specifically looked for busy practices that saw a lot
12 of patients.

13 Q. All right. And did you find that they had a lot of excess
14 capacity in their staff to do process and handling, or did they
15 generally try to hire the people that they needed to do the
16 work that they had?

17 A. I think in most physician practices, the staff is tasked
18 heavily to perform functions.

19 Q. If you had a patient that would be a candidate for HDL or
20 Singulex testing, did you find whether that physician would
21 typically be doing some blood testing on that patient, even
22 without HDL or Singulex?

23 A. Yes.

24 Q. What would they typically be doing?

25 A. Depends on the practice. Some practices own their own

1 laboratories.

2 Q. Uh-huh.

3 A. So they run their in-house lipids, liver function, renal
4 panels, et cetera. So they run those tests in-house. And they
5 may be running, at the same time, tests from other
6 laboratories.

7 Q. So on a typical patient, and I know -- I'm sure it
8 varies -- but how many -- how many tubes -- forgetting about
9 HDL or Singulex.

10 How many tubes would they generally be drawing on a
11 patient that they were ordering blood work on?

12 MS. SHORT: Objection, Your Honor. I think we've
13 established that this witness has no medical training or
14 degree.

15 THE COURT: well, if he's observed it -- I'll
16 overrule it.

17 Lay the foundation.

18 BY MR. COOKE:

19 Q. I think we covered it, but I'll ask it again.

20 Did you have occasion to observe the operations of
21 the physicians that you sought and had as your customers?

22 A. Many times.

23 Q. And were you generally familiar with their practices for
24 drawing blood for patients that needed blood work?

25 A. Yes.

11:49 AM 1 Q. So based on your observations, typically how many tubes
11:49 AM 2 would a physician have to draw to do routine blood work on a
11:49 AM 3 patient?

11:49 AM 4 A. I've seen as many as eight to nine tubes being drawn on a
11:49 AM 5 patient at one given time.

11:49 AM 6 Q. So if you were able to convince that physician to start
11:49 AM 7 using HDL or -- or Singulex, would that mean additional tubes,
11:49 AM 8 or could he use the same tubes that he was drawing anyway?

11:50 AM 9 A. The eight to nine that I referenced --

11:50 AM 10 Q. Yes.

11:50 AM 11 A. -- would typically be including the four tubes or two or
11:50 AM 12 three tubes from other advanced laboratories. So I'm referring
11:50 AM 13 to in total.

11:50 AM 14 Q. You're talking about if he's already doing advanced
11:50 AM 15 testing with another laboratory?

11:50 AM 16 A. That's correct.

11:50 AM 17 Q. Suppose he's not. Suppose you're trying to sell him on
11:50 AM 18 the idea of advanced testing.

11:50 AM 19 How many tubes would -- and my question is probably
11:50 AM 20 misleading. I'm talking about a physician who is currently not
11:50 AM 21 doing advanced lipid testing.

11:50 AM 22 A. I would say, on average, a physician not doing advanced
11:50 AM 23 testing is drawing four tubes of blood on a given patient.

11:50 AM 24 Q. All right. And then if he decides he wants to use HDL, is
11:50 AM 25 that four additional tubes he has to use or can he reuse the

1 same tubes that he's already taken?

2 A. It's four additional tubes on top of the four that are
3 already taken.

4 Q. All right. And if he uses Singulex, is that -- can he use
5 some of those tubes or is it an additional tube?

6 A. If he's drawing HDL and Singulex at the same time on that
7 patient, it would be a total of five tubes on that patient.

8 Q. You were asked some questions about billing for copays for
9 Medicare and Medicaid and -- could we look at the 1002 exhibit,
10 the Lauren DeMoss.

11 Now, first of all -- just before we get into this, I
12 think it's been established that -- looks like Brett King --
13 who is a lawyer in Alabama; correct?

14 A. Correct.

15 Q. -- sent this to Brad Baniyas in my office on -- when this
16 case was going on in 2017, but look what he forwarded.

17 If you can go down to that.

18 Does that appear to be from Lauren DeMoss to Brett
19 King?

20 A. It does.

21 Q. Okay. With a copy to Edward Sledge at -- looks like the
22 same firm that she's in?

23 A. That's correct.

24 Q. And does it show a copy to you?

25 A. It does not.

11:52 AM 1 Q. Does it show a copy to Brad Johnson?

11:52 AM 2 A. It does not.

11:52 AM 3 Q. Does it show a copy to BlueWave?

11:52 AM 4 A. It does not.

11:52 AM 5 Q. So when you were discussing this with Mr. Johnson, did you
11:52 AM 6 actually have a copy of what she was forwarding?

11:52 AM 7 A. No.

11:52 AM 8 Q. So you just talked about it on the telephone?

11:52 AM 9 A. That's correct.

11:52 AM 10 MR. COOKE: Can you scan all the way to the bottom
11:52 AM 11 until we get to the test that was attached.

11:53 AM 12 THE COURT: Mr. Cooke, I think we need to clarify
11:53 AM 13 whether that response was first received by Bluewave -- any of
11:53 AM 14 the Bluewave defendants in -- what year was that that the --
11:53 AM 15 was it 2013 that those -- Ms. DeMoss prepared those responses?

11:53 AM 16 MR. COOKE: Yes.

11:53 AM 17 THE COURT: Did they get it then or only in 2017?

11:53 AM 18 MR. COOKE: I believe the testimony is that it was
11:53 AM 19 discussed, but I'm not sure they actually had the email itself.
11:53 AM 20 But that's what I was going to ask him.

11:53 AM 21 THE COURT: Okay. Good. I think we need to clarify
11:53 AM 22 that.

11:53 AM 23 MR. COOKE: And I'm going to ask that separately with
11:53 AM 24 Mr. Johnson --

11:53 AM 25 THE COURT: Good. Thank you.

11:53 AM 1 MR. COOKE: -- because he was the one that had the
11:53 AM 2 relationship with Mr. King.

11:53 AM 3 THE COURT: Thank you.

11:53 AM 4 MR. COOKE: Is that sufficient for now?

11:53 AM 5 THE COURT: That's sufficient. I just --

11:53 AM 6 MR. COOKE: Could you go down to number 12.

11:54 AM 7 BY MR. COOKE:

11:54 AM 8 Q. This was the question about "Do we bill for copays and
11:54 AM 9 deductibles? It is our understanding that the physician's
11:54 AM 10 office, when the test was ordered, should be the entity
11:54 AM 11 collecting the patient's copays and/or deductible. In the case
11:54 AM 12 of Medicare or Medicaid patients, the routine waiver of
11:54 AM 13 copayments and deductibles is prohibited by the Anti-Kickback
11:54 AM 14 Statute."

11:54 AM 15 Now, were you informed back in 2013 that that was one
11:54 AM 16 of her opinions?

11:54 AM 17 A. I believe what I testified to, when Brad got this -- these
11:54 AM 18 responses, he and I discussed them in a conference call and
11:54 AM 19 went over the answers that she had posed to the questions.

11:54 AM 20 I see another flaw in her response that I didn't pick
11:54 AM 21 up on earlier. It says, "It is our understanding the
11:54 AM 22 physician's office where the test was ordered should be the
11:55 AM 23 entity collecting the patient's copayments and/or deductible."

11:55 AM 24 It is true that a physician's office collects a
11:55 AM 25 copayment for a patient's visit. It's different with

1 laboratory services. The laboratory is not going after a copay
2 or deductible. In the case of Medicare, Medicaid, we've always
3 understood TRICARE, there is no copay and deductible to be
4 addressed.

5 And that's why -- and then the next sentence, it goes
6 on. And that's what I'm saying, she didn't understand that
7 when I read it.

8 Q. Does a physician's office ever try to collect a copay or
9 deductible for an outside lab?

10 A. No.

11 Q. Is there any way they could even do that?

12 A. No.

13 Q. All right. That aside, her statement that, "In the case
14 of Medicare or Medicaid patients, the routine waiver of
15 copayments and deductibles is prohibited by the Anti-Kickback
16 Statute."

17 why did that strike you as wrong?

18 A. Because it's not applicable to Medicare and Medicaid
19 patients, and we've always understood TRICARE.

20 MR. COOKE: May I approach?

21 THE COURT: You may.

22 BY MR. COOKE:

23 Q. Are you familiar with this document?

24 A. This is the Medicare Claims Processing Manual.

25 Q. Are you familiar with it?

1 And I don't mean to familiarize yourself with it as
2 we sit here.

3 Are you familiar with it?

4 A. Yes.

5 MR. COOKE: Okay. I would offer this as an exhibit.

6 THE COURT: What is it?

7 MR. COOKE: It's the Medicare Claims Processing
8 Manual.

9 THE COURT: Okay. Is there an objection?

10 MS. SHORT: No, Your Honor.

11 MR. ASHMORE: No, sir.

12 THE COURT: What's the number?

13 MR. COOKE: It's Number 70.

14 THE COURT: BlueWave 70 is admitted without
15 objection.

16 Please proceed.

17 MR. COOKE: And to reassure everyone in the
18 courtroom, I'm only going to look at one page of it.

19 THE COURT: Good for you.

20 BY MR. COOKE:

21 Q. would you turn to the page that I've marked at
22 Section 30.2, Deductible and Coinsurance.

23 A. Yes.

24 Q. And would you just -- well, I guess we can pull that up on
25 the screen. Don't worry about it. It's not worth it.

1 Just read what that says, please.

2 A. "30.2. Deductible and coinsurance application for
3 laboratory tests."

4 You want me to read revision and the issue date and
5 all that, too?

6 Q. No.

7 A. Okay. "Neither the annual cash deductible nor the
8 20 percent coinsurance apply to" -- and it's got a bullet --
9 "clinical laboratory tests performed by a physician,
10 laboratory, or other entity paid on an assigned basis."

11 Second bullet, "Specimen collection fees or travel
12 allowance related to laboratory tests (collecting the
13 specimen)."

14 Q. So what does that tell you about whether there were even
15 any copays or deductibles allowed for Medicare and Medicaid?

16 A. That they're not allowed. It's forbidden.

17 Q. So would it -- well, the fact that there are no copays and
18 deductibles, could you, by law, decide, well, I don't care what
19 that says; I'm just going to bill the patient anyway? Are you
20 allowed to do that?

21 A. No. You'd be breaking the law.

22 Q. By the time you heard about this review by Ms. DeMoss,
23 were you aware that there were varieties of opinions being
24 discussed between the lawyers from the Justice Department and
25 the lawyers from Ropes & Gray?

11:58 AM 1 A. Yes.

11:58 AM 2 Q. This was -- this was in the fall of 2013, correct,
11:58 AM 3 November?

11:58 AM 4 A. Correct.

11:58 AM 5 Q. Okay. Had Ropes & Gray recently revised your process and
11:58 AM 6 handling fee agreement -- excuse me -- HDL's process and
11:58 AM 7 handling agreement?

11:58 AM 8 A. With Derek Kung.

11:58 AM 9 Q. With Derek Kung, who was the in-house counsel for HDL?

11:59 AM 10 A. Yes.

11:59 AM 11 Q. I want to go back. You were asked about training and the
11:59 AM 12 compliance training that you did.

11:59 AM 13 was compliance training important to you?

11:59 AM 14 A. Very.

11:59 AM 15 Q. Would you have done different compliance training if you
11:59 AM 16 had inexperienced sales representatives?

11:59 AM 17 A. Yes.

11:59 AM 18 Q. Tell the jury -- and I don't think we've really talked
11:59 AM 19 about this -- but what kind of people did you look for and hire
11:59 AM 20 as your contractors to be sales representatives?

11:59 AM 21 A. I think, on average, our independent sales contractors had
11:59 AM 22 at least 15 years' experience in the medical field.

11:59 AM 23 Q. And why would that be important in terms of compliance
11:59 AM 24 training?

11:59 AM 25 A. The medical field is a unique field to be in. And there's

1 a lot of rules, regulations, laws that are necessary to be
2 compliant.

3 So if you had somebody that had never been in the
4 field, you would definitely have a different training program
5 than if you had somebody with 15-plus years' experience in the
6 field.

7 Q. I'm not going to pull it up.

8 But on the test questions that you used and you were
9 asked about earlier today, there was one that said, "Can labs
10 offer gift cards?"

11 And why did you have that on there?

12 A. A couple of the independent contractors that we had
13 brought on to Bluewave worked for laboratories in the past that
14 permitted gift cards to be given to staff in a physician's
15 practice but not to the ordering provider. And we felt that
16 that was inappropriate, so we stressed to them repeatedly that
17 you cannot do that.

18 Q. What about the question about free testing? How did that
19 ever come up?

20 A. There are parameters in which courtesy testing has been
21 provided in the industry to physicians and physicians' staff.
22 And my previous employer had waffled between the two, and I
23 felt the conservative approach was it should not be offered.

24 There are some labs that differed with my opinion on
25 that, but Bluewave's approach was do not offer courtesy testing

12:01 PM 1 to physicians and staff.

12:01 PM 2 Q. what about -- sorry.

12:01 PM 3 You said that you had seen a process and handling fee
12:01 PM 4 agreement with Berkeley HeartLab after the time you left?

12:01 PM 5 A. I did, after they had been acquired by Quest.

12:01 PM 6 Q. And you said they were still paying P&H?

12:01 PM 7 A. They were.

12:01 PM 8 Q. what was the amount?

12:01 PM 9 A. When you took the two tubes that were routinely ordered
12:01 PM 10 and put them together, it's a total of \$21.

12:01 PM 11 Q. On their P&H agreement, did they break it out separately
12:01 PM 12 so that you --

12:01 PM 13 A. They did.

12:01 PM 14 Q. -- could tell?

12:01 PM 15 A. It was broken out. So to a layperson that wasn't familiar
12:01 PM 16 with the industry, you read it, it looks like it's a lower
12:01 PM 17 dollar amount. But when you have knowledge of the industry and
12:01 PM 18 you know which tubes are required to perform the testing, you
12:02 PM 19 put the two tubes together and add it up to \$21.

12:02 PM 20 Q. You were asked some questions about that OIG
12:02 PM 21 opinion 05-08?

12:02 PM 22 A. Yes.

12:02 PM 23 Q. Do you remember?

12:02 PM 24 And you've read that opinion?

12:02 PM 25 A. I've read it, yes.

1 12:02 PM Q. First of all, do you recall whether that opinion and other
2 12:02 PM OIG opinions have a little disclaimer on them saying that
3 12:02 PM nobody other than the person who's getting that opinion can
4 12:02 PM rely on it?

5 12:02 PM A. I do recall that.

6 12:02 PM Q. Do you remember that -- do you remember what that
7 12:02 PM opinion -- the subject -- the question that was being posed in
8 12:02 PM that opinion was?

9 12:02 PM A. If I could see it, I could speak specifically to it. But
10 12:02 PM it wasn't a scenario exactly like the laboratories and
11 12:02 PM processing and handling fees. It was similar.

12 12:02 PM Q. Do you know whether it related to draw fees?

13 12:02 PM A. I don't recall without seeing it.

14 12:02 PM Q. Would you have ever had any doubt in your mind that you
15 12:02 PM couldn't pay more than \$3 for a draw fee?

16 12:03 PM A. No. The \$3 draw fee was capped because there was guidance
17 12:03 PM on that.

18 12:03 PM Q. Have you ever seen an OIG opinion that says what the
19 12:03 PM appropriate fair market value for processing and handling would
20 12:03 PM be?

21 12:03 PM A. Processing and handling or draw fee?

22 12:03 PM Q. Process and handling.

23 12:03 PM You were asked about the conversations that were
24 12:03 PM going on with Mr. Perling down in Florida in the middle of
25 12:03 PM 2010; correct?

1 12:03 PM A. Yes.

2 12:03 PM Q. And let me show you BW Exhibit 68. I'm going to try to
3 show you something and ask you if you can -- if it helps you
4 put into context what was happening.

5 12:04 PM Those emails, I believe, that you looked at earlier
6 today were from April and July of 2010; is that right?

7 12:04 PM A. I believe that to be correct.

8 12:04 PM Q. Okay. And this is one that we looked at briefly
9 yesterday, but it's Bluewave Exhibit 68. And this is an email
10 which you're copied on, dated December 16, 2010. And it's
11 addressed to Kyle Martel.

12 12:04 PM And he was the sales rep down in Florida; right?

13 12:04 PM A. That is correct.

14 12:04 PM Q. Would you read out loud what Ms. Mallory says to Kyle.

15 12:04 PM A. And I'm reading slow because they've asked me to read
16 slow.

17 12:04 PM Q. Yes.

18 12:04 PM A. "Kyle, I wanted to give you an update on the discussions
19 that our attorney has had with Dr. Reddy's attorney Lester
20 Perling. Mr. Perling's email was strange, and at first we all
21 believed he didn't know what he was talking about. However,
22 our attorney quizzed him, and he has determined that his
23 credentials are quite good and he does know health care law.

24 12:05 PM "Mr. Lester is actually involved in some of the
25 changes that are going to occur in the state of Florida and the

1 state's interpretation of inducement laws. Mr. Perling has
2 said that Quest has been very active in the state and has
3 convinced the state of Florida to change their opinion of the
4 inducement laws.

5 "He told our attorney that, in the future, Florida
6 will not allow any processing and handling fees to be paid to
7 doctors, and they will also not allow a lab like HDL to put a
8 phlebotomist in the physician practice. Florida's
9 interpretation is that these will be viewed as an inducement."

10 want to keep going?

11 Q. Yes, because I want to show you the next page, too.

12 A. All right. "Mr. Perling did back down on his comments
13 that it was illegal, et cetera, and said he only wrote that
14 because he has been so entwined in these discussions with the
15 state of Florida and Quest.

16 "I've asked our attorneys to go back and research
17 what Mr. Perling has told them and to come up with a solution.
18 This has not gone into law now, but Mr. Perling said they do
19 expect that it will be next year. Exact date is uncertain, and
20 I have asked our attorneys to get this information. I have
21 asked about the punishment for doing this, and was told
22 that" --

23 Q. Go to the next page.

24 A. -- "the state of Florida would require a doc to refund the
25 amount to the lab. One thing I can think of now is to start

1 thinking about putting a draw site into strategic locations
2 where you have the greatest concentrations of doctors.

3 "I've also asked, if the processing and handling
4 amount is reduced to be a smaller amount, would it make a
5 difference. I have asked them to think about every possible
6 way to help us solve this problem, and they are working on it.

7 "Therefore, Dr. Reddy can send us samples, but he may
8 not want to legitimately sign the processing and handling
9 agreement at this time.

10 "Would he be interested in doing clinical research
11 and we pay him to retrieve electronic data from his EMR?
12 \$20 per patient for chart data for our research in the
13 development of our portals and health score is certainly a
14 bargain for us. Such research information typically goes for a
15 lot more."

16 Q. And you received a copy of that email?

17 A. Yes.

18 Q. Did you come away from that believing that HDL was
19 ignoring the advice that Mr. Perling had given?

20 A. No.

21 Q. Did you come away from that believing that they were going
22 to -- that their intention was to find a way to flout the law
23 in Florida?

24 A. No.

25 Q. Does this pretty much speak for itself as far as what HDL

1 and its attorneys were doing?

2 A. I think it's very clear.

3 MR. COOKE: May I borrow your Exhibit 7010 again.

4 If you'll go to the second page.

5 BY MR. COOKE:

6 Q. This is the email you were showed just a little while ago,
7 and there was one thing that I wanted to ask you about. It's
8 kind of blocked out.

9 Could you just scan it so that that block is not
10 there.

11 MR. PHANEUF: It goes away in about 10 seconds.

12 MR. COOKE: Oh, there it is. Okay.

13 BY MR. COOKE:

14 Q. See that? "As of next week, no LabCorp phleb is able to
15 do any draw for us"?

16 A. I see that.

17 Q. What's that mean?

18 A. I've testified to that as well. That applied to Nancy
19 Netter and Dr. Phillips' office. LabCorp and Quest
20 phlebotomists, there were lab-to-lab agreements in place where
21 many Quest and LabCorp phlebotomists were drawing specimens on
22 behalf of HDL and Singulex.

23 But both LabCorp and Quest, I felt -- I believe they
24 were threatened, and they stopped allowing their phlebotomists
25 to draw specimens.

1 You had asked a question earlier about the number of
2 tubes. If there's a butterfly needle in the vein already, a
3 vacutainer, you stick the tubes on top to fill them up. So it
4 was convenient for a patient especially not to get stuck twice.
5 If there's already a needle in the vein, they could
6 courtesy-fill the tubes for other laboratories.

7 They were making that more and more difficult, and I
8 believe it's because they saw the traction that HDL was making.
9 And LabCorp also tried to engage in discussions about
10 purchasing HDL.

11 Q. Did that go into the discussions at HDL about how do we
12 get our blood to our laboratory?

13 A. Yes. There were many different ways that we tried to get
14 blood to the laboratory.

15 Q. Did Quest ever offer P&H fees?

16 A. Yes.

17 Q. When?

18 A. Well, I know for a fact they were offering them after they
19 had acquired Berkeley. I think I had testified earlier of an
20 incident where I found an office where a Quest phlebotomist was
21 drawing for Berkeley and the practice was also collecting the
22 processing and handling from Berkeley. And I don't believe the
23 physicians were aware of it. But when they did, they corrected
24 it. That would have been an example of double payment.

25 Q. That's all. Thank you.

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1 **THE COURT:** Thank you very much.
2 Ladies and gentlemen, it's time for lunch. So
3 we'll take about an hour lunch.
4 (Whereupon the jury was excused from the courtroom.)
5 **THE COURT:** You may be seated.
6 Any matters we need to address, from the
7 government?
8 **MR. COOKE:** Nothing.
9 **THE COURT:** From the defense?
10 Very good. See y'all in about an hour.
11 (Recess.)
12 **THE COURT:** Please be seated. Any matters we need to
13 address before we call the next witness?
14 **MR. LEVENTIS:** No, Your Honor.
15 **MR. GRIFFITH:** Yes, Your Honor. Just for
16 housekeeping purposes, we're stipulating to the following
17 exhibits prior to the witness so we don't have to --
18 **THE COURT:** Hold on just a second here. Okay.
19 **MR. GRIFFITH:** Mallory Exhibit 37 and 46.
20 **THE COURT:** Okay.
21 **MR. GRIFFITH:** BlueWave Exhibit 56, 92, and 359.
22 **THE COURT:** 56, 92.
23 **MR. GRIFFITH:** 359.
24 **THE COURT:** 359. Thank you.
25 **MR. GRIFFITH:** USA Exhibits 1247, 1068, 1198, 1028,

1 1029, 1072.

2 THE COURT: Okay. You heard Mr. Griffith offering
3 those exhibits. Are there going to be any objections?

4 MS. SHORT: No objection.

5 THE COURT: From Ms. Mallory?

6 MR. ASHMORE: No, Your Honor.

7 THE COURT: Okay. Mallory Exhibits 37 and 46;
8 BlueWave Exhibits 56, 92, and 359; Plaintiffs' Exhibits 1247,
9 1068, 1198, 1028, 1029, and 1072 admitted without objection.

10 MR. COOKE: Judge, do we need to renumber the U.S.
11 exhibits like we talked about before? It doesn't matter to us,
12 but --

13 THE COURT: Which ones you talking about?

14 MR. COOKE: Well, I should let Joe talk. Some of our
15 exhibits are the USA exhibits. And, previously, you had
16 suggested we should --

17 THE COURT: You know, the -- as long as they're in by
18 stipulation, I'm not as worried about that. It's probably not
19 worth the trouble to redo it at this point.

20 Everybody okay with that? We'll just use those
21 numbers?

22 Okay. Because we do chart them, and it doesn't
23 matter who admitted the exhibit. You know, we'll put that in
24 my chart.

25 Mr. Griffith, anything else you got to offer?

1 : 2 7 P M 1 **MR. GRIFFITH:** No, thank you.

1 : 2 7 P M 2 **THE COURT:** Good.

1 : 2 7 P M 3 Mr. Ashmore?

1 : 2 7 P M 4 **MR. ASHMORE:** No, Your Honor.

1 : 2 7 P M 5 **THE COURT:** Very good. Let's bring in the jury.

1 : 2 9 P M 6 (Whereupon the jury entered the courtroom.)

1 : 2 9 P M 7 **THE COURT:** Please be seated.

1 : 2 9 P M 8 Bluewave defendants, call your next witness.

1 : 2 9 P M 9 **MR. GRIFFITH:** Gene Sellers.

1 : 2 9 P M 10 **THE DEPUTY CLERK:** Please place your left hand on the
1 : 2 9 P M 11 Bible and raise your right. State your full name for the
1 : 2 9 P M 12 record, please.

1 : 3 0 P M 13 **THE WITNESS:** Gene Morgan Sellers.

1 : 3 0 P M 14 (Witness sworn.)

1 : 3 0 P M 15 **THE DEPUTY CLERK:** Thank you. You may be seated.

1 : 3 0 P M 16 There's a step right there, so be careful. A step right there
1 : 3 0 P M 17 right in front of you. Thank you.

1 : 3 0 P M 18 **GENE MORGAN SELLERS,**

1 : 3 0 P M 19 a witness called on behalf of the defendants, being first duly
1 1 : 0 3 A M 20 sworn, was examined and testified as follows:

1 1 : 0 3 A M 21 **DIRECT EXAMINATION**

1 : 3 0 P M 22 **BY MR. GRIFFITH:**

1 : 3 0 P M 23 **Q.** Good afternoon, Mr. Sellers.

1 : 3 0 P M 24 Could you speak up a little bit. Speak into the
1 : 3 0 P M 25 microphone, if you don't mind.

1 A. Good afternoon.

2 Q. Oh, thank you.

3 Mr. Sellers, I'm Joe Griffith, as you know, and I
4 represent BlueWave and Cal Dent and Brad Johnson. And we're
5 going to ask you some questions today about your relationship
6 with these guys.

7 But, first, can you give us a brief summary of your
8 education.

9 A. Started college as a history major, spent a period of time
10 with the U.S. Army, went back to college at the University of
11 Alabama, received a bachelor's degree in education with a major
12 in general business. I spent a period of time working on a
13 master's degree, received a master's degree in accounting from
14 the University of Alabama, spent a year teaching in high school
15 level, and then back to college and completed work on a
16 doctorate in accounting.

17 Q. Okay. And, after that, did you --

18 A. After that, I went to work. And I spent about a year as
19 controller of a commercial refrigeration firm. I spent 18-plus
20 years teaching at the college level at Birmingham Southern
21 College in Birmingham, Alabama.

22 Q. And what were you teaching there?

23 A. Accounting and business law.

24 Q. And what did you do after that?

25 A. After that, well, went to law school, and I've been

1 practicing law for 40-plus years.

2 Q. Okay. And where do you practice?

3 A. Birmingham.

4 Q. Okay. And what type of legal practice do you have?

5 A. I practice in the areas of tax and --

6 Q. General corporate?

7 A. General -- general work in connection with estate planning
8 and business-related problems and probate.

9 Q. Okay. And are you licensed to practice in Alabama?

10 A. Yes.

11 Q. Okay. Are you still a licensed CPA?

12 A. Yes.

13 Q. Now, how did you first meet Brad Johnson?

14 A. I had worked with his CPA, and he was having some problems
15 and concerns about his estate and estate planning. She and I
16 had worked together before, so she referred him and introduced
17 us.

18 Q. About what time frame was this?

19 A. That was late '09.

20 Q. Okay. And so what type of work did you do for Brad
21 initially?

22 A. Initially, I did estate planning.

23 Q. Okay. And why did he -- why did he need to have estate
24 planning done?

25 A. Well, he was divorced, had a young daughter that he was

1 concerned for her well-being if anything happened to him, and
2 wanted to make sure -- because of some of the things that her
3 mother had done, wanted to make sure that that daughter was
4 protected.

5 Q. Okay. Did he appear to have been financially successful
6 at that point?

7 A. Yes. At that point, he was a multimillionaire.

8 Q. Okay. And so, in late 2009, did Brad come to you to ask
9 for your help in the formation of Bluewave?

10 A. Yes. Well, it wasn't initially asking specifically for
11 the formation of Bluewave. He had changed jobs. He had left
12 his previous occupation and had started a new career, and we
13 were talking about that and how it should be set up and so
14 forth.

15 Q. And so you said you -- did you say you helped him set it
16 up?

17 A. I helped him set up the corporation.

18 Q. And what corporation was that?

19 A. Bluewave.

20 Q. And do you recall, was Brad the sole principal in
21 Bluewave?

22 A. No. Cal Dent also.

23 Q. And so did you know what the purpose of Bluewave was?

24 A. Yes, that was explained to me.

25 Q. Okay. And what was your understanding of what Bluewave

1 was formed for?

