

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 22, 2018

REPORTER'S OFFICIAL TRANSCRIPT OF THE JURY TRIAL - DAY FIVE  
HELD BEFORE THE HONORABLE RICHARD M. GERGEL  
UNITED STATES DISTRICT JUDGE  
January 22, 2018

Appearances:

For the United States  
of America

U.S. Department of Justice  
Civil Division  
BY: Elizabeth Strawn, Esq.  
Michael David Kass, Esq.  
Jennifer Short, Esq.  
Michael Shaheen, Esq.  
Christopher Terranova, Esq.  
601 D Street NW  
Washington, DC 20005  
202.616.7986

U.S. Attorney's Office  
BY: James C. Leventis, Jr., Esq.  
1441 Main Street, Suite 500  
Columbia, SC 29201  
803.343.3172

For Bluewave Healthcare  
Consultants, Inc.

Joseph P. Griffith Law Firm  
BY: Joseph P. Griffith, Jr.  
Seven State Street  
Charleston, SC 29401  
843.225.5563

For Bluewave Healthcare  
Consultants, Inc.

Barnwell, Whaley, Patterson  
and Helms  
BY: Morris Dawes Cooke, Jr., Esq.  
Christopher M. Kovach, Esq.  
P.O. Drawer H  
Charleston, SC 29402  
843.577.7700

**Appearances:**

For Bluewave Healthcare  
Consultants

Mr. Philip L. Lawrence  
Attorney at Law  
Charleston, SC  
843.200.2794

For Latonya Mallory

Beattie B. Ashmore Law Office  
BY: Beattie B. Ashmore, Esq.  
650 E. Washington Street  
Greenville, SC 29601  
864.467.1001

Official Court Reporter:

Tana J. Hess, CRR, FCRR, RMR  
U.S. District Court Reporter  
85 Broad Street  
Charleston, SC 29401  
843.779.0837  
tana\_hess@scd.uscourts.gov

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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 the government needs to  
9 : 1 0 A M 4 address with the Court?

9 : 1 1 A M 5 **MR. LEVENTIS:** Good morning, Your Honor. We thought  
9 : 1 1 A M 6 we'd kind of give you an idea of what we had planned for today.  
9 : 1 1 A M 7 I'll let Ms. Short explain it.

9 : 1 1 A M 8 **THE COURT:** You've got Mr. Ashmore and Ms. Mallory  
9 : 1 1 A M 9 behind the screen. Are they good with this?

9 : 1 1 A M 10 **MS. SHORT:** He's here.

9 : 1 1 A M 11 **THE COURT:** It's at their request. In fact,  
9 : 1 1 A M 12 Mr. Cooke tried that, to move his table behind the -- yes,  
9 : 1 1 A M 13 ma'am?

9 : 1 1 A M 14 **MS. SHORT:** Yes, Your Honor. So we wanted to -- we  
9 : 1 1 A M 15 were thinking over the weekend about the best way to present  
9 : 1 1 A M 16 this to accommodate the jury and their breaks and things like  
9 : 1 1 A M 17 that. So this is what we have proposed: The first video that  
9 : 1 1 A M 18 we plan to show today is of the Bluewave 30(b)(6) deposition.  
9 : 1 1 A M 19 It's the longest of the video clips. It's about an hour and 16  
9 : 1 1 A M 20 minutes.

9 : 1 1 A M 21 **THE COURT:** Okay.

9 : 1 1 A M 22 **MS. SHORT:** So if we get started fairly soon, we  
9 : 1 1 A M 23 should hopefully get through this in time to take a break --

9 : 1 1 A M 24 **THE COURT:** That's an hour?

9 : 1 1 A M 25 **MS. SHORT:** And 16 minutes.

9 : 1 1 A M 1 THE COURT: Okay. Good.

9 : 1 1 A M 2 MS. SHORT: Then we'll call a live witness, Linda  
9 : 1 1 A M 3 Flipppo. We do not expect her testimony to be long, but we'll  
9 : 1 2 A M 4 see.

9 : 1 2 A M 5 THE COURT: Okay.

9 : 1 2 A M 6 MS. SHORT: And then we would like to, before lunch,  
9 : 1 2 A M 7 play the video for Mr. Johnson, and that is 55 minutes.

9 : 1 2 A M 8 THE COURT: Okay.

9 : 1 2 A M 9 MS. SHORT: And then that should be about time to  
9 : 1 2 A M 10 break for hunch, we're thinking, after that's done.

9 : 1 2 A M 11 when we come back, we would play the Cal Dent  
9 : 1 2 A M 12 individual deposition. That one runs about 58 minutes.

9 : 1 2 A M 13 THE COURT: Okay.

9 : 1 2 A M 14 MS. SHORT: And then our last witness in the case is  
9 : 1 2 A M 15 a live witness, Brian Dickerson.

9 : 1 2 A M 16 THE COURT: Okay.

9 : 1 2 A M 17 MS. SHORT: And then we would be finished.

9 : 1 2 A M 18 THE COURT: Okay. And give me a sort of an estimate  
9 : 1 2 A M 19 of what you think your direct in Flipppo would be.

9 : 1 2 A M 20 MS. SHORT: I'm guessing maybe 40 minutes would be  
9 : 1 2 A M 21 pushing it. I'm trying to overestimate a little bit to give us  
9 : 1 3 A M 22 some wiggle room.

9 : 1 3 A M 23 THE COURT: That's your direct?

9 : 1 3 A M 24 MS. SHORT: Correct.

9 : 1 3 A M 25 THE COURT: I will probably break after the 30(b)(6)

9 : 1 3 A M 1 simply because I think we'd be very shortly into the -- very  
9 : 1 3 A M 2 shortly into the -- into the direct when I had to break -- and  
9 : 1 3 A M 3 we'll just play it by ear. It's not as big a deal on my view  
9 : 1 3 A M 4 of breaking off a video as live testimony in some ways, but I  
9 : 1 3 A M 5 got to make a judgment about that.

9 : 1 3 A M 6 And how about Dickerson? How long do you  
9 : 1 3 A M 7 anticipate direct there?

9 : 1 3 A M 8 **MR. TERRANOVA:** Your Honor, probably about an hour.

9 : 1 3 A M 9 **THE COURT:** Okay. Listen, you know, I try to get  
9 : 1 3 A M 10 forecast just for my sort of management of the trial. And I  
9 : 1 3 A M 11 say this to y'all, I'm not trying to cut anybody off. Y'all  
9 : 1 3 A M 12 take as long on direct -- I told Mr. Ashmore one day, he felt  
9 : 1 3 A M 13 like he -- I could tell he was feeling a little pressure. I  
9 : 1 3 A M 14 said, "Just take your time." This is important, a lot of  
9 : 1 4 A M 15 effort here. Everybody deserves to have their day in court.

9 : 1 4 A M 16 And my effort to manage the trial is not to cut  
9 : 1 4 A M 17 anybody off, because I -- if I felt somebody was filibustering  
9 : 1 4 A M 18 or something, I'd tell you that, but you haven't seen any  
9 : 1 4 A M 19 suggestion of anybody doing that; they're just representing  
9 : 1 4 A M 20 their client. So I don't have a problem with that.

9 : 1 4 A M 21 Anything else you need to bring to my attention?

9 : 1 4 A M 22 **MS. SHORT:** Your Honor, with that schedule, it is  
9 : 1 4 A M 23 possible that the jury will be seeing Mr. Dent testify on three  
9 : 1 4 A M 24 separate occasions today. I was planning to give --

9 : 1 4 A M 25 **THE COURT:** Explain to me. He's the 30(b)(6)?

9 : 1 4 A M 1 MS. SHORT: So he's the 30(b)(6). And in calling up  
9 : 1 4 A M 2 the video in front of the jury, I was going to say that this is  
9 : 1 4 A M 3 the corporate deposition of defendant Bluewave Healthcare  
9 : 1 4 A M 4 Consultants. I can add a sentence to that to explain that  
9 : 1 4 A M 5 Mr. Dent was the corporate representative.

9 : 1 4 A M 6 THE COURT: No, I'm looking at my own notes. I have  
9 : 1 4 A M 7 a standard instruction on depositions. Let me take a look and  
9 : 1 4 A M 8 see how it fits into this particular thing. I might need to  
9 : 1 4 A M 9 make some variation of it.

9 : 1 5 A M 10 (Pause.)

9 : 1 5 A M 11 THE COURT: Are you publishing the deposition of  
9 : 1 5 A M 12 defendant Johnson?

9 : 1 5 A M 13 MS. SHORT: Yes. So Mr. Johnson will be the  
9 : 1 5 A M 14 second --

9 : 1 5 A M 15 THE COURT: Right. I'm sorry. I see it right here  
9 : 1 5 A M 16 in my notes.

9 : 1 5 A M 17 You know, what I intend to do is explain to the  
9 : 1 5 A M 18 jury that these are depositions of parties, and that the  
9 : 1 6 A M 19 government -- any party, opposing party, has a right to  
9 : 1 6 A M 20 publish -- in this case, show the video deposition and that  
9 : 1 6 A M 21 they should consider it as evidence in the case just like any  
9 : 1 6 A M 22 other testimony from the witness stand. That's what I intend  
9 : 1 6 A M 23 to instruct them.

9 : 1 6 A M 24 MS. SHORT: Okay. And I think we're concerned about  
9 : 1 6 A M 25 the confusion of seeing the same corporate --

9 : 1 6 A M 1 THE COURT: I'll say something to them about that --

9 : 1 6 A M 2 MS. SHORT: Okay.

9 : 1 6 A M 3 THE COURT: -- about Mr. Dent as a -- initially as a  
9 : 1 6 A M 4 corporate representative. I'll explain that. And to the  
9 : 1 6 A M 5 extent you feel like that's not adequate, just let me know. I  
9 : 1 6 A M 6 want to make sure -- I'm big on letting the jury figure out  
9 : 1 6 A M 7 what's going on here because this is not what they would say on  
9 : 1 6 A M 8 TV; right?

9 : 1 6 A M 9 MS. SHORT: Right. Exactly.

9 : 1 6 A M 10 THE COURT: I want them to know what they're looking  
9 : 1 6 A M 11 at and why it was there.

9 : 1 6 A M 12 Anything else?

9 : 1 6 A M 13 MS. SHORT: The other thing is that there are several  
9 : 1 6 A M 14 exhibits that are being published along with these videos. A  
9 : 1 6 A M 15 number of them have already been moved into evidence, but there  
9 : 1 6 A M 16 are a number still that will come in through these videos. We  
9 : 1 7 A M 17 can either --

9 : 1 7 A M 18 THE COURT: Let's do it now.

9 : 1 7 A M 19 MS. SHORT: -- add those now or --

9 : 1 7 A M 20 THE COURT: Let's do them right now. What are they,  
9 : 1 7 A M 21 the ones not in yet?

9 : 1 7 A M 22 MS. SHORT: All right. I'm going to just go ahead  
9 : 1 7 A M 23 and hand those up if that's okay.

9 : 1 7 A M 24 THE COURT: That would be fine.

9 : 1 7 A M 25 MS. SHORT: Okay. So, Your Honor, this is --



9 : 1 7 A M 1 THE COURT: What are the numbers?

9 : 1 7 A M 2 MS. SHORT: This is solely for the 30(b)(6)  
9 : 1 7 A M 3 deposition.

9 : 1 7 A M 4 THE COURT: Right.

9 : 1 7 A M 5 MS. SHORT: They are U.S. Trial Exhibit Numbers 1049,  
9 : 1 7 A M 6 1005, 1075, 1096, 1221, 1097, 1260, 1311, 1004, 1099, 1228,  
9 : 1 7 A M 7 1235, 1249, 1103, 1289, 1191, 1122, 1126, and Bluewave Trial  
9 : 1 8 A M 8 Exhibits 60, and Bluewave Trial Exhibit 250.

9 : 1 8 A M 9 THE COURT: Well, let me just say, unless Bluewave  
9 : 1 8 A M 10 moves it in, we wouldn't normally call it a Bluewave exhibit;  
9 : 1 8 A M 11 we'd call it a plaintiffs' exhibit. So y'all need to renumber  
9 : 1 8 A M 12 that -- those because that would be confusing. Bluewave  
9 : 1 8 A M 13 exhibits are labeled Bluewave because Bluewave offered them  
9 : 1 8 A M 14 into evidence.

9 : 1 8 A M 15 MS. SHORT: Correct, Your Honor.

9 : 1 8 A M 16 THE COURT: If the government is offering them into  
9 : 1 8 A M 17 evidence -- did Bluewave offer them during the deposition?

9 : 1 8 A M 18 MS. SHORT: So during the deposition, we used  
9 : 1 8 A M 19 deposition exhibits. So it's Deposition Exhibit 1, 2, 3, 4.  
9 : 1 8 A M 20 These are exhibits that come off of Bluewave's trial exhibit  
9 : 1 9 A M 21 list.

9 : 1 9 A M 22 THE COURT: Okay. Well, I will clarify that.

9 : 1 9 A M 23 For those just listed for the plaintiff, is  
9 : 1 9 A M 24 there any objection from the defendant -- defendants?

9 : 1 9 A M 25 MR. COOKE: Your Honor, I believe not. And I say

9 : 1 9 A M 1 that because I think you've already ruled on the objections  
9 : 1 9 A M 2 that we raised as to those deposition exhibits.

9 : 1 9 A M 3 THE COURT: Okay. Very good.

9 : 1 9 A M 4 MR. COOKE: I'll admit I haven't memorized the  
9 : 1 9 A M 5 numbers, so I'm taking it on faith that these have been agreed  
9 : 1 9 A M 6 to or the Court has ruled on them.

9 : 1 9 A M 7 THE COURT: Okay. Very good.

9 : 1 9 A M 8 Mr. Ashmore?

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

9 : 1 9 A M 10 THE COURT: Very good. In the absence of objections  
9 : 1 9 A M 11 other than the ones which I have previously ruled upon in the  
9 : 1 9 A M 12 course of the -- the Bluewave objections will be continuing.

9 : 1 9 A M 13 I admit over those objections Plaintiffs' 1049,  
9 : 1 9 A M 14 1005, 1075, 1096, 1221, 1097, 1260, 1311, 1004, 1099, 1228,  
9 : 1 9 A M 15 1235, 1249, 1103, 1289, 1191, 1122, and 1126.

9 : 2 0 A M 16 Does BlueWave seek to admit Documents 60 --  
9 : 2 0 A M 17 BlueWave Documents 60 and 250? Are you moving those in,  
9 : 2 0 A M 18 Mr. Cooke?

9 : 2 0 A M 19 MR. COOKE: No, Your Honor. I believe they're being  
9 : 2 0 A M 20 offered by the government.

9 : 2 0 A M 21 THE COURT: See, that's confusing because the jury  
9 : 2 0 A M 22 would know those are offered by BlueWave. So I think you need  
9 : 2 0 A M 23 to renumber them.

9 : 2 0 A M 24 MR. LEVENTIS: we'll do that right now, Your Honor.

9 : 2 0 A M 25 THE COURT: Okay. Let's just renumber them because I

1 think otherwise it's very confusing, you both use the Bluewave  
2 numbers.

3 MR. COOKE: Your Honor, if you give me a second, I'll  
4 take a look at them and see if it's something we would put in.

5 THE COURT: You understand? I just don't think it's  
6 fair to tell the jury it's your exhibit when it's not.

7 MS. SHORT: We've been trying to work out the  
8 exhibits and what's going to be published to the jury for  
9 several weeks now. And it so happened that one of the exhibits  
10 that is shown to the deponent was on the Bluewave exhibit list.

11 THE COURT: That's fine. I don't really mind --

12 MS. SHORT: Okay.

13 THE COURT: -- but they have the prerogative of  
14 offering documents in, and you have a prerogative. And I'm  
15 just not going to call something you offered a Bluewave  
16 exhibit. I'm just not going to do that. So you need to give  
17 me a number for those two.

18 MS. SHORT: Okay. Let's redesignate them Bluewave --  
19 the Bluewave Document 60, we'll designate as U.S. Trial  
20 Exhibit 7007.

21 THE COURT: 7007. Okay.

22 MS. SHORT: And the document that was labeled  
23 Bluewave 250, we'll redesignate as Government Exhibit 7008.

24 THE COURT: Okay. Documents -- Exhibits 7007, 7008  
25 of the plaintiff, any objection from the defendants?

9 : 2 1 A M 1 MR. COOKE: No objection.

9 : 2 1 A M 2 THE COURT: From --

9 : 2 1 A M 3 MR. ASHMORE: No.

9 : 2 1 A M 4 THE COURT: No objections. Exhibits -- Plaintiffs'  
9 : 2 1 A M 5 Exhibits 7007 and 7008 are admitted without objection.

9 : 2 1 A M 6 I want to remember -- remind the counsel the  
9 : 2 1 A M 7 admonition end of each day, when you've offered exhibits, you  
9 : 2 2 A M 8 must come to Ms. Ravenel and check them off and confirm she has  
9 : 2 2 A M 9 them all. Okay?

9 : 2 2 A M 10 Anything further?

9 : 2 2 A M 11 MS. SHORT: I believe that's all, Your Honor.

9 : 2 2 A M 12 MR. LEVENTIS: Nothing further, Your Honor. Thank  
9 : 2 2 A M 13 you.

9 : 2 2 A M 14 THE COURT: Mr. Cooke, anything you've got?

9 : 2 2 A M 15 MR. COOKE: I have two things unrelated to this  
9 : 2 2 A M 16 deposition.

9 : 2 2 A M 17 One of them has to do with exhibits that we  
9 : 2 2 A M 18 anticipate are going to be offered through Linda Flipppo. And  
9 : 2 2 A M 19 we're going so have some objections to those, and I -- because  
9 : 2 2 A M 20 they're the uncommunicated work product. And I was going to  
9 : 2 2 A M 21 offer to hand up -- just hand them up to the Court if you  
9 : 2 2 A M 22 wanted to --

9 : 2 2 A M 23 THE COURT: Let me take that up when we -- before we  
9 : 2 2 A M 24 put Ms. Flipppo on, I'm going to take a break. Let's do it  
9 : 2 2 A M 25 then. I'd rather keep it sort of related to the exhibits,

9 : 2 2 A M 1 because I want to look at the documents. I don't want to get  
9 : 2 2 A M 2 distracted. I want to focus as she's getting ready to testify.

9 : 2 2 A M 3 MR. COOKE: There are about 15 of them.

9 : 2 2 A M 4 THE COURT: That's fine. I'm fine for that.

9 : 2 2 A M 5 MR. COOKE: Then the second is -- and it's not  
9 : 2 2 A M 6 germane to this -- but we were wondering if we could get a  
9 : 2 3 A M 7 little guidance on, as we prepare our witnesses, we are mindful  
9 : 2 3 A M 8 that they have been sequestered. And we've been debating over  
9 : 2 3 A M 9 the weekend what we're allowed to tell them about what they'll  
9 : 2 3 A M 10 be testifying about or what anybody has testified to.

9 : 2 3 A M 11 THE COURT: You can't talk about what anybody has  
9 : 2 3 A M 12 been testifying about because that is the purpose of  
9 : 2 3 A M 13 sequestration, is that they don't know that. They come in  
9 : 2 3 A M 14 untarnished by that information. That's why they -- that's why  
9 : 2 3 A M 15 they've been sequestered. So you can't tell them that.  
9 : 2 3 A M 16 Obviously, Mr. Cooke, there's an element of integrity of  
9 : 2 3 A M 17 counsel, because you have a right to prepare your witness for  
9 : 2 3 A M 18 trial.

9 : 2 3 A M 19 MR. COOKE: Right.

9 : 2 3 A M 20 THE COURT: Okay?

9 : 2 3 A M 21 But you can't tell them somebody has testified  
9 : 2 3 A M 22 in a way, because that could potentially shape their testimony.  
9 : 2 3 A M 23 So you have to do it as if the trial hadn't begun.

9 : 2 3 A M 24 And I know it's asking a lot of the lawyers, but  
9 : 2 3 A M 25 that's the rule.

9 : 2 3 A M 1 MR. COOKE: That's why we asked, because --

9 : 2 3 A M 2 THE COURT: But you can talk to them. You can  
9 : 2 3 A M 3 prepare your witness for trial. It's your right to do that.

9 : 2 4 A M 4 MR. COOKE: "We're going to ask you this question.  
9 : 2 4 A M 5 You may be asked this question on cross." And I know that it's  
9 : 2 4 A M 6 based in part on what I've heard at trial. I just didn't want  
9 : 2 4 A M 7 to be honoring the --

9 : 2 4 A M 8 THE COURT: I would simply say -- let's say you were  
9 : 2 4 A M 9 doing it last week, you were preparing them. You don't do it  
9 : 2 4 A M 10 any differently than you would have done it before the trial  
9 : 2 4 A M 11 began.

9 : 2 4 A M 12 MR. COOKE: Okay.

9 : 2 4 A M 13 THE COURT: I'm telling you we have to, to some  
9 : 2 4 A M 14 degree, rely on the integrity and honesty of counsel. That --  
9 : 2 4 A M 15 with this group, I haven't the slightest worry about that.

9 : 2 4 A M 16 MR. COOKE: Could I ask about one specific example?

9 : 2 4 A M 17 THE COURT: Yes.

9 : 2 4 A M 18 MR. COOKE: This is the first time I've ever had  
9 : 2 4 A M 19 experts sequestered. And the expert is here specifically to  
9 : 2 4 A M 20 respond to their expert. And Dr. Trost didn't testify as to  
9 : 2 4 A M 21 all the things that he testified to in his deposition and  
9 : 2 4 A M 22 report. I would like to be able to tell our expert that you're  
9 : 2 4 A M 23 not going to have to respond to all the things that you think  
9 : 2 4 A M 24 you're going to have to respond to.

9 : 2 4 A M 25 THE COURT: I just don't know where that goes. I

1 think what you do is, you're obviously doing a direct on that  
2 witness, and he will respond to the questions you give him.  
3 And I wouldn't worry about it. Because he's not going to be  
4 asked about it, he doesn't need to know that it wasn't  
5 addressed.

6 **MR. COOKE:** Okay. That's helpful.

7 **THE COURT:** And, you know, I know there's an issue  
8 about experts being sequestered. But, frankly, I don't want an  
9 expert's testimony tailored to be sort of weaponized based on  
10 testimony. I want them to offer the opinion that they intended  
11 to offer, that was provided in an expert report. That's the  
12 opinion the jury should get.

13 It's a little bit different kind of trial when  
14 Rule 615 is offered. I frankly don't blame any counsel for not  
15 wanting -- I don't blame sequestration. I used to do it all  
16 the time myself. I don't know if I ever tried a case I didn't  
17 sequester witnesses.

18 Anything else?

19 **MR. GRIFFITH:** Your Honor -- and I apologize, but  
20 there's just thousands of exhibits in this case --

21 **THE COURT:** Tell me about it.

22 **MR. GRIFFITH:** -- and it's very difficult to keep up  
23 with it. But we had objected to 1191, USA 1191, and 1126.

24 **THE COURT:** Hold on a second.

25 I've admitted them. I gave y'all a chance to do

9 : 2 6 A M 1 it -- guys, we've got to have some order in this trial.

9 : 2 6 A M 2 MS. SHORT: Your Honor, those objections to those  
9 : 2 6 A M 3 exhibits were resolved at the pretrial conference.

9 : 2 6 A M 4 THE COURT: I said "over the objections of" --  
9 : 2 6 A M 5 there's a record of pretrial conference. So you're protected.

9 : 2 6 A M 6 MR. GRIFFITH: Thank you, Your Honor.

9 : 2 6 A M 7 THE COURT: I'm trying to -- I don't want an  
9 : 2 6 A M 8 argument -- this has been -- we've had all these orders and  
9 : 2 6 A M 9 we've had complicated pretrial. And what I'm trying to  
9 : 2 6 A M 10 prevent, I don't want a party prejudiced who raised it  
9 : 2 6 A M 11 somewhere and I ruled on it to somehow say, "Oh, you gave it up  
9 : 2 6 A M 12 because you didn't mention it another time."