2 A. BlueWave had an agreement with a relatively new lab, and
3 they were going to call on the doctors -- get some other
4 employees -- not employees but people to help calling on
5 doctors and explaining some kind of important new blood tests.

6 Q. Okay. And so -- and so were you involved -- you said that
7 Brad and Cal had a contract at that point. Were you involved
8 with the initial back-and-forth when they negotiated the
9 contract -- the sales contract with HDL?

10 A. Yes.

11 Q. Okay. Now, did -- did you provide any health care legal
12 advice to Brad and Cal -- to Brad and Cal at this time period
13 regarding the HDL BlueWave contract that they were negotiating?

14 A. No.

15 Q. And why not?

16 A. Well, I was told by Brad and Cal that their relationship
17 with HDL, that the lab was going to take care of all compliance
18 requirements for health care law -- health care work.

19 Q. Okay. And do you recall who represented HDL at this time
20 that they were negotiating the sales contract?

21 A. I'm not -- I don't have the complete name in my mind, but
22 it's Sinclair Ryan, which --

23 Q. Okay.

24 A. And I was told was a very large, very good health care
25 lawyer firm.

1 : 3 8 P M 1 Q. Okay. Would LeClairRyan --

1 : 3 8 P M 2 A. LeClairRyan.

1 : 3 8 P M 3 Q. Yeah. Okay. Let's pull up Mallory Exhibit 37.

1 : 3 8 P M 4 Can you read the screen, Mr. Sellers?

1 : 3 8 P M 5 A. I'm sorry?

1 : 3 8 P M 6 Q. I said can you read the screen there?

1 : 3 8 P M 7 A. Yes.

1 : 3 8 P M 8 Q. Okay. Okay. So this is an email dated December 28th,

1 : 3 9 P M 9 2009. And it's from Ryan Dennis [verbatim] to you and Tonya

1 : 3 9 P M 10 Mallory. Do you see that?

1 : 3 9 P M 11 A. Yes.

1 : 3 9 P M 12 Q. Okay. And can you read the sentence, the first paragraph
1 : 3 9 P M 13 in the email?

1 : 3 9 P M 14 A. "Gene, I am attaching both a clean and marked copy of the
1 : 3 9 P M 15 revised term sheet. Please review and confirm these terms.

1 : 3 9 P M 16 Thanks, Dennis."

1 : 3 9 P M 17 Q. Okay. And so was there negotiations going back and forth
1 : 3 9 P M 18 between HDL and Brad and Cal and BlueWave regarding the terms
1 : 3 9 P M 19 and conditions of the sales contract?

1 : 4 0 P M 20 A. Yes.

1 : 4 0 P M 21 Q. Okay. And were there other emails going back and forth --

1 : 4 0 P M 22 A. Emails, a lot of telephone conversations.

1 : 4 0 P M 23 Q. Okay. And is this email representative of the emails that
1 : 4 0 P M 24 went back and forth so we don't have to go through all of them?

1 : 4 0 P M 25 A. Yes.

1 : 4 0 P M 1 Q. Okay.

1 : 4 0 P M 2 Let's pull up Mallory Exhibit 46.

1 : 4 0 P M 3 And, again, this is two days later. Don't want to go
1 : 4 0 P M 4 through the whole thing, but is this -- this is an email from
1 : 4 1 P M 5 Tonya Mallory to you, Cal Dent, and Brad Johnson?

1 : 4 1 P M 6 A. Repeat that, please.

1 : 4 1 P M 7 Q. This is an email dated December 30th, 2009 --

1 : 4 1 P M 8 A. Yes.

1 : 4 1 P M 9 Q. -- from Mallory to Cal Dent, Brad Johnson, and you?

1 : 4 1 P M 10 A. Yes.

1 : 4 1 P M 11 Q. Again talking about the revised term sheet?

1 : 4 1 P M 12 A. Yes.

1 : 4 1 P M 13 Q. Did there come a time when you finalized -- when the sales
1 : 4 1 P M 14 contract was finalized?

1 : 4 1 P M 15 A. Yes.

1 : 4 1 P M 16 MR. GRIFFITH: And can we bring up Bluewave 56,
1 : 4 1 P M 17 please. And, again, let's call out the first paragraph.

1 : 4 1 P M 18 BY MR. GRIFFITH:

1 : 4 1 P M 19 Q. I think everybody in court agrees that this is the sales
1 : 4 2 P M 20 agreement between HDL and Bluewave. Does this appear to you to
1 : 4 2 P M 21 be the document -- the final document?

1 : 4 2 P M 22 A. Yes.

1 : 4 2 P M 23 Q. Okay. Now, from your perspective of not being a health
1 : 4 2 P M 24 care lawyer, did you believe it was appropriate to rely on
1 : 4 2 P M 25 LeClairRyan to review the health care compliance aspects of the

1 : 4 2 P M 1 sales contract?

1 : 4 2 P M 2 A. Yes. Let me -- let me explain.

1 : 4 2 P M 3 when they engaged me -- when Bluewave engaged me, you
1 : 4 2 P M 4 know, I told them I know nothing about health care law. And
1 : 4 2 P M 5 they told me that -- that the lab was taking care of all of
1 : 4 2 P M 6 that. And from what I knew about the reputation of the law
1 : 4 2 P M 7 firm and since I knew nothing about health care law, we did not
1 : 4 3 P M 8 discuss -- the lawyers did not discuss the health care aspects
1 : 4 3 P M 9 of this contract.

1 : 4 3 P M 10 Q. Understood. And were you, in fact, relying on
1 : 4 3 P M 11 LeClairRyan?

1 : 4 3 P M 12 A. LeClairRyan, yes.

1 : 4 3 P M 13 Q. Okay. And if you can go onto page 2, paragraph 3. If you
1 : 4 3 P M 14 see -- if you look at paragraph 3 of the sales agreement, 3(b)
1 : 4 3 P M 15 had a provision on the payment of process and handling fees;
1 : 4 4 P M 16 correct?

1 : 4 4 P M 17 A. Yes.

1 : 4 4 P M 18 Q. And 3(e) had the provision for zero-balance billing?

1 : 4 4 P M 19 A. Yes.

1 : 4 4 P M 20 Q. Correct? And was it your understanding that HDL's
1 : 4 4 P M 21 attorney at LeClairRyan had approved of all of these
1 : 4 4 P M 22 provisions?

1 : 4 4 P M 23 A. Yes.

1 : 4 4 P M 24 Q. Okay. And, likewise, scroll down to the compensation.

1 : 4 4 P M 25 So I don't want to go through the whole entire

1 : 4 4 P M 1 paragraph in this sales agreement, but the compensation as set
1 : 4 4 P M 2 forth in paragraph 4 of the sales agreement was basically a --
1 : 4 4 P M 3 a commission-type compensation; correct?

1 : 4 5 P M 4 A. Yes.

1 : 4 5 P M 5 Q. Okay. And it was your understanding that LeClairRyan had
1 : 4 5 P M 6 reviewed this provision as well?

1 : 4 5 P M 7 A. Please repeat.

1 : 4 5 P M 8 Q. That LeClairRyan had reviewed this provision as well?

1 : 4 5 P M 9 A. Yes.

1 : 4 5 P M 10 Q. Okay.

1 : 4 5 P M 11 A. Now, LeClairRyan drafted the entire contract, and I
1 : 4 5 P M 12 reviewed it from the business aspect for Bluewave.

1 : 4 5 P M 13 Q. Okay. Now, eventually, when the terms were finalized, did
1 : 4 5 P M 14 you recommend to Brad and Cal that they execute the sales
1 : 4 5 P M 15 agreement?

1 : 4 5 P M 16 A. I didn't specifically recommend it; I recommended the
1 : 4 5 P M 17 contract as a whole.

1 : 4 5 P M 18 Q. Right.

1 : 4 5 P M 19 A. Yeah.

1 : 4 5 P M 20 Q. Okay. Did you express any concerns regarding the legality
1 : 4 6 P M 21 of this particular sales contract to Brad and Cal?

1 : 4 6 P M 22 A. No.

1 : 4 6 P M 23 Q. Okay. Did you have any concerns regarding the legality of
1 : 4 6 P M 24 the -- this particular contract?

1 : 4 6 P M 25 A. I had none.

1 : 4 6 P M 1 Q. Okay. Did you believe that Brad and Cal were acting in
2 good faith when they executed this contract?

1 : 4 6 P M 3 A. Acting to what?

1 : 4 6 P M 4 Q. In good faith.

1 : 4 6 P M 5 A. In good faith? Yes.

1 : 4 6 P M 6 Q. Now, did there come a time in mid 2010 when you were
7 involved in the -- in the development of a Singulex sales
8 contract?

1 : 4 6 P M 9 A. Yes.

1 : 4 6 P M 10 Q. Okay. And before we go to the next exhibit, who is Leatha
11 Gilbert? who is Leatha Gilbert, Ms. Gilbert?

1 : 4 7 P M 12 A. Oh, Gilbert? Leatha Gilbert was an attorney that worked
13 in my office.

1 : 4 7 P M 14 Q. Okay.

1 : 4 7 P M 15 Let's pull up USA 1229. And I think -- pull out the
16 header.

1 : 4 7 P M 17 So, Mr. Sellers, this appears to be a -- an email
18 dated March 30th of 2010 from Leatha Gilbert. Do you see that?

1 : 4 8 P M 19 A. Yes.

1 : 4 8 P M 20 Q. And she was in your law firm?

1 : 4 8 P M 21 A. Yes.

1 : 4 8 P M 22 Q. Okay. And it copies Brad Johnson and Cal Dent. Do you
23 see that?

1 : 4 8 P M 24 A. Yes.

1 : 4 8 P M 25 Q. Okay. And it also copies Eddy Kleinhans. Do you see that

1 in the cc?

2 A. Yes.

3 Q. And so was this an email which represented the exchange of
4 communications regarding the Singulex sales contract?

5 A. Yes.

6 Q. Okay. So let's scroll down.

7 THE COURT: Mr. Griffith, is that document in?

8 MR. GRIFFITH: It is. It is, Your Honor.

9 THE COURT: It's number --

10 MR. GRIFFITH: I thought --

11 THE COURT: What's the number? I'm sorry.

12 THE DEPUTY CLERK: Is it 1229?

13 MR. GRIFFITH: 1229.

14 THE COURT: Did you think you had just offered it? I
15 had a 1029, but not a 1229.

16 MR. GRIFFITH: You have what?

17 THE COURT: A 1029 but not a 1229.

18 MR. GRIFFITH: I thought this was previously offered.

19 THE DEPUTY CLERK: Do you have it, government?

20 MR. LEVENTIS: No.

21 THE DEPUTY CLERK: I don't have it either.

22 MR. GRIFFITH: It's not?

23 THE DEPUTY CLERK: Can you take it off the screen
24 until we check it out?

25 I don't have it in.

1 MS. SHORT: Do you want to take that one to hand to
2 him?

3 MR. GRIFFITH: I'm sorry, Your Honor. We skipped
4 this number 1229. Think it's without objection; correct?

5 MS. SHORT: Correct.

6 THE COURT: Mr. Ashmore?

7 MR. ASHMORE: No objection.

8 THE COURT: And that is -- is it Plaintiffs' or
9 Bluewave?

10 MR. GRIFFITH: It is USADOC1229.

11 THE COURT: Very good. Plaintiffs' 1229 admitted
12 without objection.

13 Please proceed.

14 BY MR. GRIFFITH:

15 Q. All right. And so if you go down about -- yeah, right
16 there, the attached paragraph.

17 Do you see that particular paragraph --

18 A. Yeah, I see it.

19 Q. -- that's pulled out there?

20 A. All right.

21 Q. Can you read that?

22 A. Yes. You want me to read it out loud?

23 Q. Yeah. Please.

24 A. "Attached contract sent per Gene Sellers

25 (gene@gsellerslaw.com) as a starting point for contact --

1 contract discussions."

2 Q. Okay. And so was this a -- when you sent this particular
3 contract, was that based on the HDL contract?

4 A. Yes.

5 Q. And was Eddy -- to your knowledge, was Eddy Kleinhans on
6 that particular email a lawyer representing Singulex?

7 A. I think so, but I do not recall for sure.

8 Q. Okay. And so did you -- was the sales contract with
9 Singulex ultimately finalized?

10 A. Yes.

11 Q. And after it was finalized, did you recommend for Brad and
12 Cal to sign it?

13 A. Yes.

14 Q. Okay.

15 Call out Bluewave 92, just the first paragraph.

16 And does this appear to you to be the sales contract
17 between Singulex and Bluewave?

18 A. Yes.

19 Q. Okay. And it's -- was it generally similar in nature to
20 the HDL contract?

21 A. Yes, they are similar.

22 Q. Now, did you have any concerns whatsoever about Brad and
23 Cal entering into this Singulex-Bluewave sales contract?

24 A. No.

25 Q. Okay. You weren't concerned in any way, shape, or form

1 about the legality of this particular contract?

2 A. No.

3 Q. So did there come a time in 2010/2011 where Brad and Cal
4 started to hire new sales reps for BlueWave?

5 A. Yes.

6 Q. And did they -- did Brad and Cal come to you with
7 questions on how to treat their new sales reps in terms of
8 whether to make them independent contractors or --

9 A. Yes.

10 Q. -- otherwise?

11 A. Yes.

12 Q. Okay. And what was the -- what were the discussions
13 regarding this issue?

14 A. Well, at the time, Brad and one secretary worked in his
15 office. I think that Cal had a secretary working in his --
16 with him and one close associate of his.

17 And they were talking in terms of BlueWave covering
18 substantially all of the continental United States over a
19 period of time. And so because of that and because of all of
20 the problems and requirements that are caused by having
21 employees in different states, I recommended to them that,
22 rather than have employees, they use independent contractors,
23 make them responsible for keeping up with their individual
24 state's laws and making sure that they complied with those
25 rather than BlueWave, the small company that it was at the

1 time, having to go out and hire lawyers in all of the different
2 states where they had any employee, which one employee is a
3 nexus and requires that the company comply with every state
4 law, every reporting, all of that.

5 And I said you need to have -- to require that these
6 people that are calling on the doctors then explaining the
7 tests, that they are independent and responsible for what
8 they're doing.

9 Q. Okay. And so -- and so did you draft these particular
10 independent contractor agreements with the sales reps?

11 A. Yes.

12 Q. Okay. And as new sales reps came on, did they -- did they
13 enter it -- did Brad and Cal and BlueWave enter into
14 independent contractor sales agreements?

15 A. It's my understanding that they did, every one of them.

16 Q. Did they -- did they follow your advice regarding the
17 independent contractor agreements?

18 A. Yes, they did.

19 Q. And you naturally wouldn't have recommended these
20 particular contracts if you thought there was anything wrong
21 with the legality of them; correct?

22 A. Absolutely.

23 Q. Okay. And, again, with respect to these independent
24 contractor agreements, you believed that they were acting in --
25 Brad and Cal were acting in good faith?

1 : 5 6 P M 1 A. Yes.

1 : 5 6 P M 2 Q. Now, in 2012, do you recall generally assisting Brad and
1 : 5 7 P M 3 Cal with respect to an issue regarding Navigant Consultants?

1 : 5 7 P M 4 A. Yes.

1 : 5 7 P M 5 Q. And what was that about generally?

1 : 5 7 P M 6 A. Well -- pardon me. Navigant had -- as I understood it,
1 : 5 7 P M 7 had been trying to do this themselves.

1 : 5 7 P M 8 Q. Trying to do what themselves?

1 : 5 7 P M 9 A. The work that Bluewave was doing with the DHL (verbatim),
1 : 5 7 P M 10 not -- the going in and talking to the doctors and explaining
1 : 5 7 P M 11 to them the benefits of the test.

1 : 5 7 P M 12 Q. Okay. Well, this is not what -- this is Navigant
1 : 5 7 P M 13 Consulting in terms of they were doing a -- did the Singulex
1 : 5 7 P M 14 contract require an audit of the BlueWave Singulex
1 : 5 8 P M 15 arrangements?

1 : 5 8 P M 16 A. They had -- Singulex had the benefit of having an audit
1 : 5 8 P M 17 performed at any time they wanted to.

1 : 5 8 P M 18 Q. And was Navigant employed to perform a --

1 : 5 8 P M 19 A. Yes.

1 : 5 8 P M 20 Q. -- compliance audit?

1 : 5 8 P M 21 A. Yes.

1 : 5 8 P M 22 Q. Okay. And was there an issue involving whether or not a
1 : 5 8 P M 23 nondisclosure agreement was needed?

1 : 5 8 P M 24 A. That was not discussed, and it didn't say anything about
1 : 5 8 P M 25 it in the contract between the two parties, but Brad and Cal

1 were afraid that Navigant would decide that they don't want or
2 needed the benefits of having BlueWave and would start doing it
3 and hire BlueWave's representatives that were working through
4 HDL and that they were training and preparing to call on the
5 doctors in -- for -- for Singulex.

6 Q. Right.

7 A. So they were concerned. And with all of the
8 negotiations -- or virtually all of them -- go to sections on
9 this contract with -- about that was for nondisclosure
10 protection so that Singulex couldn't just go out and take all
11 of the reps away from BlueWave.

12 Q. And so -- and so, in essence, was it that BlueWave was
13 just trying to protect some of its confidential, proprietary
14 information?

15 A. Say it again to make sure.

16 Q. Was BlueWave trying to protect its proprietary
17 information?

18 A. There was proprietary information and those independent
19 contractors.

20 Q. Okay. And, ultimately, were you able to come to a -- an
21 agreement on the nondisclosure?

22 A. Yes, we were.

23 Q. Okay. So let's segue into the -- there was a meeting that
24 was held in June -- on June 24th, 2013, up in Richmond. Do you
25 recall that?

2 : 0 0 P M 1 A. With HDL?

2 : 0 0 P M 2 Q. Yeah.

2 : 0 0 P M 3 A. Yeah, at their office.

2 : 0 0 P M 4 Q. Okay. And do you recall generally who attended this
2 : 0 0 P M 5 meeting?

2 : 0 0 P M 6 A. Well, yes. Brad and I attended, and Cal attended, and --

2 : 0 1 P M 7 Q. Were there some Ropes & Gray attorneys there?

2 : 0 1 P M 8 A. Ropes & Gray attorneys were there. And that was a
2 : 0 1 P M 9 surprise.

2 : 0 1 P M 10 Q. Okay. What did you believe -- what did you and Brad
2 : 0 1 P M 11 believe the purpose of the meeting was when you started up
2 : 0 1 P M 12 there?

2 : 0 1 P M 13 A. Well, it was my understanding that I wasn't supposed to be
2 : 0 1 P M 14 there.

2 : 0 1 P M 15 Q. Okay.

2 : 0 1 P M 16 A. That Kristie Garrett, their CPA, was going to attend that
2 : 0 1 P M 17 meeting. And we understood that the meeting was to talk and
2 : 0 1 P M 18 discuss some problems that HDL was having with accounting and
2 : 0 1 P M 19 some reporting and stuff like that.

2 : 0 1 P M 20 When we first walked in, an attorney -- two attorneys
2 : 0 1 P M 21 from White Dowd and -- the group from Birmingham were there.
2 : 0 1 P M 22 And that surprised Brad because he didn't know or did not
2 : 0 2 P M 23 recall that they were coming --

2 : 0 2 P M 24 Q. Okay.

2 : 0 2 P M 25 A. -- since it was a financial meeting.

2 : 0 2 P M 1 Q. All right. And when you got there, what was the topic
2 : 0 2 P M 2 that was -- became discussed?

2 : 0 2 P M 3 A. P&H.

2 : 0 2 P M 4 Q. Okay. And P&H being process and handling fees?

2 : 0 2 P M 5 A. Correct.

2 : 0 2 P M 6 Q. Okay. And was there any discussion regarding the -- HDL
2 : 0 2 P M 7 moving away from P&H fees?

2 : 0 2 P M 8 A. There was discussion, I don't know what all on. I guess
2 : 0 2 P M 9 they discussed everything about P&H fees.

2 : 0 2 P M 10 Q. Okay. Well, do you have any recollection of any of the
2 : 0 2 P M 11 attorneys -- any of the other attorneys talking about moving
2 : 0 2 P M 12 away from P&H?

2 : 0 3 P M 13 A. Not specifically.

2 : 0 3 P M 14 Q. Okay. Well, do you recall any attorneys at the meeting
2 : 0 3 P M 15 saying -- directing HDL to stop paying P&H fees?

2 : 0 3 P M 16 A. No, sir. And I'll guarantee you I would have remembered
2 : 0 3 P M 17 that had it been said.

2 : 0 3 P M 18 Q. Okay. Now, were -- how did you know the attorneys at
2 : 0 3 P M 19 white Arnold & Dowd?

2 : 0 3 P M 20 A. Say again.

2 : 0 3 P M 21 Q. How did you know the attorneys at white Arnold & Dowd?

2 : 0 3 P M 22 A. When the government first contacted Bluewave and wanted to
2 : 0 3 P M 23 come to their office and look at some documents and I heard
2 : 0 3 P M 24 about it, I contacted John Galese because I knew him very well
2 : 0 4 P M 25 as an attorney.

2 : 0 4 P M 1 And we discussed it and recognized that we were not
2 : 0 4 P M 2 capable of handling a case if the government decided to bring
2 : 0 4 P M 3 an action against our client. So we thought about it. And
2 : 0 4 P M 4 John knew a little bit, not a lot, about that firm. And I knew
2 : 0 4 P M 5 a little bit about it and knew one attorney that worked for it.
2 : 0 4 P M 6 So we carried them down to their office and introduced them,
2 : 0 4 P M 7 and they engaged their services.

2 : 0 4 P M 8 Q. Okay. And what type of firm is White Arnold & Dowd?

2 : 0 4 P M 9 A. What type of what?

2 : 0 4 P M 10 Q. What type of law firm is White Arnold & Dowd?

2 : 0 4 P M 11 A. I'm still not sure what all -- or how they describe
2 : 0 4 P M 12 themselves.

2 : 0 4 P M 13 Q. Okay. But did you recommend them because there was a
2 : 0 5 P M 14 criminal investigation?

2 : 0 5 P M 15 A. Because that was starting and they knew more about federal
2 : 0 5 P M 16 litigation than John and I.

2 : 0 5 P M 17 Q. Okay. Now, were you involved in any way in responding to
2 : 0 5 P M 18 the DOJ investigation on behalf of BlueWave Healthcare other
2 : 0 5 P M 19 than to recommend White Arnold Dowd?

2 : 0 5 P M 20 A. They -- they were doing the responding.

2 : 0 5 P M 21 Q. Okay. Now, when you left that meeting, that June 24th
2 : 0 5 P M 22 meeting, did you have a sense of what was anticipated in terms
2 : 0 5 P M 23 of going forth with the DOJ investigation?

2 : 0 5 P M 24 A. I did not. I don't know whether that firm did or not at
2 : 0 5 P M 25 that time, because that first meeting that we had was educating

2 : 0 5 P M 1 them about what Bluewave did and what type business and just
2 : 0 6 P M 2 discussion about that.

2 : 0 6 P M 3 Q. Okay.

2 : 0 6 P M 4 A. And there was no action except just suspicion that
2 : 0 6 P M 5 something would come from it since the government wanted to
2 : 0 6 P M 6 look at documents.

2 : 0 6 P M 7 Q. Did there appear during the conversations at the meeting
2 : 0 6 P M 8 to be confusion as to the validity or legality of P&H fees?

2 : 0 6 P M 9 A. No, sir.

2 : 0 6 P M 10 Q. There was no confusion?

2 : 0 6 P M 11 A. As far as whether or not P&H fees could be paid or --

2 : 0 6 P M 12 Q. Right.

2 : 0 6 P M 13 A. As far as I know, there wasn't any discussion. We
2 : 0 6 P M 14 discussed it, but there wasn't any confusion about it.

2 : 0 6 P M 15 Q. Okay. Well, did anybody say stop paying P&H fees?

2 : 0 6 P M 16 A. No.

2 : 0 6 P M 17 Q. So the next point that I want to raise -- issue that I
2 : 0 7 P M 18 want to address with you is, did you have some familiarity with
2 : 0 7 P M 19 a sales rep named Emily Barron?

2 : 0 7 P M 20 A. From down in Florida?

2 : 0 7 P M 21 Q. Correct.

2 : 0 7 P M 22 A. Yes.

2 : 0 7 P M 23 Q. Okay. Now, just kind of generally, what do you recall was
2 : 0 7 P M 24 the dispute involving Emily Barron?

2 : 0 7 P M 25 A. Well, the thing that I first heard about was that Brad was

2 : 0 7 P M 1 uncomfortable or unsatisfied with the job she was doing. She
2 : 0 7 P M 2 had been assigned a rather large territory, as I understand it.
2 : 0 7 P M 3 I don't know exactly how large. And according to Brad, she
2 : 0 7 P M 4 wasn't covering that territory.

2 : 0 7 P M 5 And he talked to her about it and tried to basically
2 : 0 7 P M 6 get her to do her job, calling on the doctors. But he was
2 : 0 8 P M 7 unhappy with it, and it finally got to the point that he wanted
2 : 0 8 P M 8 to just terminate the contract with her.

2 : 0 8 P M 9 Q. Okay.

2 : 0 8 P M 10 A. And --

2 : 0 8 P M 11 Q. And so were you -- and so generally were you involved in
2 : 0 8 P M 12 the communications regarding the -- or the attempt to negotiate
2 : 0 8 P M 13 and resolve the dispute between BlueWave and Emily Barron?

2 : 0 8 P M 14 A. I was not involved and didn't know anything about it
2 : 0 8 P M 15 except what Brad and I had discussed.

2 : 0 8 P M 16 Q. Okay.

2 : 0 8 P M 17 A. And --

2 : 0 8 P M 18 Q. Well, let's go -- let's look at a few emails just to set
2 : 0 8 P M 19 forth some communications with -- in which you were involved.
2 : 0 8 P M 20 Okay?

2 : 0 8 P M 21 A. All right.

2 : 0 8 P M 22 Q. All right. Let's call up 1247. And if you'll look in the
2 : 0 9 P M 23 second header. So this is an email dated August 24th, 2013, as
2 : 0 9 P M 24 part of an email chain. But it's Brad Johnson, to Linda
2 : 0 9 P M 25 Flippo, and courtesy copy to Cal Dent, Mark White, and Gene

2 : 0 9 P M 1 Sellers.

2 : 0 9 P M 2 Do you see that?

2 : 0 9 P M 3 A. Yes.

2 : 0 9 P M 4 Q. And so the paragraph says, "Gene, need opinion on Emily.
2 : 1 0 P M 5 Discuss on Monday. May want John Galese involved. Linda sent
2 : 1 0 P M 6 P&H to Tonya. She should have all."

2 : 1 0 P M 7 Do you see that?

2 : 1 0 P M 8 A. Yes.

2 : 1 0 P M 9 Q. Okay. Now, was it your understanding that the issues that
2 : 1 0 P M 10 were being raised by Emily Barron at this time were sent to HDL
2 : 1 0 P M 11 and their attorneys?

2 : 1 0 P M 12 A. Yes.

2 : 1 0 P M 13 Q. Okay. So let's go to 1068. And you can see in the header
2 : 1 0 P M 14 that this was from Linda Flipppo to Brad Johnson, Cal Dent, Mark
2 : 1 1 P M 15 White, Gene Sellers, and Augusta Dowd.

2 : 1 1 P M 16 Do you see that?

2 : 1 1 P M 17 A. Yes.

2 : 1 1 P M 18 Q. Okay. And it says in part in the -- well, I'll just read
2 : 1 1 P M 19 it. "Did you get the last P&H agreement referenced in your
2 : 1 1 P M 20 email? Were these provided to HDL? Are you going to have them
2 : 1 1 P M 21 sent to us?"

2 : 1 1 P M 22 Do you see that?

2 : 1 1 P M 23 A. I see it.

2 : 1 1 P M 24 Q. Okay. And the second paragraph says, "Also, I got a call
2 : 1 1 P M 25 from Emily Barron's new lawyers, Brian Dickerson and Andrew

2 : 1 1 P M 1 Feldman. They said that Emily was being asked to sign a new
2 : 1 1 P M 2 contract, and they wanted me to pass along to you that Emily
2 : 1 1 P M 3 was not resistant to signing a new contract but they were in
2 : 1 1 P M 4 the process of reviewing the contract terms and had advised her
2 : 1 2 P M 5 not to sign the contract until they had a chance to review
2 : 1 2 P M 6 everything."

2 : 1 2 P M 7 Do you see that?