9 : 2 6 A M 13 That's why I said earlier to defense counsel,  
9 : 2 6 A M 14 you know, I understand your objections are ongoing, so you  
9 : 2 6 A M 15 don't got a gotcha situation because you didn't again repeat  
9 : 2 7 A M 16 something you've told me 16 times already. I get it, and I'm  
9 : 2 7 A M 17 trying to protect the record regarding that.

9 : 2 7 A M 18 MR. GRIFFITH: Thank you, Your Honor.

9 : 2 7 A M 19 THE COURT: Mr. Ashmore, anything further?

9 : 2 7 A M 20 MR. ASHMORE: No, Your Honor. Thank you.

9 : 2 7 A M 21 THE COURT: Okay. Let's bring the jury in.

9 : 2 7 A M 22 (Whereupon the jury entered the courtroom.)

9 : 2 8 A M 23 THE COURT: Please be seated. Good morning.

9 : 2 8 A M 24 JURY: Good morning.

9 : 2 8 A M 25 THE COURT: Amazing what a weekend of rest can do and



9 : 2 8 A M 1 how fresh you are.

9 : 2 9 A M 2 Let me -- I want y'all to know, I'm very  
9 : 2 9 A M 3 conscious that you're sitting back there, you've arrived at  
9 : 2 9 A M 4 9:00, but sometimes there are legal matters I need to address,  
9 : 2 9 A M 5 and it helps the trial move more smoothly. So I'm conscious  
9 : 2 9 A M 6 you're back there, but I want to keep the trial moving. And  
9 : 2 9 A M 7 that's why you may have to wait a little while out here. We're  
9 : 2 9 A M 8 in here working, trying to address and clarify matters.

9 : 2 9 A M 9 A portion of today is going to be taken up with  
9 : 2 9 A M 10 showing you a video of depositions of parties. When -- a  
9 : 2 9 A M 11 deposition is a sworn statement taken outside the courtroom by  
9 : 2 9 A M 12 the parties. It's done under oath. And our rules provide that  
9 : 2 9 A M 13 a deposition of a party is just like evidence at trial and can  
9 : 2 9 A M 14 be shown to you just like evidence at a trial. In fact, it is  
9 : 2 9 A M 15 evidence at the trial. And it comes in a couple of different  
9 : 2 9 A M 16 ways.

9 : 2 9 A M 17 One of the defendants is Bluewave. It's a  
9 : 3 0 A M 18 corporate entity. And there is something called -- we call it  
9 : 3 0 A M 19 in our business a 30(b)(6) corporate representative. And you  
9 : 3 0 A M 20 will see defendant Dent -- initially, the first video will be  
9 : 3 0 A M 21 him testifying as the corporate representative. And that video  
9 : 3 0 A M 22 will be -- will be shown.

9 : 3 0 A M 23 And then there will be depositions of defendants  
9 : 3 0 A M 24 Dent and Johnson individually testifying; that is, because  
9 : 3 0 A M 25 they're parties in the case as well.

9 : 3 0 A M 1 You should consider deposition testimony,  
9 : 3 0 A M 2 evaluate the weight and credibility to which it is entitled in  
9 : 3 0 A M 3 the same way you would consider and evaluate all other  
9 : 3 0 A M 4 testimony in the case. In other words, you should listen to  
9 : 3 0 A M 5 the deposition just as though the witness was here in person  
9 : 3 0 A M 6 testifying before you.

9 : 3 0 A M 7 So that is what we're going to do. We'll  
9 : 3 0 A M 8 intersperse this morning with some of these video depositions  
9 : 3 0 A M 9 and with live witnesses. It'll be a little of both.

9 : 3 1 A M 10 The first one, I'm told, is about an hour and 16  
9 : 3 1 A M 11 minutes. So what I'm going to do is I'll take our break after  
9 : 3 1 A M 12 that, a little short of the -- a little sooner than I normally  
9 : 3 1 A M 13 would, because then we're going to have a live witness. And I  
9 : 3 1 A M 14 didn't want to disrupt that live witness's testimony.

9 : 3 1 A M 15 So we'll do about this hour and 16 minutes,  
9 : 3 1 A M 16 we'll break, we'll come back and we'll continue. We may break  
9 : 3 1 A M 17 these other depositions just a little bit to keep them on  
9 : 3 1 A M 18 schedule and giving y'all a break about every hour and a half.

9 : 3 1 A M 19 But pay attention. This is important evidence,  
9 : 3 1 A M 20 just like every other piece of evidence and every other witness  
9 : 3 1 A M 21 who is here. But this testimony is as if the witness was on  
9 : 3 1 A M 22 the witness stand.

9 : 3 1 A M 23 Anything further the parties wish for me to  
9 : 3 1 A M 24 address with the jury regarding this matter?

9 : 3 1 A M 25 MS. SHORT: No, Your Honor.

9 : 3 1 A M 1 THE COURT: From the defense?

9 : 3 1 A M 2 MR. COOKE: No, Your Honor. Thank you.

9 : 3 1 A M 3 MR. ASHMORE: No, sir.

9 : 3 1 A M 4 THE COURT: Very good.

9 : 3 1 A M 5 Okay. Play the video.

9 : 3 1 A M 6 (video played.)

9 : 3 1 A M 7 THE VIDEOGRAPHER: We're now on the record. Today's  
9 : 3 1 A M 8 date is April 6th, 2017. The time is 9:50. This is the video  
9 : 3 2 A M 9 deposition of Floyd Calhoun Dent, III, 30(b)(6) corporate  
9 : 3 2 A M 10 representative of BlueWave Healthcare Consultants, Inc., taken  
9 : 3 2 A M 11 by counsel for the plaintiffs.

9 : 3 2 A M 12 BY MS. DOBBIE:

9 : 3 2 A M 13 Q. Mr. Dent, can you describe your relationship to BlueWave  
9 : 3 2 A M 14 Healthcare Consultants?

9 : 3 2 A M 15 A. I'm a 50 percent owner of Bluewave Healthcare Consultants.

9 : 3 2 A M 16 Q. Beyond being an owner, did you have any management  
9 : 3 2 A M 17 responsibilities for Bluewave?

9 : 3 2 A M 18 A. I did.

9 : 3 2 A M 19 Q. What was your management responsibility?

9 : 3 2 A M 20 A. I think officially I was titled the treasurer and  
9 : 3 2 A M 21 secretary on the business documents.

9 : 3 2 A M 22 Q. Who was the other 50 percent owner of BlueWave?

9 : 3 2 A M 23 A. Brad Johnson.

9 : 3 2 A M 24 Q. And what was Mr. Johnson's management responsibilities, if  
9 : 3 2 A M 25 any?

9 : 3 2 A M 1 A. Brad Johnson was the chief executive officer at BlueWave  
9 : 3 2 A M 2 Healthcare Consultants.

9 : 3 2 A M 3 Q. Did you have any other management responsibilities or  
9 : 3 2 A M 4 titles?

9 : 3 3 A M 5 A. No other titles.

9 : 3 3 A M 6 Q. Is BlueWave still in existence?

9 : 3 3 A M 7 A. It is.

9 : 3 3 A M 8 Q. Is it still an operational business?

9 : 3 3 A M 9 A. No, ma'am.

9 : 3 3 A M 10 Q. When did it cease operations?

9 : 3 3 A M 11 A. I don't recall the exact date, but it was pretty much in  
9 : 3 3 A M 12 conjunction with this case.

9 : 3 3 A M 13 Q. Can you give me an approximate month and year that it  
9 : 3 3 A M 14 ceased operations?

9 : 3 3 A M 15 A. I'd say early January 2015.

9 : 3 3 A M 16 Q. When did Bluewave begin operations?

9 : 3 3 A M 17 A. January 4th, 2010.

9 : 3 3 A M 18 Q. I'm going to show you what I'm going to have marked as  
9 : 3 3 A M 19 Government's Exhibit Number 2. Take a minute to familiarize  
9 : 3 3 A M 20 yourself with the document.

9 : 3 4 A M 21 For the record, this is USADOC1006242.

9 : 3 4 A M 22 Is it fair to say that this document reflects the  
9 : 3 4 A M 23 essential terms of the agreement that you intended to enter  
9 : 3 4 A M 24 into on behalf of BlueWave as of October of 2009?

9 : 3 4 A M 25 A. I believe this is a working document discussing the terms

9 : 3 4 A M 1 of an agreement that we would give to attorneys to finalize.

9 : 3 4 A M 2 Q. And why are certain terms included in this discussion?

9 : 3 4 A M 3 A. I don't understand your question.

9 : 3 4 A M 4 Q. Are these the things being negotiated between yourself and  
9 : 3 4 A M 5 Ms. Mallory and Mr. Warnick and Mr. Johnson?

9 : 3 4 A M 6 A. Yes.

9 : 3 4 A M 7 Q. Are these the essential terms of the agreement?

9 : 3 4 A M 8 A. Yes. I believe this is a working document discussing the  
9 : 3 4 A M 9 terms of a contract that we're going to enter into with Health  
9 : 3 4 A M 10 Diagnostic Laboratory.

9 : 3 4 A M 11 Q. I'm going to hand you the sales agreement.

9 : 3 5 A M 12 All right. Have you seen this document before?

9 : 3 5 A M 13 And while you look at it, I'll read for the record,  
9 : 3 5 A M 14 it's USADOC074666.

9 : 3 5 A M 15 what does the contract say about processing and  
9 : 3 5 A M 16 handling fees?

9 : 3 5 A M 17 A. 3(b), you're asking me?

9 : 3 5 A M 18 Q. Yes.

9 : 3 5 A M 19 A. 3(b) says, "Duties of the company. Company shall provide  
9 : 3 5 A M 20 processing and handling fees to physicians in the range of 18  
9 : 3 5 A M 21 to \$21 and processing and handling fees to outside labs in the  
9 : 3 5 A M 22 range of \$18 to \$25 provided that any fee change shall be  
9 : 3 5 A M 23 mutually agreed upon by the parties unless required by any  
9 : 3 5 A M 24 state or federal laws or regulations."

9 : 3 5 A M 25 Q. At this point in time, had BlueWave done any analysis or

9 : 3 5 A M 1 study of the fair market value of processing and handling fees?

9 : 3 5 A M 2 A. No.

9 : 3 5 A M 3 Q. Had HDL done any study or analysis of the fair market  
9 : 3 6 A M 4 value of processing and handling fees as of April of 2010?

9 : 3 6 A M 5 A. I don't have knowledge of that.

9 : 3 6 A M 6 Q. Did Mr. Sellers offer you, BlueWave, an opinion on the  
9 : 3 6 A M 7 legality of processing and handling fees?

9 : 3 6 A M 8 A. No.

9 : 3 6 A M 9 Q. I'm going to hand you what I've marked as Deposition  
9 : 3 6 A M 10 Exhibit 4, Singulex agreement.

9 : 3 6 A M 11 For the record, this is USADOC060521.

9 : 3 6 A M 12 Mr. Dent, do you recognize your signature on page 8  
9 : 3 6 A M 13 of this agreement?

9 : 3 6 A M 14 A. I do recognize my signature on page 8.

9 : 3 6 A M 15 Q. And are you signing on behalf of BlueWave Healthcare  
9 : 3 6 A M 16 Consultants?

9 : 3 7 A M 17 A. Myself and Brad Johnson are signing on behalf of BlueWave  
9 : 3 7 A M 18 Healthcare Consultants, yes.

9 : 3 7 A M 19 Q. Who executed the agreement on behalf of Singulex?

9 : 3 7 A M 20 A. Philippe Goix.

9 : 3 7 A M 21 Q. Okay. And when was this agreement executed?

9 : 3 7 A M 22 A. I signed it June the 1st of 2010.

9 : 3 7 A M 23 Q. It appears that this agreement is substantially similar,  
9 : 3 7 A M 24 albeit there are some differences, with the HDL agreement. Do  
9 : 3 7 A M 25 you agree with that?

9 : 3 7 A M 1 A. I would agree with that.

9 : 3 7 A M 2 Q. And did BlueWave provide this agreement to Singulex, the  
9 : 3 7 A M 3 HDL agreement to Singulex?

9 : 3 7 A M 4 A. It wouldn't surprise me if we did. We certainly would  
9 : 3 7 A M 5 have used existing agreements that BlueWave has as a structure  
9 : 3 7 A M 6 to create a second agreement, yes.

9 : 3 7 A M 7 Q. Now, the territory in Clause 1, the appointment clause, is  
9 : 3 7 A M 8 that identical to the territory in the HDL agreement?

9 : 3 8 A M 9 A. I'd have to put them side by side, you know, to answer  
9 : 3 8 A M 10 that. It is certainly a list of southeastern states.

9 : 3 8 A M 11 Q. How did it come to pass for Singulex in terms of the  
9 : 3 8 A M 12 territory Singulex -- excuse me -- BlueWave covered on behalf  
9 : 3 8 A M 13 of Singulex?

9 : 3 8 A M 14 A. It would have been negotiated between BlueWave and  
9 : 3 8 A M 15 Singulex.

9 : 3 8 A M 16 Q. Well, was it the same that happened with HDL, that is,  
9 : 3 8 A M 17 that BlueWave essentially represented Singulex in every state  
9 : 3 8 A M 18 for which Singulex tests were marketed or sold?

9 : 3 8 A M 19 A. No.

9 : 3 8 A M 20 Q. Okay. Explain to me the difference.

9 : 3 8 A M 21 A. We didn't market for nearly as many states for Singulex as  
9 : 3 8 A M 22 we did for HDL. I believe we started with nine states with  
9 : 3 8 A M 23 Singulex. I'd have to count them, one, two, three, four, five,  
9 : 3 8 A M 24 six, seven, eight, nine. I think there were two times with an  
9 : 3 9 A M 25 annual meeting that that territory expanded. I think at one

9 : 3 9 A M 1 time we increased it to 16 states. And I think another time,  
9 : 3 9 A M 2 it was increased to 19 states. If my memory serves me  
9 : 3 9 A M 3 correctly, once we achieved 19 states, they kind of cut off our  
9 : 3 9 A M 4 ability to negotiate additional territory.

9 : 3 9 A M 5 Q. Did Bluewave at any point in time market or sell tests for  
9 : 3 9 A M 6 any laboratories beyond HDL and Singulex?

9 : 3 9 A M 7 A. No.

9 : 3 9 A M 8 Q. Did Bluewave have any other business besides marketing  
9 : 3 9 A M 9 tests for HDL and Singulex?

9 : 3 9 A M 10 A. No.

9 : 3 9 A M 11 Q. Beyond yourself and Mr. Johnson, are there any other  
9 : 3 9 A M 12 owners of Bluewave?

9 : 3 9 A M 13 A. Owners?

9 : 3 9 A M 14 Q. Yes.

9 : 3 9 A M 15 A. No.

9 : 3 9 A M 16 Q. Beyond yourself and Mr. Johnson, were there any other  
9 : 3 9 A M 17 managers of Bluewave?

9 : 3 9 A M 18 A. No.

9 : 3 9 A M 19 Q. Did anyone else operate Bluewave?

9 : 3 9 A M 20 A. No.

9 : 3 9 A M 21 Q. were there any other shareholders of Bluewave?

9 : 4 0 A M 22 A. No.

9 : 4 0 A M 23 Q. where was Bluewave located?

9 : 4 0 A M 24 A. The corporate office was in Alabama.

9 : 4 0 A M 25 Q. what was the location? Address?



9 : 4 0 A M 1 A. I don't know the exact address. I'd have to look it up.  
9 : 4 0 A M 2 It's in my phone under BlueWave.

9 : 4 0 A M 3 Q. Was that located at 307 Commercial Street Southeast,  
9 : 4 0 A M 4 Hanceville, Alabama?

9 : 4 0 A M 5 A. Yes.

9 : 4 0 A M 6 Q. Did Bluewave have any other offices beyond that location?

9 : 4 0 A M 7 A. No.

9 : 4 0 A M 8 Q. How many employees did Bluewave have -- Bluewave have?

9 : 4 0 A M 9 A. Three to four.

9 : 4 0 A M 10 Q. Who were those employees?

9 : 4 0 A M 11 A. Myself; Brad Johnson; at one point, Sandra Tankersley; at  
9 : 4 0 A M 12 another point, Tiffany Nelson; at another point, Charlotte  
9 : 4 0 A M 13 Denny.

9 : 4 0 A M 14 Q. How many sales representatives are we talking about?

9 : 4 0 A M 15 A. When we first started, there were just five of us. That  
9 : 4 0 A M 16 was it.

9 : 4 0 A M 17 Q. All right. And how quickly after Bluewave began  
9 : 4 0 A M 18 operations did Bluewave move to solely an independent  
9 : 4 1 A M 19 contractor structure for sales representatives?

9 : 4 1 A M 20 A. It was early on. It was within the first year of doing  
9 : 4 1 A M 21 business.

9 : 4 1 A M 22 Q. Can you explain to me when Ms. Tankersley was employed by  
9 : 4 1 A M 23 Bluewave?

9 : 4 1 A M 24 A. I don't recall her official dates. It was early with  
9 : 4 1 A M 25 Bluewave.

9 : 4 1 A M 1 Q. And for how long was Ms. Tankersley employed by BlueWave?

9 : 4 1 A M 2 A. I'm guessing a couple of years.

9 : 4 1 A M 3 Q. And what were her duties and responsibilities for  
9 : 4 1 A M 4 BlueWave?

9 : 4 1 A M 5 A. I guess if you had to describe her position, I'd call it  
9 : 4 1 A M 6 an executive administrative assistant.

9 : 4 1 A M 7 Q. Were these three employees given BlueWave email accounts?

9 : 4 1 A M 8 A. Yes.

9 : 4 1 A M 9 Q. And what was the address of a BlueWave email address?

9 : 4 1 A M 10 A. It would have been the first initial of the individual,  
9 : 4 1 A M 11 last name @bluewavehealth.com.

9 : 4 1 A M 12 Q. And so in addition to these three individuals, did you  
9 : 4 1 A M 13 have a BlueWave Healthcare email address?

9 : 4 1 A M 14 A. I did.

9 : 4 1 A M 15 Q. Who else had a BlueWave Healthcare email address?

9 : 4 2 A M 16 A. Myself, Brad Johnson, I believe Sandra would have at one  
9 : 4 2 A M 17 point, Tiffany, Charlotte. And any of the contractors would  
9 : 4 2 A M 18 certainly have access to a BlueWave email address.

9 : 4 2 A M 19 Q. Were there any other businesses operated out of  
9 : 4 2 A M 20 307 Commercial Street?

9 : 4 2 A M 21 A. Yes.

9 : 4 2 A M 22 Q. What were those other businesses?

9 : 4 2 A M 23 A. They were my business partner's businesses, so I can't  
9 : 4 2 A M 24 really speak accurately on what they were.

9 : 4 2 A M 25 Q. Can you --

9 : 4 2 A M 1 A. I don't know how many.

9 : 4 2 A M 2 Q. Can you describe 307 Commercial Street?

9 : 4 2 A M 3 A. I can describe it.

9 : 4 2 A M 4 Q. How big is it?

9 : 4 2 A M 5 A. I don't know. I would guess 1500 to 2,000 square feet.

9 : 4 2 A M 6 Q. How many employees worked out of 307 Commercial Street, in  
9 : 4 2 A M 7 addition to Ms. Tankersley, when that period was going on?

9 : 4 2 A M 8 A. Those would have been the ones that work out of the  
9 : 4 3 A M 9 business office.

9 : 4 3 A M 10 Q. Were there other employees who worked at 307 Commercial  
9 : 4 3 A M 11 Street -- or excuse me -- other individuals who worked at  
9 : 4 3 A M 12 307 Commercial Street who were not Bluewave employees?

9 : 4 3 A M 13 A. Sonja Stafford works out of there, you know. She's been  
9 : 4 3 A M 14 with Brad ever since I've known Brad, you know, working with  
9 : 4 3 A M 15 some of his other businesses.

9 : 4 3 A M 16 Q. Anyone else?

9 : 4 3 A M 17 A. Not to my knowledge.

9 : 4 3 A M 18 Q. Did Bluewave hire sales representatives to perform the  
9 : 4 3 A M 19 duties under the contracts with HDL and Singulex.

9 : 4 3 A M 20 A. Bluewave contracted with companies to act as independent  
9 : 4 3 A M 21 sales contractors for Bluewave, yes. And Bluewave had hired  
9 : 4 3 A M 22 some as employees initially, which, you know, I'd indicated we  
9 : 4 3 A M 23 later transitioned them to independent contractors.

9 : 4 3 A M 24 Q. I'm going to show you what's marked as Government's  
9 : 4 3 A M 25 Exhibit Number 5. But do you recognize this document?

9 : 4 3 A M 1 A. Yes.

9 : 4 3 A M 2 Q. Okay. And is that your signature at the end of the  
9 : 4 4 A M 3 document?

9 : 4 4 A M 4 A. Yes.

9 : 4 4 A M 5 Q. Okay. And who are you signing on behalf of?

9 : 4 4 A M 6 A. Hisway of South Carolina.

9 : 4 4 A M 7 Q. What is Hisway of South Carolina?

9 : 4 4 A M 8 A. It's a limited liability corporation that was formed by  
9 : 4 4 A M 9 myself and another business partner, Tony Carnaggio.

9 : 4 4 A M 10 Q. And when was Hisway formed?

9 : 4 4 A M 11 A. I'd have to pull out the documents to figure out the  
9 : 4 4 A M 12 formation date. It would have been in and around the same  
13 time -- or, no, before this.

9 : 4 4 A M 14 Q. What was the purpose of forming Hisway?

9 : 4 4 A M 15 A. My business partner -- Tony, not Brad -- we formed an  
9 : 4 4 A M 16 independent sales contracting company because we were going to  
9 : 4 4 A M 17 be 50-50 owners of that company to market in the states of  
9 : 4 4 A M 18 South Carolina, parts of North Carolina, and just a little bit  
9 : 4 4 A M 19 of Georgia, right there in Augusta, for Bluewave.

9 : 4 4 A M 20 Q. This document is dated March 25th of 2011, and its  
9 : 4 5 A M 21 effective date is April 1st of 2011.

9 : 4 5 A M 22 Do you see that?

9 : 4 5 A M 23 A. March 25th, 2011, is when I signed it, and its effective  
9 : 4 5 A M 24 date is April 1st of 2011. I see that.

9 : 4 5 A M 25 Q. Was Hisway operating on behalf of Bluewave before

9 : 4 5 A M 1 April 1st of 2011?

9 : 4 5 A M 2 A. I would say no.

9 : 4 5 A M 3 Q. So who was -- were you selling on behalf of Bluewave as an  
9 : 4 5 A M 4 individual before April 1st of 2011?

9 : 4 5 A M 5 A. We started selling for HDL in January of 2010.

9 : 4 5 A M 6 Q. Now, with respect to this agreement, this independent  
9 : 4 5 A M 7 contractor agreement that you have before you, was it similar  
9 : 4 5 A M 8 to other independent contractor agreements that Bluewave  
9 : 4 5 A M 9 entered into with other sales representatives?

9 : 4 5 A M 10 A. Yes.

9 : 4 5 A M 11 Q. Were there any substantial differences that you can think  
9 : 4 5 A M 12 of between this contract and the other contracts that Bluewave  
9 : 4 5 A M 13 entered into with other sales representatives for Bluewave?

9 : 4 6 A M 14 A. I don't recall there being any significant differences.

9 : 4 6 A M 15 Q. All right. And if you look at the first appointment  
9 : 4 6 A M 16 clause in the contract, this similarly provides offering  
9 : 4 6 A M 17 designated laboratory tests to physicians.

9 : 4 6 A M 18 what did you understand that to mean?

9 : 4 6 A M 19 A. "Company hereby appoints the contractor-offered designated  
9 : 4 6 A M 20 laboratory tests to physicians and medical groups specializing  
9 : 4 6 A M 21 in cardiology and other disease management specialties."

9 : 4 6 A M 22 Q. What was Hisway going to do for Bluewave?

9 : 4 6 A M 23 A. Market the diagnostic tests that were made available from  
9 : 4 6 A M 24 HDL and Singulex to Bluewave.

9 : 4 6 A M 25 Q. And I believe we've previously discussed the territorial

1 arrangement for Hisway. was this territorial arrangement  
2 different for each of the independent contractor agreements  
3 that Bluewave entered into with each of its sales  
4 representatives?