2 : 1 2 P M 8 A. Yes.

2 : 1 2 P M 9 Q. Did it appear to you at the time that it was just a
2 : 1 2 P M 10 contractual dispute?

2 : 1 2 P M 11 A. Yes. Now, also I do not recall and did not find in my
2 : 1 2 P M 12 file a copy of this email.

2 : 1 2 P M 13 Q. Okay. Let's go to 1198. And this is an email string --
2 : 1 2 P M 14 the last one is dated August 26th, 2013 -- from Linda Flipppo to
2 : 1 2 P M 15 Brad Johnson, Gene Sellers, and Cal Dent with a courtesy copy
2 : 1 3 P M 16 to Mark White and Augusta Dowd.

2 : 1 3 P M 17 Do you see that?

2 : 1 3 P M 18 A. Yes.

2 : 1 3 P M 19 Q. And so the first paragraph says, "Now I realize what
2 : 1 3 P M 20 you're saying. You mean that she's had the new contract for
2 : 1 3 P M 21 39 days. Why is it taking so long; right?"

2 : 1 3 P M 22 Do you see that?

2 : 1 3 P M 23 A. Yes.

2 : 1 3 P M 24 Q. Okay. So what -- what was going on with the new contract?

2 : 1 3 P M 25 A. As I recall, Brad took the sample contract for the

2 : 1 3 P M 1 independent contractor and changed her territory, cut her
2 : 1 3 P M 2 territory in hoping that she -- if she had a smaller territory,
2 : 1 4 P M 3 she would cover it better. And that was the only change I knew
2 : 1 4 P M 4 anything about it.

2 : 1 4 P M 5 Q. Okay. And so let's go to -- which one is that? So let's
2 : 1 4 P M 6 go to 1028.

2 : 1 4 P M 7 And do you see this email dated September 6th, 2013?

2 : 1 4 P M 8 A. Yes.

2 : 1 4 P M 9 Q. All right. From Andrew Feldman to you, Gene Sellers, with
2 : 1 4 P M 10 a copy to Brian Dickerson.

2 : 1 4 P M 11 Do you see that?

2 : 1 4 P M 12 A. Yes.

2 : 1 4 P M 13 Q. And the first paragraph says, "Thank you, Gene. Our
2 : 1 5 P M 14 office has not received any documents since the telephone
2 : 1 5 P M 15 conference with your office and the attorneys from White Dowd &
2 : 1 5 P M 16 Arnold. Our office is still -- is also still reviewing the
2 : 1 5 P M 17 proposed territories agreement for Florida. Did your firm
2 : 1 5 P M 18 author that agreement?"

2 : 1 5 P M 19 Do you see that?

2 : 1 5 P M 20 A. Well, I had not seen the agreement, to my recollection.

2 : 1 5 P M 21 Q. Okay. Do you know who had authored the agreement?

2 : 1 5 P M 22 A. I think that Brad sent them the agreement --

2 : 1 5 P M 23 Q. Okay.

2 : 1 5 P M 24 A. -- just altering the territory.

2 : 1 5 P M 25 Q. Okay. And so did you have conversations with Barron's

2 : 1 5 P M 1 attorney on the telephone?

2 : 1 5 P M 2 A. Yes.

2 : 1 5 P M 3 Q. Okay. And what concerns did they express to you about the
2 : 1 5 P M 4 dispute that was going on?

2 : 1 6 P M 5 A. They did not want any changes to her agreement, and they
2 : 1 6 P M 6 wanted to protect what she was doing.

2 : 1 6 P M 7 Q. Did they express to you that they felt the existing
2 : 1 6 P M 8 agreement was enforceable?

2 : 1 6 P M 9 A. I don't know that they indicated that they thought it was
2 : 1 6 P M 10 enforceable.

2 : 1 6 P M 11 Q. But they wanted -- they wanted her to keep that agreement
2 : 1 6 P M 12 in place; correct?

2 : 1 6 P M 13 A. They wanted her to keep the relationship or some
2 : 1 6 P M 14 relationship with BlueWave, yes.

2 : 1 6 P M 15 Q. Okay. To that point, had they expressed any other
2 : 1 6 P M 16 concerns regarding the legality of the -- of the contracts?

2 : 1 6 P M 17 A. Oh, yes. The attorney just indicated that everything in
2 : 1 6 P M 18 the world was wrong with the contract --

2 : 1 6 P M 19 Q. Okay.

2 : 1 6 P M 20 A. -- in our telephone conversations and everything.

2 : 1 7 P M 21 Q. And so what was your reaction to the attorneys', I guess,
2 : 1 7 P M 22 views on what was wrong with the contract?

2 : 1 7 P M 23 A. Well, as far as I was concerned, there was nothing wrong
2 : 1 7 P M 24 with it. Then at some point, he's brought up all of these
2 : 1 7 P M 25 things about it violated every law that had ever been written

2 : 1 7 P M 1 and stuff like this, in particular health care law.

2 : 1 7 P M 2 Q. Okay. Did you pass on his concerns to HDL?

2 : 1 7 P M 3 A. Yes.

2 : 1 7 P M 4 Q. Okay. Did you believe that HDL was looking at his
2 : 1 7 P M 5 concerns?

2 : 1 7 P M 6 A. Yes.

2 : 1 7 P M 7 Q. Let's go to Exhibit Number 1029. Okay. This is an email
2 : 1 8 P M 8 dated September 10th, 2013, from you to Mr. Andrew Feldman,
2 : 1 8 P M 9 subject Emily Barron.

2 : 1 8 P M 10 Do you see that?

2 : 1 8 P M 11 A. Yes.

2 : 1 8 P M 12 Q. Okay. And does this indicate -- and I'll read it just to
2 : 1 8 P M 13 move your testimony along. "Two days after our telephone
2 : 1 8 P M 14 conversation, I notified Tonya Mallory, CEO of HDL, that you
2 : 1 8 P M 15 wanted a copy of the opinion letter. If you have not requested
2 : 1 8 P M 16 it directly from HDL, please do so as soon as possible."

2 : 1 8 P M 17 Do you see that?

2 : 1 8 P M 18 A. Yes.

2 : 1 8 P M 19 Q. Okay. So was that an indication that you had contacted
2 : 1 8 P M 20 HDL about the ongoing dispute with Emily Barron?

2 : 1 9 P M 21 A. Yes.

2 : 1 9 P M 22 Q. Okay. So let's go to BlueWave 64. And, again, this is an
2 : 1 9 P M 23 email dated September 17th, 2013, from Tonya Mallory to Brad
2 : 1 9 P M 24 Johnson, Gene Sellers, Cal Dent, and Derek Kung regarding
2 : 1 9 P M 25 Emily, being Emily Barron; correct?

2 : 1 9 P M 1 A. Yes.

2 : 1 9 P M 2 Q. Okay. And so in this particular email, it says, "See note
2 : 1 9 P M 3 from Emily's attorney below. We have confirmed that they are
2 : 1 9 P M 4 not waiting for anything from HDL. Her attorney communicated
2 : 1 9 P M 5 to Derek yesterday and again today that he has issues with the
2 : 2 0 P M 6 BW contract and needs to speak to Gene. He told Derek that
2 : 2 0 P M 7 there is nothing more they need from us."

2 : 2 0 P M 8 Do you see that?

2 : 2 0 P M 9 A. Yes.

2 : 2 0 P M 10 Q. And so were these discussions ongoing with HDL and HDL's
2 : 2 0 P M 11 attorneys at this point in time?

2 : 2 0 P M 12 A. Yes.

2 : 2 0 P M 13 Q. Okay. So let's go to BlueWave 359. So this is a letter
2 : 2 0 P M 14 dated October 3rd, 2013.

2 : 2 1 P M 15 Do you see that?

2 : 2 1 P M 16 A. Yes.

2 : 2 1 P M 17 Q. To you; correct?

2 : 2 1 P M 18 A. Yes.

2 : 2 1 P M 19 Q. And the subject matter is litigation hold; correct?

2 : 2 1 P M 20 A. Yes.

2 : 2 1 P M 21 Q. And this is from Brian Dickerson, Emily Barron's attorney;
2 : 2 1 P M 22 correct?

2 : 2 1 P M 23 A. Yes.

2 : 2 1 P M 24 Q. Okay. So is the -- is the general nature of this
2 : 2 1 P M 25 particular letter basically a threat to sue?

2 : 2 1 P M 1 A. That's the way I took it.

2 : 2 1 P M 2 Q. Okay. And it specifically is asking for a litigation
2 : 2 1 P M 3 hold; correct?

2 : 2 1 P M 4 A. Yes.

2 : 2 1 P M 5 Q. Okay. And is that typically what somebody -- what a
2 : 2 1 P M 6 lawyer asks when he wants to -- when he's getting ready to sue
2 : 2 1 P M 7 somebody?

2 : 2 1 P M 8 A. Yes.

2 : 2 1 P M 9 Q. Okay. So let's go to the second paragraph. And it says,
2 : 2 2 P M 10 "Prior to this most recent unwarranted and unlawful
2 : 2 2 P M 11 interference with Ms. Barron's email account orchestrated by
2 : 2 2 P M 12 your client and prior to September 28, 2013, we advised you
2 : 2 2 P M 13 that the independent contractor agreement and business
2 : 2 2 P M 14 arrangement your client has established violates various laws,
2 : 2 2 P M 15 as we have discussed with you."

2 : 2 2 P M 16 Do you see that?

2 : 2 2 P M 17 A. Yes.

2 : 2 2 P M 18 Q. Okay. And what laws do you recall that he indicated were
2 : 2 2 P M 19 being violated?

2 : 2 2 P M 20 A. A number of different health care laws, and I hate to try
2 : 2 2 P M 21 to specify which ones.

2 : 2 2 P M 22 Q. Right.

2 : 2 2 P M 23 A. Ones dealing with P&H and -- and I don't know what all
2 : 2 3 P M 24 else.

2 : 2 3 P M 25 Q. Okay. Well, had you -- and, again, had you referred all

2 : 2 3 P M 1 of his concerns to HDL?

2 : 2 3 P M 2 A. Yes.

2 : 2 3 P M 3 Q. Okay. Specifically, had you referred his concerns
2 : 2 3 P M 4 regarding the P&H agreements and the P&H fees to HDL?

2 : 2 3 P M 5 A. Yes.

2 : 2 3 P M 6 Q. Had you specifically referred the issues with the
2 : 2 3 P M 7 independent contractor agreement to HDL?

2 : 2 3 P M 8 A. They were made aware of it.

2 : 2 3 P M 9 Q. Okay.

2 : 2 3 P M 10 A. I did not question them about anything about the
2 : 2 3 P M 11 independent contractors agreement.

2 : 2 3 P M 12 Q. Well, did you agree with the assertions that Mr. Dickerson
2 : 2 3 P M 13 was making in this particular letter?

2 : 2 3 P M 14 A. Being ignorant of health care law, I really couldn't agree
2 : 2 3 P M 15 or disagree. But we had the agreement -- I say "we." Bluewave
2 : 2 3 P M 16 had the agreement with HDL that they would take care of all
2 : 2 4 P M 17 compliance with health care law.

2 : 2 4 P M 18 Q. Okay.

2 : 2 4 P M 19 A. And as far as me asking HDL anything about independent
2 : 2 4 P M 20 contractors, I never -- never asked them anything.

2 : 2 4 P M 21 Q. Okay. So let's go to 1072.

2 : 2 4 P M 22 Okay. So this is an email dated October 7th, 2013,
2 : 2 4 P M 23 from you to Brad Johnson and Cal Dent regarding Emily Barron;
2 : 2 4 P M 24 right?

2 : 2 4 P M 25 A. Yes.

2 : 2 4 P M 1 Q. And you sent them a copy of this letter from
2 : 2 4 P M 2 Mr. Dickerson; correct?

2 : 2 4 P M 3 A. Yes.

2 : 2 4 P M 4 Q. Okay. And the content of the paragraph says, "Received
2 : 2 5 P M 5 the attached this morning. You need to put a hold on erasing
2 : 2 5 P M 6 anything. A lawsuit will be filed shortly. Looks like a setup
2 : 2 5 P M 7 from the word go."

2 : 2 5 P M 8 A. Yes.

2 : 2 5 P M 9 Q. Did you write that?

2 : 2 5 P M 10 A. That was my opinion.

2 : 2 5 P M 11 Q. Okay. And why did you believe it was a setup?

2 : 2 5 P M 12 A. Just because of the fact that, when she couldn't settle
2 : 2 5 P M 13 with Brad and convince him that she was doing a good job on her
2 : 2 5 P M 14 territory, the next thing she did was get a lawyer involved in
2 : 2 5 P M 15 it. And that's usually when you think that there's a lawsuit
2 : 2 5 P M 16 coming.

2 : 2 5 P M 17 Q. Okay. Let's go to Bluewave 387.

2 : 2 5 P M 18 So you see this letter dated October 31st, 2013?

2 : 2 6 P M 19 A. Yes.

2 : 2 6 P M 20 Q. From -- from the law firm of Galese & Ingram?

2 : 2 6 P M 21 A. Yes.

2 : 2 6 P M 22 Q. Okay. To Brian Dickerson, Ms. Barron's attorney; correct?

2 : 2 6 P M 23 A. Yes.

2 : 2 6 P M 24 Q. Okay. And who -- just for everybody's edification, who
2 : 2 6 P M 25 was John Galese?

2 : 2 6 P M 1 A. He was a lawyer that I first met in law school.

2 : 2 6 P M 2 Q. I don't need all the history but just -- you know, what
3 was his role in this particular --

2 : 2 6 P M 4 A. I contacted him thinking that she was going to file a
5 lawsuit, and I wanted him to defend it.

2 : 2 6 P M 6 Q. Okay. And so is -- what was your understanding of the
7 letter that was being sent by John to Mr. Dickerson on
8 October 31st, 2013?

2 : 2 7 P M 9 A. I would have to review it.

2 : 2 7 P M 10 Q. Okay. Well, we can do that, then. Let's go to the body
11 of the paragraph -- or the body of the letter.

2 : 2 7 P M 12 See where it says, "As attorney for Bluewave
13 Healthcare Consultants, Inc., I have been asked to respond to
14 your letter of October 3rd, 2013, and to provide the enclosed
15 check to your client for delivery to it"?

2 : 2 7 P M 16 A. Yes.

2 : 2 7 P M 17 Q. Do you see that?

2 : 2 7 P M 18 A. Yeah.

2 : 2 7 P M 19 Q. And do you recall that there was a check for \$324,000 plus
20 some change enclosed with this particular letter?

2 : 2 7 P M 21 A. Yes.

2 : 2 7 P M 22 Q. Okay. And it says, "Before writing you and responding to
23 your October 3rd letter, I've asked for and now reviewed all
24 relevant documents, including emails, and spoken with persons
25 having knowledge of the material matters outlined in your

2 : 2 8 P M 1 letter."

2 : 2 8 P M 2 Do you see that?

2 : 2 8 P M 3 A. Yes.

2 : 2 8 P M 4 Q. Okay. And it says in the next paragraph, "Initially, it
2 : 2 8 P M 5 is now and has always been my client's position that its
2 : 2 8 P M 6 operation is wholly within applicable and controlling
2 : 2 8 P M 7 governmental rules and any suggestion by you or your client to
2 : 2 8 P M 8 the contrary is incorrect and unfortunate."

2 : 2 8 P M 9 Did you see that?

2 : 2 8 P M 10 A. Yes.

2 : 2 8 P M 11 Q. And that was John's opinion at the time; correct?

2 : 2 8 P M 12 A. Correct.

2 : 2 8 P M 13 Q. Did you have any reason to disagree with his opinion?

2 : 2 8 P M 14 A. No.

2 : 2 8 P M 15 Q. Okay. And so after -- and let's go to the check, the last
2 : 2 8 P M 16 page. All right. So this was the check for \$324,525.94.

2 : 2 8 P M 17 On the back of the check -- can you get the
2 : 2 9 P M 18 endorsement?

2 : 2 9 P M 19 THE COURT: He wants you to lie down and read it.

2 : 2 9 P M 20 BY MR. GRIFFITH:

2 : 2 9 P M 21 Q. I can read it. I'll just read it for everybody.

2 : 2 9 P M 22 "Endorsement and/or negotiation of this check by
2 : 2 9 P M 23 payee constitutes acceptance of proceeds hereof as payment in
2 : 2 9 P M 24 full of all claims of any kind, in tort, contract, or
2 : 2 9 P M 25 otherwise, from the beginning of time to the day and date

2 : 2 9 P M 1 hereof except as to October 2013 commissions."

2 : 2 9 P M 2 Do you see that?

2 : 2 9 P M 3 A. Yes.

2 : 2 9 P M 4 Q. And so did you interpret that as a release of any and all
2 : 3 0 P M 5 claims that Ms. Barron may have against BlueWave?

2 : 3 0 P M 6 A. Yes.

2 : 3 0 P M 7 Q. Okay. Do you have -- do you have any knowledge as to
2 : 3 0 P M 8 whether or not Ms. Barron actually endorsed and cashed and
2 : 3 0 P M 9 deposited the check?

2 : 3 0 P M 10 A. No, I do not.

2 : 3 0 P M 11 Q. Okay. But did you ever hear back from Mr. Dickerson after
2 : 3 0 P M 12 this particular letter and the check were sent?

2 : 3 0 P M 13 A. Not that I recall.

2 : 3 0 P M 14 Q. Okay. Now, again, did you at any time during the course
2 : 3 0 P M 15 of your representation of Brad Johnson or Cal Dent or BlueWave
2 : 3 0 P M 16 Healthcare, Inc., believe that they were not acting in good
2 : 3 0 P M 17 faith?

2 : 3 0 P M 18 A. Absolutely not.

2 : 3 0 P M 19 Q. Okay. So just to be clear, they were always acting in
2 : 3 0 P M 20 good faith; correct?

2 : 3 0 P M 21 A. With everything that I saw or heard or was involved with,
2 : 3 1 P M 22 yes.

2 : 3 1 P M 23 Q. Did you believe at any time that Brad Johnson, Cal Dent,
2 : 3 1 P M 24 or BlueWave acted unlawfully at any time during your
2 : 3 1 P M 25 representation of them?

2 : 3 1 P M 1 A. No, sir. And if they had and I knew about it, they would
2 : 3 1 P M 2 either have corrected what had been done or they would not have
2 : 3 1 P M 3 remained my clients.

2 : 3 1 P M 4 MR. GRIFFITH: Thank you. Other counsel may have
2 : 3 1 P M 5 some questions. Excuse me, one second.

2 : 3 1 P M 6 (Pause.)

2 : 3 1 P M 7 MR. GRIFFITH: Thank you. The other counsel may have
2 : 3 1 P M 8 questions for you.

2 : 3 1 P M 9 THE COURT: Cross-examination by the government.

2 : 3 1 P M 10 CROSS-EXAMINATION

2 : 3 1 P M 11 BY MS. SHORT:

2 : 3 1 P M 12 Q. Good afternoon, Mr. Sellers. How are you?

2 : 3 1 P M 13 A. Good afternoon.

2 : 3 1 P M 14 Q. My name is Jennifer Short. I'm an attorney for the United
2 : 3 1 P M 15 States.

2 : 3 1 P M 16 Can you hear me okay?

2 : 3 1 P M 17 A. Yes.

2 : 3 1 P M 18 Q. Okay.

2 : 3 1 P M 19 A. You're the right distance away from that mic.

2 : 3 1 P M 20 Q. Perfect. Perfect. I will stay right here.

2 : 3 2 P M 21 Mr. Sellers, you testified earlier that you advised
2 : 3 2 P M 22 Mr. Johnson and Mr. Dent during their negotiations with HDL; is
2 : 3 2 P M 23 that right?

2 : 3 2 P M 24 A. During their -- during what period?

2 : 3 2 P M 25 Q. Their negotiations --

2 : 3 2 P M 1 A. Yes.

2 : 3 2 P M 2 Q. -- with HDL. Okay.

2 : 3 2 P M 3 A. Now, to explain that just a little bit. They had worked
2 : 3 2 P M 4 with the president and CEO of HDL and knew her very well, and
2 : 3 2 P M 5 they negotiated the terms of the agreement. I was not directly
2 : 3 2 P M 6 involved with it -- with those negotiations.

2 : 3 2 P M 7 Q. Okay. Were you aware that Mr. Johnson and Mr. Dent have
2 : 3 2 P M 8 an ownership interest in HDL?

2 : 3 2 P M 9 A. Yes, a very small one.

2 : 3 2 P M 10 Q. Okay. I believe you testified earlier that you advised
2 : 3 2 P M 11 then Bluewave about whether it should enter into independent
2 : 3 3 P M 12 contractor arrangements rather than employment arrangements
2 : 3 3 P M 13 with its sales representatives?

2 : 3 3 P M 14 A. Yes.

2 : 3 3 P M 15 Q. Okay. And the nexus laws that you were advising them on
2 : 3 3 P M 16 aren't terribly straightforward, are they?

2 : 3 3 P M 17 A. Yes.

2 : 3 3 P M 18 Q. They're kind of complicated; right?

2 : 3 3 P M 19 A. Extremely complicated. And each state has its own nexus
2 : 3 3 P M 20 laws, or the nexus laws require different things in different
2 : 3 3 P M 21 states. So you can't just look at what one state requires and
2 : 3 3 P M 22 know what all the rest of them require.

2 : 3 3 P M 23 Q. Right. And this was a situation where it was -- you had a
2 : 3 3 P M 24 hard time telling Bluewave exactly what to do, didn't you?

2 : 3 3 P M 25 A. No. There was no question in my mind about telling them

2 : 3 3 P M 1 to use independent contractors.

2 : 3 3 P M 2 Q. Okay. So -- but you told them, didn't you, that there's
2 : 3 4 P M 3 no clear solution to the nexus issue; isn't that right?

2 : 3 4 P M 4 A. I told them what?

2 : 3 4 P M 5 Q. There was no clear solution to the nexus issue; isn't --
2 : 3 4 P M 6 wasn't that your advice?

2 : 3 4 P M 7 A. The clear solution to them is not to be involved with the
2 : 3 4 P M 8 nexus law.

2 : 3 4 P M 9 THE COURT: What is the nexus law? I don't --

2 : 3 4 P M 10 MS. SHORT: They're -- it's -- it actually is fairly
2 : 3 4 P M 11 complicated, and I can't speak to it.

2 : 3 4 P M 12 THE COURT: Mr. Sellers, what is the nexus law, so my
2 : 3 4 P M 13 jurors can understand what we're talking about here?

2 : 3 4 P M 14 THE WITNESS: Basically, as it applies in this case,
2 : 3 4 P M 15 if BlueWave, who was organized as an Alabama corporation, had
2 : 3 4 P M 16 come -- had hired someone and put that person on the payroll
2 : 3 5 P M 17 here, they would be required to comply with every law --

2 : 3 5 P M 18 THE COURT: In South Carolina?

2 : 3 5 P M 19 THE WITNESS: -- in South Carolina.

2 : 3 5 P M 20 THE COURT: They'd have to register to do business
2 : 3 5 P M 21 here?

2 : 3 5 P M 22 THE WITNESS: Do business and all of that.

2 : 3 5 P M 23 THE COURT: Okay. Thank you. I just wanted to make
2 : 3 5 P M 24 it clear for the jury.

2 : 3 5 P M 25 Please continue.

2 : 3 5 P M 1 BY MS. SHORT:

2 : 3 5 P M 2 Q. Okay. And you advised Bluewave, though, didn't you,
2 : 3 5 P M 3 that -- you wrote them that you hate to deal with a situation
2 : 3 5 P M 4 where there is no answer I can give a client and be able to
2 : 3 5 P M 5 say, "If you do it this way, you don't have to be concerned"?
2 : 3 5 P M 6 Didn't you --

2 : 3 5 P M 7 A. No.

2 : 3 5 P M 8 Q. -- give them that advice?

2 : 3 5 P M 9 A. No. That's not what I'm saying. What I'm saying is, if
2 : 3 5 P M 10 you're running a company that's got four or five employees and
2 : 3 5 P M 11 you have to keep up with all of the laws in all of the states,
2 : 3 5 P M 12 then you can't run that company with four or five employees.
2 : 3 5 P M 13 It would take 4 or 500 employees with attorneys advising them
2 : 3 6 P M 14 in every state what the law is. And it would take a large
2 : 3 6 P M 15 office full of secretarial help to file all the things that
2 : 3 6 P M 16 have to be filed.

2 : 3 6 P M 17 Now, by using independent contractors, they're
2 : 3 6 P M 18 already living in the state and they know what the law is or a
2 : 3 6 P M 19 they've been in business in the state, and they -- Bluewave
2 : 3 6 P M 20 doesn't have to know and handle all of those things. It's left
2 : 3 6 P M 21 up to the independent contractor in the state to handle it.

2 : 3 6 P M 22 MS. SHORT: Your Honor, may I approach?

2 : 3 6 P M 23 THE COURT: You may.

2 : 3 6 P M 24 BY MS. SHORT:

2 : 3 6 P M 25 Q. Mr. Sellers, do you recognize this as the opinion that you

2 : 3 6 P M 1 gave to BlueWave regarding the nexus laws?

2 : 3 7 P M 2 A. Let me -- income tax nexus. This is what we're talking
2 : 3 7 P M 3 about. I don't remember exactly what it says. Do you have a
2 : 3 7 P M 4 question about a specific part?

2 : 3 7 P M 5 Q. I do, because I was looking at -- starting at the bottom
2 : 3 7 P M 6 of page 3 of your letter to BlueWave.

2 : 3 7 P M 7 A. Okay. Which paragraph?

2 : 3 7 P M 8 Q. The very last paragraph on that page?

2 : 3 7 P M 9 THE COURT: Why don't you read it out loud to him,
2 : 3 7 P M 10 what you want?

2 : 3 7 P M 11 MS. SHORT: I will.

2 : 3 7 P M 12 THE WITNESS: The very last paragraph?

2 : 3 7 P M 13 BY MS. SHORT:

2 : 3 7 P M 14 Q. Correct.

2 : 3 7 P M 15 A. "I really hate to deal with the situation where there is
2 : 3 7 P M 16 no answer I can give a client and be able to say 'if you do it
2 : 3 7 P M 17 this way, you won't have to be concerned." Unfortunately, I
2 : 3 7 P M 18 can't give that answer to the nexus issue. Bluewave is going
2 : 3 8 P M 19 to have to decide how to handle it, knowing there is some
2 : 3 8 P M 20 potential liability anyway."

2 : 3 8 P M 21 Q. Right. If you go to the top of the next page and just
2 : 3 8 P M 22 read what your advice is.

2 : 3 8 P M 23 A. "My best advice is to decide how to conduct business and
2 : 3 8 P M 24 then do it in a manner that gives the least exposure to
2 : 3 8 P M 25 Bluewave."

2 : 3 8 P M 1 Q. Okay. Does that refresh your recollection about the
2 : 3 8 P M 2 advice that you gave?

2 : 3 8 P M 3 A. Please repeat.

2 : 3 8 P M 4 Q. Does that help refresh your recollection about the advice
2 : 3 8 P M 5 that you gave?

2 : 3 8 P M 6 A. Yes.

2 : 3 8 P M 7 Q. It wasn't so clear-cut, was it?

2 : 3 8 P M 8 A. Again, I did not understand you. I guess you moved back.

2 : 3 8 P M 9 Q. I'm sorry. I need to stay right here; right?

2 : 3 8 P M 10 A. All right.

2 : 3 8 P M 11 Q. The issue was not so clear-cut; isn't that right?

2 : 3 8 P M 12 A. What's your last word there?

2 : 3 9 P M 13 Q. It wasn't clear what advice BlueWave -- what advice you
2 : 3 9 P M 14 needed to give BlueWave, was it?

2 : 3 9 P M 15 A. Let me tell you a short story.

2 : 3 9 P M 16 THE COURT: Sir, we're going to need you to respond
2 : 3 9 P M 17 to the question.

2 : 3 9 P M 18 MS. SHORT: Thank you. We're learning some really
2 : 3 9 P M 19 interesting stuff, but tax law, I think we all want to avoid.

2 : 3 9 P M 20 THE COURT: Just answer the question.

2 : 3 9 P M 21 BY MS. SHORT:

2 : 3 9 P M 22 Q. All right. All right. All right. You also testified
2 : 3 9 P M 23 about your interactions with Ms. Barron's attorneys; correct?

2 : 3 9 P M 24 A. Yes.

2 : 3 9 P M 25 Q. All right.

2 : 3 9 P M 1 I want to pull up Plaintiffs' Exhibit 1247. And,
2 : 4 0 P M 2 Peter, the middle of the page, the Brad -- and, actually, the
2 : 4 0 P M 3 paragraph "also I got a call from Emily Barron's new lawyers."