5 A. Each independent contractor would have their own  
6 designated geographic area of responsibility, yes.

7 Q. Okay. And about respect to the compensation that was  
8 earned by the sales representatives, can you explain to me what  
9 compensation was?

10 A. Well, they got a percent of collected revenue from the  
11 tests generated in their geographic area of responsibility.

12 Q. And what was the percentage that Hisway was to receive?

13 A. 6 percent.

14 Q. Of which company? It appears to me that 6 percent of HDL  
15 and 10 percent of Singulex.

16 A. Oh, that's 6 percent of collected revenues from tests  
17 generated in the territory processed by HDL and 10 percent of  
18 collected revenues from tests generated from the territory and  
19 processed by Singulex.

20 Q. And was that -- did that commission arrangement -- was it  
21 varied for each of the independent contractors?

22 A. Slightly. It would be either 5 percent or 6 percent.

23 Q. So if the sales representative sells more tests that have  
24 more -- they're reimbursed -- that HDL is reimbursed more for  
25 them, the sales representative will earn more money. Is that

9 : 4 8 A M 1 fair to say?

9 : 4 8 A M 2 A. well, percent of collected revenue, to use your example,  
9 : 4 8 A M 3 if the lab collected \$100 for a certain battery of tests versus  
9 : 4 8 A M 4 \$200, yes, their commission would be higher.

9 : 4 8 A M 5 Q. And what if they sell more tests?

9 : 4 8 A M 6 A. well, if you sell more automobiles, you would make more  
9 : 4 8 A M 7 money; if you sell more tests, you would make more money.

9 : 4 8 A M 8 Q. And Bluewave was in the business of selling tests;  
9 : 4 8 A M 9 correct?

9 : 4 8 A M 10 A. Absolutely.

9 : 4 8 A M 11 Q. How many Bluewave sales representatives did Bluewave  
9 : 4 8 A M 12 ultimately contract with?

9 : 4 8 A M 13 A. I would say close to 50.

9 : 4 8 A M 14 Q. I'm going to show you what I'll have marked as deposition  
9 : 4 8 A M 15 Exhibit Number 6.

9 : 4 8 A M 16 Do you recognize Government's -- Deposition  
9 : 4 9 A M 17 Exhibit 6?

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

9 : 4 9 A M 19 Q. who drafted this document?

9 : 4 9 A M 20 A. I would say it was a joint effort between my -- it's got  
9 : 4 9 A M 21 Tonya Mallory's at the end.

9 : 4 9 A M 22 Q. Right. There appears to be a portion that's dedicated to  
9 : 4 9 A M 23 HDL and a portion that's dedicated to Singulex.

9 : 4 9 A M 24 A. It's a Bluewave training packet.

9 : 4 9 A M 25 Q. Bluewave provided its sales contractors with business

9 : 4 9 A M 1 cards?

9 : 4 9 A M 2 A. Yes.

9 : 4 9 A M 3 Q. And was the name Bluewave on those business cards?

9 : 4 9 A M 4 A. Yes.

9 : 4 9 A M 5 Q. All right. Did Bluewave provide its independent  
9 : 4 9 A M 6 contractors with Bluewave email addresses?

9 : 4 9 A M 7 A. Yes.

9 : 4 9 A M 8 Q. Okay. Did independent contracts also hire employees or  
9 : 4 9 A M 9 independent contractors, to Bluewave's knowledge?

9 : 4 9 A M 10 A. Yes.

9 : 4 9 A M 11 Q. Okay. Did Bluewave require that the individuals hired by  
9 : 5 0 A M 12 independent contractors receive Bluewave, HDL, or Singulex  
9 : 5 0 A M 13 training?

9 : 5 0 A M 14 A. The Bluewave, Singulex, and HDL training were made  
9 : 5 0 A M 15 available to anybody and everybody that worked for the  
9 : 5 0 A M 16 independent contractors.

9 : 5 0 A M 17 Q. Was -- were the independent contractors required to notice  
9 : 5 0 A M 18 Bluewave of when independent contractors hired additional  
9 : 5 0 A M 19 employees or independent contractors themselves?

9 : 5 0 A M 20 A. No.

9 : 5 0 A M 21 Q. So did Bluewave provide any legal training to its sales  
9 : 5 0 A M 22 representatives?

9 : 5 0 A M 23 A. Yes.

9 : 5 0 A M 24 Q. What was that training?

9 : 5 0 A M 25 A. We had a test that would go over the dos and don'ts in the



9 : 5 0 A M 1 industry, primarily related to HIPAA, the Anti-Kickback, and  
9 : 5 0 A M 2 Stark Laws.

9 : 5 0 A M 3 Q. what legal training did Bluewave provide to its  
9 : 5 0 A M 4 independent sales contractors on the Anti-Kickback Statute?

9 : 5 0 A M 5 A. we had PowerPoint presentations that I'm under the  
9 : 5 0 A M 6 impression have been provided to the federal government.

9 : 5 1 A M 7 Q. were these presentations prepared by Bluewave?

9 : 5 1 A M 8 A. Yes.

9 : 5 1 A M 9 Q. who prepared them for Bluewave?

9 : 5 1 A M 10 A. Myself and Brad.

9 : 5 1 A M 11 Q. were they reviewed by an attorney?

9 : 5 1 A M 12 A. Yes.

9 : 5 1 A M 13 Q. who?

9 : 5 1 A M 14 A. There was a law firm that we actually had look at them a  
9 : 5 1 A M 15 second time. I don't recall a formal submission to a law firm  
9 : 5 1 A M 16 to review our training slides. There were training slides that  
9 : 5 1 A M 17 you could get off the internet. There were training slides  
9 : 5 1 A M 18 that we had available to us through previous employment, et  
9 : 5 1 A M 19 cetera.

9 : 5 1 A M 20 Q. what was the name of the law firm?

9 : 5 1 A M 21 A. I don't recall.

9 : 5 1 A M 22 Q. And how was -- what was the mechanism by which that was  
9 : 5 1 A M 23 provided to --

9 : 5 1 A M 24 A. we had conference calls, you know, for different training,  
9 : 5 1 A M 25 and it was something that Brad and I would do out in the field,

9 : 5 1 A M 1 you know, with representatives. But, again, most of these  
9 : 5 1 A M 2 folks are very familiar with all of that. They've been in the  
9 : 5 1 A M 3 industry for years.

9 : 5 1 A M 4 Q. How frequently were the conference calls?

9 : 5 1 A M 5 A. We would conduct the legal training annually. The HIPAA  
9 : 5 1 A M 6 training was every six months.

9 : 5 2 A M 7 Q. Do you have records of the legal training being conducted  
9 : 5 2 A M 8 by BlueWave annually?

9 : 5 2 A M 9 A. We do have the records of the conference calls where the  
9 : 5 2 A M 10 training was conducted. When there was a formal training  
9 : 5 2 A M 11 session, any conference call would be logged in, and the  
9 : 5 2 A M 12 attendees would be marketed. But it was an ongoing thing when  
9 : 5 2 A M 13 you work with, you know, contractors in the field.

9 : 5 2 A M 14 Q. And was that -- did that begin in 2010?

9 : 5 2 A M 15 A. In 2010, you have to remember, there's only five people  
9 : 5 2 A M 16 promoting for Bluewave, so -- and those five people were myself  
9 : 5 2 A M 17 and Brad being two and then three others that were very close  
9 : 5 2 A M 18 with us that worked at Berkeley.

9 : 5 2 A M 19 So we were trained together all the time at Berkeley  
9 : 5 2 A M 20 on legal compliance.

9 : 5 2 A M 21 Q. So when did the trainings begin?

9 : 5 2 A M 22 A. When we started adding new contractors, you know, in --  
9 : 5 2 A M 23 aside the initial five, then we started formally training  
9 : 5 2 A M 24 folks.

9 : 5 2 A M 25 Q. And what year was that?

9 : 5 2 A M 1 A. It would have been 2011, 2012.

9 : 5 3 A M 2 Q. All right. So did Bluewave ever hire any outside  
9 : 5 3 A M 3 consultants to conduct training?

9 : 5 3 A M 4 A. I don't recall ever hiring any outside consultants to  
9 : 5 3 A M 5 conduct training, no.

9 : 5 3 A M 6 Q. What efforts did Bluewave undertake to monitor the  
9 : 5 3 A M 7 performance and practice of the Bluewave sales representatives?

9 : 5 3 A M 8 A. Well, we would ride in the field with them routinely, for  
9 : 5 3 A M 9 training purposes, and go with them on account calls.

9 : 5 3 A M 10 Q. Okay. But how else would you monitor their performance?

9 : 5 3 A M 11 A. Their performance was monitored by their sales.

9 : 5 3 A M 12 Q. All right. Did Bluewave receive from HDL a daily sample  
9 : 5 3 A M 13 count of how many samples were being referred by physicians in  
9 : 5 3 A M 14 each territory operated by a Bluewave sales representative?

9 : 5 3 A M 15 A. Yes.

9 : 5 3 A M 16 Q. Okay. And what was the purpose of obtaining that  
9 : 5 3 A M 17 information?

9 : 5 3 A M 18 A. Feedback on, you know, what sales were made in their  
9 : 5 4 A M 19 accounts.

9 : 5 4 A M 20 Q. Ultimately, how much did Bluewave expend on sales  
9 : 5 4 A M 21 representative commissions?

9 : 5 4 A M 22 A. You should have the exact numbers of what we paid out in  
9 : 5 4 A M 23 sales commissions, but it would be in keeping with the  
9 : 5 4 A M 24 independent contract sales agreement with those individual  
9 : 5 4 A M 25 companies.

9 : 5 4 A M 1 Q. Is there any reason to think that \$63 million is an  
9 : 5 4 A M 2 inaccurate number?

9 : 5 4 A M 3 A. That Bluewave paid to independent sales contractors?  
9 : 5 4 A M 4 There's no reason to believe that that's not accurate.

9 : 5 4 A M 5 Q. All right. Beyond the \$63 million that Bluewave expended  
9 : 5 4 A M 6 to sales represent activities in terms of commissions, what  
9 : 5 4 A M 7 other expenses did Bluewave have?

9 : 5 4 A M 8 A. Bluewave expenses were limited to our employees, any  
9 : 5 4 A M 9 expenses for Brad and I to travel, you know, to the various  
9 : 5 4 A M 10 states to work with the contractors. So that would include  
9 : 5 4 A M 11 airline tickets. That would include hotels, meals, fuel  
9 : 5 5 A M 12 reimbursement, legal expenses. We had a ton of legal expenses,  
9 : 5 5 A M 13 you know, with attorneys. Again, our accounting records would  
9 : 5 5 A M 14 show you very detailed listing of all expenses that Bluewave  
9 : 5 5 A M 15 incurred.

9 : 5 5 A M 16 Q. What happened to the balance of the monies earned by  
9 : 5 5 A M 17 Bluewave?

9 : 5 5 A M 18 A. The balance of monies that were paid to Bluewave, as you  
9 : 5 5 A M 19 indicated, would go out to the independent contractors for --

9 : 5 5 A M 20 Q. Above and beyond the 63 million that was expended on  
9 : 5 5 A M 21 commissions.

9 : 5 5 A M 22 A. So you're talking about profit?

9 : 5 5 A M 23 Q. I'm asking, if Bluewave earned above \$63 million, where  
9 : 5 5 A M 24 did the -- where did any additional money go?

9 : 5 5 A M 25 A. From inception, Bluewave would periodically distribute

9 : 5 5 A M 1 money to the two owners, which were myself and Brad Johnson.

9 : 5 5 A M 2 Q. So is it fair to say that any monies not expended in  
9 : 5 5 A M 3 commissions were remitted to the owners in terms of  
9 : 5 6 A M 4 distributions?

9 : 5 6 A M 5 A. Minus expenses for the company, yes.

9 : 5 6 A M 6 Q. Is it fair to say that you and Mr. Johnson shared  
9 : 5 6 A M 7 responsibility for compliance?

9 : 5 6 A M 8 A. Yes.

9 : 5 6 A M 9 Q. But I'm just asking, is there any specific Anti-Kickback  
9 : 5 6 A M 10 Statute training that was separate and apart from the legal  
9 : 5 6 A M 11 training mentioned in this --

9 : 5 6 A M 12 A. No. It would have been included in the legal training.

9 : 5 6 A M 13 Q. Did there come a point in time when Bluewave did implement  
9 : 5 6 A M 14 a compliance program or policy?

9 : 5 6 A M 15 A. We had our compliance and ethics bulletin from the  
9 : 5 6 A M 16 beginning.

9 : 5 6 A M 17 Q. Well, the document that Bluewave provided to the United  
9 : 5 6 A M 18 States, which I believe is -- appears to be dated -- appears to  
9 : 5 6 A M 19 be dated November -- excuse me -- January of 2012. Is that  
9 : 5 7 A M 20 accurate, that Bluewave had an ethics and compliance guideline  
9 : 5 7 A M 21 as of January of 2012?

9 : 5 7 A M 22 A. This is dated 4 January 2012, yes.

9 : 5 7 A M 23 Q. Was there an ethics and compliance guideline prior to  
9 : 5 7 A M 24 January 2012?

9 : 5 7 A M 25 A. I don't recall a formal one.

9 : 5 7 A M 1 Q. And for the record, that's USADOC054241?

9 : 5 7 A M 2 A. So which one am I looking at now?

9 : 5 7 A M 3 Q. We're going to put aside 7, and I've had marked for the  
9 : 5 7 A M 4 record as 8 USADOC054812.

9 : 5 7 A M 5 Mr. Dent, do you recognize Government's Exhibit  
9 : 5 7 A M 6 Number 8?

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

9 : 5 7 A M 8 Q. What is Government's Exhibit 8?

9 : 5 7 A M 9 A. A legal conference call test.

9 : 5 8 A M 10 Q. And what is this document?

9 : 5 8 A M 11 A. This is a test that we would provide to our contractors  
9 : 5 8 A M 12 after we did a legal conference call.

9 : 5 8 A M 13 Q. So it appears that there are three legal conference calls  
9 : 5 8 A M 14 tests contained within Exhibit 8? Just so the record's clear  
9 : 5 8 A M 15 on which documents we're talking about.

9 : 5 8 A M 16 A. Yes.

9 : 5 8 A M 17 Q. Okay. And are these the legal conference call tests that  
9 : 5 8 A M 18 you referenced prior to your -- previously in your testimony?

9 : 5 8 A M 19 A. Yes.

9 : 5 8 A M 20 Q. Who wrote those documents?

9 : 5 8 A M 21 A. Myself and Brad.

9 : 5 8 A M 22 Q. Okay. And how were they transmitted to sales  
9 : 5 8 A M 23 representatives?

9 : 5 8 A M 24 A. I would guess email.

9 : 5 8 A M 25 Q. And who reviewed these documents?

9 : 5 8 A M 1 A. Myself, Brad, Gene Sellers. And I referenced earlier  
9 : 5 8 A M 2 there was another law firm after all this investigation that  
9 : 5 8 A M 3 they were sent to that reviewed them, but I don't recall the  
9 : 5 8 A M 4 name of that law firm.

9 : 5 8 A M 5 Q. At the time prior to them being shown to sales  
9 : 5 8 A M 6 representatives, did you have an attorney review the legal  
9 : 5 9 A M 7 conference call tests?

9 : 5 9 A M 8 A. We also gave them to the laboratories we represented, at  
9 : 5 9 A M 9 their request. They also wanted to see these. And I didn't  
9 : 5 9 A M 10 have a problem giving it to them. So their chief compliance  
9 : 5 9 A M 11 officers would have looked at them.

9 : 5 9 A M 12 Q. But did BlueWave have any input from any attorney on the  
9 : 5 9 A M 13 legal conference call test prior to giving it to sales  
9 : 5 9 A M 14 representatives?

9 : 5 9 A M 15 A. I believe that we would have shown it to Gene Sellers.  
9 : 5 9 A M 16 Maybe not. I don't know. I mean, it's pretty straightforward  
9 : 5 9 A M 17 questions.

9 : 5 9 A M 18 Q. Did you -- do you recollect providing this document to  
9 : 5 9 A M 19 Mr. Sellers?

9 : 5 9 A M 20 A. I do not. I lived in South Carolina. Mr. Sellers is in  
9 : 5 9 A M 21 Alabama.

9 : 5 9 A M 22 Q. Who would have provided it to Mr. Sellers?

9 : 5 9 A M 23 A. My business partner or one of our employees.

9 : 5 9 A M 24 Q. Did Bluewave, in fact, provide it to Mr. Sellers?

9 : 5 9 A M 25 A. I said I don't recall. I don't know.

9:59 AM 1 Q. Now, the earliest dated legal conference call test within  
9:59 AM 2 this packet is dated January of 2013. Do you see that?

9:59 AM 3 A. The one in this packet, yes.

10:00 AM 4 Q. Okay. Were there legal conference calls tests before this  
10:00 AM 5 document was -- before January of 2013?

10:00 AM 6 A. I don't recall if we had a test prior to that date. We  
10:00 AM 7 certainly performed training, but I don't recall having a test.

10:00 AM 8 Q. So is January of 2013 the earliest time at which such a  
10:00 AM 9 document came into being?

10:00 AM 10 A. I'm not sure. I don't -- I don't recall.

10:00 AM 11 Q. Now, with respect to this document, what is the -- what is  
10:00 AM 12 the substantive question -- what is the purpose of it?

10:00 AM 13 A. To essentially test the learning objectives of the  
10:00 AM 14 training and make sure you got the key takeaways about the dos  
10:00 AM 15 and don'ts and legalities in this business.

10:00 AM 16 Q. And so did you and Bluewave have an understanding of what  
10:00 AM 17 the Anti-Kickback Statute prohibited?

10:00 AM 18 A. Yes.

10:00 AM 19 Q. What did Bluewave understand the Anti-Kickback Statute  
10:00 AM 20 prohibited generally?

10:00 AM 21 A. You can't pay kickbacks to physicians in turn for  
10:00 AM 22 referrals.

10:00 AM 23 Q. Okay. I'm going to show you what we'll have marked as  
10:01 AM 24 Government's Exhibit Number 9. This document for the record is  
10:01 AM 25 marked Mallory0046521. And we're on 9; correct?



1 It's produced natively, so there's no Bates number on  
2 the document. It's a PowerPoint presentation, but we have  
3 attached a cover sheet to it.

4 Do you recognize this document?

5 A. I do.

6 Q. What is this document?

7 A. This is Health Diagnostic Laboratories' compliance  
8 training.

9 Q. And when is this document dated?

10 A. This one is dated May 8th of 2014.

11 Q. And was this document provided to Bluewave?

12 A. Yes, it's been provided to Bluewave.

13 Q. And was it provided to Bluewave sales representatives?

14 A. It would have been provided to Bluewave sales  
15 representatives.

16 Q. Is this the kind of document you were referencing in your  
17 legal training policy discussion before?

18 A. PowerPoint presentations on key compliance areas, yes.

19 Q. Okay. Do you -- are you aware of any such PowerPoint  
20 presentations before May 8th of 2014?

21 A. I'm not aware of any formal PowerPoint presentation before  
22 that date, no.

23 Q. All right. So in terms of income, did Bluewave have  
24 income from any entities beyond HDL and Singulex?

25 A. No.

1 Q. And was that basis of that income solely the terms of the  
2 two contracts, the HDL and Singulex contracts?

3 A. The sales contract agreements? Yes.

4 Q. Did you receive -- did Bluewave receive approximately  
5 \$220.3 million from HDL in terms of earned commissions pursuant  
6 to the contract?

7 A. That sounds correct.

8 Q. Okay. Did Bluewave receive approximately \$24.6 million  
9 from Singulex from earned commissions pursuant to the Singulex  
10 sales contracts?

11 A. That sound correct.

12 Q. What amount --

13 A. But I don't have those numbers memorized.

14 Q. Well, I'm trying to understand if that's, in your view, a  
15 generally accurate number.

16 A. And that's -- they sound correct.

17 Q. Okay. Did you -- what amounts of that money did Bluewave  
18 reinvest in Bluewave?

19 A. I don't -- I don't understand the question.

20 Q. Did Bluewave reinvest any of the profits it received into  
21 Bluewave?

22 A. I don't think we ever reinvested anything. There were  
23 times that we would loan money back to the company to cover  
24 overhead and expenses. And if I can elaborate on that.

25 Q. Sure. Please.

10:03 AM 1 A. You'll also understand that BlueWave was not paid  
10:03 AM 2 commissions that were owed by the laboratories under the  
10:03 AM 3 pretense that the government told them they couldn't because it  
10:03 AM 4 was a violation of the Anti-Kickback Statute. So we had an  
10:03 AM 5 entire quarter that BlueWave upheld its contracts with its  
10:03 AM 6 independent contractors and paid them despite the fact that we  
10:03 AM 7 did not get paid, and there's a lawsuit pending on that.

10:03 AM 8 So that's the clarity in my answer to your question.

10:03 AM 9 Q. Did BlueWave at any point in time hire a compliance team?

10:04 AM 10 A. No.

10:04 AM 11 Q. Did BlueWave hire a legal department?

10:04 AM 12 A. No.

10:04 AM 13 Q. Okay. In terms of the profits that were earned by  
10:04 AM 14 BlueWave during this period, I understand that it would have  
10:04 AM 15 been distributed to the two owners in amounts of \$53.2 million  
10:04 AM 16 to Mr. Johnson.

10:04 AM 17 A. Okay.

10:04 AM 18 Q. Is that accurate?

10:04 AM 19 A. That sounds accurate.

10:04 AM 20 Q. And in terms of 52.2 million for Mr. Dent.

10:04 AM 21 A. I don't know why the numbers would be different.

10:04 AM 22 Q. So you believe them to be the same?

10:04 AM 23 A. They should be the same.

10:04 AM 24 Q. Okay. Somewhere between 52.3 and 53.2 million dollars?

10:04 AM 25 A. That sounds accurate.

10:04 AM 1 Q. Okay. Was it -- is it fair to say that every dollar that  
10:04 AM 2 BlueWave earned above and beyond its expenses flowed out in  
10:04 AM 3 terms of these distributions?

10:04 AM 4 A. Yes.

10:04 AM 5 Q. Okay. And those distributions were remitted back to the  
10:04 AM 6 two owners on a routine basis from the inception of BlueWave?

10:04 AM 7 A. Yes.

10:04 AM 8 Q. What other assets does BlueWave possess, if any?

10:05 AM 9 A. None.

10:05 AM 10 Q. But how would BlueWave -- in addition to using sales  
10:05 AM 11 representatives who had experience in the area, how else would  
10:05 AM 12 BlueWave work to identify leads?

10:05 AM 13 A. BlueWave didn't identify leads for the contractors. We  
10:05 AM 14 would contract with people in that geographic area of  
10:05 AM 15 responsibility that already had the relationships and knowledge  
10:05 AM 16 of that territory.

10:05 AM 17 Q. Did BlueWave provide any information or training to sales  
10:05 AM 18 representatives about the kinds of physicians for whom it would  
10:05 AM 19 seek to sell HDL and Singulex tests?

10:05 AM 20 A. Sure, we did.

10:05 AM 21 Q. And what sorts of information did BlueWave provide to its  
10:05 AM 22 contractors?

10:05 AM 23 A. I'm guessing you're referencing the targeting criteria,  
10:05 AM 24 you know.

10:05 AM 25 Q. I'm asking what criteria it provided.

10:05 AM 1 A. well, there's certain types of profiles of people that are  
10:05 AM 2 inclined to do advanced testing. Not every physician out there  
10:05 AM 3 is going to be interested in doing it.

10:05 AM 4 Q. I'm going to show you what I'll have marked as  
10:05 AM 5 Government's Exhibit Number 10.

10:05 AM 6 For the record, this is USADOC756967. Does this  
10:06 AM 7 reflect BlueWave's policy about identifying certain physicians  
10:06 AM 8 to whom it sought to sell HDL and Singulex tests?

10:06 AM 9 A. This strongly resembles a document that we were trained on  
10:06 AM 10 at Berkeley HeartLab about targeting criteria for physicians.  
10:06 AM 11 That's what this is.

10:06 AM 12 Q. Does it reflect Bluewave's policy on identifying certain  
10:06 AM 13 physicians to whom to sell BlueWave -- excuse me -- HDL and  
10:06 AM 14 Singulex tests?

10:06 AM 15 A. There's no policy written for Bluewave that talks about  
10:06 AM 16 this, but this is trying to describe a physician practice that  
10:06 AM 17 would possibly be interested in doing advanced diagnostics.

10:06 AM 18 Q. Okay. And with respect to the statement "money hungry,"  
10:06 AM 19 what does that mean?

10:06 AM 20 A. well, again, I don't know the document, and that's not  
10:06 AM 21 terminology that I have would used. But it elaborates. It  
10:07 AM 22 says someone that likes money or at least the thought of making  
10:07 AM 23 it is someone that is money hungry.

10:07 AM 24 Q. How would a doctor make money from selling -- from  
10:07 AM 25 Bluewave selling HDL and Singulex tests?

10:07AM 1 A. How would a doctor make money from selling?

10:07AM 2 Q. Yes.

10:07AM 3 A. Well, the doctors don't sell the tests.

10:07AM 4 Q. From the sales, sorry. I mean, so how does -- I mean, how  
10:07AM 5 does a doctor make money? It says they have to be money  
10:07AM 6 hungry, so I'm trying to understand how the doctor is going to  
10:07AM 7 make Monday in this situation.

10:07AM 8 A. You're making a huge leap --

10:07AM 9 Q. Okay.

10:07AM 10 A. -- saying that they're making money by doing HDL or  
10:07AM 11 Singulex tests. This is criteria for looking for a certain  
10:07AM 12 personality of a provider. You'd much rather have a provider  
10:07AM 13 that works from 7:00 in the morning to 7:00 at night and is  
10:07AM 14 seeing, you know, 30 to 40, 50, 60 patients a day than somebody  
10:07AM 15 who's a hospital employee that works from 9 to 5, has no  
10:07AM 16 decision-making ability at all, and they see 15 patients a day.

10:07AM 17 Q. So why does this say money hungry instead of hardworking?

10:07AM 18 A. I can't speak to say why this says money hungry. I would  
10:08AM 19 have probably used the expression business savvy, you know,  
10:08AM 20 because that's the type of provider that is forward-thinking,  
10:08AM 21 they're more cutting edge, they're early adopters, they're the  
22 first ones to use the new medications, they're the first ones  
23 to incorporate bone density scanning into their practice, x-ray  
24 machines, have their own laboratory. You're basically just  
25 describing the personality of a physician.

1 Q. So I'm going to have this marked as Government's Exhibit  
2 Number 11. It's USADOC1379903. What was BlueWave indicating  
3 about what it was to represent to doctors about the  
4 zero-balance billing policy?

5 A. Okay. Again, I haven't seen this document until right  
6 now. Okay? So it's not a -- in my opinion and understanding,  
7 a BlueWave document. But if you're asking my interpretation of  
8 Number 2, I think it's kind of comical. "They are taking the  
9 market by storm." They, HDL. "They have the most advanced  
10 tests on the market. They do not balance-bill the patients.  
11 And they have free RDs," which -- that would be a registered  
12 dietitian.

13 Again, registered dietitians were a big part of the  
14 Berkeley HeartLab offering. That terminology really wasn't  
15 used at HDL, although they did have health coaches, that many  
16 of them were certified registered dietitians. But those  
17 laboratories would provide those services to patients post  
18 receiving testing so that they could particularly use the APOE  
19 genotype test, which would reveal what type of diet a patient  
20 would or would not respond.

21 "All I know is that it is the bomb. All the doctors  
22 are doing it." So this appears to be some sort of sample  
23 dialogue for a sales call.

24 Q. So was it a tool in the marketing kit of a BlueWave sales  
25 representative to indicate to the physician that there was a

1 zero-balance billing policy at HDL and Singulex?

2 A. I would say, no, it is a tool. I would say, yes, it is  
3 the laboratory's policy that we promoted for.

4 Q. And so from Bluewave's perspective, did it understand that  
5 HDL was complying with the terms and conditions of the contract  
6 and not balance-billing the patients?

7 A. Yes.

8 Q. And Bluewave understood the same for Singulex?

9 A. Yes.

10 Q. Okay. So in addition to -- well, strike that.

11 Did Bluewave indicate that its tests were -- or  
12 excuse me -- HDL tests or Singulex tests were better than other  
13 tests available on the market?

14 A. I believe they're absolutely better than other tests  
15 available on the market.

16 Q. Okay. And did Bluewave indicate in its -- did -- Bluewave  
17 sales representatives, in their sales pitch, how were they  
18 instructed to describe the processing and handling fees?

19 A. They weren't instructed to describe the processing and  
20 handling fee. If it came up, it was to be verbatim what the  
21 processing and handling letter of agreement that the  
22 laboratories provided stated.

23 In fact, during these legal training calls which were  
24 held, I would read a processing and handling letter of  
25 agreement, as painstakingly as it was, word for word from the



1 first sentence to the very last sentence so that I would not  
2 inaccurately state exactly what it said.

3 Q. When were Bluewave sales representatives instructed to  
4 describe processing and handling fees in their contact with  
5 physicians?

6 A. They were never instructed to describe processing and  
7 handling fees to physicians.

8 Q. Are you aware of any other instances in which Bluewave  
9 sales representatives touted processing and handling fees as a  
10 revenue generator?

11 A. I'm aware of one other instance at the same interview  
12 where I was shown a video of somebody that I didn't know, who  
13 looked like he was off "Saturday Night Live," wearing black  
14 horn-rimmed glasses, in an office that didn't even look like a  
15 physician office because there were no charts, there were no  
16 books, there were no anything. And this guy literally is  
17 saying, 'Hey, Doc, you got a lot cash out of this.'

18 And they said, "Do you know who this was?"

19 And I said, "I don't have an absolute clue who that  
20 is."

21 They said, "Did you train this individual?"

22 I said, "I have not."

23 And I have learned since that apparently it's  
24 somebody that a Bluewave contractor was using to generate  
25 potential leads that he could go in and offer the product to.

1 Q. And did you see, as part of that videotape -- I understand  
2 you to be referencing a videotape with a Bluewave independent  
3 contractor helper. Is that a term that you're familiar with?

4 A. The individual I saw on that tape --

5 Q. Yes.

6 A. -- was not a BlueWave contractor.

7 Q. I'm sorry. So BlueWave hired independent contractor sales  
8 representatives. And the individual in the videotape was a  
9 helper for one of those --

10 A. I've heard the terminology "helper" used.

11 Q. Yes.

12 A. Those are independent contractors. I don't know if  
13 they -- if that individual was an employee. I don't know if  
14 that individual was a subcontractor. I don't even know who  
15 that individual was.

16 But I know when this same video was played to my  
17 business partner with White Arnold & Dowd present, we called  
18 the contractor that was responsible for that area and said, "I  
19 don't know what kind of relationship that you have with this  
20 individual, but it needs to terminate immediately."

21 Q. And so who was the independent contractor that you're  
22 referencing?

23 A. Charles Maimone.

24 Q. Okay. And what's the name of his LLC?

25 A. I don't recall the name of the LLC.

10:13AM 1 Q. Does Quasi Maturi sound familiar?

10:13AM 2 A. That sounds very familiar.

10:13AM 3 Q. Thank you.

10:13AM 4 Good afternoon, Mr. Dent. I have handed you what's  
10:13AM 5 been marked as Government's Exhibit Number 12, USADOC1409739.  
10:13AM 6 Take a minute to familiarize yourself with that document.

10:13AM 7 Do you recognize that document, sir?

10:13AM 8 A. I don't, but I was copied on it.

10:13AM 9 Q. And who sent the document?

10:13AM 10 A. Tony Carnaggio.

10:13AM 11 Q. What was your relationship with Tony Carnaggio?

10:14AM 12 A. Tony Carnaggio and I own 50 percent each of Hisway of  
10:14AM 13 South Carolina.

10:14AM 14 Q. And who was this email sent to?

10:14AM 15 A. Nancy Netter, Dr. Netter.

10:14AM 16 Q. And do you know who Dr. Netter is?

10:14AM 17 A. I do.

10:14AM 18 Q. Who is Dr. Netter?

10:14AM 19 A. She's either an internist or a family practitioner up in  
10:14AM 20 the Greenville, South Carolina, area.

10:14AM 21 Q. And was she a client of Bluewave?

10:14AM 22 A. She was.

10:14AM 23 Q. Was she a client of Hisway?

10:14AM 24 A. She was.

10:14AM 25 Q. Did she order HDL tests?

10:14 AM 1 A. She did.

10:14 AM 2 Q. Did she order Singulex tests?

10:14 AM 3 A. She did.

10:14 AM 4 Q. And when is this email being sent?

10:14 AM 5 A. It is being sent April 23rd, 2012.

10:14 AM 6 Q. Okay. And what is the stated purpose for sending this  
10:14 AM 7 email?

10:14 AM 8 A. The subject is "HDL/Singulex pro forma for Dr. Netter and  
10:14 AM 9 Dr. Phillips and HDL/Quest Diagnostic contract."

10:14 AM 10 Q. Okay. What is a pro forma?

10:14 AM 11 A. A pro forma in our industry has typically been an  
10:14 AM 12 assessment of what the cost would be to perform a particular  
10:14 AM 13 activity.

10:14 AM 14 Q. It says, "Cal asked me to forward the attached pro forma."  
10:15 AM 15 Is Cal you?

10:15 AM 16 A. That's me.

10:15 AM 17 Q. All right. Can we look at that pro forma, please.

10:15 AM 18 what does the pro forma indicate on it in terms of  
10:15 AM 19 Dr. Netter? Focusing on Dr. Netter, what does it indicate to  
10:15 AM 20 Dr. Netter about the projected annual total P&H dollars based  
10:15 AM 21 on the last eight weeks?

10:15 AM 22 A. I'm trying to read it. I'm not familiar with this format.

10:15 AM 23 Q. Sure. Please take your time.

10:15 AM 24 A. It says it's a pro forma for Dr. Netter and Dr. Phillips.  
10:15 AM 25 I will tell you that Dr. Netter and Dr. Phillips are both what

1 they refer to as MD VIP docs. So they're kind of concierge  
2 physicians that see patients on a cash-type basis.

3 They had separate practices at different points.  
4 They were with groups. I know they went independent. And they  
5 eventually moved in to share office space. HDL had placed a  
6 Quest phlebotomist in that practice -- or excuse me. They had  
7 a Quest phlebotomist in that practice drawing specimens. I  
8 recall this practice bounced back and forth several times  
9 between either using a LabCorp phlebotomist, a Quest  
10 phlebotomist. And I remember they were contemplating having  
11 their employees draw blood.

12 So my guess is this is Tony answering a request from  
13 them to look at what -- processing and handling fees, if those  
14 were paid, what kind of money it would generate for the  
15 practice.

16 Q. And what kind of money would it generate for the practice?

17 A. It says HDL processing and handling of \$17 and Singulex  
18 processing and handling of 10. And he said in his email  
19 something about a Quest Diagnostics.

20 Q. And it looks like the current mechanism is 10?

21 A. Most current contract with Quest Diagnostics.

22 Q. I'm going to just sort of focus your attention here on the  
23 chart. It says "Singulex P&H 10," but in the second column,  
24 the proposal is "Singulex P&H 13." Do you see that difference?

25 A. I do see that.

10:17AM 1 Q. why is that different?

10:17AM 2 A. I don't know. I didn't prepare this, but, you know --

10:17AM 3 Q. well, let's go back, because it indicates here that "Cal  
10:17AM 4 asked me to forward the attached pro forma."

10:17AM 5 A. I see that.

10:17AM 6 Q. Do you not recollect being involved in the conversations  
10:17AM 7 about creating that particular pro forma?

10:17AM 8 A. I do not.

10:17AM 9 Q. Okay. And with respect to this document, it indicates  
10:17AM 10 that, under the proposal, that Drs. Netter and Phillips' total  
10:17AM 11 P&H dollars together for HDL would be approximately -- well,  
10:17AM 12 \$25,960 and \$7,384 for a total of \$33,344.

10:17AM 13 A. Okay. So there's a current one --

10:17AM 14 Q. Yes.

10:17AM 15 A. -- and then there's a proposed one.

10:17AM 16 Q. Okay.

10:18AM 17 A. If there was a Quest phlebotomist in the practice that was  
10:18AM 18 filling up the tubes for HDL and Singulex, then a practice  
10:18AM 19 could not collect the \$3 venipuncture fee because the  
10:18AM 20 venipuncture was being performed by a Quest phlebotomist, which  
10:18AM 21 Quest and LabCorp often would do what they referred to as  
10:18AM 22 courtesy fills. As long as the physician was sending a  
10:18AM 23 diagnostic test to one of those laboratories and they already  
10:18AM 24 had a needle in the vein, they would courtesy fill the tubes up  
10:18AM 25 so the patient would not have to get stuck twice.

1           So if a Quest phlebotomist is performing that  
2   venipuncture fee, then you can't have a \$3 draw fee, not only  
3   for one lab but either lab. So you'd see 17 for the P&H for  
4   HDL and 10 for the P&H for Singulex. So that's what that  
5   means.

6   Q.   well, how about if we look at another one?

7           Let's see. I'm going to show you Government's  
8   Exhibit Number 13.

9           Oh, sorry. They go together. They just didn't get  
10   attached very well.

11          So, for the record, this is USADOC BWDJ006338. And  
12   there's an attachment to the email which is BWDJ0066341.

13          Okay. And what does the second -- what does --  
14   does -- the subject line "Brad Johnson lipid clinic pro forma,"  
15   what does that mean?

16   A.   well, I didn't put the subject in there, but I read it as  
17   Brad Johnson lipid clinic pro forma.

18   Q.   And it says, "He asked me to provide you with a lipid  
19   clinic pro forma." Do you see that there?

20   A.   Yeah, I see that.

21   Q.   Okay. Is it your understanding that Mr. Lively sent this  
22   email wholly independent of BlueWave?

23   A.   I didn't say that.

24   Q.   Okay.

25   A.   I mean, Burt Lively is an independent contractor for

1 Bluewave, and he does have a Bluewave email address. And you'd  
2 have to ask Burt why he sent this and the circumstances behind  
3 it. I don't know of those. I can just take it at face value.

4 Q. So what I am trying to understand is I see two pro formas  
5 here from two years apart from each other indicating the amount  
6 of revenue that could be made off of processing and handling  
7 fees.

8 A. This is -- to me, I'm reading this as the amount of  
9 revenue that's made off of a lipid clinic with level 3  
10 follow-up visits, et cetera. This one both --

11 Q. What did -- what is specifically entailed in a lipid  
12 clinic?

13 A. I don't know.

14 Q. Okay. Well, here, the math seems to be based on  
15 processing and handling fees based on 200 specimens per week.  
16 Is that specific to a lipid clinic or is that just specific to  
17 the test that HDL runs?

18 A. Well, at the very beginning with his 200 specimens per  
19 week, you could see where he said, "My estimations -- I have  
20 conservatively based my estimations on 200 lipids per week,  
21 approximately 25 percent of your total volume."

22 So I guess his experience is telling him that 25  
23 percent of your patients under lipid management would probably  
24 be candidates for advanced lipid testing. And he's  
25 demonstrating that if he or she set up a lipid clinic, this is



10:21AM 1 what they would expect would happen.

10:21AM 2 Q. All right. And what would happen?

10:21AM 3 A. Ma'am, I can't tell the future, what would happen.

10:21AM 4 Q. No, no, no. What is Burt Lively recommending to the  
10:21AM 5 physician would happen, assuming his -- he is correct, that  
10:21AM 6 they would run -- I assume that's 200 samples per week because  
10:21AM 7 that's the calculation for 200 times the processing and  
10:21AM 8 handling fee of \$20; right?

10:21AM 9 A. Right. He says, "Based on a conservative estimate, my  
10:21AM 10 estimations of 200, approximately 25 of your total volume." So  
10:21AM 11 he obviously has knowledge of what that practice's volume is  
10:21AM 12 based upon what they told him.

10:22AM 13 Q. So if they ordered 200 specimens from HDL, that's the  
10:22AM 14 entity that pays the \$20 processing and handling fee; correct?  
10:22AM 15 And here it says "HDL" on the attached document.

10:22AM 16 A. I'm not denying that. I mean, if your question is --

10:22AM 17 Q. So if the -- if the provider orders 200 samples per week,  
10:22AM 18 they will make revenue of \$4,000 in terms of processing and  
10:22AM 19 handling fees, but they will make additional revenue as well;  
10:22AM 20 correct?

10:22AM 21 A. The processing and handling fee, he says, based on 200  
10:22AM 22 specimens per week, would be \$4,000. He's using a -- well, the  
10:22AM 23 math is \$20 per specimen, which would be the 17 and 3, and he  
10:22AM 24 says, "I based my estimations on a level 3 follow-up."

10:22AM 25 when you get into that level 3 follow-up, you're

10:22 AM 1 talking about a lipid clinic. So, obviously, if the physician  
10:22 AM 2 sees that patient, they identify abnormality, it would be  
10:22 AM 3 malpractice for them not to bring the patient back and at least  
10:22 AM 4 address and try to treat those abnormalities. So --

10:22 AM 5 Q. What supplies would BlueWave provide to the physicians?

10:23 AM 6 A. Any supplies that the doctor ordered, but they would come  
10:23 AM 7 from the laboratory, not from BlueWave.

10:23 AM 8 Q. So who placed the order with the laboratory if the  
10:23 AM 9 physician needed supplies?

10:23 AM 10 A. Well, there was a supply order form in the in-service  
10:23 AM 11 manual where they could order them directly.

10:23 AM 12 Q. When you say "they," are you referencing BlueWave sales  
10:23 AM 13 representatives?

10:23 AM 14 A. Well, a BlueWave sales representative could order  
10:23 AM 15 supplies. The physician practice could order supplies. If a  
10:23 AM 16 physician called me and said, "Hey, Cal, I'm running out of  
10:23 AM 17 kits. Can you get some of those for me?" I'd call the  
10:23 AM 18 laboratory and say, "Hey, Practice A is running out of kits.  
10:23 AM 19 would you please overnight them two small and two large."

10:23 AM 20 Q. And who set up new accounts with the laboratories, HDL and  
10:23 AM 21 Singulex?

10:23 AM 22 A. Who set up a new account?

10:23 AM 23 Q. Yes.

10:23 AM 24 A. Well, I mean, the sales team is the one that identifies  
10:23 AM 25 new accounts. And, remember, when you go back, there's a sales

1 call, an in-service, and a test review. We were the face of  
2 HDL and Singulex at the ground level. So we're the face going  
3 in and out of these laboratories -- or in and out of the  
4 physician practices.

5 Q. Okay. I'm going to show you -- I'm going to show you  
6 Government's Exhibit Number 14. And this goes with -- I will  
7 represent to you -- the attachment -- I believe the attachment  
8 is what I'm going to have marked as 15. I believe them to be  
9 attachments to each other, but we can certainly check that at a  
10 later point. And, regardless, we can talk about both of them.

11 All right. Take a minute to look at 14 and 15. With  
12 respect to Government's Exhibit 14, this appears to be an email  
13 from Christina Dent to Tonya Mallory. Who's Christina Dent?

14 A. Christina Dent's my wife.

15 Q. Okay. And the email address is --

16 A. CMDent7@yahoo.com.

17 Q. Did your wife send this email?

18 A. No, I did.

19 Q. And what -- who is this email to?

20 A. Tonya Mallory.

21 Q. When is it dated?

22 A. This is December 15th, 2009, before Bluewave's inception.

23 Q. All right. But this was during -- during the time period  
24 the contract was being sort of -- the agreement was being  
25 discussed and negotiated?

10:25 AM 1 A. Absolutely, which is why I sent it from a personal email  
2 as opposed to sending it from my Berkeley HeartLab email.

10:25 AM 3 Q. Okay. And it appears to say, "P&H letters." And it's  
10:25 AM 4 from you. And it says, "Attached are the updated P&H letters  
10:26 AM 5 for a lab and a practice. I'm not sure why you changed the  
10:26 AM 6 amount to \$15.50 for a practice. I've been using \$20 for a  
10:26 AM 7 practice and \$25 for a laboratory based on our previous  
10:26 AM 8 discussions."

10:26 AM 9 So this appears to be a response to an email from  
10:26 AM 10 Ms. Mallory in which she had provided you an agreement which  
10:26 AM 11 had \$15.50.

10:26 AM 12 A. This is preparing marketing data and letters of agreement  
10:26 AM 13 prior to Bluewave even contracting with HDL, even prior to  
10:26 AM 14 Bluewave selling for HDL when there wasn't a contract. So,  
10:26 AM 15 yes, I mean, we're sitting there developing the marketing  
10:26 AM 16 pieces, the letters of agreement that will need to be  
10:26 AM 17 effectively used to conduct business.

10:26 AM 18 And I'm guessing she had something she sent me with  
10:26 AM 19 \$15.50 when the \$20 fee is what was discussed, which the \$20  
10:26 AM 20 fee of \$17 and \$3 was in keeping with what the fee was at  
10:27 AM 21 Berkeley when we originally worked at Berkeley.

10:27 AM 22 Q. And what is the attachment? Can you describe the  
10:27 AM 23 attachment for the record?

10:27 AM 24 A. It's a sample processing and handling letter of agreement.

10:27 AM 25 Q. And this one's dated January 1st, 2010, the Mint Hill

1 10:27AM 1 Family Practice. Are you familiar with that practice?

2 A. It doesn't ring a bell, but I'm assuming it exists.

3 Q. All right. And with respect to the processing and  
4 handling agreement letter, does this -- if you want to take a  
5 minute to just briefly look at it. Are you familiar with this  
6 document?

7 A. Well, I mean, it appears to be the -- a working document  
8 of what HDL was going to use for their processing and handling  
9 letter of agreement.

10 Q. Okay. And did you review that letter agreement before it  
11 was provided to physicians?

12 A. Yeah, Tonya's asking me to review the marketing pieces.

13 Q. And what was the purpose of your review?

14 A. We were about to be the contract sales organization for  
15 HDL, and she wanted me to see the letters that they were using  
16 and send out and asked me if I'd look over them.

17 Q. And did you have any comments on this letter?

18 A. It looks like I did. It looks like there's a document  
19 missing. I guess there was one that had \$15.50, and I'm saying  
20 "Hey, why did you use that instead of the 20?"

21 Q. Did you have any other comments to the letter?

22 A. Not in this email.

23 Q. Did Bluewave sales representatives arrange for the  
24 laboratory to provide P&H agreements to physicians?

25 A. Again, I'll do my best to answer your question, but I

1 don't understand it. BlueWave contractors certainly are the  
2 face for the laboratory with the physician practice.

3 Q. So what did a Bluewave sales representative communicate to  
4 a physician about what that physician needed in order to obtain  
5 P&H?

6 A. Oh, you have to have a signed processing and handling  
7 letter of agreement so that both parties understand what they  
8 can and cannot do and what this processing and handling fee is  
9 for.

10 Q. So BlueWave sales representatives communicated to  
11 physicians that they were required to have a P&H agreement on  
12 file with HDL?

13 A. If they wanted to get processing and handling from a  
14 laboratory, absolutely they had to have a processing and  
15 handling letter of agreement on file.

16 Q. In the event that HDL uncovered doctors who did not have a  
17 processing and handling agreement on file, would Bluewave sales  
18 representatives be the individuals following up with the  
19 physicians in order to obtain these documents?

20 A. It would not have been out of the question for the  
21 compliance officer to say -- I'll just use this name -- "Cal,  
22 we can't find a processing and handling letter of agreement for  
23 Mint Hill Family Practice. Can you have that contractor reach  
24 out to them and obtain a copy or is it possible they have a  
25 copy?" Because they might have maintained a copy on their own

1 because, oftentimes, things might get lost going from the field  
2 to the laboratory.

3 Q. would Bluewave -- did Bluewave have any preference one way  
4 or the other about whether Bluewave was the company  
5 communicating with the physician or HDL was the company  
6 communicating with the physician?