2 : 4 0 P M 4 Mr. Sellers, do you remember looking at this document
2 : 4 0 P M 5 just a few minutes ago?

2 : 4 0 P M 6 Do you remember looking at this document just a few
2 : 4 0 P M 7 minutes ago?

2 : 4 0 P M 8 A. Yes.

2 : 4 0 P M 9 Q. All right. And Mr. Griffith asked you about the first
2 : 4 0 P M 10 couple of sentences in that paragraph from Ms. Flipppo, "I got a
2 : 4 0 P M 11 call from Emily Barron's new attorneys." Do you remember
2 : 4 0 P M 12 talking about that?

2 : 4 0 P M 13 A. Yes.

2 : 4 0 P M 14 Q. All right. I want to focus your attention on the sentence
2 : 4 0 P M 15 starting, "They have also requested information from us about
2 : 4 1 P M 16 BlueWave's relationship with HDL and, specifically, information
2 : 4 1 P M 17 about the P&H fees. They are aware of the May 2010 letter by
2 : 4 1 P M 18 Tonya, but it appears that Emily's prior counsel had raised
2 : 4 1 P M 19 concerns over the legality of the P&H fee, and the new lawyers
2 : 4 1 P M 20 are trying to understand the issues so as to advise their
2 : 4 1 P M 21 client."

2 : 4 1 P M 22 Ms. Flipppo goes on to send that email to you;
2 : 4 1 P M 23 correct? Or perhaps it was -- it was Mr. Johnson sent that
2 : 4 1 P M 24 email to you. Do you see that?

2 : 4 1 P M 25 A. Yes.

2 : 4 1 P M 1 Q. So you understood from the very beginning that
2 : 4 1 P M 2 MS. Barron's attorneys were concerned about the P&H fees;
2 : 4 1 P M 3 correct?

2 : 4 1 P M 4 A. I -- from August '13, I understood that there was a
2 : 4 2 P M 5 question about P&H fees.

2 : 4 2 P M 6 Q. Okay.

2 : 4 2 P M 7 Let's go ahead and pull up -- we looked at this one
2 : 4 2 P M 8 before also -- Plaintiffs' Exhibit 1198.

2 : 4 2 P M 9 Mr. Sellers, I think that Mr. Griffith asked you
2 : 4 2 P M 10 about the first email in this string. Let's pull it up so that
2 : 4 2 P M 11 you can remember what we talked about. Do you remember looking
2 : 4 2 P M 12 at that language earlier today?

2 : 4 2 P M 13 A. No.

2 : 4 2 P M 14 Q. Okay.

2 : 4 2 P M 15 A. Not specifically.

2 : 4 2 P M 16 Q. Okay. You were copied on this email; correct?

2 : 4 2 P M 17 A. I can't even tell what the email is.

2 : 4 2 P M 18 MS. SHORT: Let's pull it out just a little bit more,
2 : 4 3 P M 19 Peter, so he can see --

2 : 4 3 P M 20 THE WITNESS: No, blow it up.

2 : 4 3 P M 21 MS. SHORT: Make it real big so we can all see it.

2 : 4 3 P M 22 THE WITNESS: I'm wearing glasses and I'm wearing
2 : 4 3 P M 23 hearing aids. Neither seem to work very well.

2 : 4 3 P M 24 That's blown up so large I can't read all of it.

2 : 4 3 P M 25 All right. Okay.

2 : 4 3 P M 1 BY MS. SHORT:

2 : 4 3 P M 2 Q. Do you remember telling Mr. Griffith that your
2 : 4 3 P M 3 understanding was that she wasn't -- she wasn't interested in
2 : 4 3 P M 4 signing the new contract; she wanted her old contract. That
2 : 4 3 P M 5 was your understanding; right?

2 : 4 3 P M 6 A. Yes. She didn't want her territory cut.

2 : 4 3 P M 7 Q. Okay. And if we look at the bottom of that email, the
2 : 4 3 P M 8 chain here starts with Mr. Feldman writing to Linda Flipppo,
2 : 4 4 P M 9 saying, "Your clients are sending text messages to our client,
2 : 4 4 P M 10 Ms. Barron, demanding that she sign the territories agreement
2 : 4 4 P M 11 we discussed last Friday per telephone. As discussed, our firm
2 : 4 4 P M 12 is reviewing that agreement. However, as previously discussed,
2 : 4 4 P M 13 we need to know what, if any, safe harbors under the Social
2 : 4 4 P M 14 Security Act are applicable to Bluewave's current compensation
2 : 4 4 P M 15 arrangements with HDL and Singulex."

2 : 4 4 P M 16 And you saw that email, didn't you?

2 : 4 4 P M 17 A. I assume I did.

2 : 4 4 P M 18 Q. Okay. Did you have any questions about what Mr. Feldman
2 : 4 4 P M 19 was talking about?

2 : 4 4 P M 20 A. No.

2 : 4 4 P M 21 Q. All right.

2 : 4 4 P M 22 Let's go ahead and pull up Bluewave 359.

2 : 4 5 P M 23 Mr. Sellers, do you remember talking about this
2 : 4 5 P M 24 letter earlier today?

2 : 4 5 P M 25 A. Yes.

2 : 4 5 P M 1 Q. Okay. This was the letter that you described as a threat
2 : 4 5 P M 2 to sue? Was this -- you considered this to be a threat to sue?

2 : 4 5 P M 3 A. Yes.

2 : 4 5 P M 4 Q. Okay. I want to point your attention to the bottom of the
2 : 4 5 P M 5 first page, going over to the top page 2.

2 : 4 5 P M 6 And, here, Mr. Dickerson writes, "Ironically, on
2 : 4 5 P M 7 Saturday, September 28th, 2013, we made both you and Linda
2 : 4 5 P M 8 Flippo, White Arnold & Dowd, P.C, aware of Ms. Barron's receipt
2 : 4 5 P M 9 of a termination letter for an alleged breach of the
2 : 4 5 P M 10 independent contractor agreement. Our office further made you
2 : 4 5 P M 11 aware of the repercussions of terminating a contractor who has
2 : 4 6 P M 12 reported or alerted the client to potential illegal or wrongful
2 : 4 6 P M 13 conduct. Such actions constitute retaliation, and this case is
2 : 4 6 P M 14 no exception."

2 : 4 6 P M 15 Skipping down a couple of lines, "We repeatedly
2 : 4 6 P M 16 requested that you provide our office with an opinion from a
2 : 4 6 P M 17 competent health care counsel regarding the legality of
2 : 4 6 P M 18 BlueWave's current corporate structure. We even offered to
2 : 4 6 P M 19 provide you with an expert in the field of health care, Lester
2 : 4 6 P M 20 Perling, to render such an opinion. On both occasions, you
2 : 4 6 P M 21 ignored us, and then you terminated Ms. Barron."

2 : 4 6 P M 22 Do you remember getting -- those conversations with
2 : 4 6 P M 23 Mr. Dickerson?

2 : 4 6 P M 24 A. Yes.

2 : 4 6 P M 25 Q. Do you remember him recommending that you reach out to

2 : 4 7 P M 1 Lester Perling to give your clients advice on how they
2 : 4 7 P M 2 structured their business?

2 : 4 7 P M 3 A. I do not specifically remember who -- you know, what the
2 : 4 7 P M 4 discussion was and who he recommended, but I saw no reason why
2 : 4 7 P M 5 my client should have to contact some other lawyer about the
2 : 4 7 P M 6 contract. If he wanted somebody to tell us the contract was
2 : 4 7 P M 7 bad, he had already told us that.

2 : 4 7 P M 8 He could go hire another lawyer. And if he didn't
2 : 4 7 P M 9 like what that lawyer told him, he could probably hire another
2 : 4 7 P M 10 lawyer until he found one that would tell him what he wanted us
2 : 4 7 P M 11 to hear.

2 : 4 7 P M 12 Q. In fact, Mr. Sellers, you didn't think it would be helpful
2 : 4 7 P M 13 to BlueWave, to your client, to get an opinion from a health
2 : 4 7 P M 14 care attorney; is that right?

2 : 4 8 P M 15 A. No, ma'am, that's not what I said. I was talking about
2 : 4 8 P M 16 this specific case.

2 : 4 8 P M 17 Now, according to what I had been told and what I had
2 : 4 8 P M 18 come to know for sure later on, opinions had been gathered from
2 : 4 8 P M 19 health care lawyers, some very reputable health care lawyers,
2 : 4 8 P M 20 by HDL. They had said that the P&H was handled the way it was
2 : 4 8 P M 21 being handled. And this man was coming and saying, "No, I know
2 : 4 8 P M 22 health care law. I don't agree with them."

2 : 4 8 P M 23 And, obviously, he thought that this man that he was
2 : 4 8 P M 24 talking about here that recommended that we or BlueWave engage
2 : 4 9 P M 25 his services agreed with him.

2 : 4 9 P M 1 Q. But, Mr. Sellers, didn't Mr. Dickerson also raise issues
2 : 4 9 P M 2 about the structure of BlueWave itself, BlueWave's independent
2 : 4 9 P M 3 contractor arrangements with Mr. Dicker -- Mr. Dickerson's
2 : 4 9 P M 4 client, Emily Barron? That was his specific concern, wasn't
2 : 4 9 P M 5 it?

2 : 4 9 P M 6 A. His specific concern, in my opinion, was trying to keep a
2 : 4 9 P M 7 person who was not doing a good job, keeping that. Now, the
2 : 4 9 P M 8 way that I understood it worked, if there was any referral to
2 : 4 9 P M 9 this -- to HDL by a doctor in her area, she got a commission on
2 : 4 9 P M 10 it whether she had ever seen the doctor or not.

2 : 4 9 P M 11 Q. Yeah. And that --

2 : 4 9 P M 12 A. And so she was sitting back collecting money for not doing
2 : 5 0 P M 13 anything. And she wasn't doing a good job.

2 : 5 0 P M 14 Q. And that arrangement of when Ms. Barron was getting a
2 : 5 0 P M 15 commission payment, that was pursuant to an agreement that she
2 : 5 0 P M 16 had with Bluewave; correct?

2 : 5 0 P M 17 A. That is correct.

2 : 5 0 P M 18 Q. And Mr. Dickerson's concern was precisely that. He was
2 : 5 0 P M 19 concerned about the commission structure of Bluewave and its
2 : 5 0 P M 20 independent contractors; isn't that right?

2 : 5 0 P M 21 A. I'm not sure, because I think that you mentioned something
2 : 5 0 P M 22 about he said something about Social Security Administration.

2 : 5 0 P M 23 Q. There was a reference to the Social Security Act, yes.

2 : 5 0 P M 24 A. Yes. The first case I ever had involving independent
2 : 5 0 P M 25 contractors, there was a discussion about it -- that my client

2 : 5 0 P M 1 was examined by the IRS. And they said these people are -- are
2 : 5 1 P M 2 not employees of yours. Because social security was involved,
2 : 5 1 P M 3 they had to refer it to -- I'm not -- to the Social Security
2 : 5 1 P M 4 Administration. They examined it, and they say they are your
2 : 5 1 P M 5 employees.

2 : 5 1 P M 6 Now, that case was handled in the U.S. Senate. And
2 : 5 1 P M 7 there's a little phrase that is attached to a textile import
2 : 5 1 P M 8 case that says that a person that runs a company that refers
2 : 5 1 P M 9 people is not an employee of that company.

2 : 5 1 P M 10 Q. Okay. Mr. Sellers, I believe that Mr. Dickerson was
2 : 5 1 P M 11 attempting to point you to the provisions of the Social
2 : 5 2 P M 12 Security Act that deal with Medicare fraud. I understand your
2 : 5 2 P M 13 anecdote, but I think that's what he was trying to get at.

2 : 5 2 P M 14 I want to ask one more question.

2 : 5 2 P M 15 If we could pull up Plaintiffs' Exhibit 1072.

2 : 5 2 P M 16 Mr. Sellers, I think you talked about this short
2 : 5 2 P M 17 email to your clients earlier today; correct?

2 : 5 2 P M 18 A. What are you asking me about this?

2 : 5 2 P M 19 Q. Yeah, you remember this is the email that you sent to your
2 : 5 2 P M 20 clients that attached Mr. Dickerson's letter?

2 : 5 2 P M 21 A. Yes.

2 : 5 2 P M 22 Q. Okay. And this email and your instruction to put a hold
2 : 5 2 P M 23 on erasing anything, that instruction came while Bluewave was
2 : 5 3 P M 24 still in the process of collecting documents and responding to
2 : 5 3 P M 25 the United States subpoena, wasn't it?

2 : 5 3 P M 1 A. Either change it or ask it again, because I don't know
2 : 5 3 P M 2 what you're trying to get at.

2 : 5 3 P M 3 Q. Okay. Let me try this: You testified earlier that White
2 : 5 3 P M 4 Arnold & Dowd -- you referred your clients to White Arnold &
2 : 5 3 P M 5 Dowd to help them with the government subpoena; is that right?

2 : 5 3 P M 6 A. Yes.

2 : 5 3 P M 7 Q. And you knew, didn't you, that White Arnold & Dowd was in
2 : 5 3 P M 8 the process of gathering documents and responding to that
2 : 5 3 P M 9 subpoena in 2013; right?

2 : 5 3 P M 10 A. I'm not sure when they started responding, but, yes, they
2 : 5 3 P M 11 were handling the case.

2 : 5 3 P M 12 Q. Okay. And that -- when you sent this email to your
2 : 5 3 P M 13 clients in October of 2013, that was at the same time White
2 : 5 3 P M 14 Arnold & Dowd was gathering documents to respond to the United
2 : 5 3 P M 15 States subpoena; correct?

2 : 5 4 P M 16 A. Yes.

2 : 5 4 P M 17 Q. Okay.

2 : 5 4 P M 18 MS. SHORT: Thank you. That's all I have.

2 : 5 4 P M 19 THE COURT: Mr. Ashmore?

2 : 5 4 P M 20 MR. ASHMORE: No questions, Your Honor.

2 : 5 4 P M 21 THE COURT: Very good. Mr. Sellers, you may step --
2 : 5 4 P M 22 well, I don't know. We have redirect.

2 : 5 4 P M 23 REDIRECT EXAMINATION

2 : 5 4 P M 24 BY MR. GRIFFITH:

2 : 5 4 P M 25 Q. Mr. Sellers, did you follow the advice -- did the clients,

2 : 5 4 P M 1 Brad Johnson and Cal Dent, follow your advice?

2 : 5 4 P M 2 A. Yes.

2 : 5 4 P M 3 Q. Okay. Did you believe that they were acting in good faith
2 : 5 4 P M 4 at all times?

2 : 5 4 P M 5 A. Absolutely.

2 : 5 4 P M 6 MR. GRIFFITH: Okay. Thank you.

2 : 5 4 P M 7 THE COURT: Mr. Sellers, let me just ask you this
2 : 5 4 P M 8 question: As I understood your testimony, you were not engaged
2 : 5 4 P M 9 by your clients to offer health care advice; is that right?

2 : 5 4 P M 10 THE WITNESS: That's correct. And I never offered
2 : 5 4 P M 11 any.

2 : 5 4 P M 12 THE COURT: You did not feel yourself competent in
2 : 5 4 P M 13 that area?

2 : 5 4 P M 14 THE WITNESS: No, sir.

2 : 5 4 P M 15 THE COURT: And you offered no such advice?

2 : 5 4 P M 16 THE WITNESS: That is correct.

2 : 5 4 P M 17 THE COURT: Thank you.

2 : 5 4 P M 18 Any questions occasioned by the Court's
2 : 5 4 P M 19 questions?

2 : 5 4 P M 20 MS. SHORT: No, Your Honor.

2 : 5 4 P M 21 MR. GRIFFITH: No, Your Honor.

2 : 5 4 P M 22 MR. ASHMORE: No, sir.

2 : 5 4 P M 23 THE COURT: You may step down, Mr. Sellers. Thank
2 : 5 4 P M 24 you, sir.

2 : 5 4 P M 25 (Witness excused.)

2 : 5 5 P M 1 THE COURT: Call your next witness.

2 : 5 5 P M 2 Actually, it's five minutes to 3. Let's take
2 : 5 5 P M 3 our afternoon break.

2 : 5 5 P M 4 (Whereupon the jury was excused from the courtroom.)

2 : 5 5 P M 5 (Recess.)

3 : 0 9 P M 6 THE COURT: Please be seated. Okay. Any matters we
3 : 1 0 P M 7 need to address before we call the next witness?

3 : 1 0 P M 8 MR. LEVENTIS: No, Your Honor.

3 : 1 0 P M 9 THE COURT: For the defense?

3 : 1 0 P M 10 MR. COOKE: No, Your Honor.

3 : 1 0 P M 11 THE COURT: Let's bring in the jury.

3 : 1 0 P M 12 MR. COOKE: Can we bring the witness in?

3 : 1 0 P M 13 THE COURT: Go ahead and bring the witness in.

3 : 1 1 P M 14 (Whereupon the jury entered the courtroom.)

3 : 1 1 P M 15 THE COURT: Please be seated. Call your next
3 : 1 1 P M 16 witness.

3 : 1 1 P M 17 MR. COOKE: Thank you, Your Honor. The defendants
3 : 1 1 P M 18 BlueWave, Johnson, and Dent would call Kevin Carrier.

3 : 1 1 P M 19 THE DEPUTY CLERK: Please come forward and be sworn.
3 : 1 1 P M 20 Please come forward and be sworn.

3 : 1 2 P M 21 THE WITNESS: Oh, I'm sorry.

3 : 1 2 P M 22 THE DEPUTY CLERK: Please place your left hand on the
3 : 1 2 P M 23 Bible, raise your right, and state your full name for the
3 : 1 2 P M 24 record, please.

3 : 1 2 P M 25 THE WITNESS: Kevin Michael Carrier.

3 : 1 2 P M 1 THE DEPUTY CLERK: Can you spell your last name for
3 : 1 2 P M 2 the record?

3 : 1 2 P M 3 THE WITNESS: C-a-r-r-i-e-r.

3 : 1 2 P M 4 THE DEPUTY CLERK: Thank you.

3 : 1 2 P M 5 (Witness sworn.)

3 : 1 2 P M 6 THE DEPUTY CLERK: Thank you. You may be seated.

7 KEVIN MICHAEL CARRIER,

8 a witness called on behalf of the defendants, being first duly
1 1 : 0 3 A M 9 sworn, was examined and testified as follows:

1 1 : 0 3 A M 10 DIRECT EXAMINATION

3 : 1 2 P M 11 BY MR. COOKE:

3 : 1 2 P M 12 Q. Good afternoon, Mr. Carrier.

3 : 1 2 P M 13 A. Hey there.

3 : 1 2 P M 14 Q. We've met recently. I'm Dawes Cooke, and I represent
3 : 1 2 P M 15 BlueWave and Mr. Dent and Mr. Johnson. You're aware of that?

3 : 1 2 P M 16 A. Yes, sir.

3 : 1 2 P M 17 Q. Have you ever been in a courtroom before?

3 : 1 2 P M 18 A. I never have, sir.

3 : 1 2 P M 19 Q. All right. Tell us who you are and where you're from.

3 : 1 2 P M 20 A. I'm Kevin Carrier. I reside in Spanish Fort, Alabama.

3 : 1 2 P M 21 Q. What do you do for a living?

3 : 1 2 P M 22 A. I work for True Health Diagnostics now.

3 : 1 2 P M 23 Q. And just for review, did True Health take over the assets
3 : 1 3 P M 24 of HDL?

3 : 1 3 P M 25 A. I think so.

3 : 1 3 P M 1 Q. Something like that?

3 : 1 3 P M 2 A. Yeah, something like that.

3 : 1 3 P M 3 Q. Okay. Tell us where you grew up and your educational
3 : 1 3 P M 4 background, please.

3 : 1 3 P M 5 A. I grew up in Orlando, Florida, and dream was of going to
3 : 1 3 P M 6 medical school. Went to school at University of Alabama and
3 : 1 3 P M 7 majored in biology there.

3 : 1 3 P M 8 Q. What happened instead of going to medical school?

3 : 1 3 P M 9 A. The good Lord had a different plan for me. I just
3 : 1 3 P M 10 couldn't cut it to do what was required of me.

3 : 1 3 P M 11 Q. All right. So what did you do instead?

3 : 1 3 P M 12 A. Started interviewing with a lot of different
3 : 1 3 P M 13 pharmaceutical companies. At that time, pharmaceuticals was a
3 : 1 3 P M 14 very sought-after career. So tried to interview with as many
3 : 1 3 P M 15 companies as I can and eventually got on with a small company
3 : 1 3 P M 16 out of Madison, Mississippi.

3 : 1 3 P M 17 Q. What year was that?

3 : 1 3 P M 18 A. That would have been -- that would have been '99, 1999.

3 : 1 4 P M 19 Q. And that was soon after you graduated from college?

3 : 1 4 P M 20 A. Two years.

3 : 1 4 P M 21 Q. Okay. What kind of pharmaceutical company was that?

3 : 1 4 P M 22 A. That was a cough and cold company in Madison, Mississippi,
3 : 1 4 P M 23 a start-up company. It was a little, small company, wasn't
3 : 1 4 P M 24 much structure to it.

3 : 1 4 P M 25 Q. What did you do for them?

3 : 1 4 P M 1 A. I was a sales rep.

3 : 1 4 P M 2 Q. How long did you do that?

3 : 1 4 P M 3 A. I think about nine months.

3 : 1 4 P M 4 Q. Then what did you do?

3 : 1 4 P M 5 A. I went to work for Takeda Pharmaceuticals.

3 : 1 4 P M 6 Q. Was that a bigger company?

3 : 1 4 P M 7 A. Yes, sir, much bigger.

3 : 1 4 P M 8 Q. What kind of drugs did they sell?

3 : 1 4 P M 9 A. Predominantly a diabetes drug called Actos was my main
3 : 1 4 P M 10 drug I started with.

3 : 1 4 P M 11 Q. And you were a sales rep for them?

3 : 1 4 P M 12 A. Yes, sir.

3 : 1 4 P M 13 Q. And how long did you do that?

3 : 1 4 P M 14 A. About 13 years.

3 : 1 4 P M 15 Q. And where did you go after that?

3 : 1 4 P M 16 A. I went to work with Bluewave.

3 : 1 4 P M 17 Q. So during the time that you were working in the
3 : 1 4 P M 18 pharmaceutical industry, were you introduced to a concept
3 : 1 4 P M 19 called compliance training?

3 : 1 5 P M 20 A. Yes, I was.

3 : 1 5 P M 21 Q. In what way?

3 : 1 5 P M 22 A. We had compliance training on a routine basis, probably
3 : 1 5 P M 23 once a quarter. There was always some type of webinar or
3 : 1 5 P M 24 something that we watched on compliance training.

3 : 1 5 P M 25 Q. And that means compliance with the law?

3 : 1 5 P M 1 A. It was my assumption compliance in all fashions. I mean,
3 : 1 5 P M 2 law, everything that was needed to do the job in the right way.

3 : 1 5 P M 3 Q. Did that include learning what you could and couldn't
3 : 1 5 P M 4 compensate doctors for?

3 : 1 5 P M 5 A. Yes, sir.

3 : 1 5 P M 6 Q. And why was that considered important in your line of
3 : 1 5 P M 7 work?

3 : 1 5 P M 8 A. I just assumed that, you know, at that -- the overall goal
3 : 1 5 P M 9 was to do it in the right way and the anti-kickback, everything
3 : 1 5 P M 10 else that was involved, in trying to train employees to do the
3 : 1 5 P M 11 job the right way.

3 : 1 5 P M 12 Q. Did you find that difficult for you to accept?

3 : 1 5 P M 13 A. Not at all.

3 : 1 5 P M 14 Q. Were you ever taught that it was better to try to skirt
3 : 1 5 P M 15 the law or come as close to the line as you could?

3 : 1 6 P M 16 A. No, sir.

3 : 1 6 P M 17 Q. How did you come to work for Bluewave?

3 : 1 6 P M 18 A. I had known Brad Johnson for some years before that, and I
3 : 1 6 P M 19 kind of talked to him on a regular basis about what he was
3 : 1 6 P M 20 doing. I was drawn to the ability to do something that I felt
3 : 1 6 P M 21 was making an impact on patients' lives.

3 : 1 6 P M 22 And he -- he had chased me for a few years, and I had
3 : 1 6 P M 23 said I was happy where I was. I was a district manager in a
3 : 1 6 P M 24 pharmaceutical company. But we went through several layoffs,
3 : 1 6 P M 25 and I chose to make a career change.

3 : 1 6 P M 1 Q. And what year did you do that?

3 : 1 6 P M 2 A. That would have been 2013.

3 : 1 6 P M 3 Q. Did you come in as an employee or as an independent
4 contractor?

3 : 1 6 P M 5 A. I was an independent contractor.

3 : 1 6 P M 6 Q. Did you form a company?

3 : 1 6 P M 7 A. Yes, sir.

3 : 1 6 P M 8 Q. What was the name of your company?

3 : 1 6 P M 9 A. MRT Health Consultants.

3 : 1 7 P M 10 Q. What was your territory?

3 : 1 7 P M 11 A. My original territory was Orlando, Florida, north through
12 the panhandle.

3 : 1 7 P M 13 Q. Who -- what other contractors were assigned to Florida?

3 : 1 7 P M 14 A. Kyle Martel and Emily Barron.

3 : 1 7 P M 15 Q. Did you know them?

3 : 1 7 P M 16 A. I did know them.

3 : 1 7 P M 17 Q. Would you take the jury through the training that you
18 received at BlueWave to become a sales representative.

3 : 1 7 P M 19 A. Well, I rode with Brad, I rode with Cal. There was some
20 direction as to learning these biomarkers, some home study time
21 to read through the documents to teach you these biomarkers.
22 We had conference calls with other representatives that talked
23 through what a typical day was like, what was involved.

3 : 1 7 P M 24 Q. Did you -- did you study up on the clinical aspects of
25 these tests?

3 : 1 7 P M 1 A. I still have 50, 60 note cards in my car, where I have the
3 : 1 8 P M 2 test and two bullet points on the back of it. My goal was to
3 : 1 8 P M 3 know two or three bullet points for every test.

3 : 1 8 P M 4 Q. Did you meet Cal along the way?

3 : 1 8 P M 5 A. I did. I came and rode with Cal.

3 : 1 8 P M 6 Q. Did you feel like you knew the clinical stuff as well as
3 : 1 8 P M 7 he did?

3 : 1 8 P M 8 A. I did not. I knew where I wanted to go, is to learn it as
3 : 1 8 P M 9 well as him.

3 : 1 8 P M 10 Q. So did you ride with both Cal and Brad as part of your
3 : 1 8 P M 11 training?

3 : 1 8 P M 12 A. I would more describe it as I rode with Cal, and Brad rode
3 : 1 8 P M 13 with me to see clients, potential clients, that I was going to
3 : 1 8 P M 14 meet with.

3 : 1 8 P M 15 Q. And did you do the sales presentations when you would ride
3 : 1 8 P M 16 with Brad?

3 : 1 8 P M 17 A. We would mix -- we would kind of do it together, but Brad
3 : 1 8 P M 18 was obviously trying to get me to learn it. So he would allow
3 : 1 8 P M 19 me to do the presentation. I'd say it's an 80-20 split.

3 : 1 8 P M 20 Q. What did you understand about how the laboratory, HDL,
3 : 1 9 P M 21 and -- by the way, did you sell Singulex as well?

3 : 1 9 P M 22 A. I did.

3 : 1 9 P M 23 Q. What were you taught about how the laboratories were going
3 : 1 9 P M 24 to get their blood specimens to their laboratories?

3 : 1 9 P M 25 A. I was taught we needed somehow the blood collected, either

3 : 1 9 P M 1 at a -- in the office, potentially in an independent lab that
3 : 1 9 P M 2 would draw it for us, but the challenge was the blood had to
3 : 1 9 P M 3 get shipped from the doctor's office to Richmond.

3 : 1 9 P M 4 Q. So what were the methods that were used by HDL?

3 : 1 9 P M 5 A. Basically, you could have it -- an employee in the office
3 : 1 9 P M 6 draw the blood, or you could reach out to a lab and have a lab
3 : 1 9 P M 7 agreement with somebody such as Any Lab Test Now is a
3 : 1 9 P M 8 commercial lab that would send the -- the patient would go and
3 : 1 9 P M 9 get the blood drawn there.

3 : 1 9 P M 10 Q. Did you hear the term "process and handling fee"?