7 A. with regards to what?

8 Q. Generally speaking.

9 A. well, me personally, I wouldn't want laboratory support  
10 staff communicating with the physician -- I'm the face of the  
11 physician -- unless it's about quantity insufficient. You  
12 know, we couldn't perform this particular test that you ordered  
13 because the tube didn't have enough blood in it. I don't need  
14 to be the person to tell them that. You know, that would come  
15 back on a lab report.

16 Q. All right. And I will -- the Bates number on this  
17 document is USADOC685307. I will represent to you that this  
18 document, it was produced natively, so it's an Excel  
19 spreadsheet. That means they don't come out with a Bates  
20 number on them. I printed out the 2010 tab. There were tabs  
21 all the way through, I believe, 2014, but we could go back and  
22 check the document. There may be one from 2015 as well.

23 Okay. I understand this document to represent the  
24 list of physicians who were receiving processing and handling  
25 fees and the amounts of those fees paid by HDL. Have you seen

10:31AM 1 this document before?

10:31AM 2 A. I think so.

10:31AM 3 Q. Okay. Who were Hisway's biggest customers in terms of  
10:31AM 4 revenue?

10:31AM 5 A. Again, I'm speaking from memory.

10:31AM 6 Q. That's fine.

10:31AM 7 A. You can get that directly off of the weekly, monthly, and  
10:31AM 8 yearly reports. Keowee would certainly be a big customer, you  
10:31AM 9 know, for HDL, Singulex, Bluewave, Hisway. That's a big  
10:31AM 10 practice. They've got anywhere from five to six, you know,  
10:31AM 11 medical providers in there. And they have their own  
10:31AM 12 laboratory.

10:31AM 13 Q. And beyond Keowee, what were the other biggest customers  
10:32AM 14 for Hisway?

10:32AM 15 A. Again, you can get that -- you could list top 10, top 5  
10:32AM 16 right off of a weekly report, and I could go through there and  
10:32AM 17 show it to you just like that if you show me a weekly report.

10:32AM 18 I didn't, in my mind, say, okay, this is my Number 1  
10:32AM 19 customer, Number 2 customer, Number 3 customer. It was  
10:32AM 20 irrelevant to me. The -- it's certainly relevant to me from a  
10:32AM 21 financial standpoint, but the time and energy that you spend on  
10:32AM 22 an account that was your top account was the same time and  
10:32AM 23 energy you spend on an account that was a low account.

10:32AM 24 But if you force my hand on it, Columbia Heart  
10:32AM 25 Clinic, you know, which is one of the largest invasive



1 cardiology groups in the state of South Carolina. They were a  
2 big customer in the state of South Carolina.

3 Keowee Primary Care was certainly a big customer.  
4 You had some individual physicians. Lloyd Miller's name has  
5 come up several times. He was certainly a big customer.  
6 Spartanburg Family Physicians in Spartanburg, South Carolina,  
7 was a large customer. That's four right there. I mean --

8 Q. Did each of those practices receive processing and  
9 handling fees?

10 A. Again, if there's a letter of agreement on file and  
11 they're listed in a document that they received on them, then I  
12 would say they received them. I know for a fact Keowee did,  
13 because --

14 Q. Okay. Let's look at -- okay. So with respect to  
15 compensation that BlueWave earned, how did BlueWave earn money?

16 A. Directly in accordance with our sales contract agreement.  
17 We were paid a percent of collected revenue for all the  
18 specimens that came out of our geographic area of  
19 responsibility.

20 Q. Okay. And what is this document?

21 A. This is the BlueWave commission calculations.

22 Q. And I will represent to you that I hid some of the columns  
23 in the middle between Quarter 3 2010 and Quarter 4 2012 so that  
24 we could see a couple years on this sheet of paper.

25 Does that make sense to you?

10:33 AM 1 A. It does.

10:33 AM 2 Q. Okay. But, otherwise, you recognize the formatting of the  
10:34 AM 3 document?

10:34 AM 4 A. I created it. I made it.

10:34 AM 5 Q. Now, when you -- when Bluewave imported information into  
10:34 AM 6 its commission calculator on collected revenue, how would it  
10:34 AM 7 obtain that information?

10:34 AM 8 A. From HDL.

10:34 AM 9 Q. Okay. And would it come in the format of an Excel  
10:34 AM 10 spreadsheet?

10:34 AM 11 A. It would.

10:34 AM 12 Q. And then it would -- Bluewave would input that information  
10:34 AM 13 into this spreadsheet in order to ascertain how much commission  
10:34 AM 14 to pay the --

10:34 AM 15 A. That's correct.

10:34 AM 16 Q. -- contractors?

10:34 AM 17 A. That's correct.

10:34 AM 18 Q. And I understand this is the spreadsheet you have created.

10:34 AM 19 what was the significance of total number of  
10:34 AM 20 specimens?

10:34 AM 21 A. Well, the total number of specimens would come directly  
10:34 AM 22 off of your weekly, monthly, quarterly, and/or yearly reports.

10:34 AM 23 Q. Remitted from HDL to Bluewave?

10:34 AM 24 A. Yes. They were the ones that counted the number of  
10:34 AM 25 specimens that came in, the number of requisitions that came

1 in. So they would give those to us, as we discussed earlier,  
2 daily, weekly, monthly, et cetera.

3 Q. And then there's a specimen total percentage. What is  
4 that line?

5 A. Percent of total specimens. So that's letting you know  
6 that this particular geographic area -- which was Brad Johnson,  
7 Burt Lively, and Richard Yunger -- used their total number of  
8 specimens for each month, and then gives you a total for the  
9 quarter, and then it's telling you that they were 0.43. That's  
10 the percent of the total specimens for Bluewave that particular  
11 geography had.

12 Q. What row -- what line are you -- what row were you on for  
13 that -- when you made that last statement?

14 A. Percent of total specimens.

15 Q. Under the first box, which is BJ/BL/RV?

16 A. So that would say that 43 percent of the total specimens  
17 that Bluewave had for July of 2010, 43 percent of those came  
18 from Brad, Burt, and Richard's territory, which would make  
19 sense; right? They were the first ones. They started early.  
20 They got more customers, et cetera.

21 If you go down to the next one where it's FCD, those  
22 are my initials, and TC, Tony Carnaggio. So you see the 31  
23 percent of the total specimens, with the total specimens count  
24 of 2,894, came from our geographic area of responsibility.

25 Q. I see that that changes -- if you look back forward to

1 Quarter 4 2012, that specimen percentage goes down.

2 A. So if you go to Q4 2012, and you will see -- yeah, because  
3 you've got many more territories then; right? So, naturally,  
4 you'll look up at Brad and Burt's territory, I mean, you just  
5 fast-forwarded from Q3 of 2010 to Q4 of 2012, and we've added a  
6 bunch more states, a bunch more geographies. So naturally our  
7 percent is going to go down.

8 So his went from 43 percent to 18 percent of the  
9 total specimens, and mine went to 11 percent from 31 percent.

10 Q. All right. And so what did -- if you're looking at the  
11 first category of Brad Johnson, Burt Lively, and Richard  
12 Yunger, how much money did Mr. Johnson make off of commissions  
13 in Quarter 4 2012 for selling for his independent contractor?

14 A. Say that again. Which one are you looking at? Q --

15 Q. So let's just back up.

16 A. Yeah.

17 Q. So I understand that Mr. Johnson had his independent  
18 contractor company, as did yourself.

19 A. Correct.

20 Q. And what was the name of his?

21 A. I believe it was Royal Blue.

22 Q. All right. So does this spreadsheet reflect the amount of  
23 commissions earned by the individuals in Royal Blue for the  
24 first box, BJ/BL/RV?

25 A. Well, those are multiple contractors. Okay? You've got

10:37AM 1 Brad, Burt, and Richard. So Brad had Royal Blue. I'm under  
10:37AM 2 the impression Burt and Richard had their own independent  
10:37AM 3 contracting companies.

10:37AM 4 Q. well, let's use you as an example. Is that easier?

10:38AM 5 A. Yeah.

10:38AM 6 Q. So FCD and TC. Is that Hisway?

10:38AM 7 A. That's correct.

10:38AM 8 Q. All right. So for Hisway for Quarter 4 of 2012, is it  
10:38AM 9 accurate to say that in that quarter, Cal Dent earned  
10:38AM 10 \$142,792.58 off commissions?

10:38AM 11 A. where are you looking at? Yeah, so you're at Q4 of 2012?

10:38AM 12 Q. Yes.

10:38AM 13 A. So the total commissions right there that Cal would have  
10:38AM 14 gotten paid is 142,000, Tony would have gotten paid 142,000,  
10:38AM 15 and Hisway of South Carolina -- because we kept that company;  
10:38AM 16 we were 50-50 owners -- that would go into Hisway, because  
10:38AM 17 Hisway had employee and operating expenses too.

10:38AM 18 Q. we'll just mark for the record Government's Exhibit  
10:38AM 19 Number 22.

10:38AM 20 I'm going to point you to Government's Exhibit  
10:38AM 21 Number 25. For the record, this is USADOC884609.

10:39AM 22 A. Okay.

23 Q. who is Kyle Martel?

10:39AM 24 A. Kyle Martel is a BlueWave contractor in the state of  
10:39AM 25 Florida.

10:39 AM 1 Q. And what does Mr. Lester Perling, on page 2, indicate  
10:39 AM 2 about his view of processing and handling?

10:39 AM 3 A. Mr. Lester Perling, which I have no idea who that is, and  
10:39 AM 4 other than it says he is a board-certified in health law, Broad  
10:39 AM 5 and Cassel, somewhere out of Florida. And I assume, because of  
10:39 AM 6 one of the emails, that he is the attorney for a practice. I  
10:39 AM 7 don't know who dtottel is at aol.com. Can you tell me who that  
10:39 AM 8 is? I'm guessing a practice manager or somebody. Okay. I  
10:39 AM 9 don't know either.

10:39 AM 10 But he's saying that, in his opinion, that he  
10:39 AM 11 believes whatever was forwarded to him, which I don't know what  
10:39 AM 12 was forwarded to him -- I can assume it was a processing and  
10:39 AM 13 handling letter of agreement -- that he thinks it's the most  
10:40 AM 14 blatantly illegal relationship that he has ever seen.

10:40 AM 15 Q. All right. And this email from Kyle Martel eventually  
10:40 AM 16 gets forwarded by Mr. Martel to Brad Johnson from Bluewave?

10:40 AM 17 A. I didn't see that, but where? Oh, here it is. Brad.  
10:40 AM 18 Okay.

10:40 AM 19 Q. Okay. So -- and Kyle indicates, "I have spoken with Cal  
10:40 AM 20 about this already, and we definitely have to address this very  
10:40 AM 21 soon because they have a hefty amount of specimens they are  
10:40 AM 22 ready to ship today."

10:40 AM 23 A. Okay.

10:40 AM 24 Q. In April of 2011, did HDL or Bluewave have an opinion from  
10:40 AM 25 a reputable health care lawyer laying out the argument for why

1 processing and handling was not a kickback?

2 A. In when?

3 Q. April of 2011.

4 A. Okay. Did HDL or BlueWave have what?

5 Q. An opinion from a reputable health care lawyer laying out  
6 the argument for why processing and handling is not a kickback.

7 A. To my knowledge, HDL did not have a letter laying it out,  
8 although it was something that we had been asking for for quite  
9 some time. I think you produced it earlier, and the date was  
10 April 27, 2012, was when that legal letter came out.

11 But this has been a practice my entire time in the  
12 laboratory industry of paying processing and handling fees, and  
13 I have seen legal opinion letters, and so have all these other  
14 contractors. Keep in mind, Kyle Martel worked for LipoScience.  
15 LipoScience had legal opinion letters on it. LipoScience paid  
16 processing and handling fees.

17 So it was a common practice in the industry that even  
18 all of our contractors knew of. So they're speaking of it, the  
19 customers are familiar with it, they're asking for it so they  
20 can make a decision whether they're going to test or not test.

21 Q. All right. So turning to the top document, the top email  
22 from April 29th, "Hi, Kyle. There's another concern from our  
23 lawyer."

24 And if you pull and compare this with the position  
25 statement from HDL -- which does not appear to be from a health

10:41 AM 1 care lawyer; correct?

10:41 AM 2 A. Say that again.

10:42 AM 3 Q. The position statement that HDL had provided to  
10:42 AM 4 physicians. I call it the position statement, but maybe the  
10:42 AM 5 OIG --

10:42 AM 6 A. The OIG letter?

10:42 AM 7 Q. Letter, yes. That also was not from an attorney; correct?

10:42 AM 8 A. That letter was signed by Tonya Mallory, the CEO of HDL.

10:42 AM 9 Q. All right. And so I am presuming that this is the  
10:42 AM 10 document that Ms. Kaibigan is referencing.

10:42 AM 11 It says, "The attached document does not adequately  
10:42 AM 12 address the kickback concern. The letter does not really  
10:42 AM 13 explain how the HDL payment is different from the payment  
10:42 AM 14 described in the OIG advisory opinion."

10:42 AM 15 So was BlueWave on notice here about what -- that a  
10:42 AM 16 lawyer viewed the position statement as an inadequate legal  
10:42 AM 17 cover?

10:42 AM 18 A. BlueWave hadn't been put on notice of anything. This is a  
10:42 AM 19 BlueWave contractor that is having communications, obviously,  
10:42 AM 20 with somebody who neither you nor I can even say who it is. I  
10:42 AM 21 can assume it's a practice manager.

10:42 AM 22 I compliment them. I'm glad the practice is  
10:43 AM 23 questioning the legality of it. And, again, that's an HDL  
10:43 AM 24 attorney responsibility, not mine.

10:43 AM 25 Did that practice ever order tests? Did they ever



1 10:43AM 1 get their concerns alleviated? I don't know.

2 10:43AM 2 Q. I'm going to hand you what I'll have marked next.

3 10:43AM 3 who is Jason Dupin, Mr. Dent?

4 10:43AM 4 A. Jason Dupin would have been a BlueWave contractor.

5 10:43AM 5 Q. And who is Pathological Laboratories?

6 10:43AM 6 A. I have no idea.

7 10:43AM 7 Q. Have you heard of something calls PathLabs?

8 10:43AM 8 A. No.

9 10:43AM 9 Q. All right. This letter is dated March 21st of 2012. This  
10 10:43AM appears to be a letter from PathLabs to Mr. Bartels -- I mean  
11 10:43AM to Dr. Bartels.

12 10:43AM Do you know if Dr. Bartels was a client of HDL or  
13 10:44AM Singulex?

14 10:44AM 14 A. I don't know.

15 10:44AM 15 Q. Okay. And what does this letter indicate?

16 10:44AM 16 A. I haven't read it, but I will.

17 10:44AM 17 Q. Okay. Turning to the last sentence of the first  
18 10:44AM paragraph: "Payment for collected referrals has potential  
19 10:44AM legal consequences to both the laboratory and the physician."

20 10:44AM The last sentence of the second paragraph: "The OIG  
21 10:44AM determined that without paying physicians to collect samples  
22 10:44AM would potentially place the laboratory and the physician in  
23 10:44AM violation of the federal Anti-Kickback Statute and the Federal  
24 10:44AM False Claims Act."

25 10:44AM Do you see that?

10:44 AM 1 A. I see what you just read, yes.

10:44 AM 2 Q. Okay. And this is signed by Ruth Blake, compliance  
10:44 AM 3 officer, at the bottom?

10:44 AM 4 A. Okay.

10:44 AM 5 Q. What does Ms. Blake appear to indicate about the payment  
10:45 AM 6 of paying for collecting referrals?

10:45 AM 7 A. Well, again, can I read the entire letter?

10:45 AM 8 Q. Yes.

10:45 AM 9 A. Okay. Can you give me a chance to do that?

10:45 AM 10 Q. Sure.

10:45 AM 11 A. Okay.

10:45 AM 12 Q. Ms. Blake, a compliance officer, apparently from PathLabs,  
10:45 AM 13 appears to indicate that there were concerns that she, Path  
10:45 AM 14 Laboratories, had been made aware and -- of the payment for  
10:45 AM 15 collected referrals and indicates that this has potential legal  
10:45 AM 16 consequences to both the laboratory and the physician.

10:45 AM 17 Do you see that?

10:45 AM 18 A. Yeah, I see the word "potential" used at least three  
10:45 AM 19 different times.

10:45 AM 20 Q. Uh-huh. And the OIG determined that paying physicians to  
10:45 AM 21 collect samples would potentially place the laboratory and the  
10:45 AM 22 physician in violation of the Federal Anti-Kickback Statute?

10:45 AM 23 A. Potentially, yes.

10:45 AM 24 Q. Okay. What -- there's another activity that she  
10:45 AM 25 references in the third-to-the-last paragraph.

1 A. The copays and deductibles.

2 Q. All right. And she says, "This activity also has  
3 significant ramifications in terms of potential for fraudulent  
4 insurance practices."

5 Do you see that?

6 A. Yes.

7 Q. Okay. I'm going to show you Government's Exhibit 28.

8 A. Are we done with this one?

9 Q. Yes. I want you to just focus -- for the record, this is  
10 BWDJ0085815. If you would just turn to 817, please.

11 In the middle of the page, there's a highlighted  
12 "Important Legal Advice for Members of the NLA."

13 A. Hold on a second. Where am I going?

14 Q. The Bates number is 817.

15 A. Okay. What am I looking at on this page?

16 Q. The two paragraphs underneath "Important Legal Advice for  
17 Members of the NLA."

18 A. Okay.

19 Q. Are you familiar with the NLA?

20 A. The National Lipid Association, yes.

21 Q. And are you familiar with this announcement?

22 A. I don't recall reading this announcement, but I'm familiar  
23 with it now.

24 Q. What does the NLA indicate to members in the second  
25 sentence of the second paragraph?

1 10:47AM A. well, it says, "In recent weeks, the NLA general counsel  
2 has reviewed several contracts in which physicians are to be  
3 paid by laboratories to collect and ship specimens that are  
4 even furnished -- and even furnish the supplies to do so."

5 That's accurate. Several labs out there pay  
6 processing and handling fees and provide the supplies.

7 They're saying we're cautioning -- the National Lipid  
8 Association members are cautioned to have such contracts  
9 reviewed carefully by a health care attorney.

10 I would agree with them.

11 "Under Counsel Advisory Opinion Number 05-08, such  
12 arrangements may well run afoul of the Stark Law."

13 So they're referencing an opinion, which I'm assuming  
14 is penned by another attorney, and they're saying, "A  
15 collection fee well in excess of what Medicare would pay for  
16 such services may be deemed to exceed fair market value."

17 THE COURT: Is that it?

18 MS. SHORT: That is the conclusion, Your Honor.

19 THE COURT: Okay. Ladies and gentlemen, let's take  
20 our morning break.

21 (Whereupon the jury was excused from the courtroom.)

22 THE COURT: Please be seated.

23 Okay. There were some documents in the next --  
24 for the next testimony that need to be addressed? Was that  
25 Ms. Flipppo? Was that it?

10:48 AM 1 MR. COOKE: Yes, Your Honor.

10:48 AM 2 THE COURT: Okay. Let's address those.

10:49 AM 3 MR. COOKE: Thank you, Your Honor. We haven't been  
10:49 AM 4 told specifically which exhibits are going to be used, but we  
10:49 AM 5 have learned to anticipate, and there -- as you may recall,  
10:49 AM 6 during discovery the Court ruled that, because of the fact that  
10:49 AM 7 the defendants had asserted that they had relied on certain  
10:49 AM 8 advice of counsel, that all advice of counsel, attorney-client  
10:49 AM 9 privilege, was waived, even as to White Arnold & Dowd, which  
10:49 AM 10 was the criminal defense attorneys that they retained upon  
10:49 AM 11 receiving the subpoena from the government.

10:49 AM 12 And in the Court's order, it included not only  
10:49 AM 13 waiver of attorney-client communications, but also you ordered  
10:49 AM 14 production of uncommunicated attorney work product.

10:49 AM 15 And so, as a result of that, the -- white  
10:49 AM 16 Arnold & Dowd produced essentially its entire file, including  
10:50 AM 17 its internal emails, internal memos. And I believe that some  
10:50 AM 18 of those are going to be admitted.

10:50 AM 19 And, Your Honor, we, of course, had objected to  
10:50 AM 20 the Court finding that attorney-client communications were a --  
10:50 AM 21 privilege was waived, but you've ruled that it is a waiver.  
10:50 AM 22 And so I'm not addressing right now any communications between  
10:50 AM 23 Ms. Flipppo and Bluewave. I'm assuming that the Court is going  
10:50 AM 24 to allow her to testify fully as to --

10:50 AM 25 THE COURT: Yes.

10:50 AM 1 MR. COOKE: -- anything she communicated. So I'm  
10:50 AM 2 looking now specifically at her internal memos that were never  
10:50 AM 3 communicated to Bluewave.

10:50 AM 4 THE COURT: Okay.

10:50 AM 5 MR. COOKE: And, Your Honor, she gave a declaration,  
10:50 AM 6 which is in the record and it was filed, and she said that the  
10:50 AM 7 firm was not retained to and they did not ever give an opinion  
10:50 AM 8 or give advice to BlueWave as to the legality of processing and  
10:50 AM 9 handling fees, waiver of copays, or the independent contractor  
10:51 AM 10 sales commission arrangement. And that -- that'll be her  
10:51 AM 11 testimony, I assume. Of course, the government is calling her.  
10:51 AM 12 They'll ask questions.

10:51 AM 13 So I could envision a situation where perhaps  
10:51 AM 14 her internal memoranda could be used to impeach her if she --  
10:51 AM 15 if she testifies differently than what her notes indicate, but  
10:51 AM 16 her internal memoranda and notes are laden with the most  
10:51 AM 17 private mental impressions and work product of a criminal  
10:51 AM 18 defense attorney.

10:51 AM 19 THE COURT: Well, I want to know -- first of all, I  
10:51 AM 20 don't want to deal with the abstract. Are there specific  
10:51 AM 21 documents the government knows that's going to be offered which  
10:51 AM 22 represent uncommunicated internal work product?

10:51 AM 23 MS. SHORT: Your Honor, it is our intention to lay  
10:51 AM 24 the foundation that those documents contained information that  
10:51 AM 25 she would have conveyed to her clients.

1           **THE COURT:** will she testify -- you've talked to  
2 her -- that she conveyed that to her clients?

3           **MS. SHORT:** She will testify that that was her  
4 general practice and that also her general practice, as she was  
5 working on behalf of her clients, was to take contemporaneous  
6 notes. And that is her best recollection of the issues that  
7 were facing them and that she was talking to her clients about.

8           **THE COURT:** Okay. So let me understand this, because  
9 I think what Mr. Cooke was suggesting would be the testimony  
10 and what the government is different, and I think the  
11 difference is pretty important. Okay?

12           You're anticipating that -- that Ms. Flippo will  
13 testify -- does she say she did or did not give opinions to her  
14 clients regarding the legality of processing and handling fees  
15 or the risks associated with it and commissions and that type  
16 of thing, no-balance billing? Did she give any -- will she say  
17 she did or did not give such opinions to her clients?

18           **MS. SHORT:** I believe that her testimony will be  
19 consistent with her statements in her declaration. That said,  
20 her testimony --

21           **THE COURT:** Because I don't have the declaration,  
22 what does the declaration say?

23           **MS. SHORT:** And I can hand it up for Your Honor.

24           **THE COURT:** Just let me just hear right now.

25           **MS. SHORT:** She does say that they were not asked to

1 give a formal legal opinion on processing and handling fees, on  
2 payments of commissions, and so forth.

3 **THE COURT:** I get that. But did they discuss with  
4 their clients the legality of the processing and handling fees  
5 and these other matters?

6 **MS. SHORT:** Yes, Your Honor, they did.

7 **THE COURT:** Okay. And she will acknowledge -- and,  
8 specifically, will it be her testimony that she does not  
9 remember what she said?

10 **MS. SHORT:** I believe her testimony will be that  
11 her -- her practice was to create internal memoranda or  
12 internal emails in order to have her best recollection of what  
13 happened.

14 **THE COURT:** Do these memos purport to summarize those  
15 discussions with clients?

16 **MS. SHORT:** Some of them indeed do. For example,  
17 Your Honor, there is -- Ms. Flipppo drafted a memo shortly after  
18 the June 2013 meeting of all counsel. There are several  
19 statements in there that are party admissions, statements  
20 against interests, but it's also Ms. Flipppo's present sense  
21 impression of what happened at that meeting and her recording  
22 of what happened at that meeting.

23 **THE COURT:** well, present impression, if it, in fact,  
24 is that, is one thing. That's a pretty narrow set of -- under  
25 the rules of evidence.



1 Her recording what people said is quite a  
2 different thing, because that would be a statement, presumably,  
3 by one of the defendants. It would be a statement by a  
4 defendant. So that's important.

5 These are very nuanced issues based upon exactly  
6 what is said. And, you know, I think we're just going to have  
7 to put the witness up and let me hear objections and address  
8 them. I just -- there's just so many variations here of very  
9 subtle questions that really go to how the question is asked  
10 and what she's able to remember and what she indicates these  
11 statements provide.

12 Let's just -- let's just say if she has -- let's  
13 give a hypothetical here that she says, "It's my impression  
14 that these defendants did not want to hear what we were telling  
15 them." Let's just say what lawyers were telling them.

16 Do you view that as admissible? And under what  
17 theory would that be admissible, her impression of that?

18 **MS. SHORT:** It is both her impression. It is  
19 contained in a business record that she kept during the normal  
20 course of her representation of these defendants.

21 **THE COURT:** But let's take the testimony. She comes  
22 in; she says, "I had the impression they -- they didn't want to  
23 hear what we were telling them."

24 Is that admissible?

25 **MS. SHORT:** I believe it is, Your Honor.

1           **THE COURT:** As her own observation of the -- of  
2 willful ignorance, perhaps?

3           **MS. SHORT:** Correct.

4           **THE COURT:** Well, you know, I just think we got to go  
5 question by question. I just don't think in the abstract I can  
6 really rule on these. So I think you need to put her up, and  
7 then I will have to deal with these objections. Though I don't  
8 particularly like doing it that way, I just think it really  
9 matters, the context, the question, the document -- it all  
10 really matters, and I don't think, in the abstract, I can rule  
11 in these things.

12           Now I, often in motions in limine, give the  
13 answer that I just need to know -- I've got to know more  
14 information before I can rule, and I think this is one of those  
15 areas. And I could just see as they might come up.

16           So if there are documents that you're going to  
17 use, I'm glad to look at them. I wouldn't mind having a set up  
18 here in anticipation of that so you can point me to the  
19 document and the language. And we might just, unfortunately,  
20 have to have some sidebars and maybe send the jury out to the  
21 extent that's necessary, but I want to get it right.

22           There is some of this that's admissible under  
23 certain theories, and to simply say she didn't give the  
24 document to -- to her client doesn't answer all of the  
25 questions. And she, obviously, is an eyewitness to some of

10:57 AM 1 this information.

10:57 AM 2 So, Mr. Cooke, anything you wish else to add? I  
10:57 AM 3 think we just got to do it -- put the witness on.

10:57 AM 4 **MR. COOKE:** Yes, Your Honor. I think the Court is on  
10:57 AM 5 the right track. Ms. Flipppo was a very prolific reporter of  
10:57 AM 6 things. You can use documents to refresh memory; that doesn't  
10:58 AM 7 make the document admissible into evidence. You actually  
10:58 AM 8 picked up an example that is not far from the truth. She does  
10:58 AM 9 write some detail about the summit conference, and she talks  
10:58 AM 10 about who spoke and what different people said.

10:58 AM 11 But at one point she says, you know, Brad  
10:58 AM 12 talked -- I mean, "Cal talked for way too long." All right?  
10:58 AM 13 Well, that's her mental impression of that meeting.

10:58 AM 14 There's another point where she says, "I don't  
10:58 AM 15 think Gene Sellers understood the distinction that one of the  
10:58 AM 16 attorneys was trying to make."

10:58 AM 17 But she also is very detailed in what she  
10:58 AM 18 communicated to the clients. So she's not going to have any  
10:58 AM 19 problem, and in her --

10:58 AM 20 **THE COURT:** Here's the problem. There is an issue  
10:58 AM 21 here, among other things, about willful ignorance, willful  
10:58 AM 22 blindness. We know that. It's not an unusual charge I give in  
10:58 AM 23 criminal cases, and I frankly think there's some relevancy  
10:58 AM 24 here, not just under the FCA, but also under the AKS. I  
10:59 AM 25 believe it's an issue in the case. And how do you prove that?

1 And part of it is that people -- "I don't want  
2 to hear this. Don't say it. I don't want to hear it," or  
3 someone would filibuster to prevent someone else from saying it  
4 because they're trying to prevent the disruption of P&H fees.  
5 Now, that's a government take on the evidence.

6 I am not going to draw the inference myself.  
7 I'll just simply say everybody's got the right to prove their  
8 case, and I can see -- I think that Gene meeting is a very  
9 significant piece of evidence in the case. And she is an  
10 eyewitness to it. And to the extent that it is information  
11 that is relevant to -- you know, under, of course, the FCA you  
12 can have both willful ignorance and recklessness, a reckless  
13 disregard. And this is a meeting in which lawyers are trying  
14 to advise these defendants.

15 So, you know, I can see how, traditionally, a  
16 lot of evidence that wouldn't come in for other purposes, this  
17 becomes very relevant in this particular context, in the same  
18 way, Mr. Cooke, that, over the government's objections, you're  
19 going to get in information about what other people told that  
20 normally would be hearsay, wouldn't be admissible, but which go  
21 to the defendants' state of mind because this is what was in  
22 their mind when they were taking these actions. So --

23 **MR. COOKE:** Can I say one more thing?

24 **THE COURT:** Yes, sir.

25 **MR. COOKE:** And I'm not disagreeing with anything

11:00AM 1 you've said so far. The reason it's so troubling is that this  
11:00AM 2 was a criminal defense attorney, and it's very unusual that  
11:00AM 3 they would ever have to disclose their work product in the  
11:00AM 4 first place, but they did.

11:00AM 5 And for it now to be -- her job was to  
11:00AM 6 anticipate the worst-case scenario. My job is to anticipate  
11:00AM 7 every possible thing that could happen. And so she had a lot  
11:00AM 8 of thoughts that were not conveyed to the client, and it is  
11:00AM 9 very important --

11:00AM 10 **THE COURT:** And if you have thoughts that were not  
11:00AM 11 conveyed to the client and are otherwise not relevant, they  
11:01AM 12 should not come in. I mean -- but they could be relevant for  
11:01AM 13 some other purpose other than they were conveyed to the client.

11:01AM 14 **MR. COOKE:** Right.

11:01AM 15 **THE COURT:** She is -- you know, people would say,  
11:01AM 16 boy, I wish I was a fly on the wall for that meeting. How many  
11:01AM 17 times has the government lawyers probably said that; right?  
11:01AM 18 And she's a little bit of a fly on the wall. Okay? I mean, so  
11:01AM 19 I can see how -- in a sort of untraditional way, this has  
11:01AM 20 become like very interesting evidence that you're trying to  
11:01AM 21 prove state of mind. And that's often going to be proven by  
11:01AM 22 circumstantial evidence.

11:01AM 23 And so, anyway, that's my present thought at  
11:01AM 24 this point, is I need to hear the evidence, and -- and we'll  
11:01AM 25 kind of rule -- to the extent there are objections, we'll rule

1 on them as we need to. You know? I will just take them up as  
2 we go. It's not my preferred course but one that's going to be  
3 necessary. Okay?

4 Anything further at this point? And let's go  
5 take a break and bring the jury in to hear Ms. Flippo. Okay?

6 **MS. SHORT:** Okay.

7 (Recess.)

8 **THE COURT:** Please be seated. Any other matters we  
9 need to address with the Court before we bring the jury in?

10 From the government?

11 **MR. LEVENTIS:** No, thank you, Your Honor.

12 **THE COURT:** From the defense?

13 **MR. COOKE:** Nothing. Thank you.

14 **MR. ASHMORE:** Nothing.

15 **THE COURT:** Thank you very much.

16 Mr. Ashmore as well?

17 **MR. ASHMORE:** No, sir.

18 **THE COURT:** I now can see you.

19 Yes, bring in the jury.

20 Folks, if I ask you for an objection, you can  
21 do, like, a one-word objection. I kind of know where you're  
22 going. And if we need to do a sidebar, we'll do that.

23 **MR. COOKE:** Judge, can we have a continuing objection  
24 to the waiver of attorney-client privilege?

25 **THE COURT:** Yes. It's continuing.

11:14 AM 1 MR. COOKE: Thank you.

11:14 AM 2 THE COURT: And work product.

11:15 AM 3 MR. COOKE: Yes.

11:15 AM 4 (Whereupon the jury entered the courtroom.)

11:15 AM 5 THE COURT: Please be seated.

11:15 AM 6 Government, call your next witness.

11:15 AM 7 MS. SHORT: Your Honor, the United States calls Linda

11:15 AM 8 Flippo.

11:16 AM 9 THE DEPUTY CLERK: Please place your left hand on the

11:16 AM 10 Bible and raise your right. State your full name for the

11:16 AM 11 record, please.

11:16 AM 12 THE WITNESS: Linda Gail Flippo.

11:16 AM 13 THE DEPUTY CLERK: Thank you.

11:16 AM 14 (Witness sworn.)

11:16 AM 15 THE DEPUTY CLERK: Thank you. You may be seated.

11:16 AM 16 There's a step right there. Be careful.

11:16 AM 17 THE WITNESS: Okay. Thank you.

11:16 AM 18 LINDA GAIL FLIPPO,

11:16 AM 19 called on behalf of the plaintiff, being first duly

11:03 AM 20 sworn, was examined and testified as follows:

11:16 AM 21 DIRECT EXAMINATION

11:16 AM 22 BY MS. SHORT:

11:16 AM 23 Q. Good morning.

11:16 AM 24 A. Good morning.

11:16 AM 25 Q. Could you please state your name for the record.

1 A. Linda Gail Flipppo, G-a-i-l.

2 Q. Ms. Flipppo, are you an attorney?

3 A. I am.

4 Q. Where do you practice?

5 A. With White Arnold & Dowd in Birmingham, Alabama.

6 Q. Are you a partner in that law firm?

7 A. I am.

8 Q. How long have you practiced with White Arnold & Dowd?

9 A. With White Arnold & Dowd, about 12 or 13 years; but with  
10 its predecessor firms since 1990.

11 Q. Do you have an area of specialty?

12 A. I do mainly document production, e-discovery.

13 Q. Do you consider yourself a health care attorney?

14 A. No.

15 Q. Did you and your law firm represent defendants BlueWave,  
16 Dent, and Johnson for a period of time?

17 A. Yes.

18 Q. When was White Arnold & Dowd first hired to represent  
19 these defendants?

20 A. I believe January of 2013.

21 Q. What attorneys at your firm worked on that matter, that  
22 representation?

23 A. Myself, Mark White, Augusta Dowd, and Hope Marshall.

24 Q. Did you or your law firm ever represent or give legal  
25 advice to these defendants before January of 2013?



11:18 AM 1 A. No.

11:18 AM 2 Q. Can you describe the general purpose of your  
11:18 AM 3 representation of the defendants?

11:18 AM 4 A. We were hired to assist Bluewave and Mr. Dent and  
11:18 AM 5 Mr. Johnson in -- in responding to a subpoena for documents.

11:18 AM 6 Q. And who issued that subpoena?

11:18 AM 7 A. The Department of Justice.

11:18 AM 8 Q. Now, I'll ask you to turn to the first tab in the binder  
11:18 AM 9 that's in front of you. It's a document with a yellow sticker  
11:18 AM 10 on it saying Plaintiffs' Exhibit 1495. Do you see that?

11:18 AM 11 A. I do.

11:18 AM 12 Q. Ms. Flippo, in connection with this case, did you prepare  
11:18 AM 13 a statement about the work that you and your firm did on behalf  
11:18 AM 14 of the defendants?

11:18 AM 15 A. I prepared this declaration in response to a subpoena my  
11:19 AM 16 firm had received for documents.

11:19 AM 17 Q. Okay. And you recognize Plaintiffs' Exhibit 1495 as the  
11:19 AM 18 declaration that you prepared?

11:19 AM 19 A. I do.

11:19 AM 20 Q. Now, is this a statement that is prepared or given under  
11:19 AM 21 oath?

11:19 AM 22 A. Yes.

11:19 AM 23 MS. SHORT: Your Honor, I would like to move for the  
11:19 AM 24 admission of Plaintiffs' Exhibit 1495 into evidence.

11:19 AM 25 THE COURT: Any objection?

11:19AM 1 MR. COOKE: Yes, Your Honor.

11:19AM 2 THE COURT: Okay.

11:19AM 3 Mr. Ashmore, any objections?

11:19AM 4 MR. ASHMORE: No, sir.

11:19AM 5 THE COURT: Okay. Let me see the statement, if I  
11:19AM 6 could, please.

11:20AM 7 (Pause.)

11:20AM 8 THE COURT: Ladies and gentlemen, this matter is  
11:20AM 9 simply going to be too involved for me to take up right here in  
11:20AM 10 the courtroom, so I regretfully need to ask you to go back to  
11:20AM 11 the jury room so I can take this up.

11:20AM 12 (Whereupon the jury was excused from the courtroom.)

11:21AM 13 THE COURT: Please be seated.

11:21AM 14 why are we using this statement as opposed to  
11:21AM 15 just having her testify?

11:21AM 16 MS. SHORT: Your Honor, within the declaration,  
11:21AM 17 Ms. Flippo, it's actually the next thing I'm going to ask her,  
11:21AM 18 paragraph 11. In order to prepare this declaration and to  
11:21AM 19 recall her communications with the defendants, she was required  
11:21AM 20 to go back through her files and documents and communications.  
11:21AM 21 And her memory is largely limited to those documents. And so I  
11:21AM 22 intend to ask her about some of those documents, and this  
11:21AM 23 establishes the predicate for that.

11:22AM 24 THE COURT: well, couldn't you simply ask her what  
11:22AM 25 documents that she reviewed. And if she said "I would need --

1 I don't remember off the top of my head every document," and  
2 you could ask her, "Do you need to have your memory refreshed?"  
3 And she could look at her statement and then tell you that, it  
4 doesn't mean the document comes in.

5 I'm just worried that the document may contain  
6 lots of things that we are going to need to go line by line  
7 through that present evidentiary issues. So that's a  
8 refresh-her-recollection issue. What else you got? Because I  
9 don't think that -- the whole document needs to come in for  
10 that purpose.

11 **MS. SHORT:** And it's certainly not my intention to go  
12 line by line.

13 **THE COURT:** Well, the defendants are going to be  
14 concerned line by line -- I may be wrong about this -- because  
15 it may contain inadmissible information. And, to the extent we  
16 have the witness here who's flown here from Alabama, why  
17 wouldn't we just let her testify? To the extent her memory  
18 needs to be refreshed, you can hand the document up without  
19 admitting the document.

20 **MS. SHORT:** I understand, Your Honor. I think two  
21 reactions to that.

22 One, she does make statements in this  
23 declaration, as Mr. Cooke had pointed out earlier, about the  
24 scope of the firm's representation and the fact that they did  
25 not give formal legal opinions.

1 THE COURT: Right.

2 MS. SHORT: That's contained in her statement.

3 THE COURT: I think she's very capable of making that  
4 statement right from the witness stand.

5 MS. SHORT: Okay.

6 THE COURT: I don't know why you need the statement.  
7 We don't normally have scripts for witnesses. Okay? And this  
8 is in some way a sworn script. And it just seems to me that  
9 the -- and if it was just something that there was no objection  
10 to, I would kind of wonder why you were doing it, but it  
11 wouldn't be objectionable.

12 But when I'm loaded with this -- if this thing  
13 is, as the defendant suggests, loaded up with things that may  
14 not be admissible, then it puts a burden on the Court that I  
15 think there's a more effective way to present the evidence,  
16 which is, let her testify. To the extent she needs her memory  
17 refreshed, she can look at it. And we don't need to put the  
18 whole document in for that purpose. And then, to the extent  
19 she testifies in a way that is inconsistent, you can impeach  
20 her on that.

21 So I -- I just think it's -- it just presents  
22 problems that I think are unduly necessary for me. I think I  
23 would have to go literally through 13 pages of line by line to  
24 do this, and I just don't think that's an effort here. And  
25 I've made other rulings about making people be here. This is

1 for the jury to hear. It looks like Ms. Flipppo is a very  
2 competent and thorough person. And to the extent she -- she  
3 can't remember something, I'm delighted to have her refresh her  
4 recollection.

5 MS. SHORT: Your Honor, that's fine. I understand  
6 your ruling.

7 For the record, I'd like to just note that this  
8 declaration also appears on the proposed Bluewave trial exhibit  
9 list. We did not object to --

10 THE COURT: Well, are you offering it, Counsel?

11 MR. COOKE: No, Your Honor. We have many, many  
12 exhibits listed that we might use but we have not offered.

13 THE COURT: Well, that doesn't make it admissible.  
14 And the government itself could have had concerns about it. I  
15 just -- you know, we just don't normally put scripts into  
16 evidence when the witness is here to testify about the very  
17 subject.

18 MS. SHORT: Yes, Your Honor. I just wanted to state  
19 for the record that --

20 THE COURT: I hear you.

21 MS. SHORT: This is the first objection that we've  
22 had to this document.

23 THE COURT: Right. And I want to make it clear.

24 Mr. Ashmore, you planning to offer this  
25 document?

11:25 AM 1 MR. ASHMORE: No, Your Honor.

11:25 AM 2 THE COURT: And, Mr. Cooke, you are representing to  
11:25 AM 3 the Court you don't intend to offer this document?

11:25 AM 4 MR. COOKE: Yes, Your Honor. I mean, if I need it to  
11:25 AM 5 impeach the witness, we might.

11:25 AM 6 THE COURT: That's not offering the document into  
11:25 AM 7 evidence; that's impeachment purposes.

11:25 AM 8 MR. COOKE: Right. We do not intend to offer this  
11:25 AM 9 document.

11:25 AM 10 THE COURT: Okay. Then my ruling is I'm not going to  
11:25 AM 11 admit the document. I'm going to allow you to testify.

11:25 AM 12 Listen, Ms. Short, as we go along here, I can  
11:25 AM 13 revisit this if we've got more issues. But let's just let the  
11:26 AM 14 witness testify the old-fashioned way.

11:26 AM 15 Let's bring the jury in.

11:26 AM 16 MR. ASHMORE: Your Honor, may I?

11:26 AM 17 THE COURT: Yes.

11:26 AM 18 MR. ASHMORE: Ms. Short, she's using the phrase  
11:26 AM 19 "defendants." Could she be more particular and refer to  
11:26 AM 20 Mr. Dent, Mr. Johnson, and BlueWave?

11:26 AM 21 MS. SHORT: Yes, I will. Thank you.

11:26 AM 22 THE COURT: Fair question.

11:27 AM 23 (Whereupon the jury entered the courtroom.)

11:27 AM 24 THE COURT: Please be seated.

11:27 AM 25 Defendant BlueWave's motion -- objection is

1 sustained.

2 Please continue.

3 MS. SHORT: Thank you.

4 BY MS. SHORT:

5 Q. Ms. Flippo, could you turn to the next tab in your binder.  
6 It's marked Government Exhibit 7002.

7 A. Okay.

8 Q. Do you recognize this document?

9 A. I do.

10 Q. What is it?

11 A. This is a memorandum that Hope Marshall and I prepared of  
12 the initial meeting that we attended with Brad Johnson and Cal  
13 Dent, along with their other counsel, John Galese and Gene  
14 Sellers.

15 Q. Ms. Flippo, may I ask you, is it generally your practice  
16 to memorialize your meetings and conversations regarding client  
17 matters?

18 A. Yes.

19 Q. When you participate in meetings or calls either with or  
20 on behalf of your clients, do you routinely take notes or  
21 memorialize or record your impressions of the meetings close to  
22 the time of the meeting or call?

23 A. I try, yes.

24 Q. And in the normal course of your business, do you  
25 sometimes memorialize those meetings and calls in email format?

11:28 AM 1 A. Yes.

11:28 AM 2 Q. And do those memos and emails typically reflect your  
11:29 AM 3 thoughts and impressions of the meetings and communications?

11:29 AM 4 A. Sometimes, yes.

11:29 AM 5 Q. Do you use those memos and emails to convey information to  
11:29 AM 6 your clients?

11:29 AM 7 A. To clients, yes.

11:29 AM 8 Q. And so if your clients weren't part of a meeting or a  
11:29 AM 9 discussion that you had or had on their behalf, do you rely  
11:29 AM 10 upon your memos and emails to convey information to them?

11:29 AM 11 A. Yes.

11:29 AM 12 Q. Do you often rely on those memos and emails to recall  
11:29 AM 13 contemporaneous details about things that happened during those  
11:29 AM 14 meetings and phone calls?

11:29 AM 15 A. Yes.

11:29 AM 16 Q. And if you look at Government Exhibit 7002, does this  
11:29 AM 17 memorandum fall into that general category? Is this something  
11:29 AM 18 that you prepared following a meeting with your clients?

11:29 AM 19 A. Yes. It's something that Hope initially prepared, and  
11:29 AM 20 then I reviewed and added whatever information that I recalled  
11:30 AM 21 from that meeting.

11:30 AM 22 MS. SHORT: Your Honor, I'd move for the admission of  
11:30 AM 23 Government Exhibit 7002.

11:30 AM 24 THE COURT: Are there objections?

11:30 AM 25 MR. COOKE: Yes, Your Honor. Same as the previous



1 exhibit.

2 THE COURT: Let me see the document.

3 Ladies and gentlemen, I hate to do it, but I  
4 need to send you back to the jury room.

5 (Whereupon the jury was excused from the courtroom.)

6 THE COURT: Please be seated.

7 Ms. Short, I'm confused why this witness can't  
8 simply testify and then, to the extent she doesn't remember  
9 something, you can put the document in front of her to refresh  
10 her recollection without turning all this -- I can see issues  
11 here that are potentially raised by -- that would raise  
12 appropriate objections. There must be much of it she could  
13 testify to. But just let her -- it seems like you want to have  
14 a script for everything. Let her just testify.

15 And to the extent we -- you'll present it to  
16 her, ask her if it refreshes your recollection, I presume it  
17 will, and then she can testify what she remembers. But it  
18 doesn't have me the burden of, again, on a document which is  
19 pages long and which potentially has information which could be  
20 objectionable or which -- it may not be relevant, et cetera.  
21 And I don't know why we would have to sit and just surgically  
22 go into these documents when she can simply testify to it and  
23 use the rule allowing her to refresh her recollection to  
24 testify.

25 So, at this moment, I'm going to sustain the

1 objection.

2 Does the -- first of all, do the defendants  
3 intend to offer this document themselves?

4 MR. COOKE: No, Your Honor.

5 MR. ASHMORE: No, sir.

6 THE COURT: I'm going to sustain the objection and  
7 let her testify. And, again, all of these, if by the context  
8 and information, I realize that there is a -- that my concerns  
9 are not well-considered, I will -- I'm prepared to reconsider.  
10 But, right now, I'm going to sustain the objection.

11 Bring the jury back in.

12 MR. LEVENTIS: Your Honor, do you mind if Ms. Flippo,  
13 she pulls the microphone a little closer?

14 THE COURT: Absolutely.

15 Ms. Flippo, would you do that?

16 THE WITNESS: Sure.

17 MR. LEVENTIS: Thank you.

18 THE COURT: Ms. Short, just let her testify.

19 MS. SHORT: I will, Your Honor. Thank you.

20 (Whereupon the jury entered the courtroom.)

21 THE COURT: Please be seated.

22 Objection sustained.

23 Please continue.

24 BY MS. SHORT:

25 Q. Ms. Flippo, when did you first meet with Mr. Johnson and

1 Mr. Dent?

2 A. It would have been in January of 2013.

3 Q. In that initial meeting -- well, let me ask this: where  
4 did that initial meeting take place?

5 A. In our office in Birmingham.

6 Q. Who else attended the meeting?

7 A. It was Mr. Dent, Mr. Johnson, Gene Sellers, John Galese,  
8 Mark White, Hope Marshall. I do not recall if Augusta Dowd was  
9 at that meeting.