3 : 2 0 P M 11 A. Yes, sir.

3 : 2 0 P M 12 Q. How was that term used?

3 : 2 0 P M 13 A. It was used to -- it was used as an avenue that if a
3 : 2 0 P M 14 doctor said "Yes, I wanted to do this type of testing" and you
3 : 2 0 P M 15 then went into the discussion of needing the blood packaged
3 : 2 0 P M 16 into this box into these tubes, that if he or she chose to do
3 : 2 0 P M 17 so, there was a processing and handling agreement that he or
3 : 2 0 P M 18 she could take part in.

3 : 2 0 P M 19 Q. Were you taught to use the availability of process and
3 : 2 0 P M 20 handling fees as a selling point for the tests?

3 : 2 0 P M 21 A. I was not.

3 : 2 0 P M 22 Q. Can you think of any example where that was made clear to
3 : 2 0 P M 23 you?

3 : 2 0 P M 24 A. Yes, sir. In the very beginning, on one of these field
3 : 2 0 P M 25 visits that Brad came and rode with me, we were speaking with a

3 : 2 0 P M 1 doctor clinically about the biomarkers. And, at the end, we
3 : 2 1 P M 2 discussed process and handling. And I quickly talked to him
3 : 2 1 P M 3 about, you know, if he did ten tests, then, you know, at \$17,
3 : 2 1 P M 4 he'd make \$170.

3 : 2 1 P M 5 And we got out to the car. And, as a sales manager
3 : 2 1 P M 6 would do, Brad criticized me, reprimanded me, and said, "That's
3 : 2 1 P M 7 not what we do. We don't sell creating revenue; we sell
3 : 2 1 P M 8 clinical aspects, biomarkers."

3 : 2 1 P M 9 And I said it'll never happen again.

3 : 2 1 P M 10 Q. And did it ever happen again?

3 : 2 1 P M 11 A. Never did.

3 : 2 1 P M 12 Q. Well, did you find that doctors were receptive to the
3 : 2 1 P M 13 clinical benefits of these tests?

3 : 2 1 P M 14 A. Very much so.

3 : 2 1 P M 15 Q. Did you come to believe in them yourself?

3 : 2 1 P M 16 A. Very passionate about my belief in them, sir.

3 : 2 1 P M 17 Q. So without repeating your sales presentation, could you
3 : 2 1 P M 18 just tell the jury what you would tell a doctor when you went
3 : 2 1 P M 19 into his office for the first time?

3 : 2 2 P M 20 A. I would basically tell him that a standard lipid profile,
3 : 2 2 P M 21 as we know from several landmark trials, missed many of the
3 : 2 2 P M 22 events that were happening and people out there were getting a
3 : 2 2 P M 23 pat on the back saying they were doing a great job with a
3 : 2 2 P M 24 standard normal lipid profile and were having a heart attack
3 : 2 2 P M 25 and ending up in the ER and there was something else out there.

3 : 2 2 P M 1 And I felt that these advanced biomarkers allowed a
3 : 2 2 P M 2 physician a method to look at better patient care and to find
3 : 2 2 P M 3 patients at risk that they potentially didn't know were at
3 : 2 2 P M 4 risk.

3 : 2 2 P M 5 And like you said, I'm that patient now. I mean, I
3 : 2 2 P M 6 had my report done. I was the patient that didn't know he was
3 : 2 2 P M 7 at risk.

3 : 2 2 P M 8 Q. Did your taking the test result in any changes in your
3 : 2 2 P M 9 lifestyle or the way you took care of yourself?

3 : 2 2 P M 10 A. Absolutely. I'm now on medication, and I have made
3 : 2 2 P M 11 drastic changes in my diet and exercise regimen.

3 : 2 2 P M 12 Q. would you tell doctors things like that?

3 : 2 3 P M 13 A. Not at the time. I didn't really want them to know my
3 : 2 3 P M 14 personal information, but --

3 : 2 3 P M 15 Q. Okay.

3 : 2 3 P M 16 A. I told them I was a big believer in finding patients that
3 : 2 3 P M 17 were -- that they didn't know were at risk.

3 : 2 3 P M 18 Q. what kind of advice were you given about targeting
3 : 2 3 P M 19 doctors? what kind of doctors were you told to look for?

3 : 2 3 P M 20 A. We were told to look for independently owned offices,
3 : 2 3 P M 21 smaller offices with one or two doctors. And one of the main
3 : 2 3 P M 22 things we looked for were offices where they drew blood.

3 : 2 3 P M 23 Q. were you told to look for money-hungry doctors?

3 : 2 3 P M 24 A. Not that I remember.

3 : 2 3 P M 25 Q. why was it important to look for doctors that drew their

3 : 2 3 P M 1 own blood?

3 : 2 3 P M 2 A. To me, it was a path of least resistance. If they
3 : 2 3 P M 3 already -- if they were already used to drawing blood, it was a
3 : 2 3 P M 4 very simple process to have the blood collected for HDL.

3 : 2 4 P M 5 Q. What, if anything, were you told about making up your own
3 : 2 4 P M 6 sales materials? Were you supposed to do that?

3 : 2 4 P M 7 A. Told we were -- we could never do that.

3 : 2 4 P M 8 Q. Were you told why?

3 : 2 4 P M 9 A. I don't remember why, but I know from pharmaceutical days
3 : 2 4 P M 10 it was always so that everything was consistent and
3 : 2 4 P M 11 standardized.

3 : 2 4 P M 12 Q. Did you receive specific training at BlueWave on
3 : 2 4 P M 13 compliance?

3 : 2 4 P M 14 A. Yes, sir.

3 : 2 4 P M 15 Q. Did you have to take a test on compliance?

3 : 2 4 P M 16 A. Yes, sir.

3 : 2 4 P M 17 Q. What, if anything, were you instructed about emphasizing
3 : 2 4 P M 18 the financial aspects of this testing at all, aside from P&H
3 : 2 4 P M 19 fees?

3 : 2 4 P M 20 A. I don't ever -- I wouldn't know how there would be a
3 : 2 4 P M 21 financial aspect to it outside of the P&H fee.

3 : 2 4 P M 22 Q. Were you successful in selling these tests?

3 : 2 4 P M 23 A. Not in the beginning, but I made up for it in the end.

3 : 2 5 P M 24 Q. Okay.

3 : 2 5 P M 25 A. I did well towards the end.

3 : 2 5 P M 1 Q. Did you sell for Singulex as well?

3 : 2 5 P M 2 A. I did.

3 : 2 5 P M 3 Q. Did you emphasize to doctors that they could get extra
3 : 2 5 P M 4 process and handling fees by ordering both HDL tests and
3 : 2 5 P M 5 Singulex tests together?

3 : 2 5 P M 6 A. No, sir. I sold on tests that were available through
3 : 2 5 P M 7 Singulex that you couldn't get through HDL.

3 : 2 5 P M 8 Q. How many of your customers did order typically both HDL
3 : 2 5 P M 9 and Singulex tests?

3 : 2 5 P M 10 A. I wasn't very good at it, so I would say probably
3 : 2 5 P M 11 10 percent. Not many.

3 : 2 5 P M 12 Q. Can you remember it ever coming up in your visits to
3 : 2 5 P M 13 doctors about whether you could get processing and handling
3 : 2 5 P M 14 fees for doing both?

3 : 2 5 P M 15 A. I mean, I would assume it would be very similar to the HDL
3 : 2 5 P M 16 discussion. If a physician -- the few that decided to do the
3 : 2 5 P M 17 testing through Singulex, I would present the processing and
3 : 2 6 P M 18 handling agreement to the physician and say, "This is available
3 : 2 6 P M 19 to you if you choose to utilize it."

3 : 2 6 P M 20 Q. Did you believe that physicians that you dealt with
3 : 2 6 P M 21 considered process and handling fees an inducement to order
3 : 2 6 P M 22 tests?

3 : 2 6 P M 23 A. I did not.

3 : 2 6 P M 24 Q. Did you feel that you ever tried to affect a doctor's
3 : 2 6 P M 25 independent exercise of his professional judgment?

3 : 2 6 P M 1 A. Never.

3 : 2 6 P M 2 Q. Did you feel like you couldn't do that even if you wanted
3 : 2 6 P M 3 to?

3 : 2 6 P M 4 A. I didn't. I mean, from my medical training through the
3 : 2 6 P M 5 years, I was -- I was always the sales rep. The doctor was the
3 : 2 6 P M 6 doctor. It wasn't my place to tell him how to run his or her
3 : 2 6 P M 7 practice.

3 : 2 6 P M 8 Q. Did you know Emily Barron?

3 : 2 6 P M 9 A. I did.

3 : 2 6 P M 10 Q. Was there a time when she stopped working?

3 : 2 7 P M 11 A. Pretty hard for me to say that because I was so far away
3 : 2 7 P M 12 from her. That was the general consensus amongst people.

3 : 2 7 P M 13 I heard calls from her clients that they couldn't get
3 : 2 7 P M 14 in touch with her. So I would assume that, but it's kind of
3 : 2 7 P M 15 unfair for me to say that I knew she was working or not
3 : 2 7 P M 16 working.

3 : 2 7 P M 17 Q. Did she ever say anything to you that -- to the effect
3 : 2 7 P M 18 that she was not working because she was afraid that what she
3 : 2 7 P M 19 was doing was not legal?

3 : 2 7 P M 20 A. I never remember her saying that.

3 : 2 7 P M 21 Q. Do you remember any sales representatives for Bluewave
3 : 2 7 P M 22 saying that they thought what they were doing was illegal?

3 : 2 7 P M 23 A. I do not.

3 : 2 7 P M 24 Q. Did you ever think that what you were doing was illegal?

3 : 2 7 P M 25 A. I did not.

3 : 2 7 P M 1 Q. would you have done it if you believed that you were
3 : 2 7 P M 2 breaking the law?

3 : 2 7 P M 3 A. I would not have. It was hard for me to assume it was
3 : 2 7 P M 4 illegal when I had other competitor labs doing what I
3 : 2 7 P M 5 considered almost the same thing we were doing. So I had no
3 : 2 8 P M 6 reason -- I looked on -- to my right, to my left, and there
3 : 2 8 P M 7 were sales reps for other companies that were doing the same
3 : 2 8 P M 8 thing.

3 : 2 8 P M 9 Q. But what do you mean by "doing the same thing"?

3 : 2 8 P M 10 A. Selling these advanced biomarkers, offering a process and
3 : 2 8 P M 11 handling agreement.

3 : 2 8 P M 12 Q. What happened to your sales after processing and handling
3 : 2 8 P M 13 fees stopped?

3 : 2 8 P M 14 A. I would say they stayed pretty consistent. I might have
3 : 2 8 P M 15 lost one or two physicians, but I did not lose many.

3 : 2 8 P M 16 Q. And you're aware -- are you aware that there was a lot of
3 : 2 8 P M 17 adverse publicity about Bluewave and HDL in the wake of this
3 : 2 8 P M 18 investigation?

3 : 2 8 P M 19 A. Yes, sir.

3 : 2 8 P M 20 Q. And you went to work for True Health?

3 : 2 8 P M 21 A. Yes, sir.

3 : 2 8 P M 22 Q. Do you still find that, even with all the publicity, there
3 : 2 8 P M 23 is a demand for these advanced lipid tests?

3 : 2 8 P M 24 A. Yes, sir. I sign up new clients still to this day.

3 : 2 9 P M 25 Q. About what percent of your book of business is former HDL

3 : 2 9 P M 1 clients?

3 : 2 9 P M 2 A. Probably 70 percent.

3 : 2 9 P M 3 Q. In the -- if someone told you that Brad Johnson and Cal
3 : 2 9 P M 4 Dent would -- would prefer that you bend the law or come up to
3 : 2 9 P M 5 the edge of the law or skirt the law in some way, would you
3 : 2 9 P M 6 agree with that or disagree with that?

3 : 2 9 P M 7 A. Can you repeat the question, please.

3 : 2 9 P M 8 Q. Yeah. If someone suggested to you that these two folks
3 : 2 9 P M 9 over here, Brad Johnson and Cal Dent, encouraged their sales
3 : 2 9 P M 10 reps to either break the law or come close to breaking the law
3 : 2 9 P M 11 or push the law or skirt the law, would you agree with that or
3 : 2 9 P M 12 disagree with that?

3 : 2 9 P M 13 A. I would disagree. I'd say the total opposite. Every
3 : 3 0 P M 14 conference call we had was -- on compliance was in regards to
3 : 3 0 P M 15 remaining compliant.

3 : 3 0 P M 16 MR. COOKE: That's all I have. Thank you.

3 : 3 0 P M 17 THE COURT: Thank you very much.

3 : 3 0 P M 18 Cross-examination by the government, Mr.
3 : 3 0 P M 19 Terranova.

3 : 3 0 P M 20 CROSS-EXAMINATION

3 : 3 0 P M 21 BY MR. TERRANOVA:

3 : 3 0 P M 22 Q. Mr. Carrier, is it fair to say you were not among the
3 : 3 0 P M 23 top-selling sales representatives at BlueWave?

3 : 3 0 P M 24 A. That's correct.

3 : 3 0 P M 25 MR. TERRANOVA: Mr. Phaneuf, could you please put on

3 : 3 0 P M 1 the screen Plaintiffs' Demonstrative 10.

3 : 3 0 P M 2 **BY MR. TERRANOVA:**

3 : 3 0 P M 3 Q. This is a slide that United States' forensic expert --
3 : 3 0 P M 4 forensic accounting expert prepared regarding the commissions
3 : 3 0 P M 5 that Bluewave paid to its sales representatives.

3 : 3 0 P M 6 Mr. Carrier, you're aware that you weren't among the
3 : 3 1 P M 7 top five Bluewave sales representatives in commissions, which
3 : 3 1 P M 8 included Kyle Martel and Emily Barron?

3 : 3 1 P M 9 A. Yes, sir.

3 : 3 1 P M 10 Q. You're also aware that you weren't among the top 10
3 : 3 1 P M 11 Bluewave sales representatives in commissions earned, which
3 : 3 1 P M 12 includes Boomer Cornwell and Chad Sloat?

3 : 3 1 P M 13 A. If that's accurate, I would agree with that.

3 : 3 1 P M 14 Q. You're also aware you weren't among the top 15 Bluewave
3 : 3 1 P M 15 sales representatives in commissions earned, which includes
3 : 3 1 P M 16 Shane Marquess?

3 : 3 1 P M 17 A. Correct.

3 : 3 1 P M 18 Q. Is it fair to say you're good friends with defendant
3 : 3 1 P M 19 Johnson?

3 : 3 1 P M 20 A. That would be correct.

3 : 3 1 P M 21 Q. You work with him on a number of business ventures?

3 : 3 1 P M 22 A. Yes, sir.

3 : 3 1 P M 23 Q. Even after HDL stopped paying process and handling fees
3 : 3 1 P M 24 and went bankrupt, you kept working with defendant Johnson?

3 : 3 2 P M 25 A. I don't know the time line of bankruptcy versus it going

3 : 3 2 P M 1 away, but -- yes, I would say yes.

3 : 3 2 P M 2 Q. For example, you worked for Royal Blue?

3 : 3 2 P M 3 A. Yes, sir.

3 : 3 2 P M 4 Q. And Royal Blue does business with Eagle Pharmacy?

3 : 3 2 P M 5 A. Yes, sir.

3 : 3 2 P M 6 Q. And both Royal Blue and Eagle Pharmacy are defendant
3 : 3 2 P M 7 Johnson's companies?

3 : 3 2 P M 8 A. Yes, sir.

3 : 3 2 P M 9 Q. Defendant Johnson paid you through those companies after
3 : 3 2 P M 10 you left Bluewave?

3 : 3 2 P M 11 A. Yes, sir.

3 : 3 2 P M 12 Q. He paid you commissions?

3 : 3 2 P M 13 A. Yes, sir, to my company, not to me.

3 : 3 2 P M 14 Q. Your company is listed here on Plaintiffs'
3 : 3 2 P M 15 Demonstrative 10, MRT Health Consultants Inc.?

3 : 3 2 P M 16 A. Yes, sir.

3 : 3 2 P M 17 Q. You've spoken with defendant Johnson about this case?

3 : 3 3 P M 18 A. I have not.

3 : 3 3 P M 19 Q. You've spoken with defendant Johnson in preparation for
3 : 3 3 P M 20 submitting an affidavit that you signed in this case?

3 : 3 3 P M 21 A. I'm not sure what you're asking, sir.

3 : 3 3 P M 22 Q. Do you recall signing an affidavit that was submitted to
3 : 3 3 P M 23 this court signed by yourself July 21st, 2017?

3 : 3 3 P M 24 A. I don't remember it. But, I mean, once again, this is my
3 : 3 3 P M 25 first time in a court. So, I mean, I guess, if it's there,

3 : 3 3 P M 1 it's my signature.

3 : 3 3 P M 2 Q. And I will get to that document.

3 : 3 3 P M 3 I want to turn to this -- the story that you told
3 : 3 3 P M 4 about the visit where you told the physician, if you order 10
3 : 3 4 P M 5 tests -- order tests for 10 patients, it's \$17 process and
3 : 3 4 P M 6 handling fees, you'll make \$170; is that fair?

3 : 3 4 P M 7 A. That's fair.

3 : 3 4 P M 8 Q. Okay. And you now know that such a sales pitch to a
3 : 3 4 P M 9 doctor is wrong?

3 : 3 4 P M 10 A. That's correct.

3 : 3 4 P M 11 Q. Why is it wrong?

3 : 3 4 P M 12 A. Because we weren't in the job of creating revenue for
3 : 3 4 P M 13 physicians. We were selling better clinical testing.

3 : 3 4 P M 14 Q. So if you go to a physician and tell them how much money
3 : 3 4 P M 15 they could make by ordering a certain number of tests, you're
3 : 3 4 P M 16 not just doing math for the physician; is that fair?

3 : 3 4 P M 17 A. I only did it one time, so I would assume it was only
3 : 3 4 P M 18 doing math.

3 : 3 4 P M 19 Q. Because physicians generally can do their own math; right?

3 : 3 4 P M 20 A. Uh-huh.

3 : 3 4 P M 21 Q. Is that fair?

3 : 3 4 P M 22 A. That's fair.

3 : 3 5 P M 23 Q. Okay. So in a sales pitch, when you're doing the math for
3 : 3 5 P M 24 the physician, the reason you're doing that is to make sure
3 : 3 5 P M 25 that physician understands exactly how much money they can make

3 : 3 5 P M 1 if they order your client's products; is that fair?

3 : 3 5 P M 2 A. The one time I did it, I would assume that's what I was
3 : 3 5 P M 3 doing.

3 : 3 5 P M 4 Q. You were trained by defendant Johnson?

3 : 3 5 P M 5 A. Yes, sir.

3 : 3 5 P M 6 Q. You would follow his advice?

3 : 3 5 P M 7 A. Yes, sir.

3 : 3 5 P M 8 Q. And he advised you at times about selling Singulex tests?

3 : 3 5 P M 9 A. Yes, sir.

3 : 3 5 P M 10 Q. Told you to be sure and sell Singulex tests?

3 : 3 5 P M 11 A. Yes, sir.

3 : 3 5 P M 12 Q. He also advised you about HDL tests?

3 : 3 6 P M 13 A. Yes, sir.

3 : 3 6 P M 14 Q. He advised you to be sure that all of your accounts have
3 : 3 6 P M 15 CYP2C19 on their panel?

3 : 3 6 P M 16 A. He never advised me of that.

3 : 3 6 P M 17 Q. And you know what CYP2C19 is; right?

3 : 3 6 P M 18 A. I do.

3 : 3 6 P M 19 Q. It's a test that looks at an enzyme for processing Plavix,
3 : 3 6 P M 20 an anti-coagulant drug; is that fair?

3 : 3 6 P M 21 A. Yes, sir.

3 : 3 6 P M 22 Q. And you know that not all of the patients that doctors see
3 : 3 6 P M 23 in a primary care setting need the CYP2C19 test?

3 : 3 6 P M 24 A. Correct.

3 : 3 6 P M 25 Q. But defendant Johnson nevertheless sent you a note saying

3 : 3 6 P M 1 be sure that all of your accounts have the CYP2C19 test in the
3 : 3 7 P M 2 panel?

3 : 3 7 P M 3 A. I never remember seeing that note, sir.

3 : 3 7 P M 4 Q. Mr. Carrier, what was your email address at Bluewave?

3 : 3 7 P M 5 A. Kcarrier@bluewavehealth.com.

3 : 3 7 P M 6 MR. TERRANOVA: May I approach, Your Honor?

3 : 3 7 P M 7 THE COURT: You may.

3 : 3 7 P M 8 BY MR. TERRANOVA:

3 : 3 7 P M 9 Q. Mr. Carrier, let me just start with the top of this
3 : 3 7 P M 10 document, which is Plaintiffs' Exhibit 1204.

3 : 3 7 P M 11 Do you see that the subject of Exhibit 1204 is Notes
3 : 3 8 P M 12 from Brad?

3 : 3 8 P M 13 A. Yes.

3 : 3 8 P M 14 Q. Do you see that you were one of the recipients of this
3 : 3 8 P M 15 email, kcarrier@bluewavehealth.com?

3 : 3 8 P M 16 A. Yes, sir.

3 : 3 8 P M 17 Q. And that's you?

3 : 3 8 P M 18 A. Yes, sir.

3 : 3 8 P M 19 Q. Do you see that it was sent by Sandra Tankersley at
3 : 3 8 P M 20 Bluewave? At the very top, do you see that, Mr. Carrier?

3 : 3 8 P M 21 A. I do. But, honestly, sir, this date is 2010. And I
3 : 3 8 P M 22 formally signed a contract in 2012. I tried to sell some in
3 : 3 8 P M 23 the beginning. That might be why I've never seen this before
3 : 3 8 P M 24 other than --

3 : 3 8 P M 25 Q. Okay.

3 : 3 8 P M 1 A. And also the time. But if my name is on there, I see what
3 : 3 8 P M 2 you're saying.

3 : 3 9 P M 3 Q. You were receiving emails from Bluewave in 2010?

3 : 3 9 P M 4 A. I assume I -- I don't know -- I don't remember. It's so
3 : 3 9 P M 5 long ago.

3 : 3 9 P M 6 Q. And you were trying to sell tests for BlueWave in 2010?

3 : 3 9 P M 7 A. Yeah.

3 : 3 9 P M 8 Q. Let's get to this document.

3 : 3 9 P M 9 MR. TERRANOVA: Your Honor, I'd offer Plaintiffs'
3 : 3 9 P M 10 Exhibit 1204 into evidence.

3 : 3 9 P M 11 THE COURT: Any objection?

3 : 3 9 P M 12 MR. COOKE: No objection.

3 : 3 9 P M 13 MR. ASHMORE: No objection.

3 : 3 9 P M 14 THE COURT: Plaintiffs' 1204 admitted without
3 : 3 9 P M 15 objection.

3 : 3 9 P M 16 MR. TERRANOVA: Mr. Phaneuf, could you please focus
3 : 3 9 P M 17 on paragraph 4 of the email. Actually, before we get there,
3 : 3 9 P M 18 let's just look at the subject and the first sentence of the
3 : 3 9 P M 19 email.

3 : 3 9 P M 20 BY MR. TERRANOVA:

3 : 3 9 P M 21 Q. Do you see that the first sentence of the email is
3 : 3 9 P M 22 "Message from Brad"?

3 : 3 9 P M 23 A. Yes.

3 : 4 0 P M 24 Q. If we go down to the fourth paragraph of the email, it
3 : 4 0 P M 25 states, "Be sure that all of your accounts have CYP2C19 on

3 : 4 0 P M 1 their HDL panels."

3 : 4 0 P M 2 Did I read that correctly?

3 : 4 0 P M 3 A. That's how I read it.

3 : 4 0 P M 4 MR. TERRANOVA: No further questions.

3 : 4 0 P M 5 THE COURT: Mr. Ashmore?

3 : 4 0 P M 6 MR. ASHMORE: No questions, Your Honor.

3 : 4 0 P M 7 THE COURT: Very good.

3 : 4 0 P M 8 Any on redirect?

3 : 4 0 P M 9 MR. COOKE: Just briefly.

3 : 4 0 P M 10 REDIRECT EXAMINATION

3 : 4 0 P M 11 BY MR. COOKE:

3 : 4 0 P M 12 Q. That last exhibit that we looked at, did you interpret
3 : 4 0 P M 13 this to somehow be telling yourself and the other sales reps
3 : 4 0 P M 14 that they need to force the doctors to order the CYP2C19 test?

3 : 4 0 P M 15 A. In all honesty, I don't remember seeing this email. So
3 : 4 0 P M 16 it's hard for me to comment on it, but I will say it wasn't my
3 : 4 1 P M 17 job to tell a doctor what test to order or not order. I'm not
3 : 4 1 P M 18 the doctor.

3 : 4 1 P M 19 I presented the biomarkers that were on a case study.
3 : 4 1 P M 20 And at the end of the day, the doctor is the doctor. It's not
3 : 4 1 P M 21 my job to tell him what tests to order or not order.

3 : 4 1 P M 22 It could be CYP2C19. It could be any other test. I
3 : 4 1 P M 23 wouldn't -- I wouldn't tell them to order a test.

3 : 4 1 P M 24 Q. Well, where it says, "Be sure that all of your accounts
3 : 4 1 P M 25 have CYP2C19 on their HDL panels," does that mean to make sure

3 : 4 1 P M 1 that that test is made available to the doctors?

3 : 4 1 P M 2 A. It's unfair for me to tell what it means because I don't
3 : 4 1 P M 3 remember the email. I mean, if I had glanced at it the first
3 : 4 1 P M 4 time, it would be to make sure it's available to be ordered if
3 : 4 1 P M 5 deemed necessary.

3 : 4 1 P M 6 MR. COOKE: Thank you. That's all.

3 : 4 1 P M 7 THE COURT: Thank you, sir. You may step down.

3 : 4 1 P M 8 THE WITNESS: Leave these here?

3 : 4 1 P M 9 THE COURT: Yes, sir. Leave them there.

3 : 4 1 P M 10 THE WITNESS: Thank you.

3 : 4 2 P M 11 THE COURT: Thank you, sir.

3 : 4 2 P M 12 (Witness excused.)

3 : 4 2 P M 13 THE COURT: Call your next witness.

3 : 4 2 P M 14 MR. LEVENTIS: Your Honor, do you mind if I just go
3 : 4 2 P M 15 grab that off the witness stand?

3 : 4 2 P M 16 THE COURT: Yes, go right ahead.

3 : 4 2 P M 17 THE DEPUTY CLERK: Please come forward to be sworn.
3 : 4 2 P M 18 Please place your left hand on the Bible and raise your right.
3 : 4 2 P M 19 State your full name for the record.

3 : 4 2 P M 20 THE WITNESS: Erika Guest.

3 : 4 2 P M 21 THE DEPUTY CLERK: Guest. Could you spell your last
3 : 4 2 P M 22 name for the record?

3 : 4 2 P M 23 THE WITNESS: G-u-e-s-t.

3 : 4 2 P M 24 (Witness sworn.)

3 : 4 2 P M 25 THE DEPUTY CLERK: You may be seated, right up around

3 : 4 3 P M 1 there. There's a step right there. Be careful.

3 : 4 3 P M 2 **THE WITNESS:** Thank you.

3 : 4 3 P M 3 **ERIKA GUEST,**

3 : 4 3 P M 4 a witness called on behalf of the defendants, being first duly
1 1 : 0 3 A M 5 sworn, was examined and testified as follows:

1 1 : 0 3 A M 6 **DIRECT EXAMINATION**

3 : 4 3 P M 7 **BY MR. GRIFFITH:**

3 : 4 3 P M 8 **Q.** Good afternoon, Ms. Guest.

3 : 4 3 P M 9 **A.** Good afternoon.

3 : 4 3 P M 10 **Q.** My name is Joe Griffith. I represent Cal Dent, Brad
3 : 4 3 P M 11 Johnson, and BlueWave. Thank you for coming.

3 : 4 3 P M 12 Can you state your name for the record?

3 : 4 3 P M 13 **A.** Erika Guest, G-u-e-s-t.

3 : 4 3 P M 14 **Q.** And where are you from?

3 : 4 3 P M 15 **A.** Illinois, Chicago area.

3 : 4 3 P M 16 **Q.** Okay. And can you give a brief summary of your
3 : 4 3 P M 17 educational background.

3 : 4 3 P M 18 **A.** Education, I attended University of Illinois with a BS in
3 : 4 3 P M 19 marketing, had some master's education in sports marketing.
3 : 4 4 P M 20 And beyond that, any training, education would be with my
3 : 4 4 P M 21 career path, wherever that's taken me, be it medical or real
3 : 4 4 P M 22 estate.