10 Q. And you had mentioned Mr. Galese and Mr. Sellers before.  
11 Who are those gentlemen?

12 A. My understanding at that meeting was they were BlueWave's  
13 corporate counsel.

14 Q. What was the purpose --

15 A. I'm sorry. If I may correct myself. Mr. Galese, I  
16 believe, was their litigation counsel.

17 Q. And whose litigation counsel, just to be clear?

18 A. BlueWave's.

19 Q. What was the purpose of your meeting with Mr. Johnson and  
20 Mr. Dent?

21 A. BlueWave had received a subpoena for documents from the  
22 Department of Justice. And we were asked to participate in  
23 helping collect that -- those documents and provide them to the  
24 government.

25 Q. Do you recall in your initial meeting with Mr. Johnson and

1 Mr. Dent a discussion about a BlueWave policy about opening new  
2 accounts?

3 A. I believe there was some discussion about what was  
4 included in a packet that was provided to providers whenever  
5 they opened up a new account.

6 Q. Do you remember what Mr. Johnson or Mr. Dent told you was  
7 in that packet?

8 A. I remember there being a new account form. There was a --  
9 an HDL form for a processing and handling agreement. And then  
10 I can't -- I think there were some -- I'm trying to think. I  
11 think there were some materials, some educational materials,  
12 maybe brochures, that kind of thing.

13 Q. Ms. Flippo, would it help to refresh your recollection to  
14 look at the memo in your binder about that first meeting?

15 A. As to what was provided in the package, yes.

16 Q. Okay.

17 THE COURT: Refer her to a page number so she  
18 wouldn't --

19 MS. SHORT: Yes, sir.

20 BY MS. SHORT:

21 Q. It's page 5, Ms. Flippo, in the middle of the page.

22 A. Okay. Oh, the w-9. I apologize.

23 Q. Okay. And did Mr. Johnson and Mr. Dent describe that  
24 packet as a BlueWave policy that new accounts had to follow?

25 A. I don't recall them saying it was a policy; I remember

11:38 AM 1 them saying that it was part of a package.

11:38 AM 2 Q. Okay. In that initial meeting, did you and Mr. Dent and  
11:38 AM 3 Mr. Johnson have a discussion about Health Diagnostics  
11:38 AM 4 Laboratory?

11:38 AM 5 A. Yes.

11:38 AM 6 Q. And is that also known as HDL?

11:38 AM 7 A. Right.

11:38 AM 8 Q. What is HDL?

11:38 AM 9 A. My understanding, HDL was a laboratory that processed  
11:38 AM 10 blood for doing cardiovascular testing. They may have done  
11:38 AM 11 other testing, but that's the only thing that I recall.

11:39 AM 12 Q. What was the relationship between your clients and HDL?

11:39 AM 13 A. BlueWave was the sales force for HDL because HDL did not  
11:39 AM 14 have an internal sales force.

11:39 AM 15 Q. And in your initial meeting, was there discussion about  
11:39 AM 16 HDL also receiving a subpoena from the Department of Justice?

11:39 AM 17 A. Yes.

11:39 AM 18 Q. Do you know whether HDL was represented by counsel in  
11:39 AM 19 responding to that subpoena?

11:39 AM 20 A. I came to learn that they were.

11:39 AM 21 Q. And who was representing HDL in responding to the  
11:39 AM 22 subpoenas?

11:39 AM 23 A. Three lawyers that I had communications with from the  
11:39 AM 24 Ropes & Gray law firm: Laura Hoey, Brien O'Connor, and David  
11:39 AM 25 Rhinesmith.

11:39AM 1 Q. Do you recall having an opportunity to speak to Laura Hoey  
11:39AM 2 in the spring of 2013 while you were representing Mr. Dent and  
11:40AM 3 Mr. Johnson?

11:40AM 4 A. I had several conversations with Laura Hoey, so yes.

11:40AM 5 Q. Do you remember discussing with Mr. -- or Ms. Hoey  
11:40AM 6 concerns that Ropes & Gray had regarding the LeClairRyan  
11:40AM 7 letter?

11:40AM 8 A. Yes.

11:40AM 9 Q. What do you recall about that discussion when it first  
11:40AM 10 came up?

11:40AM 11 A. I recall Laura saying that one of the health care lawyers  
11:40AM 12 from their firm --

11:40AM 13 MR. ASHMORE: Objection, Your Honor. Hearsay.

11:40AM 14 THE COURT: Overruled. 801(d)(2)(D).

11:40AM 15 Go ahead.

11:40AM 16 THE WITNESS: I recall Laura Hoey saying that one of  
11:40AM 17 the health care lawyers in her firm had looked at the  
11:40AM 18 LeClairRyan letter and had some concerns about it.

11:40AM 19 BY MS. SHORT:

11:40AM 20 Q. Do you remember the name of the LeClairRyan -- or I'm  
11:41AM 21 sorry -- the Ropes & Gray attorney that had expressed concerns?

11:41AM 22 A. I believe his name was Michael Lombard.

11:41AM 23 Q. Ms. Flipppo, would it help refresh your recollection to  
11:41AM 24 look at an email that you wrote in conjunction with those  
11:41AM 25 conversations?

11:41 AM 1 A. Yes.

11:41 AM 2 Q. If you'll turn in your binder to the next tab, which is  
11:41 AM 3 marked Plaintiffs' Exhibit 1173.

11:41 AM 4 A. Okay.

11:41 AM 5 Q. You want to take a minute and look at that and see if you  
11:41 AM 6 see the name of the attorney who Ms. Hoey mentioned?

11:41 AM 7 A. Yes, Lampert, not Lombard.

11:41 AM 8 Q. Say it one more time.

11:41 AM 9 A. I'm sorry. His name is Michael Lampert and not Lombard.

11:41 AM 10 Q. Okay. And what was your understanding from that call with  
11:41 AM 11 Ms. Hoey about the concerns that they had with the LeClairRyan  
11:41 AM 12 letter?

11:42 AM 13 A. I don't know if I had an appreciation at the time as to  
11:42 AM 14 what exactly were Mr. Lampert's concerns about the letter.

11:42 AM 15 Q. Did Ms. Hoey offer to introduce you to Mr. Lampert?

11:42 AM 16 A. She did offer to set up a telephone conference with  
11:42 AM 17 Mr. Lampert to explain what his concerns were.

11:42 AM 18 Q. And at the time that you had the conversation with  
11:42 AM 19 Ms. Hoey, did she mention that there were concerns about  
11:42 AM 20 potential Anti-Kickback Statute violations?

11:42 AM 21 A. Yes.

11:42 AM 22 Q. And just so that we're all on the same page, I've been  
11:42 AM 23 referring to "the LeClairRyan letter." What was that?

11:42 AM 24 A. The LeClairRyan letter was a letter that was written by a  
11:42 AM 25 lawyer from the LeClairRyan law firm in Richmond that gave an

1 opinion about the propriety of processing and handling fees.

2 Q. And why was that pertinent to your representation of  
3 Mr. Dent and Mr. Johnson?

4 A. Because of -- it was a letter that Mr. Dent and  
5 Mr. Johnson had relied on because it -- the letter had  
6 indicated that processing and handling fees were appropriate,  
7 and Mr. Dent and Mr. Johnson were relying on that letter.

8 Q. And you said you later had an opportunity to speak with  
9 Mr. Lampert who had concerns about that LeClairRyan letter?

10 A. Correct.

11 Q. Do you remember having a conference call with Mr. Lampert  
12 in May of 2014?

13 A. I remember having a conference call with Mr. Lampert.

14 Q. What was said at that conference call? What happened?

15 A. He mentioned several things that he was concerned about  
16 with regard to the LeClairRyan letter and whether or not it fit  
17 into what was called one of the safe harbor provisions of the  
18 Anti-Kickback Statute.

19 Q. Do you understand what he was referring to when he said  
20 "safe harbor protections"?

21 A. I understand that there are certain -- what are called  
22 safe harbor exemptions within the statute, but I haven't  
23 studied them.

24 Q. Why was it pertinent to your representation of Mr. Dent  
25 and Mr. Johnson as to whether or not a safe harbor protection



11:44 AM 1 applied?

11:44 AM 2 A. We were looking at it in terms of whether or not there was  
11:44 AM 3 a -- what impact that had on a criminal investigation and their  
11:44 AM 4 assertion of reliance on the advice of counsel as a defense to  
11:44 AM 5 any kind of criminal act.

11:44 AM 6 Q. Okay. And help me understand, how did that relate to  
11:44 AM 7 potential safe harbors or the lack of safe harbors?

11:45 AM 8 A. I really didn't go into -- we really didn't investigate  
11:45 AM 9 the safe harbor provision. We were looking more at their  
11:45 AM 10 intent.

11:45 AM 11 Q. Okay. Did Mr. Lambert describe to you what the safe  
11:45 AM 12 harbor provisions were that he was concerned about?

11:45 AM 13 A. He tried.

11:45 AM 14 Q. Okay. Would it help refresh your recollection to look at  
11:45 AM 15 a memo that you prepared following that conversation with  
11:45 AM 16 Mr. Lambert?

11:45 AM 17 A. For any information regarding that conversation, yes.

11:45 AM 18 Q. Okay. If you would turn to the next tab in your binder,  
11:45 AM 19 which has been marked Plaintiffs' Exhibit 1080.

11:45 AM 20 A. Okay.

11:45 AM 21 Q. And can you tell us just briefly what you're looking at  
11:45 AM 22 here.

11:45 AM 23 A. This is a memo that I prepared from my notes of the  
11:45 AM 24 discussion with Mr. Lambert.

11:45 AM 25 Q. When does it appear that that conversation took place?

11:46 AM 1 what was the date?

11:46 AM 2 A. May 29th, 2013.

11:46 AM 3 THE COURT: Let me make this clear for a second,  
11:46 AM 4 because earlier I believe it was stated that the conversation  
11:46 AM 5 with Mr. Lambert occurred in 2014. So I think we need to  
11:46 AM 6 clarify. What year are we talking about?

11:46 AM 7 THE WITNESS: It would have been 2013.

11:46 AM 8 THE COURT: Thank you.

11:46 AM 9 MS. SHORT: Thank you, Your Honor. I likely misspoke  
11:46 AM 10 there.

11:46 AM 11 BY MS. SHORT:

11:46 AM 12 Q. Ms. Flipppo, if you would turn to page 3 of your memo, and  
11:46 AM 13 the first full paragraph on that page, just take a second to  
11:46 AM 14 look at that. And my question to you is what were you told by  
11:46 AM 15 Mr. Lambert about the applicability of safe harbors under the  
11:46 AM 16 Anti-Kickback Statute?

11:46 AM 17 A. I could tell you what I wrote at the time, but I don't  
11:46 AM 18 recall specifically what he said.

11:47 AM 19 THE COURT: Well, I believe she can only do it if it  
11:47 AM 20 refreshes her recollection. She needs to --

11:47 AM 21 BY MS. SHORT:

11:47 AM 22 Q. Okay. Ms. Flipppo, do you recall in that discussion what  
11:47 AM 23 practice by HDL was at issue when you were discussing the safe  
11:47 AM 24 harbor provisions?

11:47 AM 25 A. The practice of paying processing and handling fees.

11:47 AM 1 Q. And how was that pertinent to your representation of  
11:47 AM 2 Mr. Dent and Mr. Johnson?

11:47 AM 3 A. I'm not sure I understand your question.

11:47 AM 4 Q. Was that information relevant to your -- was the payment  
11:47 AM 5 of processing and handling fees, P&H fees, was that relevant to  
11:47 AM 6 your representation of Mr. Dent and Mr. Johnson?

11:47 AM 7 A. It was in the sense that we were trying to -- it was part  
11:48 AM 8 of the subpoena for documents. It was part of the documents  
11:48 AM 9 that were requested. So in that sense, yes.

11:48 AM 10 Q. Okay. And help me understand that. How were P&H fees  
11:48 AM 11 part of the document requests?

11:48 AM 12 A. Because the document requested all documents related to  
11:48 AM 13 processing and handling fees.

11:48 AM 14 Q. Do you know if Mr. Dent and Mr. Johnson ever had a  
11:48 AM 15 conversation with Mr. Lambert at Ropes & Gray?

11:48 AM 16 A. I don't believe they did.

11:48 AM 17 Q. Okay.

11:48 AM 18 A. No, I don't believe they did.

11:48 AM 19 Q. Okay. If you look at the top of page 4 of your memo, the  
11:48 AM 20 very first sentence on that page, does that refresh your  
11:48 AM 21 recollection about whether or not Mr. Dent and Mr. Johnson had  
11:48 AM 22 ever spoken to Mr. Lampert?

11:48 AM 23 A. No. To my knowledge, they had never spoken with  
11:48 AM 24 Mr. Lambert. And I don't -- I don't know if -- I don't know  
11:49 AM 25 why I said "our clients," but I don't believe they ever had

11:49 AM 1 that discussion with him.

11:49 AM 2 Q. Do you know why you wrote in your memo that "Mr. Lambert  
11:49 AM 3 said that our clients wondered if the advisory opinion was  
11:49 AM 4 applicable"?

11:49 AM 5 A. I do not know why.

11:49 AM 6 Q. Did you also talk to Mr. Lambert about some issues that he  
11:49 AM 7 had with a fair market value analysis that had been performed?

11:49 AM 8 A. Yes.

11:49 AM 9 Q. What is your recollection about what Mr. Lambert's  
11:49 AM 10 concerns were with the fair market value analysis?

11:49 AM 11 A. Just that he had disagreed with LeClairRyan's analysis of  
11:49 AM 12 whether or not the amount that was being paid was fair market  
11:49 AM 13 value.

11:49 AM 14 Q. Did LeClairRyan conduct the fair market value analysis?

11:50 AM 15 A. I think there's some statement about fair market value in  
11:50 AM 16 the LeClairRyan letter, but it's been a long time since I've  
11:50 AM 17 seen it, so --

11:50 AM 18 Q. Okay. And if you look at page 4 of the memo that we've  
11:50 AM 19 been referring to, do you see a reference to an Exponent  
11:50 AM 20 analysis?

11:50 AM 21 A. Yes.

11:50 AM 22 Q. And who was Exponent?

11:50 AM 23 A. I believe that was a company that was retained by HDL to  
11:50 AM 24 perform a time-motion study.

11:50 AM 25 Q. And did Mr. Lambert have concerns about the Exponent

11:50 AM 1 study?

11:50 AM 2 A. He made -- I see he made statements in the memo, but I  
11:50 AM 3 don't have any recollection what specifically -- other than  
11:50 AM 4 what's written here.

11:50 AM 5 Q. Did Mr. Lambert raise concerns with you during this  
11:50 AM 6 conversation about potential exposure under the False Claims  
11:50 AM 7 Act?

11:50 AM 8 A. I did.

11:50 AM 9 Q. And I'm looking at the bottom of page 4 of your memo, if  
11:51 AM 10 that helps.

11:51 AM 11 A. I'm sorry. Would you ask your question one more time,  
11:51 AM 12 please.

11:51 AM 13 Q. Did Mr. Lambert raise concerns with you regarding  
11:51 AM 14 potential liability under the False Claims Act?

11:51 AM 15 A. Yes.

11:51 AM 16 Q. Do you also recall having a discussion with Mr. Lambert  
11:51 AM 17 about how physicians were reimbursed for an office visit?

11:51 AM 18 A. Yes.

11:51 AM 19 Q. Do you recall what he told you about how physicians were  
11:51 AM 20 reimbursed and what applicability that had to P&H fees?

11:51 AM 21 A. I don't specifically recall what it was he said.

11:51 AM 22 Q. If you turn to page 6 of your memo. And take a second to  
11:51 AM 23 look at that first paragraph and see if that refreshes your  
11:51 AM 24 recollection.

11:52 AM 25 A. Yes.

11:52 AM 1 Q. What do you recall Mr. Lampert's concerns were of that  
2 discussion about the physician's visit?

11:52 AM 3 A. That the process -- if a blood draw was done during the  
4 office visit, that it was taken into account already by the CPT  
5 code and was reimbursed.

11:52 AM 6 Q. Did you relay your concerns -- or relay Mr. Lambert's  
7 concerns to your clients, Mr. Dent and Mr. Johnson?

11:52 AM 8 A. I did not at the time. I think a month later was a  
9 meeting, at which time it was discussed. We were not able to  
10 set up any kind of conference call in between the time of the  
11 my discussion with Mr. Lambert and that follow-up meeting.

11:52 AM 12 Q. Okay. And, Ms. Flipppo, just one last time on this memo,  
13 the very bottom of page 6.

11:52 AM 14 Following your discussion with Mr. Lampert, did you  
15 agree that you would reach out to your clients to discuss this  
16 information and they would reach out to their client, Tonya  
17 Mallory?

11:53 AM 18 A. Yes.

11:53 AM 19 Q. And if I understand what you were just saying, you didn't  
20 have an opportunity to do that until about a month later. Is  
21 that correct?

11:53 AM 22 A. Correct. We were not able to connect.

11:53 AM 23 Q. So when were you able to discuss these concerns with  
24 Mr. Dent and Mr. Johnson?

11:53 AM 25 A. Let's see. This memo is May. I believe it was in June.

1 June or July at a meeting in Richmond.

2 Q. Okay. Do you recall who was at the meeting in Richmond,  
3 Virginia?

4 A. I remember Brad was there, Cal was there, Mark White was  
5 there, I was there, Gene Sellers, Tonya Mallory, a couple of  
6 members of the HDL board, and a couple of their employees. I  
7 believe maybe their in-house counsel was there as well. Laura  
8 Hoey and Brien O'Connor, people I remember.

9 Q. Ms. Flipppo, did you prepare a memo following that meeting  
10 in Richmond, Virginia?

11 A. I did.

12 Q. I'll ask you to turn to the next tab in your binder. It's  
13 Plaintiffs' Exhibit 1034.

14 A. Yes.

15 Q. Take a minute to look at that and tell us what this  
16 document is.

17 A. This is a memo that I prepared following the June meeting.  
18 I prepared it in July from my notes of that meeting.

19 Q. And did you prepare this memo in your -- in the course of  
20 your representation of Mr. Dent and Mr. Johnson?

21 A. Yes.

22 MS. SHORT: Your Honor, I move for the admission of  
23 Plaintiffs' Exhibit 1034.

24 THE COURT: Let me have a look at it.

25 Ladies and gentlemen, I'm going to be sending

1 you to the jury room.

2 (Whereupon the jury was excused from the courtroom.)

3 **THE COURT:** Okay. I want to hear, does defense have  
4 any objections to Plaintiffs' Exhibit 1034?

5 **MR. COOKE:** Yes, Your Honor.

6 **THE COURT:** And what are those objections?

7 **MR. COOKE:** Same objections that we had before --

8 **THE COURT:** This is a little bit different kind of  
9 document. This is a summary of a meeting in which she is  
10 there. She's a -- this is a statement by an agent of a party,  
11 and it is -- this is -- and this is summarizing a meeting in  
12 which the government, at least, alleges that -- that the  
13 defendants were willfully ignorant or were informed or  
14 obstructionist. The -- and this is an eyewitness to the  
15 meeting.

16 So what specifically -- so I think some of the  
17 concerns the Court had that things that were sort of perhaps  
18 loaded up in there that were perhaps not relevant to the case,  
19 this looks to the Court pretty relevant.

20 You want to point out things that aren't  
21 relevant?

22 **MR. COOKE:** Well, first of all, of course, our  
23 primary objection is that there's nothing in the rules that  
24 allows a -- a consistent statement unless it's being used to  
25 refresh your recollection or to --



11:57AM 1 THE COURT: No, no. You can have a -- I mean, we  
11:57AM 2 got -- this is state-of-mind evidence. What happened here is a  
11:58AM 3 very important piece of the case. It's circumstantial  
11:58AM 4 evidence, and it's relevant under 401. And it's, you know, not  
11:58AM 5 barred by 403.

11:58AM 6 So I'm trying to figure -- it's a statement by a  
11:58AM 7 party's agent, and it is summarizing a meeting which is very  
11:58AM 8 relevant both to the government's case and to the defense of  
11:58AM 9 state of mind, lacking intent.

11:58AM 10 So tell me what in this is not relevant?

11:58AM 11 MR. COOKE: Okay. Our objection --

11:58AM 12 THE COURT: Or otherwise objectionable?

11:58AM 13 MR. COOKE: We do object under 403. It's the mental  
11:58AM 14 impressions of the defense attorney, not of the parties. And  
11:58AM 15 I'll just give an example.

11:58AM 16 THE COURT: Okay.

11:58AM 17 MR. COOKE: On the --

11:58AM 18 THE COURT: Don't give me an example. Give me  
11:58AM 19 precise things that I can look at, because I might consider, to  
11:58AM 20 the extent there is something isolated that would have 403  
11:59AM 21 issues, we might -- you know, we might block them out or  
11:59AM 22 something.

11:59AM 23 So just tell me. Because much in there is  
11:59AM 24 probative, but I haven't gone line by line through it.

11:59AM 25 MR. COOKE: Can I take a moment to look at it --

11:59 AM 1 THE COURT: Yes.

11:59 AM 2 MR. COOKE: -- rather than wing it?

11:59 AM 3 THE COURT: Yes.

11:59 AM 4 (Pause.)

12:02 PM 5 THE COURT: Okay. Mr. Cooke, what's your objection?

12:02 PM 6 MR. COOKE: Okay. Let's start with -- because the  
12:02 PM 7 very first page, first paragraph, "Our clients were surprised  
12:02 PM 8 to learn we were coming to the meeting. Mark reminded Brad  
12:02 PM 9 that he told him we were coming to the meeting in a prior  
12:02 PM 10 conference call. Looked back at my notes. I had written down  
12:02 PM 11 that we told them we were coming." So that's irrelevant.

12:02 PM 12 THE COURT: It's just giving context for the  
12:02 PM 13 discussion. I mean, I disagree. I think it's a minor matter,  
12:02 PM 14 but it kind of sets up the whole scenario, gives a little  
12:02 PM 15 feeling of the meeting. This is, like, a key part of the case,  
12:02 PM 16 Mr. Cooke. But, you know, it's -- it's not particularly  
12:02 PM 17 harmful and it has some -- you know, some relevance in setting  
12:03 PM 18 up the context for the meeting. So overruled.

12:03 PM 19 what else you got?

12:03 PM 20 MR. COOKE: All right. On page 2, the very first  
12:03 PM 21 paragraph, there's a discussion about another laboratory  
12:03 PM 22 venture called IDL, been no foundation for that being relevant.

12:03 PM 23 THE COURT: Well, yes. It says here, "Brad and Cal  
12:03 PM 24 were of the opinion it did not include these" -- that being P&H  
12:03 PM 25 fees -- "and the IDL contract would be an admission that paying

1 them was improper." Seems relevant to their state of mind.

2 MR. COOKE: Okay. The bottom of that page, "Brien  
3 makes it clear to the summit group that the government is not  
4 going to go away, that they do not buy HDL's theory of why it's  
5 okay to pay P&H fees."

6 That's attorney mental impressions.

7 "The test of whether something is legal or not  
8 is not whether the government is going to go away."

9 This was in the context --

10 THE COURT: It's just state of mind, and it -- Brien  
11 being Brien O'Connor; is that right?

12 MS. SHORT: Correct.

13 THE COURT: Lawyer for HDL. Overruled.

14 what else?

15 MR. COOKE: Brien said that during the -- looking at  
16 the next page, second paragraph, "Brien said that during their  
17 meeting with the government, Leventis told him that HDL was an  
18 outlier." So that's hearsay. Mr. Leventis is saying that  
19 they're an outlier and there's no testimony --

20 THE COURT: It's not offered that they were an  
21 outlier. It's just giving them the information they had that  
22 forms their state of mind. And part of this is just the  
23 context of the meeting and of the concerns they had. And all  
24 this is leading to the strong documentation here is that there  
25 was a grave concern by lawyers present for HDL that there

1 was -- that this was problematic, potentially unlawful conduct.  
2 And this is just part of it. Overruled.