3 : 4 4 P M 23 **Q.** Okay. And so give me a brief summary of your employment
3 : 4 4 P M 24 background.

3 : 4 4 P M 25 **A.** My employment, I will take you over the past 10 years, if

3 : 4 4 P M 1 that's okay.

3 : 4 4 P M 2 Q. Okay.

3 : 4 4 P M 3 A. I have worked at Abbott Laboratories selling
3 : 4 4 P M 4 cardiovascular pharmaceutical products. I worked at
3 : 4 4 P M 5 Atherotech, which is a cardiovascular biomarker lab; a very,
3 : 4 4 P M 6 very short time at Tethys, which was a startup -- or I'm sorry,
3 : 4 4 P M 7 prediabetes marker lab; and then with my company representing
3 : 4 4 P M 8 Health Diagnostic Laboratories, cardiovascular lab testing,
3 : 4 5 P M 9 prediabetes lab testing; and then True Health Diagnostics most
3 : 4 5 P M 10 recently.

3 : 4 5 P M 11 Q. Okay. And so have you received compliance training in the
3 : 4 5 P M 12 various -- over these last 10 years -- most of these companies
3 : 4 5 P M 13 are health care related; is that correct?

3 : 4 5 P M 14 A. Yes, yes.

3 : 4 5 P M 15 Q. Okay. Have you received compliance training at each one
3 : 4 5 P M 16 of these companies?

3 : 4 5 P M 17 A. Yes.

3 : 4 5 P M 18 Q. And when you say "compliance training," generally are you
3 : 4 5 P M 19 meaning compliance with health care laws?

3 : 4 5 P M 20 A. That would be included in each of the company's compliance
3 : 4 5 P M 21 trainings, yes.

3 : 4 5 P M 22 Q. In addition to whatever the company policies and
3 : 4 5 P M 23 procedures are?

3 : 4 5 P M 24 A. Yes.

3 : 4 5 P M 25 Q. Okay. And so has the compliance training that you've

3 : 4 5 P M 1 received at these various companies included information
3 : 4 6 P M 2 regarding the Anti-Kickback Statute?

3 : 4 6 P M 3 A. Yes.

3 : 4 6 P M 4 Q. Okay. And the Stark Law?

3 : 4 6 P M 5 A. Yes.

3 : 4 6 P M 6 Q. How about the False Claims Act?

3 : 4 6 P M 7 A. Yes.

3 : 4 6 P M 8 Q. Okay. And so were you -- as you went along through your
3 : 4 6 P M 9 career, were you sensitive to being compliant with the
3 : 4 6 P M 10 Anti-Kickback Statute and the Stark laws and not violating the
3 : 4 6 P M 11 False Claims Act?

3 : 4 6 P M 12 A. Absolutely.

3 : 4 6 P M 13 Q. Okay. Now, you said that you worked at Atherotech;
3 : 4 6 P M 14 correct?

3 : 4 6 P M 15 A. Yes, Atherotech.

3 : 4 6 P M 16 Q. Atherotech.

3 : 4 6 P M 17 And that was a cardiovascular-type lab?

3 : 4 6 P M 18 A. Yes, yes.

3 : 4 6 P M 19 Q. When you say that, do they -- did Atherotech offer lab
3 : 4 6 P M 20 tests similar to what HDL offered?

3 : 4 6 P M 21 A. They had most of the testing that HDL provided, not
3 : 4 7 P M 22 absolutely everything but -- but most -- or let's say
3 : 4 7 P M 23 three-quarters of the testing available with HDL.

3 : 4 7 P M 24 Q. Okay. And what about -- you said Tethys?

3 : 4 7 P M 25 A. Yes.

3 : 4 7 P M 1 Q. And that was a lab as well?

3 : 4 7 P M 2 A. Yes.

3 : 4 7 P M 3 Q. And what type of lab tests did they market?

3 : 4 7 P M 4 A. It was a prediabetes biomarker lab.

3 : 4 7 P M 5 Q. And with respect to Atherotech, did they offer P&H fee
3 : 4 7 P M 6 reimbursements?

3 : 4 7 P M 7 A. Yes, they did.

3 : 4 7 P M 8 Q. And with respect to Tethys, did they offer P&H
3 : 4 7 P M 9 reimbursements to doctors?

3 : 4 7 P M 10 A. I believe that they did. I don't recall the amount at
3 : 4 7 P M 11 Tethys, but yes.

3 : 4 7 P M 12 Q. Okay. Do you recall the amount at Atherotech?

3 : 4 7 P M 13 A. Yes. That was \$13 for process and handling.

3 : 4 7 P M 14 Q. And do you recall how many tubes that they had?

3 : 4 7 P M 15 A. My recollection is two.

3 : 4 8 P M 16 Q. Now, approximately when did you enter into a relationship
3 : 4 8 P M 17 with Bluewave?

3 : 4 8 P M 18 A. In 2011.

3 : 4 8 P M 19 Q. Okay. And what was your territory?

3 : 4 8 P M 20 A. The Illinois market.

3 : 4 8 P M 21 Q. Did you have that territory -- did you share that
3 : 4 8 P M 22 territory with anybody else?

3 : 4 8 P M 23 A. No, I was responsible for the Illinois geography.

3 : 4 8 P M 24 Q. Okay. And did you enter into an independent contractor
3 : 4 8 P M 25 sales agreement with Bluewave?

3 : 4 8 P M 1 A. My company did.

3 : 4 8 P M 2 Q. Okay. Did you -- did you have an attorney review the
3 : 4 8 P M 3 contract?

3 : 4 8 P M 4 A. I did not.

3 : 4 8 P M 5 Q. Did you have any reason to believe that there was anything
3 : 4 8 P M 6 amiss or illegal about the contract?

3 : 4 8 P M 7 A. No.

3 : 4 8 P M 8 Q. Had -- do you have any experience in the medical field
3 : 4 9 P M 9 where commission arrangements are set between the company and
3 : 4 9 P M 10 the salesman on an independent contractor basis?

3 : 4 9 P M 11 A. Are you asking if I've heard of that from -- in other
3 : 4 9 P M 12 areas --

3 : 4 9 P M 13 Q. Right.

3 : 4 9 P M 14 A. -- other than this arrangement? Is that your question?

3 : 4 9 P M 15 Q. Yes, please.

3 : 4 9 P M 16 A. Okay. Yes, I've absolutely heard of -- medical device
3 : 4 9 P M 17 companies will enter independent contract agreements.
3 : 4 9 P M 18 Different products in the market may use 1099 representatives.

3 : 4 9 P M 19 Q. Okay. So when you joined the Bluewave marketing group,
3 : 4 9 P M 20 did you receive any training?

3 : 4 9 P M 21 A. Yes.

3 : 4 9 P M 22 Q. Okay. And what did the training entail?

3 : 4 9 P M 23 A. Well, we -- initially, I rode with a representative who
3 : 5 0 P M 24 was trying to open the Illinois market. Turns out he didn't
3 : 5 0 P M 25 have the Illinois market. So then very quickly I was connected

3 : 5 0 P M 1 with Brad Johnson.

3 : 5 0 P M 2 Brad came into my geography, and I think we were
3 : 5 0 P M 3 together two or three days. And he went on sales calls with me
3 : 5 0 P M 4 and just ensured that the messaging that we should be using was
3 : 5 0 P M 5 what was happening. We would go over lab results with the
3 : 5 0 P M 6 physicians, and that was kind of in-person training.

3 : 5 0 P M 7 Additionally, we would have sales calls via
3 : 5 0 P M 8 conference call at different points where we would go over, if
3 : 5 0 P M 9 there were new testing, compliance issues, different consistent
3 : 5 0 P M 10 trainings that would happen. I don't know how often they were,
3 : 5 0 P M 11 but we would have those sales calls as needed.

3 : 5 1 P M 12 Q. Okay. And did Bluewave have any compliance -- written
3 : 5 1 P M 13 compliance policies?

3 : 5 1 P M 14 A. Yes.

3 : 5 1 P M 15 Q. Okay. And did they set forth a requirement that you
3 : 5 1 P M 16 comply with all laws?

3 : 5 1 P M 17 A. Yes.

3 : 5 1 P M 18 Q. Now, when you said that you went on a -- basically a
3 : 5 1 P M 19 ride-along or Brad rode along with you; correct?

3 : 5 1 P M 20 A. Uh-huh. Yes.

3 : 5 1 P M 21 Q. And what did Brad explain to you as to what the proper
3 : 5 1 P M 22 method or approach to marketing the lab tests were?

3 : 5 1 P M 23 A. Well, the lab test is many pages. I'm not sure if
3 : 5 1 P M 24 everyone has seen it, but he went through the entire lab result
3 : 5 1 P M 25 with the physician with me there, each of the different

3 : 5 2 P M 1 biomarkers, the significance of that, what that means to
3 : 5 2 P M 2 patients. You know, 50 percent of the time that someone dies
3 : 5 2 P M 3 of a heart attack or a stroke, their cholesterol is normal.
3 : 5 2 P M 4 And so making sure that the physician has understanding of why
3 : 5 2 P M 5 they would order additional testing beyond a basic lipid panel
3 : 5 2 P M 6 is something that we would go over, making sure they had an
3 : 5 2 P M 7 understanding of each of the different biomarkers and what --
3 : 5 2 P M 8 what that means to their patient population. I mean, that's
3 : 5 2 P M 9 the majority of what the call with the physician would be.

3 : 5 2 P M 10 we would have to also educate the physician on how to
3 : 5 2 P M 11 draw the blood, what needs to happen to get a stable specimen
3 : 5 2 P M 12 to the lab so that the results were not compromised and they
3 : 5 2 P M 13 were accurate results. We would discuss the clinical health
3 : 5 2 P M 14 consultants that could help patients with understanding their
3 : 5 3 P M 15 results and how to make actual changes in their dietary and
3 : 5 3 P M 16 exercise routines to help comply and improve their health.

3 : 5 3 P M 17 So, I mean, those are the major things that were
3 : 5 3 P M 18 discussed on the sales calls.

3 : 5 3 P M 19 Q. Okay. Well, I notice you didn't even mention P&H fees.
3 : 5 3 P M 20 Did P&H fees ever come up?

3 : 5 3 P M 21 A. If a physician would ask about, "How do I get the blood
3 : 5 3 P M 22 there? Oh, I have to have someone do this? This is my office
3 : 5 3 P M 23 staff's time," you know, then perhaps process -- then, yes,
3 : 5 3 P M 24 process and handling would be discussed.

3 : 5 3 P M 25 Q. Okay. Well, what were the options that -- physicians that

3 : 5 3 P M 1 you were going to see, what were their options generally in
3 : 5 3 P M 2 getting the blood from their office to the lab?

3 : 5 3 P M 3 A. well, they could have an MA draw the blood. They could
3 : 5 4 P M 4 potentially draw the blood themselves. I did have a couple of
3 : 5 4 P M 5 physicians that did that. They could utilize a mobile
3 : 5 4 P M 6 phlebotomist. They could send it to a lab or there may have
3 : 5 4 P M 7 been a lab agreement where the -- where HDL had a lab agreement
3 : 5 4 P M 8 that that lab could draw for HDL and send the blood out. So
3 : 5 4 P M 9 those are basically the options.

3 : 5 4 P M 10 Q. Did you know about how much the lab-to-lab agreements
3 : 5 4 P M 11 were --

3 : 5 4 P M 12 A. I don't --

3 : 5 4 P M 13 Q. -- per draw?

3 : 5 4 P M 14 A. I don't recall. I don't recall.

3 : 5 4 P M 15 Q. Okay. What about the cost of a -- did you say traveling
3 : 5 4 P M 16 phlebotomist or --

3 : 5 4 P M 17 A. Right. I don't recall if they were -- I don't recall the
3 : 5 4 P M 18 amount.

3 : 5 4 P M 19 Q. Now, did you -- did you work to study the research and the
3 : 5 4 P M 20 clinical efficacy of the tests at HDL?

3 : 5 5 P M 21 A. Did I work to study?

3 : 5 5 P M 22 Q. well, did you study the research that was involved in HDL
3 : 5 5 P M 23 lab tests that were being offered?

3 : 5 5 P M 24 A. Did I study the biomarkers, make sure I understood them?

3 : 5 5 P M 25 Q. Correct.

3 : 5 5 P M 1 A. Again, I worked at Atherotech prior to coming to Health
3 : 5 5 P M 2 Diagnostic Labs, so a lot of training I'd had there, so I was
3 : 5 5 P M 3 very familiar with the biomarkers. And then, yes,
3 : 5 5 P M 4 additionally, when I came to HDL, we had a -- I don't know. If
3 : 5 5 P M 5 I have to guess, 2- to 300-page manual that I pored over. Also
3 : 5 5 P M 6 I've discussed the biomarkers with other reps. We had a
3 : 5 5 P M 7 clinical pocket guide that had all the information.

3 : 5 5 P M 8 I mean, these are detailed biomarkers that you have
3 : 5 5 P M 9 to have an understanding so that you can provide that
3 : 5 5 P M 10 information to a physician so that they can then provide it to
3 : 5 5 P M 11 their patients so that it's meaningful to that patient to make
3 : 5 6 P M 12 a life change. So, yes, I did.

3 : 5 6 P M 13 Q. Will -- generally, the physicians that you visited, were
3 : 5 6 P M 14 they familiar with the biomarkers to the extent of your
3 : 5 6 P M 15 knowledge?

3 : 5 6 P M 16 A. Were most of them? Not -- I would say some of the
3 : 5 6 P M 17 biomarkers, yes. That's a hard question to answer because some
3 : 5 6 P M 18 yes and some no.

3 : 5 6 P M 19 Q. Fair enough. The -- did you market at Bluewave for both
3 : 5 6 P M 20 HDL and Singulex?

3 : 5 6 P M 21 A. I did not, no. I just marketed for HDL.

3 : 5 6 P M 22 Q. Okay. Now, were you ever instructed by Brad or Cal to
3 : 5 7 P M 23 just go into an office and put \$20 on -- offer a doctor \$20 to
3 : 5 7 P M 24 order a lab test?

3 : 5 7 P M 25 A. No. Absolutely not.

3 : 5 7 P M 1 Q. Were you ever -- did you ever do any pro formas to show
3 : 5 7 P M 2 how much a doctor could supposedly make by doing a -- by
3 : 5 7 P M 3 ordering labs and getting P&H fees?

3 : 5 7 P M 4 A. No.

3 : 5 7 P M 5 Q. Did any of the doctors with whom you established
3 : 5 7 P M 6 relationships with relay to you their satisfaction with the lab
3 : 5 7 P M 7 tests that they were utilizing?

3 : 5 7 P M 8 A. Yeah, absolutely.

3 : 5 7 P M 9 Q. And what was typical? what was the typical reaction?

3 : 5 7 P M 10 A. "This has changed my practice. This has changed my
3 : 5 7 P M 11 conversations with my patients. This has allowed my patients
3 : 5 8 P M 12 to understand that they have an opportunity to regress and
3 : 5 8 P M 13 reverse their cardiovascular disease. They might not be on the
3 : 5 8 P M 14 path to a stroke anymore. They might be able to reverse their
3 : 5 8 P M 15 diabetes and not go down the path of mom or dad of having a leg
3 : 5 8 P M 16 removed because of their diabetes."

3 : 5 8 P M 17 Many stories.

3 : 5 8 P M 18 Q. Did the -- did many doctors feel like they were saving
3 : 5 8 P M 19 lives?

3 : 5 8 P M 20 A. Absolutely. They felt like they were able to practice
3 : 5 8 P M 21 medicine in a more rewarding and preventative way.

3 : 5 8 P M 22 Q. Did you believe in these lab tests?

3 : 5 8 P M 23 A. Did I?

3 : 5 8 P M 24 Q. Yes.

3 : 5 8 P M 25 A. Absolutely.

3 : 5 8 P M 1 Q. Okay. Now, was there a target physician or physician
3 : 5 8 P M 2 group that you were looking for?

3 : 5 8 P M 3 A. well, physicians that were able to take -- were able to
3 : 5 8 P M 4 and willing to take the time with their patients, yeah. I mean
3 : 5 9 P M 5 there are physicians out there that are not willing to take the
3 : 5 9 P M 6 time to go over these lab results with their patients. So I
3 : 5 9 P M 7 would target offices where they were willing to do that.

3 : 5 9 P M 8 Q. Okay. well, did you target physicians or physician
3 : 5 9 P M 9 practices who were money hungry?

3 : 5 9 P M 10 A. I wouldn't say that I looked for money-hungry physicians.

3 : 5 9 P M 11 Q. What -- to your knowledge, was it a -- was targeting
3 : 5 9 P M 12 money-hungry doctors a standard policy at BlueWave?

3 : 5 9 P M 13 A. A policy?

3 : 5 9 P M 14 Q. Yeah.

3 : 5 9 P M 15 A. No.

3 : 5 9 P M 16 Q. Okay. Now, you said that you -- I believe you said that
4 : 0 0 P M 17 you work at True Health; is that correct?

4 : 0 0 P M 18 A. Yes.

4 : 0 0 P M 19 Q. Okay. And, to your knowledge, is True Health a successor
4 : 0 0 P M 20 to the former lab HDL?

4 : 0 0 P M 21 A. You want to clarify what you're getting at?

4 : 0 0 P M 22 Q. well, is it your understanding that True Health bought the
4 : 0 0 P M 23 assets of HDL?

4 : 0 0 P M 24 A. Yes.

4 : 0 0 P M 25 Q. Okay. And so at True Health are you basically marketing

4 : 0 0 P M 1 all the tests that HDL had?

4 : 0 0 P M 2 A. True Health is marketing all of the tests that HDL had,
4 : 0 0 P M 3 yes.

4 : 0 0 P M 4 Q. well, how successful are you in marketing these same lab
4 : 0 0 P M 5 tests to physician practices?

4 : 0 0 P M 6 A. So I left True Health in October.

4 : 0 0 P M 7 Q. Okay.

4 : 0 0 P M 8 A. Up to that point, I spent about two years with True Health
4 : 0 0 P M 9 marketing the same tests. How successful am I? I have the
4 : 0 1 P M 10 same client base that I had when I was with Health Diagnostic
4 : 0 1 P M 11 Labs.

4 : 0 1 P M 12 Q. Was True Health paying P&H fees to the doctors?

4 : 0 1 P M 13 A. No.

4 : 0 1 P M 14 Q. Did you -- did you find that there was any difference in
4 : 0 1 P M 15 the patterns of doctors ordering lab tests at True Health as
4 : 0 1 P M 16 opposed to HDL?

4 : 0 1 P M 17 A. Any differences in the patterns?

4 : 0 1 P M 18 Q. Right. I mean, did the P&H in any way affect the pattern
4 : 0 1 P M 19 of lab test ordering that you saw?

4 : 0 1 P M 20 A. well, the process and handling stopped when I was still
4 : 0 1 P M 21 with Health Diagnostic Labs, so I -- that doesn't necessarily
4 : 0 1 P M 22 translate Health Diagnostic Labs to True Health, P&H, no P&H;
4 : 0 1 P M 23 but, no, I didn't see a change of pattern due to process and
4 : 0 1 P M 24 handling.

4 : 0 2 P M 25 Q. And when you were at -- were you at Bluewave when the June

4 : 0 2 P M 1 25th, 2014, special fraud alert came out?

4 : 0 2 P M 2 A. Yes, I was.

4 : 0 2 P M 3 Q. Okay. And so you were there at BlueWave in marketing for
4 HDL when HDL terminated its P&H fee payment program; correct?

4 : 0 2 P M 5 A. Yes.

4 : 0 2 P M 6 Q. How did that affect your -- your physician clients in
7 terms of their ordering patterns?

4 : 0 2 P M 8 A. Well, I took the time to call them and let them all know
4 : 0 2 P M 9 about what was going on and why and how did it change their
4 : 0 2 P M 10 ordering. But they used the tests for the reason that they can
4 : 0 2 P M 11 communicate better with their patients. So it didn't make that
4 : 0 3 P M 12 much of an impact.

4 : 0 3 P M 13 Q. One second.

4 : 0 3 P M 14 (Pause.)

4 : 0 3 P M 15 MR. GRIFFITH: No further questions, Ms. Guest.
4 : 0 3 P M 16 Other attorneys may have some questions for you.

4 : 0 3 P M 17 THE COURT: Thank you, sir. Mr. Terranova?

4 : 0 3 P M 18 CROSS-EXAMINATION

4 : 0 3 P M 19 BY MR. TERRANOVA:

4 : 0 3 P M 20 Q. Ms. Guest, fair to say that you were not one of the
4 : 0 3 P M 21 top-selling BlueWave sales representatives?

4 : 0 3 P M 22 A. Probably fair.

4 : 0 3 P M 23 MR. TERRANOVA: Mr. Phaneuf, could you please put up
4 : 0 3 P M 24 on the screen Plaintiffs' Demonstrative 10?

4 : 0 3 P M 25 BY MR. TERRANOVA:

4 : 0 3 P M 1 Q. This is a slide that the United States forensic accounting
4 : 0 3 P M 2 expert prepared regarding the commissions that Bluewave sales
4 : 0 3 P M 3 representatives received from Bluewave. Is it fair to say you
4 : 0 4 P M 4 were not one of the top 10 Bluewave sales representatives to
4 : 0 4 P M 5 receive commissions from Bluewave, which would include Kyle
4 : 0 4 P M 6 Martel, Charles Maimone, Emily Barron, Boomer Cornwell, and
4 : 0 4 P M 7 Chad Sloat?

4 : 0 4 P M 8 A. So, according to this document, commission scheme that you
4 : 0 4 P M 9 have placed up here, that's correct.

4 : 0 4 P M 10 Q. Are you aware of anything different that would suggest you
4 : 0 4 P M 11 were among the top 10 selling Bluewave sales reps?

4 : 0 4 P M 12 A. No. I just have never documented it out, so no.

4 : 0 4 P M 13 Q. And, in fact, you were number 20 on the list of all the
4 : 0 4 P M 14 Bluewave sales representatives who sold HDL tests?

4 : 0 4 P M 15 A. I'm going to take your word for it.

4 : 0 4 P M 16 Q. You know nothing that would suggest you were any higher
4 : 0 4 P M 17 than the 20th Bluewave sales representative as far as the
4 : 0 5 P M 18 number of HDL tests you've sold?

4 : 0 5 P M 19 A. I know nothing different.

4 : 0 5 P M 20 Q. Fair to say you're friends with Brad Johnson?

4 : 0 5 P M 21 A. I work for Brad Johnson. I respect Brad Johnson.

4 : 0 5 P M 22 Q. Fair to say you're friends with him?

4 : 0 5 P M 23 A. I don't know that we're friends; we're not not friends.

4 : 0 5 P M 24 Q. And after HDL stopped paying process and handling fees and
4 : 0 5 P M 25 went bankrupt, you continued to work with defendant Johnson?

4 : 0 5 P M 1 A. After HDL -- with -- can you clarify your question,
4 : 0 5 P M 2 please? I'm sorry.

4 : 0 5 P M 3 Q. Sure.

4 : 0 5 P M 4 Are you familiar with HDL stopping paying process and
4 : 0 5 P M 5 handling fees in June of 2014?

4 : 0 5 P M 6 A. Correct. Yes.

4 : 0 5 P M 7 Q. About six months later, HDL went bankrupt. You familiar
4 : 0 5 P M 8 with that?

4 : 0 5 P M 9 A. Okay. Correct. Yes.

4 : 0 5 P M 10 Q. You went to work for the successor, True Health?

4 : 0 5 P M 11 A. Yes. Correct.

4 : 0 5 P M 12 Q. But you kept working with defendant Johnson after HDL went
4 : 0 6 P M 13 bankrupt?

4 : 0 6 P M 14 A. Well, I went to work for True Health.

4 : 0 6 P M 15 Q. And you were working for other companies that defendant
4 : 0 6 P M 16 Johnson had; is that fair?

4 : 0 6 P M 17 A. So working for -- there is a small -- like, very small
4 : 0 6 P M 18 amount of business that I've done with one of his other
4 : 0 6 P M 19 companies.

4 : 0 6 P M 20 Q. Right.

4 : 0 6 P M 21 A. Very small, like \$15 a week or less.

4 : 0 6 P M 22 Q. So you worked for Royal Blue?

4 : 0 6 P M 23 A. Right. Yeah.

4 : 0 6 P M 24 Q. Okay. And Royal Blue was selling for Eagle Pharmacy?

4 : 0 6 P M 25 A. Right. Correct.

4 : 0 6 P M 1 Q. And are you aware that Royal Blue and Eagle Pharmacy are
4 : 0 6 P M 2 defendant Johnson's companies?

4 : 0 6 P M 3 A. As far as I know.

4 : 0 6 P M 4 Q. Royal Blue would pay you commissions on sales?

4 : 0 6 P M 5 A. As I said, like, \$15 a month.

4 : 0 6 P M 6 Q. And Eagle Pharmacy is a compounding pharmacy?

4 : 0 7 P M 7 A. Correct.

4 : 0 7 P M 8 Q. Sells things like testosterone creams?

4 : 0 7 P M 9 A. I have not sold testosterone creams, so I don't know if
4 : 0 7 P M 10 they are selling that or not.

4 : 0 7 P M 11 Q. You were trained by defendant Johnson at Bluewave?

4 : 0 7 P M 12 A. Correct.

4 : 0 7 P M 13 Q. You would follow his advice?

4 : 0 7 P M 14 A. I would follow his advice? Do you want to clarify?

4 : 0 7 P M 15 Q. When defendant Johnson would advise you about how to sell
4 : 0 7 P M 16 HDL tests, you would take that advice and follow it in your
4 : 0 7 P M 17 role as a BlueWave sales representative?

4 : 0 7 P M 18 A. Yes.

4 : 0 7 P M 19 Q. Did you ever go to a physician and tell them, "Doc, if you
4 : 0 7 P M 20 order X amount of tests at \$17 per patient, you'll be able to
4 : 0 7 P M 21 make -- and you do the math -- an amount of money"?

4 : 0 7 P M 22 A. No.

4 : 0 7 P M 23 Q. You knew that was wrong?

4 : 0 8 P M 24 A. I just -- as -- well, I don't know if you or -- I'm sure
4 : 0 8 P M 25 you were listening, but I sold based on the clinical utility of

4 : 0 8 P M 1 the test.

4 : 0 8 P M 2 Q. You knew that going into a physician's office and telling
4 : 0 8 P M 3 them how much money they could make by ordering HDL tests was
4 : 0 8 P M 4 wrong?

4 : 0 8 P M 5 A. Right. You -- I mean, you're not going to be selling
4 : 0 8 P M 6 based on an amount per test.

4 : 0 8 P M 7 Q. And defendant Johnson knew that going into a physician
4 : 0 8 P M 8 office, telling them how much money they could make by ordering
4 : 0 8 P M 9 HDL tests was wrong?

4 : 0 8 P M 10 A. I don't know. I'm not defendant Johnson, but I would
4 : 0 8 P M 11 assume --

4 : 0 8 P M 12 Q. Do you have reason to believe that --

4 : 0 8 P M 13 A. I would have reason to believe he knew that was wrong --

4 : 0 8 P M 14 Q. But --

4 : 0 8 P M 15 A. -- based on our training.

4 : 0 8 P M 16 Q. Sorry.

4 : 0 8 P M 17 A. Sorry. Based on our training, I would know that that
4 : 0 8 P M 18 would be wrong.

4 : 0 8 P M 19 Q. You would agree that defendant Johnson would know that
4 : 0 8 P M 20 going into a physician office and telling them how much money
4 : 0 9 P M 21 they could make in process and handling fees was wrong?

4 : 0 9 P M 22 A. So if you -- if you are asking, did that ever come up? Is
4 : 0 9 P M 23 that what you're asking?

4 : 0 9 P M 24 Q. I'm asking was it your belief, based on your interactions,
4 : 0 9 P M 25 communications with defendant Johnson, that he would know it's

4 : 0 9 P M 1 wrong to go into a physician office, tell them how much money
4 : 0 9 P M 2 they could make in process and handling fees if they ordered
4 : 0 9 P M 3 the HDL tests?

4 : 0 9 P M 4 A. In the manner you're discussing it? Yes.

4 : 0 9 P M 5 Q. And defendant Cal Dent would also know it's wrong to go
4 : 0 9 P M 6 into a physician office, tell them how much money they could
4 : 0 9 P M 7 make by ordering HDL tests?

4 : 0 9 P M 8 A. AS -- walking into the office and stating that first thing
4 : 0 9 P M 9 on a call, absolutely.

4 : 0 9 P M 10 Q. And even if you stated it the last thing, in closing, to a
4 : 1 0 P M 11 physician after explaining to them the tests that were offered,
4 : 1 0 P M 12 if you made such a presentation, saying, "Doctor, here's how
4 : 1 0 P M 13 much money -- if you order 10 tests a week, we'll give you \$17,
4 : 1 0 P M 14 that equals \$170 a week that you could make."

4 : 1 0 P M 15 That would be wrong; is that fair?

4 : 1 0 P M 16 A. I think we've answered the question.

4 : 1 0 P M 17 THE COURT: well, answer it again.

4 : 1 0 P M 18 THE WITNESS: Okay.

4 : 1 0 P M 19 So, again, you're -- if a physician is asking
4 : 1 0 P M 20 how -- "My -- my MA is going to draw this, I need to compensate
4 : 1 0 P M 21 her," and then walks through that in that context and the
4 : 1 0 P M 22 physician tells you that amount, they're thinking of it.
4 : 1 0 P M 23 That's okay.

4 : 1 0 P M 24 If you're using it as some way to incentivize
4 : 1 0 P M 25 the physician, then it's wrong. So that's what I'm trying to

4 : 1 1 P M 1 make clear.

4 : 1 1 P M 2 **BY MR. TERRANOVA:**

4 : 1 1 P M 3 Q. And you had mentioned that you worked with BlueWave
4 through a company known as EL Medical Consulting?

4 : 1 1 P M 5 A. That's correct.

4 : 1 1 P M 6 Q. You didn't come up with the idea to form a company to work
7 with BlueWave; did you?

4 : 1 1 P M 8 A. I didn't come up with the idea to form a company. I
9 wanted to have a company because I sold other things besides
10 Health Diagnostic Labs.

4 : 1 1 P M 11 Q. Defendant Johnson told you that you needed to form a
12 company to do business as an independent contractor with
13 BlueWave.

4 : 1 1 P M 14 A. So BlueWave was paying -- or was forming their
15 relationship with EL Medical Consulting, yes.

4 : 1 1 P M 16 Q. Among the training you've had with defendant Johnson, he
17 advised you about how to sell HDL tests.

4 : 1 2 P M 18 A. He did the training, yes.

4 : 1 2 P M 19 Q. And one of the things that BlueWave tracked was the
20 adoption rates for new tests that BlueWave was selling.

4 : 1 2 P M 21 A. Are you telling me that, or you're asking me that?

4 : 1 2 P M 22 Q. Is that a correct statement?

4 : 1 2 P M 23 A. Did we know when people were ordering new tests?

4 : 1 2 P M 24 Q. Let me step back.

4 : 1 2 P M 25 Do you recall hearing from BlueWave about the number

4 : 1 2 P M 1 or percentage of physicians who were adopting new tests that
4 : 1 2 P M 2 you were trying to sell?

4 : 1 2 P M 3 A. I don't recall that, no.

4 : 1 3 P M 4 Q. Do you recall hearing about new tests --

4 : 1 3 P M 5 A. Yes.

4 : 1 3 P M 6 Q. -- that HDL was offering and Bluewave was trying to sell
4 : 1 3 P M 7 to physicians?

4 : 1 3 P M 8 A. Yes.

4 : 1 3 P M 9 Q. Those new tests generally were unusual tests?

4 : 1 3 P M 10 A. I don't think they were unusual.

4 : 1 3 P M 11 Q. And those new tests generally offered a high amount of
4 : 1 3 P M 12 reimbursement compared to the older tests?

4 : 1 3 P M 13 A. I don't know.

4 : 1 3 P M 14 Q. And one of the things that you were told by Bluewave is to
4 : 1 3 P M 15 make a concerted effort to add those tests to your customer's
4 : 1 3 P M 16 panels.

4 : 1 3 P M 17 A. You're telling me. Are you asking me a question or --

4 : 1 3 P M 18 THE COURT: That's a question, yes, ma'am.

4 : 1 3 P M 19 THE WITNESS: Okay.

4 : 1 3 P M 20 So can you restate the question, please.

4 : 1 3 P M 21 BY MR. TERRANOVA:

4 : 1 3 P M 22 Q. Sure.

4 : 1 3 P M 23 You were told by Bluewave to make a concerted effort
4 : 1 3 P M 24 to add those new panels with the higher reimbursement to your
4 : 1 4 P M 25 customer's panel.

4 : 1 4 P M 1 A. I -- I would not state it that way. I would say that we
4 : 1 4 P M 2 had new tests with clinical utility to share with the
4 : 1 4 P M 3 physician. And if the physician wanted to order that test,
4 : 1 4 P M 4 then he was more than welcome to if he thought it was of
4 : 1 4 P M 5 clinical value to his patients.

4 : 1 4 P M 6 Q. You were specifically told that the reason it was
4 : 1 4 P M 7 important to add those new tests to your customers' panels was
4 : 1 4 P M 8 because those tests offered additional reimbursement of well
4 : 1 4 P M 9 over \$150.

4 : 1 4 P M 10 A. I don't recall that.

4 : 1 4 P M 11 Q. And one of those tests was known as the galectin-3? Are
4 : 1 4 P M 12 you familiar with that test?

4 : 1 4 P M 13 A. I do recall the galectin-3, yes.

4 : 1 4 P M 14 Q. Another of the tests was the omega-3?

4 : 1 4 P M 15 A. I remember omega-3, yes.

4 : 1 4 P M 16 Q. Another test was the sterol?

4 : 1 4 P M 17 A. Yes, all with clinical utility.

4 : 1 5 P M 18 MR. TERRANOVA: May I approach, Your Honor?

4 : 1 5 P M 19 THE COURT: You may.

4 : 1 5 P M 20 BY MR. TERRANOVA:

4 : 1 5 P M 21 Q. Ms. Guest, I've handed you what has been marked
4 : 1 5 P M 22 Plaintiffs' Exhibit 3031. I want to focus on that top portion
4 : 1 5 P M 23 of the email. Do you see this is an email from Sandra
4 : 1 5 P M 24 Tankersley at Bluewave?

4 : 1 5 P M 25 A. I do, yes.

4 : 1 5 P M 1 Q. And who is Sandra Tankersley?

4 : 1 5 P M 2 A. She was an assistant at Bluewave.

4 : 1 5 P M 3 Q. One of the assistants for defendant Johnson?

4 : 1 5 P M 4 A. Right.

4 : 1 5 P M 5 Q. And the email was sent to Erika Guest at Bluewave? Do you
4 : 1 6 P M 6 see that?

4 : 1 6 P M 7 A. Erika Guest, yes.

4 : 1 6 P M 8 Q. And that's yourself?

4 : 1 6 P M 9 A. Uh-huh.

4 : 1 6 P M 10 Q. And copied on the email are C. Dent at Bluewave Health?

4 : 1 6 P M 11 A. Yes.

4 : 1 6 P M 12 Q. And who is that?

4 : 1 6 P M 13 A. Cal Dent.

4 : 1 6 P M 14 Q. And also copied on the email is Brad Johnson, Bluewave?

4 : 1 6 P M 15 A. Right.

4 : 1 6 P M 16 MR. TERRANOVA: Your Honor, I offer Plaintiffs'
4 : 1 6 P M 17 Exhibit 3031.

4 : 1 6 P M 18 THE COURT: Is there an objection?

4 : 1 6 P M 19 MR. GRIFFITH: No objection.

4 : 1 6 P M 20 MR. ASHMORE: No objection.

4 : 1 6 P M 21 THE COURT: Plaintiffs' 3031 admitted without
4 : 1 6 P M 22 objection.

4 : 1 6 P M 23 BY MR. TERRANOVA:

4 : 1 6 P M 24 Q. The subject of this email is "adoption rates"?

4 : 1 6 P M 25 A. Yes. Yes.

4 : 1 6 P M 1 Q. And the first sentence of the email states, "Below are
4 : 1 6 P M 2 your percent adoptions for galectin-3, omega-3, omega-6 fatty
4 : 1 6 P M 3 acid profile, and sterols."

4 : 1 6 P M 4 Did I read that correctly?

4 : 1 6 P M 5 A. Yes.

4 : 1 7 P M 6 Q. The email then shows your adoption rates when you were
4 : 1 7 P M 7 telling BlueWave -- selling HDL tests; is that right?

4 : 1 7 P M 8 A. Okay. Yes.

4 : 1 7 P M 9 Q. And the email concludes by telling you, "Remember, these
4 : 1 7 P M 10 three tests require no additional tubes and offer additional
4 : 1 7 P M 11 reimbursement of well over \$150 for all three. Please make a
4 : 1 7 P M 12 concerted effort to add these to each of your customer's
4 : 1 7 P M 13 panels."

4 : 1 7 P M 14 Did I read that correctly?

4 : 1 7 P M 15 A. You read it correctly, yes.

4 : 1 7 P M 16 MR. TERRANOVA: No further questions, Your Honor.

4 : 1 7 P M 17 THE COURT: Mr. Ashmore?

4 : 1 7 P M 18 MR. ASHMORE: No questions, Your Honor.

4 : 1 7 P M 19 THE COURT: Anything on redirect?

4 : 1 7 P M 20 MR. GRIFFITH: Briefly.

4 : 1 7 P M 21 THE COURT: Yes, sir.

4 : 1 7 P M 22 **REDIRECT EXAMINATION**

4 : 1 7 P M 23 **BY MR. GRIFFITH:**

4 : 1 7 P M 24 Q. Ms. Guest, on this Exhibit 3031 that you just went over,
4 : 1 7 P M 25 were you in any way ever trying to influence the medical

4 : 1 8 P M 1 judgment of a doctor to order a test?

4 : 1 8 P M 2 A. No. Again, as I have -- I'll just restate. When there's
4 : 1 8 P M 3 a new test, any of the three listed here, we would discuss -- I
4 : 1 8 P M 4 would share what the test was, the clinical utility, the
4 : 1 8 P M 5 benefit to the patient, the reason that they would order it.
4 : 1 8 P M 6 And the physician would decide if they would like to order the
4 : 1 8 P M 7 test or not.

4 : 1 8 P M 8 Q. I mean, you're not a medical doctor; correct?

4 : 1 8 P M 9 A. I am not a medical doctor.

4 : 1 8 P M 10 Q. And so you cannot legally order a test for a doctor;
4 : 1 8 P M 11 right?

4 : 1 8 P M 12 A. I cannot order a test, no.

4 : 1 8 P M 13 Q. You had no intention to ever influence the medical
4 : 1 8 P M 14 judgment of a doctor; right?

4 : 1 8 P M 15 A. No.

4 : 1 8 P M 16 Q. Did Brad and Cal ever ask you to do anything unlawful?

4 : 1 8 P M 17 A. No, they didn't.

4 : 1 8 P M 18 Q. To your knowledge, did you do anything unlawful when you
4 : 1 8 P M 19 were at BlueWave?

4 : 1 8 P M 20 A. No.

4 : 1 8 P M 21 Q. Did you believe the independent contractor agreements were
4 : 1 8 P M 22 unlawful?

4 : 1 8 P M 23 A. No.

4 : 1 9 P M 24 Q. Did you believe that no-balance billing was unlawful?

4 : 1 9 P M 25 THE COURT: I believe this is beyond the scope of

4 : 1 9 P M 1 cross.

4 : 1 9 P M 2 MR. GRIFFITH: Your Honor, he said -- he went into
4 : 1 9 P M 3 their intent, would they have any intent --

4 : 1 9 P M 4 THE COURT: But this is beyond -- those other issues
4 : 1 9 P M 5 were not discussed during cross. So limit the redirect to the
4 : 1 9 P M 6 cross-examination.

4 : 1 9 P M 7 BY MR. GRIFFITH:

4 : 1 9 P M 8 Q. well, did they -- the prosecutor asked -- the USA asked
4 : 1 9 P M 9 you about the advice that you were given by Brad; right?

4 : 1 9 P M 10 A. Uh-huh.

4 : 1 9 P M 11 Q. Did you -- did he give you any advice that you ever
4 : 1 9 P M 12 thought was unlawful?

4 : 1 9 P M 13 A. No.

4 : 1 9 P M 14 Q. would you have followed any advice that you thought was
4 : 1 9 P M 15 unlawful?

4 : 1 9 P M 16 A. No.

4 : 1 9 P M 17 MR. GRIFFITH: Thank you, Your Honor.

4 : 1 9 P M 18 THE COURT: Yes, ma'am. You may step down.

4 : 1 9 P M 19 (Witness excused.)

4 : 2 0 P M 20 THE COURT: Call your next witness.

4 : 2 0 P M 21 MR. COOKE: We'll call Darrin Thomas.

4 : 2 0 P M 22 THE DEPUTY CLERK: Please place your left hand on the
4 : 2 0 P M 23 Bible and raise your right. State your full name for the
4 : 2 0 P M 24 record, please.

4 : 2 0 P M 25 THE WITNESS: Darrin Orin Thomas.

4 : 2 0 P M 1 THE DEPUTY CLERK: Thank you.

4 : 2 0 P M 2 (Witness sworn.)

4 : 2 0 P M 3 THE DEPUTY CLERK: Thank you. You may be seated.

4 : 2 1 P M 4 DARRIN THOMAS,

4 : 2 1 P M 5 a witness called on behalf of the defendants, being first duly
1 1 : 0 3 A M 6 sworn, was examined and testified as follows:

1 1 : 0 3 A M 7 DIRECT EXAMINATION

4 : 2 1 P M 8 BY MR. COOKE:

4 : 2 1 P M 9 Q. Good afternoon, Mr. Thomas. Thank you for being here.
4 : 2 1 P M 10 would you state your full name for the jury, please.

4 : 2 1 P M 11 A. Darrin Orin Thomas.

4 : 2 1 P M 12 Q. And we've met recently. And I'm Dawes Cooke, and I
4 : 2 1 P M 13 represent the defendants BlueWave and Dent and Johnson. You
4 : 2 1 P M 14 understand that?

4 : 2 1 P M 15 A. Yes, sir.

4 : 2 1 P M 16 Q. And we'd like to ask you some questions today about your
4 : 2 1 P M 17 experience when you were associated with Bluewave. Is that all
4 : 2 1 P M 18 right with you?

4 : 2 1 P M 19 A. That's fine. Yes, sir.

4 : 2 1 P M 20 Q. Where do you live?

4 : 2 1 P M 21 A. I live in Avon, Indiana, a suburb of Indianapolis.

4 : 2 1 P M 22 Q. What do you do?

4 : 2 1 P M 23 A. I'm currently in medical sales and marketing.

4 : 2 1 P M 24 Q. Did you receive a subpoena to come here to testify?

4 : 2 1 P M 25 A. I did.

4 : 2 1 P M 1 Q. what company do you work for?

4 : 2 1 P M 2 A. I work for a company called American Healthcare
4 : 2 1 P M 3 Innovations.

4 : 2 1 P M 4 Q. what do you sell?

4 : 2 1 P M 5 A. we sell lab tests.

4 : 2 2 P M 6 Q. what kind of lab tests?

4 : 2 2 P M 7 A. Mostly -- we do some blood testing, but mostly it's tests
4 : 2 2 P M 8 off of urine for drugs of abuse.

4 : 2 2 P M 9 Q. where did you grow up?

4 : 2 2 P M 10 A. I grew up until I was about 16 in Ohio and then moved to
4 : 2 2 P M 11 Southern California, graduated from high school in Southern
4 : 2 2 P M 12 California.

4 : 2 2 P M 13 Q. Did you go to college?

4 : 2 2 P M 14 A. I did.

4 : 2 2 P M 15 Q. where did you go?

4 : 2 2 P M 16 A. Oklahoma Wesleyan University. I went there on an athletic
4 : 2 2 P M 17 scholarship.

4 : 2 2 P M 18 Q. what sport did you play?

4 : 2 2 P M 19 A. Soccer.

4 : 2 2 P M 20 Q. when did you graduate?

4 : 2 2 P M 21 A. 1990.

4 : 2 2 P M 22 Q. Do you have any postgraduate training?

4 : 2 2 P M 23 A. No. I've taken some classes here and there but no
4 : 2 2 P M 24 degrees.

4 : 2 2 P M 25 Q. what did you do after you left there?

4 : 2 2 P M 1 A. I went into the restaurant business and managed
4 : 2 2 P M 2 restaurants for about two years, and then I went into health
4 : 2 2 P M 3 care management and worked in a facility for developmentally
4 : 2 3 P M 4 disabled and mentally disabled adults. It was a
4 : 2 3 P M 5 Medicaid-funded facility. Did management and casework there
4 : 2 3 P M 6 for about four years and then switched over to the marketing
4 : 2 3 P M 7 side of the health care business from there.

4 : 2 3 P M 8 Q. And by that, you mean sales?

4 : 2 3 P M 9 A. Yes, sir.

4 : 2 3 P M 10 Q. And what companies did you work for?

4 : 2 3 P M 11 A. Started out with Ameripath, which is a national pathology
4 : 2 3 P M 12 company. It was purchased by Quest Diagnostics in 2008. It
4 : 2 3 P M 13 was announced -- the sale was announced in '06. I think it was
4 : 2 3 P M 14 completed in '08. I spent a short period of time after that
4 : 2 3 P M 15 with Eli Lilly and Company, a pharmaceutical company based out
4 : 2 3 P M 16 of Indianapolis, Indiana.

4 : 2 3 P M 17 Q. What kind of pharmaceuticals did you sell there?

4 : 2 3 P M 18 A. Insulin mostly. And then we launched three new molecules
4 : 2 3 P M 19 that Lilly developed during the time I was there as well.

4 : 2 4 P M 20 Q. How long were you there?

4 : 2 4 P M 21 A. Right at three years.

4 : 2 4 P M 22 Q. When did you leave there?

4 : 2 4 P M 23 A. That was probably 2008.

4 : 2 4 P M 24 Q. Where did you go after that?

4 : 2 4 P M 25 A. I started consulting in -- back in the lab business. I

4 : 2 4 P M 1 was an interim vice president of sales for a lab company in
4 : 2 4 P M 2 Nashville, Tennessee, and built out their genetics and esoteric
4 : 2 4 P M 3 testing division for them.

4 : 2 4 P M 4 Q. what did that include?

4 : 2 4 P M 5 A. Mostly -- you know, lab testing is divided into two
4 : 2 4 P M 6 buckets, clinical tests, which are mostly run off of blood or
4 : 2 4 P M 7 fluids, serums; and then anatomic pathology, which is pieces
4 : 2 4 P M 8 and parts.

4 : 2 4 P M 9 So what I did for them -- they were an anatomic
4 : 2 4 P M 10 pathology lab. I built the genetics testing on those types of
4 : 2 5 P M 11 biopsies, whether it's prostate or breast or cervical or
4 : 2 5 P M 12 whatever kind of biopsy, you know, bone marrow biopsy.

4 : 2 5 P M 13 A lot of that stuff requires genetic testing to
4 : 2 5 P M 14 decide, you know, where's the origin of the tumor, you know,
4 : 2 5 P M 15 what type of disease is it, what type of medicine is going to
4 : 2 5 P M 16 work best for it. More personalized medicine.

4 : 2 5 P M 17 Q. All right. Now, you used the word "pieces and parts."
4 : 2 5 P M 18 I'm sure we're all thinking about that phrase right now.

4 : 2 5 P M 19 THE COURT: More casually than we are used to using
4 : 2 5 P M 20 it; right?

4 : 2 5 P M 21 BY MR. COOKE:

4 : 2 5 P M 22 Q. Yeah. I am assuming that the processing and handling of
4 : 2 5 P M 23 those is a bit different than blood specimens?

4 : 2 5 P M 24 A. It is. You could have, you know, something that requires
4 : 2 5 P M 25 very specialized preparation in a, you know, almost toxic

4 : 2 5 P M 1 solution to keep that tissue viable for the pathologist to make
4 : 2 6 P M 2 a slide and, you know, look at it under the microscope.

4 : 2 6 P M 3 You know, most of that work is done in surgery. So
4 : 2 6 P M 4 it's a little bit different setting.

4 : 2 6 P M 5 Q. And what did you do after that?

4 : 2 6 P M 6 A. After that, I became the CEO of a pathology lab in
4 : 2 6 P M 7 Chicago, Libertyville, Illinois.

4 : 2 6 P M 8 Q. And is that pieces and parts also?

4 : 2 6 P M 9 A. Pieces and parts, yes, sir. We did start a clinical lab
4 : 2 6 P M 10 with a joint venture partner right before I left there, but --

4 : 2 6 P M 11 Q. And when did you leave there?

4 : 2 6 P M 12 A. That was almost the end -- probably October or November of
4 : 2 6 P M 13 2011.

4 : 2 6 P M 14 Q. Where did you go after that?

4 : 2 6 P M 15 A. I went back home to Indianapolis. My family had been away
4 : 2 6 P M 16 for almost 10 years from our families, and I was looking for an
4 : 2 6 P M 17 opportunity. Chicago wasn't quite close enough for us. So
4 : 2 6 P M 18 went to Indianapolis and sought the contract with Bluewave to
4 : 2 7 P M 19 become an independent contractor to sell advanced diagnostic
4 : 2 7 P M 20 tests for heart disease.

4 : 2 7 P M 21 Q. Did you have any prior relationship with either Brad
4 : 2 7 P M 22 Johnson or Cal Dent?

4 : 2 7 P M 23 A. No, sir.

4 : 2 7 P M 24 Q. How did you know about the job opening?

4 : 2 7 P M 25 A. Well, you know, at that point, I had been in the lab

4 : 2 7 P M 1 industry for quite a long time. And, you know, one of my
4 : 2 7 P M 2 friends introduced me to one of their contractors, and I
4 : 2 7 P M 3 started to investigate, you know, what type of testing they
4 : 2 7 P M 4 were doing, what type of disease states they were having
4 : 2 7 P M 5 success impacting. And then I sought them out from there,
4 : 2 7 P M 6 so --

4 : 2 7 P M 7 Q. Did you sign on as an employee or as an independent
4 : 2 7 P M 8 contractor?

4 : 2 7 P M 9 A. Contractor.

4 : 2 7 P M 10 Q. Did you form a company?

4 : 2 7 P M 11 A. I did.

4 : 2 7 P M 12 Q. What was the name of your company?

4 : 2 7 P M 13 A. DX Sales, LLC.

4 : 2 7 P M 14 Q. Did you have a contract -- an actual contract with
4 : 2 7 P M 15 Bluewave?

4 : 2 7 P M 16 A. I did. Well, my corporation did.

4 : 2 7 P M 17 Q. The corporation did.

4 : 2 7 P M 18 And did you have an attorney review that contract for
4 : 2 8 P M 19 you?

4 : 2 8 P M 20 A. Yes, sir.

4 : 2 8 P M 21 Q. Was this your regular attorney?

4 : 2 8 P M 22 A. Yes, sir.

4 : 2 8 P M 23 Q. Did he say anything to you about there being anything
4 : 2 8 P M 24 questionable or possibly illegal about that contract?

4 : 2 8 P M 25 A. No, sir.

4 : 2 8 P M 1 Q. Has anybody ever said anything to you about that
4 : 2 8 P M 2 contract --

4 : 2 8 P M 3 A. No, sir.

4 : 2 8 P M 4 Q. -- being possibly illegal?

4 : 2 8 P M 5 what kind of training did you get at BlueWave?

4 : 2 8 P M 6 A. The training was quite extensive and admittedly a bit
4 : 2 8 P M 7 overwhelming. You know, even though I'd been in the lab
4 : 2 8 P M 8 industry for a while, I'd never really dealt with biomarkers
4 : 2 8 P M 9 off of serum before. And there were quite a few biomarkers
4 : 2 8 P M 10 that I had to become proficient with understanding, you know,
4 : 2 8 P M 11 what's the medical or chemical process, you know, why is this
4 : 2 9 P M 12 biomarker important, you know, what is the evidence behind --
4 : 2 9 P M 13 because all of the biomarkers were evidence based -- what is
4 : 2 9 P M 14 the evidence behind them.

4 : 2 9 P M 15 So it was a pretty steep learning curve for me to try
4 : 2 9 P M 16 to understand how all of these biomarkers work together to tell
4 : 2 9 P M 17 a story about, you know, where any given patient is at that
4 : 2 9 P M 18 moment in regards to progression towards heart disease or
4 : 2 9 P M 19 possible progression.

4 : 2 9 P M 20 Q. How did you go about learning that information, what that
4 : 2 9 P M 21 evidence was?

4 : 2 9 P M 22 A. Well, Bluewave provided training. I was on numerous calls
4 : 2 9 P M 23 where we went through the science over and over. And then I
4 : 2 9 P M 24 worked with a couple of reps and, you know, spent a lot of time
4 : 2 9 P M 25 going through the science with them, you know, taking a ton of

4 : 2 9 P M 1 notes, and then, you know, research online, finding the
4 : 2 9 P M 2 peer-reviewed journal articles and printing those and reading
4 : 3 0 P M 3 them, understanding, you know, how the puzzle fit together as
4 : 3 0 P M 4 far as all the biomarkers that were being offered.

4 : 3 0 P M 5 Q. A couple of people have used the phrase "peer-reviewed
4 : 3 0 P M 6 medical journal."

4 : 3 0 P M 7 Can you tell the jury what that means?

4 : 3 0 P M 8 A. Yes, sir. So when -- you know, I could create a medical
4 : 3 0 P M 9 device or test and go out and tell everybody that it's the best
4 : 3 0 P M 10 thing since sliced bread. But until actual scientists who are
4 : 3 0 P M 11 certified, licensed, and trained in the field that I'm -- that
4 : 3 0 P M 12 I developed this test in, until they review it, do clinical
4 : 3 0 P M 13 trials, studies, and they say yes, this is a valid test and it
4 : 3 0 P M 14 has efficacy for, you know, whatever you're selling it for,
4 : 3 0 P M 15 then it's just me saying it.

4 : 3 0 P M 16 If it's peer-reviewed, then it's gone through the
4 : 3 0 P M 17 rigors of -- of the medical field and it has become, you know,
4 : 3 1 P M 18 somewhat of an approved test, if you will. It's not like FDA
4 : 3 1 P M 19 approval, but --

4 : 3 1 P M 20 Q. But the term "peer," that's p-e-e-r; right?

4 : 3 1 P M 21 A. Correct.

4 : 3 1 P M 22 Q. Meaning it's been reviewed by the author's peers.

4 : 3 1 P M 23 A. Correct.

4 : 3 1 P M 24 Q. So these aren't things that you'd read in, you know, your
4 : 3 1 P M 25 local magazine or those types of things; these are actual

4 : 3 1 P M 1 medical journals?

4 : 3 1 P M 2 A. Correct. You'd have to go to medical journals to find
4 : 3 1 P M 3 this information.

4 : 3 1 P M 4 Q. Any -- any -- I didn't tell you I was going to ask you
4 : 3 1 P M 5 this question, but do you have any idea how many articles you
4 : 3 1 P M 6 read in preparing yourself to sell these tests?

4 : 3 1 P M 7 A. I probably had about 45 different articles. You know, I
4 : 3 1 P M 8 made sure that I had at least one good peer-reviewed journal
4 : 3 1 P M 9 for each biomarker. You know, some of them, it's easier to
4 : 3 1 P M 10 find information on those because they've been around longer
4 : 3 1 P M 11 and there's more information.

4 : 3 2 P M 12 But I probably had about 45 articles in a file folder
4 : 3 2 P M 13 that, you know, I could keep. If a clinician wanted to read
4 : 3 2 P M 14 the literature, I could, you know, either give him the journal
4 : 3 2 P M 15 article or direct him to it.

4 : 3 2 P M 16 Q. Well, did you become a believer in these tests?

4 : 3 2 P M 17 A. Yes, sir. I -- I had my first panel done toward the end
4 : 3 2 P M 18 of 2011, and it -- it revealed a genetic issue that I have that
4 : 3 2 P M 19 predisposes me to increased risk for heart disease.

4 : 3 2 P M 20 So I immediately went and encouraged both of my
4 : 3 2 P M 21 parents to have a panel done and then all three of my siblings.
4 : 3 2 P M 22 And my parents, they're both in their mid 70s, and they
4 : 3 2 P M 23 still -- their doctor, you know, does this on them annually
4 : 3 2 P M 24 and, you know, was able to treat some metabolic syndrome and
4 : 3 2 P M 25 inflammation in both of them that otherwise probably wouldn't

4 : 3 3 P M 1 have been found. So I believe in it very much so.

4 : 3 3 P M 2 Q. And has it affected your lifestyle, the way you take care
4 : 3 3 P M 3 of yourself?

4 : 3 3 P M 4 A. Definitely.

4 : 3 3 P M 5 Q. How old are you?

4 : 3 3 P M 6 A. I'm 50.

4 : 3 3 P M 7 Q. Before coming to become a sales contractor for BlueWave,
4 : 3 3 P M 8 were you ever exposed to the idea of process and handling fees?

4 : 3 3 P M 9 A. Yes, sir.

4 : 3 3 P M 10 Q. In what context?

4 : 3 3 P M 11 A. Various labs in the industry offered process and handling
4 : 3 3 P M 12 fees in lieu of an actual employee to do that work for the
4 : 3 3 P M 13 laboratory.

4 : 3 3 P M 14 You know, the lab that I was CEO of in Chicago, we
4 : 3 3 P M 15 didn't really have to get into that part of the business
4 : 3 3 P M 16 because we were in pathology and specimen processing and
4 : 3 3 P M 17 handling was different. But many of my colleagues were working
4 : 3 3 P M 18 for labs that did offer process and handling fees, and I became
4 : 3 4 P M 19 aware of it, you know, through them.

4 : 3 4 P M 20 Q. Did you receive compliance training in your various jobs
4 : 3 4 P M 21 that you had before BlueWave?

4 : 3 4 P M 22 A. Yes, sir. I also provided it to my sales force and sales
4 : 3 4 P M 23 reps.

4 : 3 4 P M 24 Q. What did it consist of?

4 : 3 4 P M 25 A. It always consisted of training on the Stark Law,

4 : 3 4 P M 1 anti-kickback.

4 : 3 4 P M 2 Q. why was that considered important in the medical field?

4 : 3 4 P M 3 A. well, because, I mean, you can't -- you can't really buy
4 : 3 4 P M 4 business in this field. So, I mean, I don't know how it works
4 : 3 4 P M 5 in other industries, but you can't go out and, you know, tell
4 : 3 4 P M 6 somebody you're going to do something in a quid pro quo manner
4 : 3 4 P M 7 to try to get them to send you business.

4 : 3 4 P M 8 And, you know, you have to make sure that your sales
4 : 3 5 P M 9 reps understand that, that they know what that means, they know
4 : 3 5 P M 10 what the rules are. And, you know, I always used to tell my
4 : 3 5 P M 11 reps, you know, this is where the guardrail is. We don't even
4 : 3 5 P M 12 want to see any swerving toward it, definitely don't want any
4 : 3 5 P M 13 sparks. But, you know, you've got to know that this is a hard
4 : 3 5 P M 14 line and we can't cross it. So --

4 : 3 5 P M 15 Q. In your compliance training at Bluewave, did you get any
4 : 3 5 P M 16 different sense than that?

4 : 3 5 P M 17 A. No, sir. It was very consistent with what I'd always
4 : 3 5 P M 18 received or taught.

4 : 3 5 P M 19 Q. In your own words, would you describe the training that
4 : 3 5 P M 20 you were given at BlueWave and who provided it to you.

4 : 3 5 P M 21 A. It was multifaceted. Again, I was able to work with some
4 : 3 5 P M 22 of the reps and got training there.

4 : 3 5 P M 23 Are you speaking about compliance --

4 : 3 5 P M 24 Q. Yes.

4 : 3 5 P M 25 A. -- or just training in general?

4 : 3 5 P M 1 Compliance training was mostly done with either Brad
4 : 3 5 P M 2 or Cal. You know, we were given written tests that we had to
4 : 3 6 P M 3 take. We had conference calls that we had to participate in
4 : 3 6 P M 4 and, you know, log into and listen to the training. And then
4 : 3 6 P M 5 we were tested on the information afterwards. So --

4 : 3 6 P M 6 Q. In any of your interactions with Brad and Cal, did you get
4 : 3 6 P M 7 to know both of them?

4 : 3 6 P M 8 A. Yes, sir.

4 : 3 6 P M 9 Q. I'm trying to figure out the best way to ask this.

4 : 3 6 P M 10 Did you ever get any sense at all that there was the
4 : 3 6 P M 11 written rules and then there was the unwritten rules about what
4 : 3 6 P M 12 you could really do?

4 : 3 6 P M 13 A. No, sir.

4 : 3 6 P M 14 Q. Did you ever get any sense from them that you could
4 : 3 6 P M 15 probably sell more of these tests if you could emphasize the
4 : 3 6 P M 16 process and handling fee revenue aspects of them?

4 : 3 6 P M 17 A. No, sir.

4 : 3 6 P M 18 Q. How did you sell the tests?

4 : 3 6 P M 19 A. I sold it on the merits of the science. I usually would
4 : 3 6 P M 20 use a sample report, a case study, and go through that with the
4 : 3 7 P M 21 clinician, you know, let them see that -- you know, the
4 : 3 7 P M 22 difference between a baseline lipid panel, which, you know,
4 : 3 7 P M 23 50 percent of people that have heart attacks and strokes have a
4 : 3 7 P M 24 normal baseline lipid panel. So it clearly is not the best
4 : 3 7 P M 25 diagnostic tool.

4 : 3 7 P M 1 And then we would just walk through the panel and
4 : 3 7 P M 2 show how each of these biomarkers will better assess or has the
4 : 3 7 P M 3 ability to better assess risk for these patients.

4 : 3 7 P M 4 That's the real question, right, is how can we -- you
4 : 3 7 P M 5 know, it's the number one cause of death. How can we make a
4 : 3 7 P M 6 dent in that 50 percent that we're not catching? So --

4 : 3 7 P M 7 Q. Were you successful in getting doctors to order these
4 : 3 7 P M 8 tests?

4 : 3 7 P M 9 A. Yes, sir.

4 : 3 7 P M 10 Q. Did you sell Singulex as well?

4 : 3 7 P M 11 A. I had the Singulex contract, but admittedly I didn't spend
4 : 3 7 P M 12 much time on it. As I mentioned, the science behind all of the
4 : 3 8 P M 13 biomarkers for HDL was quite a steep learning curve for me and
4 : 3 8 P M 14 I felt like I needed to continue to get very proficient on
4 : 3 8 P M 15 that.

4 : 3 8 P M 16 And, you know, I was just starting to get familiar
4 : 3 8 P M 17 with the Singulex -- I mean, I did sell it. I did talk about
4 : 3 8 P M 18 it from time to time, but usually it was because the clinician
4 : 3 8 P M 19 that I was speaking with brought up a question about a
4 : 3 8 P M 20 biomarker that was on that panel versus the other one. Then I
4 : 3 8 P M 21 would be reminded to talk about that.

4 : 3 8 P M 22 Q. Did it ever occur to you that it might be attractive to
4 : 3 8 P M 23 doctors to be able to get the process and handling fees both
4 : 3 8 P M 24 from HDL and from Singulex by ordering both panels?

4 : 3 8 P M 25 A. No, sir.

4 : 3 8 P M 1 Q. Did that ever come up in any of your conversations?

4 : 3 8 P M 2 A. No, sir.

4 : 3 8 P M 3 Q. Did you ever suggest it to anybody?

4 : 3 8 P M 4 A. No, sir. I didn't think in terms of selling on that at
4 : 3 8 P M 5 all, so --

4 : 3 8 P M 6 Q. Selling on what?

4 : 3 9 P M 7 A. On process and handling.

4 : 3 9 P M 8 Q. Did physicians sometimes ask about it?

4 : 3 9 P M 9 A. About?

4 : 3 9 P M 10 Q. Process and handling fees.

4 : 3 9 P M 11 A. You know, they would ask how we -- how we would get the
4 : 3 9 P M 12 blood to the lab. Or, you know, they would make statements
4 : 3 9 P M 13 like, I would love to do this, you know; it's great, but it
4 : 3 9 P M 14 just seems too cumbersome for my staff. You know, they're
4 : 3 9 P M 15 already overworked and don't have time to do it.

4 : 3 9 P M 16 You know, and that's usually when we would offer
4 : 3 9 P M 17 those options.

4 : 3 9 P M 18 Q. Did you recommend specific tests to doctors?

4 : 3 9 P M 19 A. "Recommend" is a -- not really. That's -- I consider that
4 : 3 9 P M 20 to be a medical term. That's something with a medical --
4 : 3 9 P M 21 someone with a medical license does the recommending. All I
4 : 3 9 P M 22 did was show them the science and the efficacy of the panel.

4 : 3 9 P M 23 Q. Did you find that you were able to answer questions that
4 : 3 9 P M 24 they might have?

4 : 4 0 P M 25 A. For the most part. I mean, many times, if a clinician had

4 : 4 0 P M 1 interest in treating -- being more aggressive and treating
4 : 4 0 P M 2 heart disease and they started to use the biomarkers, you know,
4 : 4 0 P M 3 I could go back and read some -- some tests with them and help
4 : 4 0 P M 4 them figure out, you know, what -- kind of the "So what? what
4 : 4 0 P M 5 does this information mean and how does it apply to the
4 : 4 0 P M 6 treatment decisions for this patient?"

4 : 4 0 P M 7 But usually I even let that be done over a lunch
4 : 4 0 P M 8 conference call with one of the clinicians from our -- from the
4 : 4 0 P M 9 lab.

4 : 4 0 P M 10 Q. Did you talk to the doctors about no-balance billing?

4 : 4 0 P M 11 A. No, sir.

4 : 4 0 P M 12 Q. Did you get the sense that that was a major selling point
4 : 4 0 P M 13 for your customers?

4 : 4 0 P M 14 A. No. I mean, and that term has really only come -- that's
4 : 4 0 P M 15 a modern term for me. It's not really one that I've grown up
4 : 4 0 P M 16 with or been accustomed to using. It's more from coming out of
4 : 4 1 P M 17 this trial that I've heard that term, so --

4 : 4 1 P M 18 Q. Well, how well received were these tests by your
4 : 4 1 P M 19 customers?

4 : 4 1 P M 20 A. Very well received.

4 : 4 1 P M 21 Q. Did you ever get any feedback from the doctors about how
4 : 4 1 P M 22 they felt about it, how it had improved their practice?

4 : 4 1 P M 23 A. Definitely. On multiple occasions, I would get calls from
4 : 4 1 P M 24 clinicians who said, you know, "This information probably saved
4 : 4 1 P M 25 this patient's life. I just got the report back. I called the

4 : 4 1 P M 1 patient immediately, had them go to the ER, and they cathed
4 : 4 1 P M 2 them and -- you know, otherwise, they probably were going to
4 : 4 1 P M 3 have an MI or a stroke."

4 : 4 1 P M 4 Q. why did you stop working for Bluewave?

4 : 4 1 P M 5 A. In January -- I think around January 7th of 2015, HDL
4 : 4 1 P M 6 canceled its contract with Bluewave, which essentially canceled
4 : 4 1 P M 7 my contract. And that's why I stopped selling.

4 : 4 2 P M 8 Q. Do you still believe that these tests are good tests?

4 : 4 2 P M 9 A. Very much so. And, again, my family still gets these
4 : 4 2 P M 10 tests on an annual basis.

4 : 4 2 P M 11 Q. Thinking back on it, let's -- let me ask you a
4 : 4 2 P M 12 hypothetical. Let's assume that it's been suggested or alleged
4 : 4 2 P M 13 that the philosophy or the ethos of Bluewave was to sell these
4 : 4 2 P M 14 tests, sell as many of these tests as they could, but to push
4 : 4 2 P M 15 the line, to push the envelope, and to use processing and
4 : 4 2 P M 16 handling fees and the economic benefits to the physician as an
4 : 4 2 P M 17 under-the-table incentive for these doctors to order tests.

4 : 4 3 P M 18 Can you comment on whether, based on your
4 : 4 3 P M 19 observations, that would be a fair assessment?

4 : 4 3 P M 20 A. That -- that is not a fair assessment. And in no way -- I
4 : 4 3 P M 21 mean, I'm very compliance-minded and always have been. That's
4 : 4 3 P M 22 what creates longevity in this field. You know, I was never --
4 : 4 3 P M 23 I never saw any red flags or heard any of that. I would have
4 : 4 3 P M 24 questioned it, so --

4 : 4 3 P M 25 Q. Did you ever look at other -- are you familiar with other

4 : 4 3 P M 1 ways of getting blood to laboratories besides offering process
4 : 4 3 P M 2 and handling fees?

4 : 4 3 P M 3 A. Sure. It's -- I mean, as long as I can remember, you
4 : 4 3 P M 4 know, the laboratory could hire a phlebotomist or a collection
4 : 4 3 P M 5 tech -- technician and place that phlebotomist or collection
4 : 4 4 P M 6 tech in an office and let them do all of that work that
4 : 4 4 P M 7 otherwise would have to be put onto the staff of the office.

4 : 4 4 P M 8 And, obviously, there are rules that govern that as
4 : 4 4 P M 9 well. You know, that employee can't do any work for the
4 : 4 4 P M 10 office. They can only do work for the laboratory that's
4 : 4 4 P M 11 related to getting those specimens to the lab.

4 : 4 4 P M 12 Q. How would you police that?

4 : 4 4 P M 13 A. Well, all of those employees were required to have
4 : 4 4 P M 14 compliance training as well, and they had to sign documents
4 : 4 4 P M 15 stating that they -- you know, they understood clearly what
4 : 4 4 P M 16 their duties were. So --

4 : 4 4 P M 17 Q. So if a laboratory put a phlebotomist into a practice,
4 : 4 4 P M 18 that phlebotomist could only draw blood for that laboratory?

4 : 4 4 P M 19 A. Correct.

4 : 4 4 P M 20 Q. All right. Did that seem practical to you for most of
4 : 4 4 P M 21 your clients?

4 : 4 4 P M 22 A. Some -- some, it was; some, it wasn't. You know, some
4 : 4 5 P M 23 already had another lab's phlebotomist in there. And, you
4 : 4 5 P M 24 know, how many phlebotomists can you stack in -- on top of each
4 : 4 5 P M 25 other. You know, it really becomes inefficient from that

4 : 4 5 P M 1 standpoint. So --

4 : 4 5 P M 2 Q. Did it -- were you able to observe whether it actually
4 : 4 5 P M 3 required more work to process and handle HDL and Singulex tests
4 : 4 5 P M 4 than the doctor would with just standard blood testing?

4 : 4 5 P M 5 A. Yeah, I think so. I mean, there -- generally, we're
4 : 4 5 P M 6 talking about four tubes of blood plus urine for most of my
4 : 4 5 P M 7 customers. And, to be quite honest, that was a -- that was a
4 : 4 5 P M 8 hurdle that sometimes we had to overcome because there was so
4 : 4 5 P M 9 much blood. Some of the MAS that were doing the drawing, you
4 : 4 5 P M 10 know, were concerned that maybe they couldn't get that much
4 : 4 5 P M 11 blood or the patients would object or whatever.

4 : 4 5 P M 12 Q. Was it -- was it another alternative to get another
4 : 4 5 P M 13 laboratory to draw the blood for you?

4 : 4 6 P M 14 A. I mean, they could go to, you know, an outside draw site.
4 : 4 6 P M 15 I didn't really have -- I had one of those relationships with a
4 : 4 6 P M 16 company called Any Lab Test Now. I think they had somewhat of
4 : 4 6 P M 17 a global draw agreement with HDL, but, you know --

4 : 4 6 P M 18 Q. Do you know how much that cost?

4 : 4 6 P M 19 A. I think it was 50 bucks.

4 : 4 6 P M 20 Q. \$50?

4 : 4 6 P M 21 A. Yeah.

4 : 4 6 P M 22 Q. Well, after processing and handling fees stopped, what
4 : 4 6 P M 23 effect did that have on your business?

4 : 4 6 P M 24 A. Virtually none. I had a small downtick in my business
4 : 4 6 P M 25 toward the end of that summer, but that was mostly from one of

4 : 4 6 P M 1 my clinicians who had lost his medical license.

4 : 4 6 P M 2 Q. Okay. That'll do it. Yeah. All right. Just a moment,
4 : 4 6 P M 3 if you would.

4 : 4 6 P M 4 (Pause.)

4 : 4 6 P M 5 BY MR. COOKE:

4 : 4 7 P M 6 Q. Up until this controversy, had you -- had you ever heard
4 : 4 7 P M 7 from anybody that paying a process and handling fee at fair
4 : 4 7 P M 8 market value was against the law?

4 : 4 7 P M 9 A. No, sir. It was always my understanding that, you know,
4 : 4 7 P M 10 it was an alternative to placing an employee in the office.
4 : 4 7 P M 11 You know, both were for the same purpose, and that was to do
4 : 4 7 P M 12 the lab's work and get those specimens to the lab.

4 : 4 7 P M 13 Q. Did you believe that what was being offered as a process
4 : 4 7 P M 14 and handling fee by HDL and by Singulex was fair and
4 : 4 7 P M 15 reasonable?

4 : 4 7 P M 16 A. Yes, sir.

4 : 4 7 P M 17 MR. COOKE: Thank you. That's all.

4 : 4 7 P M 18 THE COURT: Cross-examination by the government?

4 : 4 7 P M 19 CROSS-EXAMINATION

4 : 4 7 P M 20 BY MS. STRAWN:

4 : 4 7 P M 21 Q. Good afternoon, Mr. Thomas.

4 : 4 7 P M 22 A. Hi.

4 : 4 7 P M 23 Q. My name is Elizabeth Strawn, and I'm one of the attorneys
4 : 4 7 P M 24 representing the United States in this case.

4 : 4 7 P M 25 A. Hi.

4 : 4 8 P M 1 Q. And, actually, if we could begin, Mr. Thomas, with a
4 : 4 8 P M 2 demonstrative for your information. I know you haven't been in
4 : 4 8 P M 3 the courtroom for more than a week now, but this is a
4 : 4 8 P M 4 demonstrative that was assembled by the United States forensic
4 : 4 8 P M 5 accounting expert, who totaled up the commissions received by
4 : 4 8 P M 6 different Bluewave sales representatives.

4 : 4 8 P M 7 And, Mr. Phaneuf, if you could zoom in.

4 : 4 8 P M 8 And if I could ask you, Mr. Thomas, to have a look at
4 : 4 8 P M 9 your screen and see if you recognize the name of your LLC?

4 : 4 8 P M 10 A. I do.

4 : 4 8 P M 11 MS. STRAWN: And, Mr. Phaneuf, if you could zoom back
4 : 4 8 P M 12 out.

4 : 4 8 P M 13 BY MS. STRAWN:

4 : 4 8 P M 14 Q. Would it be fair to say, Mr. Thomas, is that -- does that
4 : 4 8 P M 15 seem like an accurate amount reflecting your commissions when
4 : 4 8 P M 16 you were at Bluewave?

4 : 4 8 P M 17 A. Over about a five-year period, yes, ma'am.

4 : 4 9 P M 18 Q. And looking at this demonstrative, would it be fair to say
4 : 4 9 P M 19 you were in the bottom half of Bluewave's sales representatives
4 : 4 9 P M 20 in terms of commissions?

4 : 4 9 P M 21 A. If the right side is the bottom half, then, yes, ma'am.

4 : 4 9 P M 22 MS. STRAWN: Nothing further, Your Honor.

4 : 4 9 P M 23 THE COURT: Mr. Ashmore?

4 : 4 9 P M 24 MR. ASHMORE: No questions, Your Honor.

4 : 4 9 P M 25 THE COURT: Anything on redirect?

4 : 4 9 P M 1 MR. COOKE: Nothing. Thank you.

4 : 4 9 P M 2 THE COURT: You may step down.

4 : 4 9 P M 3 (Witness excused.)

4 : 4 9 P M 4 THE COURT: Call your next witness.

4 : 4 9 P M 5 How lengthy is our next witness likely to be?

4 : 4 9 P M 6 MR. COOKE: Probably a little longer than these, but
4 : 4 9 P M 7 he's another former sales rep.

4 : 4 9 P M 8 MR. GRIFFITH: Your Honor, he is definitely going to
4 : 4 9 P M 9 be longer.

4 : 4 9 P M 10 THE COURT: I think we ought to call it a day. I
4 : 4 9 P M 11 don't want to keep my jury here. These things generally go a
4 : 4 9 P M 12 little bit longer than y'all are expecting.

4 : 4 9 P M 13 Ladies and gentlemen, we're going to call it a
4 : 4 9 P M 14 day. 9:00 tomorrow morning. Do not do any research. Do not
4 : 5 0 P M 15 discuss the case with anybody. See you tomorrow morning.

4 : 5 0 P M 16 (Whereupon the jury was excused from the courtroom.)

4 : 5 0 P M 17 THE COURT: Please be seated. Give me a little
4 : 5 0 P M 18 forecast on where we're heading, Mr. Cooke, for you in terms
4 : 5 0 P M 19 of -- you know, it's Wednesday. I'm trying to figure out about
4 : 5 0 P M 20 where we're likely -- are you likely to finish by tomorrow?

4 : 5 0 P M 21 MR. COOKE: No, we don't think so.

4 : 5 0 P M 22 THE COURT: Okay. Fair enough.

4 : 5 0 P M 23 MR. COOKE: We're pretty sure we'll not finish by
4 : 5 0 P M 24 tomorrow because we've got a couple of witnesses that have to
4 : 5 0 P M 25 come on Friday.

4 : 5 1 P M 1 THE COURT: Well, that answers that question, doesn't
4 : 5 1 P M 2 it?

4 : 5 1 P M 3 MR. COOKE: That answers that question. And what
4 : 5 1 P M 4 we're uncertain about now is whether we'll leak over into
4 : 5 1 P M 5 Monday.

4 : 5 1 P M 6 THE COURT: Mr. Ashmore -- believe it or not,
4 : 5 1 P M 7 Mr. Ashmore actually has a right to defend his client too, you
4 : 5 1 P M 8 know.

4 : 5 1 P M 9 So how about you, Mr. Ashmore? What are you
4 : 5 1 P M 10 figuring?

4 : 5 1 P M 11 MR. ASHMORE: I'm not certain, Your Honor. We may
4 : 5 1 P M 12 not -- we may rest.

4 : 5 1 P M 13 THE COURT: Okay. It's your prerogative. I'm not
4 : 5 1 P M 14 pressing you to make that decision or a commitment. I'm just
4 : 5 1 P M 15 trying to judge whether we're likely to finish on Friday,
4 : 5 1 P M 16 because, when we finish the testimony, we got to have a charge
4 : 5 1 P M 17 conference. And there is a fair amount of disagreement among
4 : 5 1 P M 18 counsel -- surprise, surprise -- on the charges. And I feel
4 : 5 1 P M 19 like we ought to take sufficient time to go do that and not be
4 : 5 1 P M 20 rushed.

4 : 5 2 P M 21 So if we finished, you know, early Friday
4 : 5 2 P M 22 morning, I'd just send the jury out for an early lunch, and
4 : 5 2 P M 23 then we'd get our charge conference done, and we'd argue a
4 : 5 2 P M 24 charge in the afternoon.

4 : 5 2 P M 25 If you're into the afternoon, I'm probably going

4 : 5 2 P M 1 to send them home and us do our charge conference and get the
4 : 5 2 P M 2 charge finished Friday and probably bring them back Monday.

4 : 5 2 P M 3 I know they're not going to particularly want to
4 : 5 2 P M 4 come back Monday, but I don't see -- these issues are fairly
4 : 5 2 P M 5 complicated. I don't think, after we've spent two weeks trying
4 : 5 2 P M 6 it, y'all could try to jam it in at the last moment.

4 : 5 2 P M 7 what are y'all's thoughts about it?

4 : 5 2 P M 8 **MR. COOKE:** I think there's no chance we're going to
4 : 5 2 P M 9 finish Friday morning. The challenge is going to be whether we
4 : 5 2 P M 10 can finish Friday.

4 : 5 2 P M 11 we still have Mr. Johnson, who's going to be --

4 : 5 2 P M 12 **THE COURT:** Let me say to you, I don't have any --
4 : 5 2 P M 13 you know, if we're going over to Monday, I just don't have any
4 : 5 2 P M 14 heartburn about that. I mean, I don't. I've been pressuring
4 : 5 2 P M 15 you because I want to keep the trial moving, but the government
4 : 5 3 P M 16 has the right to put up its case; the defendants have a right
4 : 5 3 P M 17 to put up their defense. And I don't think we ought to be in
4 : 5 3 P M 18 the business of trying to cut them down.

4 : 5 3 P M 19 So would I prefer you to finish Friday? Sure.
4 : 5 3 P M 20 Am I going to be disappointed if you don't? No, because it's
4 : 5 3 P M 21 important that you have a right to put up your whole case.

4 : 5 3 P M 22 **MR. COOKE:** And we appreciate that. And we're
4 : 5 3 P M 23 actually both on track. I think we each estimated five days,
4 : 5 3 P M 24 and I think we're going to be good for that. We've eliminated
4 : 5 3 P M 25 some witnesses. We may eliminate some more.

4 : 5 3 P M 1 we'd like to finish too, but I'm just thinking,
4 : 5 3 P M 2 practically, it's going to be tough to do it.

4 : 5 3 P M 3 THE COURT: well, that'll be fine. You know?
4 : 5 3 P M 4 we'll -- I would like to -- and we'll see, I mean, how late we
4 : 5 3 P M 5 go Friday. I would like, if I could, to have the charge
4 : 5 3 P M 6 conference Friday if we're not too late in the day, because
4 : 5 3 P M 7 that would give y'all a good opportunity to know what's -- you
4 : 5 3 P M 8 know, in preparing your closing argument, exactly what I'm
4 : 5 3 P M 9 going to say.

4 : 5 3 P M 10 MR. COOKE: That would be helpful.

4 : 5 3 P M 11 THE COURT: And I think that's helpful for y'all. So
4 : 5 3 P M 12 that would be my preference. Even if we haven't finished
4 : 5 4 P M 13 entirely the -- the -- all the evidence, we could do it with
4 : 5 4 P M 14 the opportunity to add or make changes if there's new evidence
4 : 5 4 P M 15 afterwards. I think it's just better to give -- and maybe the
4 : 5 4 P M 16 rule says I'm supposed to do it after the close of all the
4 : 5 4 P M 17 evidence, and I would only do that if y'all agreed to waive
4 : 5 4 P M 18 that.

4 : 5 4 P M 19 I mean, I -- I would only be doing it to help
4 : 5 4 P M 20 you.

4 : 5 4 P M 21 MR. COOKE: I will represent that I doubt anything is
4 : 5 4 P M 22 going to happen in the last witness or two that's going to
4 : 5 4 P M 23 radically change the charge, so we would agree to do the charge
4 : 5 4 P M 24 conference on Friday.

4 : 5 4 P M 25 MR. LEVENTIS: Yeah, we'd like to go ahead and get it

4 : 5 4 P M 1 started as well, Your Honor.

4 : 5 4 P M 2 THE COURT: Mr. Ashmore?

4 : 5 4 P M 3 MR. ASHMORE: Of course, yes.

4 : 5 4 P M 4 THE COURT: I mean, I think it's just in everybody's
4 : 5 4 P M 5 interest to do that. We got to be flexible to the extent that,
4 : 5 4 P M 6 if something comes up that we need to adjust the charge, we
4 : 5 4 P M 7 need to do that too. But y'all know better than I do about
4 : 5 4 P M 8 what's coming. But I'd love you to give you the opportunity to
4 : 5 5 P M 9 know the charge as soon as possible.

4 : 5 5 P M 10 Okay. Anything else?

4 : 5 5 P M 11 MR. LEVENTIS: Not from the government, Your Honor.

4 : 5 5 P M 12 MR. COOKE: Not from us either. Thank you.

4 : 5 5 P M 13 MR. ASHMORE: Nothing.

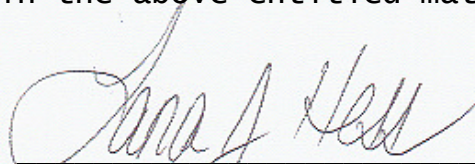
4 : 5 5 P M 14 THE COURT: Very good. See you tomorrow morning at
4 : 5 5 P M 15 9.

4 : 5 5 P M 16 * * * * *

4 : 5 5 P M 17 CERTIFICATE

4 : 5 5 P M 18 I, Tana J. Hess, CCR, FCRR, Official Court Reporter
4 : 5 5 P M 19 for the United States District Court, District of South
4 : 5 5 P M 20 Carolina, certify that the foregoing is a true and correct
4 : 5 5 P M 21 transcript, to the best of my ability and understanding, from
4 : 5 5 P M 22 the record of proceedings in the above-entitled matter.

4 : 5 5 P M 23
4 : 5 5 P M 24
4 : 5 5 P M 25
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4 : 5 5 P M
4 : 5 5 P M



Tana J. Hess, CRR, FCRR, RMR
Official Court Reporter