3 what else you got?

4 MR. COOKE: All right. The next one, you need to  
5 read it in conjunction with another one. It's the one, two,  
6 three, fourth paragraph down on page 3.

7 THE COURT: Hold on a second. Let me get there.  
8 One, two, three. Yes, sir.

9 MR. COOKE: And then go to page 6, and the third  
10 paragraph on that page.

11 THE COURT: Okay. Let me read this.

12 (Pause.)

13 THE COURT: And then page 6, what, Mr. Cooke?

14 MR. COOKE: The third paragraph, just the first part  
15 of that.

16 THE COURT: About Cal being upset?

17 MR. COOKE: Cal being really upset at this point and  
18 then went through way too many exhausting minutes where Cal was  
19 challenging and so forth.

20 THE COURT: Overruled. I think the suggestion is  
21 he's filibustering to obstruct the legal advice. Overruled.

22 what else you got?

23 MR. COOKE: Again, Your Honor, my objection would not  
24 be to her testifying about it; it's her characterization of way  
25 too many minutes.

1           **THE COURT:** It's her testimony that she was observing  
2 someone who was perhaps -- arguably, it can make an inference  
3 of willful ignorance and of obstructing other people to act. I  
4 overrule that objection.

5                       what else you got?

6           **MR. COOKE:** On the next page --

7           **THE COURT:** Page.

8           **MR. COOKE:** I'm sorry. Page 4.

9           **THE COURT:** Yes, sir.

10          **MR. COOKE:** Second paragraph, very last sentence.  
11 "It was noted that the LeClairRyan letter was not designated as  
12 confidential, and the government is very anxious to get their  
13 hands on it."

14                       That's not relevant.

15          **THE COURT:** Oh, I think it's very relevant.  
16 Overruled.

17                       what else?

18          **MR. COOKE:** Okay. Page 5. And this one is, I think,  
19 fairly important. The last two paragraphs, "Back at the summit  
20 meeting, Gene tried to argue that the amount of the  
21 purported -- of any purported kickback is so miniscule that it  
22 could not be considered inducement. He said that what HDL is  
23 doing is reimbursing the doctor for the doctor's expenses  
24 associated with the draw. I don't think Gene gets that, for  
25 purposes of the Anti-Kickback Statute, anything of value is

1 considered remuneration."

2 But that's not communicated to anybody. This is  
3 her private thoughts about what Gene Sellers was saying.

4 THE COURT: Statement of an agent of a party.  
5 Overruled.

6 MR. COOKE: He's an independent contractor.

7 THE COURT: Overruled.

8 what else?

9 MR. COOKE: He's the -- okay. "Laura Hoey explained  
10 that, under the statute, the government only has to prove that  
11 one purpose of the payment was for referral."

12 Under Rule 403, that's a conclusion of law which  
13 it would be for Your Honor to --

14 THE COURT: She explained. Overruled.

15 what else?

16 MR. COOKE: That's all.

17 THE COURT: Let's bring the jury back in.

18 Miss Eunice?

19 (Whereupon the jury entered the courtroom.)

20 THE COURT: Please be seated. Plaintiff has offered  
21 Exhibit 1034. Is there an objection from the defendants?

22 MR. COOKE: Yes, Your Honor, as stated.

23 THE COURT: Previously stated.

24 MR. ASHMORE: No, sir.

25 THE COURT: Very good. Plaintiffs' Exhibit 1034 is

1 admitted over Bluewave Defendants' objection.

2 Please proceed.

3 **BY MS. SHORT:**

4 Q. All right. Ms. Flipppo, just to reset us for a moment,  
5 we're looking at this exhibit. This is a memo that you wrote  
6 following a meeting in Richmond, Virginia; is that correct?

7 A. That's correct.

8 Q. All right. And when did that meeting take place?

9 A. According to the memo, June 24th, 2013.

10 Q. Did you attend that meeting?

11 A. I did.

12 Q. And you took notes about what happened at the meeting?

13 A. I did.

14 Q. And you converted those notes into this memorandum?

15 A. Yes.

16 Q. If we look at page 2 -- and I'm going to focus you on the  
17 second full paragraph on page 2 of your memo -- tell us how the  
18 meeting began.

19 A. I believe that Brad and Cal, Ms. Mallory, the HDL people,  
20 and their counsel were already in the room when Mark and I went  
21 in.

22 Q. Okay. And I'm looking at this paragraph. Can you just  
23 read this paragraph for us.

24 A. "The summit meeting began with Brien advising everyone  
25 about the meeting he and Laura had with the government. He

1 explained that their meeting focused on P&H fees, copay  
2 waivers, and medical necessity. Brien had told the government  
3 that HDL's focus was on being on the forefront of health care  
4 in America."

5 Q. And who is the Brien that you refer to in this paragraph?

6 A. Brien O'Connor, HDL's counsel.

7 Q. Okay. Was he also with the firm of Ropes & Gray?

8 A. Yes.

9 Q. Going down to the last paragraph on that page, what did  
10 Mr. O'Connor report about -- or his -- what did Mr. O'Connor  
11 report about the government's view of the case?

12 A. He indicated that, in his discussions with the government,  
13 that they were going to continue investigating processing and  
14 handling fees, and apparently the government did not agree with  
15 what HDL was presenting to the government as its theory on the  
16 viability of processing and handling fees.

17 Q. Looking at the next page of the memo, I want to focus your  
18 attention on the third paragraph.

19 And can you read that for us?

20 A. "Strawn said she believed that the P&H fees had an  
21 inducive -- inductive effect, and she wanted to know what  
22 BlueWave was representing to the doctors. The government  
23 believes that HDL is waiving copays on non-Medicare patients as  
24 an inducement to doctors."

25 Q. And when you refer to Strawn, who is Strawn?



1 A. Elizabeth Strawn with the Department of Justice in DC.

2 Q. Was she at the meeting in Richmond?

3 A. No.

4 Q. Who was reporting this information to you?

5 A. Mr. O'Connor.

6 Q. And going down two more paragraphs. And can you read that  
7 one for us.

8 A. "There was some discussion about how Brad and Cal used the  
9 time-motion study and legal opinion letter in the field. Tonya  
10 threw into the conversation that people in the field will refer  
11 to her May 2010 letter as the legal opinion."

12 Q. Did you know what -- does Tonya here refer to Ms. Mallory?

13 A. Yes.

14 Q. And did you know what she was talking about, this legal  
15 opinion letter?

16 A. Yes.

17 Q. What do you remember about that legal opinion letter?

18 A. There was a letter that was on HDL's letterhead signed by  
19 Ms. Mallory, dated May of 2010, that indicated to providers  
20 that HDL had undertaken to get a legal opinion as to whether or  
21 not P&H fees were proper and that that opinion had come back  
22 that they were proper.

23 Q. Did you see -- was that 2010 memo on HDL letterhead, was  
24 that itself an attorney legal opinion?

25 A. It was Ms. Mallory's letter, but the letter indicated that

1 12:13 PM 1 they had gotten a legal opinion.

2 12:13 PM 2 Q. Did you see a legal opinion to HDL that would have been  
3 12:13 PM 3 referenced in Ms. Mallory's 2010 letter?

4 12:13 PM 4 A. No.

5 12:13 PM 5 Q. I want to turn your attention to page 5 of your memo in  
6 12:14 PM 6 the section just under "back at the summit meeting." Let's  
7 12:14 PM 7 look at the first paragraph at the bottom of the page.

8 12:14 PM 8 A. Okay.

9 12:14 PM 9 Q. And you refer to Gene in this paragraph. Who is Gene?

10 12:14 PM 10 A. Gene Sellers, Bluewave's corporate counsel.

11 12:14 PM 11 Q. And can you read this paragraph for us?

12 12:14 PM 12 A. "Gene tried to argue that the amount of any purported  
13 12:14 PM 13 kickback is so miniscule that it could not be considered  
14 12:14 PM 14 inducement. He said what HDL is doing is reimbursing the  
15 12:14 PM 15 doctor for the doctor's expenses associated with the draw. I  
16 12:14 PM 16 don't think Gene gets that, for purposes of Anti-Kickback  
17 12:14 PM 17 Statutes, anything of value is considered remuneration."

18 12:14 PM 18 Q. And that last sentence, was that your impression or was  
19 12:14 PM 19 that your commentary?

20 12:14 PM 20 A. That was my commentary, that I did not think that Gene was  
21 12:14 PM 21 looking at it from the anti-kickback position.

22 12:15 PM 22 Q. And your statement that anything of value is considered  
23 12:15 PM 23 remuneration, is that your understanding of the Anti-Kickback  
24 12:15 PM 24 Statute?

25 12:15 PM 25 A. That's what I was -- that's what I understood from my

12 : 15 PM 1 discussions with Mr. Lampert.

12 : 15 PM 2 Q. Did you convey that information to Mr. Dent or  
12 : 15 PM 3 Mr. Johnson, that anything of value is considered remuneration  
12 : 15 PM 4 for purposes of the Anti-Kickback Statute?

12 : 15 PM 5 A. No.

12 : 15 PM 6 Q. Looking at the last paragraph on that page --

12 : 15 PM 7 A. I'm sorry. You mean prior to this meeting? Prior to this  
12 : 15 PM 8 meeting, we did not.

12 : 15 PM 9 Q. You did not prior to this meeting, but my question was  
12 : 15 PM 10 more broad than that. Did you convey that information, that  
12 : 15 PM 11 anything of value is considered remuneration under the  
12 : 15 PM 12 Anti-Kickback Statute? Did you convey that information to your  
12 : 15 PM 13 clients?

12 : 15 PM 14 A. No.

12 : 15 PM 15 Q. Not at any point?

12 : 16 PM 16 A. Let's see. They were -- at that meeting it was  
12 : 16 PM 17 Mr. O'Connor speaking. And I think we told them the  
12 : 16 PM 18 government's position from your discussions with the  
12 : 16 PM 19 government. But as far as any kind of independent analysis and  
12 : 16 PM 20 saying that anything of value was remuneration, no.

12 : 16 PM 21 Q. Okay. So do I understand you correctly that you,  
12 : 16 PM 22 subsequent to this meeting, had discussions with the United  
12 : 16 PM 23 States?

12 : 16 PM 24 A. Yes.

12 : 16 PM 25 Q. And they told you that that was their view, that anything

1 of value can be considered remuneration?

2 A. I believe so.

3 Q. And you conveyed that information, the government's  
4 position, to your clients?

5 A. That's correct.

6 Q. Back at the summit meeting, if we look at the last  
7 paragraph on page 5, how did Ms. Hoey react to Mr. Sellers'  
8 argument?

9 A. Well, she -- she explained that -- that, contrary to what  
10 Mr. Sellers was saying, that she believed that, if even one  
11 purpose was -- the payment of P&H fee was for referral, it  
12 would be a violation.

13 Q. And that's a violation of the Anti-Kickback Statute?

14 A. I believe so, yes.

15 Q. I want to turn your attention next to the top of page 6 of  
16 your memo, the second full paragraph.

17 A. Okay.

18 Q. Can you read just the -- just the first two sentences of  
19 that paragraph.

20 A. "The conversation then came back to whether everyone was  
21 on the same page as to the use of P&H fees going forward. Cal  
22 said no."

23 Q. And why did he say no?

24 A. Because Cal was concerned, as the next statement says,  
25 that -- that if P&H fees were immediately stopped, that it

1 would be an admission of -- a type of -- when I said admission  
2 of guilt, was an admission of some kind of criminal guilt.

3 Q. We go down to the next paragraph. What happened next at  
4 the meeting?

5 A. Cal became upset, because he --

6 THE COURT: Hold on just a second.

7 (Pause.)

8 THE COURT: Thank you. Please continue.

9 THE WITNESS: Cal was getting very frustrated  
10 because -- my impression was that he felt like that the lawyers  
11 didn't understand where he was coming from, and I didn't think  
12 he was understanding where the lawyers were coming from. And I  
13 think he was getting really frustrated about that.

14 BY MS. SHORT:

15 Q. Was it your understanding that HDL's attorneys at Ropes &  
16 Gray were recommending that HDL stop paying P&H fees at this  
17 meeting?

18 A. They were recommending that HDL had signaled to the  
19 government that they were going to get away from P&H fees but  
20 that it couldn't be done immediately.

21 Q. And, in fact, if you look in the middle of the paragraph  
22 that we were just looking at -- one up again -- you reference  
23 Brien. Is that Brien O'Connor?

24 A. That's correct.

25 Q. And what do you say there? If you can just read that.

1 A. Sure. "Brien said that he signaled the government based  
2 on Tonya" -- should be Tonya's -- "authority that HDL was  
3 moving away." And that would be away from P&H fees.

4 Q. What was Ms. Mallory's response? If you just want to read  
5 the next sentence, if you don't mind.

6 A. "Tonya said she told Ropes & Gray that HDL would move away  
7 from P&H if they could get a level playing field."

8 Q. In the last sentence of that paragraph, you say "the 'if'  
9 seemed to be something new, something that Tonya had not said  
10 before."

11 was that your impression of Ms. Mallory's reaction?

12 A. Yes.

13 Q. And can you explain that to us?

14 A. Yes. We had -- HDL's counsel had told us that they had  
15 already advised the government that they were going to be  
16 getting away from P&H fees. There was concern on Brad and  
17 Cal's point -- part that if -- that HDL not be the only one  
18 that was going to give up paying P&H fees, that all labs would  
19 have to stop paying P&H fees, and that it was clear to all labs  
20 that they were going to have to do that.

21 Q. Did you have the impression that Ms. Mallory changed her  
22 mind during the course of this meeting as to whether or not to  
23 phase out P&H fees?

24 A. I don't know one way or the other.

25 Q. All right. The very last paragraph of your memo concludes

1 by talking about options being thrown out. Can we take a quick  
2 look at that.

3 A. Sure.

4 Q. And, Ms. Flippo, can you just read that last paragraph --

5 A. Sure.

6 Q. -- For us.

7 A. "There were several options thrown out, with most being  
8 shot down because they just did not get you into a safe harbor.  
9 Any P&H contract would have to get the aggregate compensation  
10 in advance for at least a one-year period, and that  
11 compensation must not be in excess of fair market value. If  
12 they can't get away from a per-click payment, they will never  
13 get into a safe harbor."

14 Q. Ms. Flippo, do you recall what you were referencing when  
15 you say "a per-click payment"? What did that -- what did that  
16 mean?

17 A. A volume-based payment, a payment based on each draw. Per  
18 click, it's just a term that's used for per event, per draw,  
19 per test, per --

20 Q. Okay. I want to step back just a minute. So this is end  
21 of June 2013. What was White Arnold & Dowd doing in its  
22 representation of Mr. Dent and Mr. Johnson at that time?

23 A. We were continuing to produce documents responsive to the  
24 subpoena. We were continuing to follow HDL's lead, their  
25 counsel's lead, in what they were doing in discussions with the

1 government. And we were monitoring -- we were -- I'm trying to  
2 think when we had our first discussion with the government from  
3 a timeline perspective.

4 I don't remember when that was, but we were  
5 continuing to produce records and monitor the matter.

6 Q. Okay. And I wanted to ask you about that document  
7 production effort. What kinds of things did you do to gather  
8 documents from BlueWave?

9 A. I went to BlueWave's offices in Hanceville, Alabama, and  
10 spoke with the secretary, Sandra Tankersley, who handled most  
11 of the -- she -- the paperwork. Spoke with her, went through  
12 the various requests, and talked about what documents that they  
13 would have available, and gathered them. To the extent there  
14 were paper documents, we gathered those. To the extent she had  
15 electronic documents, we gathered those and reviewed them and  
16 produced them.

17 We learned that the emails of BlueWave were kept on  
18 a -- hosted by -- I can't think if it was MonsterHost or  
19 HostMonster, but we retained a -- an e-discovery expert to  
20 obtain those emails. We reviewed those and we produced those.

21 Q. Did you also work with BlueWave's independent contractors  
22 to gather materials?

23 A. We did. We facilitated that production.

24 Q. In the course of gathering materials to respond to the  
25 government's subpoena, did you come across the name Leonard



1 Blasko?

2 A. I did -- well, no, not in regard to responding to  
3 document -- the document request on behalf of the independent  
4 contractors. His name had come up before then, I believe.

5 Q. How did his name come up?

6 A. We first became aware of Mr. Blasko, I believe one of the  
7 independent contractors. Mr. Blasko was a subcontractor, if  
8 you will, to Mr. Maimone or Maimone. And Mr. Maimone had  
9 contacted Cal and told him that government investigators had  
10 approached Mr. Blasko and wanted to interview him. And so --  
11 or had interviewed him. And so we had a private investigator  
12 that my firm usually used go and talk to Mr. Blasko. And  
13 that's the first I've heard of him.

14 Q. Okay. Did you also come across documents in Bluewave's  
15 files that referenced Mr. Blasko?

16 A. The only time I remember -- the only thing I remember  
17 about his name coming up is Sandra Tankersley had a -- an  
18 electronic word document that -- it was called "helpers," which  
19 I think these were people that assisted the independent  
20 contractors. And his name appeared on this helpers list. But  
21 that's the only document I remember seeing with his name on it.

22 Q. Okay.

23 MS. SHORT: Your Honor, I'm at a good place to pause  
24 right now if we wanted to take a lunch break, or I could  
25 continue probably for another 15 or 20 minutes.

1 THE COURT: Let's keep going.

2 BY MS. SHORT:

3 Q. Okay. Ms. Flipppo, do you remember a BlueWave independent  
4 contractor named Emily Barron?

5 A. I remember her name, yes.

6 Q. Did you have occasion to speak with Laura Hoey at  
7 Ropes & Gray about Emily Barron?

8 A. Yes, I believe I did.

9 Q. And did you -- were you able to describe to Ms. Hoey who  
10 Emily Barron was?

11 A. I don't remember a specific conversation.

12 Q. Okay. Would it help to look at an email that you wrote in  
13 conjunction with the conversation?

14 A. It would.

15 Q. I'll ask you to turn to the next tab in your binder. It's  
16 Plaintiffs' Exhibit 1259.

17 Is this an email that you wrote regarding a  
18 conversation that you had with Ms. Hoey?

19 A. It is.

20 Q. And the subject of the conversation was Emily Barron?

21 A. Yes.

22 Q. Let me ask you just more generally, who was Emily Barron?

23 A. She was one of the independent contractors that -- I  
24 believe down in Florida.

25 Q. And how did you learn about Ms. Barron?

1 A. well, I learned about her because we produced a list of  
2 all independent contractors. So that's how I first learned who  
3 she was.

4 Q. And why was her name coming up in this conversation with  
5 Ms. Hoey in September of 2013?

6 A. Ms. Barron was renegotiating her contract with BlueWave.  
7 And I received a call from her attorneys that had -- well, I'm  
8 trying to think in terms of the timing. I had -- I had one  
9 contact with one of her attorneys when we were producing  
10 documents on behalf of independent contractors. I didn't have  
11 any substantive discussion with him. Then, shortly thereafter,  
12 I got a call from another attorney representing Ms. Barron  
13 about her contract with BlueWave.

14 Q. Okay. And do you recall the second attorney who contacted  
15 you about Ms. Barron?

16 A. I remember Mr. Feldman. And then later he got Mr. Brian  
17 Dickerson involved.

18 Q. Okay. And why were they contacting you about Ms. Barron?

19 A. My understanding at the time was that they were calling  
20 because she was being pressured, if you will, to get her  
21 contract signed because it had been expired for a while.

22 Q. And why were they calling you about that issue?

23 A. I do not know.

24 Q. Let me direct your attention to the paragraph in the  
25 middle of your email. Do you recall having a conference

1 call -- you, Mr. White, Mr. Galese, and Gene Sellers, and  
2 Ms. Barron's counsel?

3 A. I don't recall the discussion. I see it in the -- this  
4 document, but I don't recall the discussion.

5 Q. Do you recall Ms. Barron's attorneys being upset about --  
6 or concerned about a legal opinion they had found from  
7 Ms. Barron's previous counsel?

8 A. Yes. Mr. Entin apparently had left some memo in his file  
9 when he turned it over to Mr. Feldman.

10 Q. And what was your understanding of what Mr. Entin's memo  
11 had said?

12 A. I don't know other than they indicated he had some concern  
13 about the processing and handling fee.

14 Q. Did they have some concern that the P&H fees were illegal?

15 A. My understanding was that they had some concerns about  
16 whether or not they were proper, yes.

17 Q. Is that coming from Mr. Entin?

18 A. I don't know what was in the memo; I just know what --  
19 Mr. Feldman indicated that they had found this memo that  
20 questioned the validity of the P&H fees.

21 Q. Were Mr. Feldman and Mr. Dickerson also concerned about  
22 the legality of P&H fees?

23 A. They expressed that.

24 Q. And what were they asking Bluewave's attorneys to do?

25 A. I'm not sure I know exactly what they were asking

1 BlueWave's attorneys to do except provide them whatever  
2 information we advised them that there was a -- that the  
3 LeClairRyan letter that we understood was out there that had  
4 given a favorable opinion on P&H fees. And so we offered to  
5 provide that to them.

6 Q. Okay. So in response to --

7 A. So we -- excuse me.

8 we told them that -- or Mr. Sellers agreed to provide  
9 that to them.

10 Q. This was following that June meeting where you met with  
11 HDL's attorneys?

12 A. That's correct.

13 Q. Was there a discussion at the June meeting about the  
14 LeClairRyan letter?

15 A. If I may go back and look. I believe there was.

16 Q. What was your understanding of HDL's instructions to your  
17 clients regarding the LeClairRyan letter?

18 A. HDL's instructions to BlueWave regarding the letter?

19 Q. Correct.

20 A. As far as explanation of the letter or as far as -- I'm  
21 not sure I understand your question.

22 Q. Well, let's go back and look at the memo from that June  
23 meeting.

24 A. Okay.

25 Q. Forgive me. I may be misremembering your memo,

1 Ms. Flipppo.

2 If you look at the second paragraph on page 4 of your  
3 memo, the very last sentence of this paragraph says, "It was  
4 noted that the LeClairRyan letter was not designated as  
5 confidential, and the government is very anxious to get their  
6 hands on it."

7 Do you remember if there was direction from HDL or  
8 its counsel as to how that LeClairRyan letter should be  
9 treated?

10 A. I do not.

11 Q. When we go a month or so later, this September  
12 conversation with Emily Barron's attorneys, is it your  
13 understanding that Mr. Sellers was going to provide them with  
14 the LeClairRyan letter?

15 A. That's correct.

16 Q. And do you know if he did?

17 A. I do not know. I believe he did, but I do not know for  
18 certain.

19 Q. Okay. Looking -- I'll ask the question this way: Also  
20 coming out of the June 2013 meeting in Richmond, were Mr. Dent  
21 and Mr. Johnson going to provide other legal opinions from  
22 other laboratories?

23 A. Yes, I believe they were going to obtain copies of the  
24 other legal opinions they believed the other labs had.

25 Q. Were they also going to look for other P&H agreements that

1 other labs had?

2 A. I don't specifically remember they were looking for other  
3 P&H agreements.

4 Q. Okay. Now if you flip back to your email at Plaintiffs'  
5 Exhibit 1259 -- and I'll direct your attention to the third  
6 paragraph from the bottom.

7 A. I'm sorry. The third from the bottom?

8 Q. Yeah, the one that starts "Laura also said."

9 A. Okay.

10 Q. Take a minute to read that. And let me ask you if that  
11 refreshes your recollection as to what your clients were  
12 supposed to be doing coming out of that meeting in Richmond.

13 A. Yes. I did ask -- apparently, I asked Brad and Cal about  
14 getting copies of other P&H agreements that were used by other  
15 labs.

16 Q. Were Mr. Dent and Mr. Johnson supposed to send those other  
17 legal opinion letters to you?

18 A. I had hoped.

19 Q. Did they ever send you any?

20 A. I did not see them.

21 Q. Did you ever see any P&H agreements from other  
22 laboratories?

23 A. I don't recall.

24 Q. Did Mr. Dent or Mr. Johnson ever send you a P&H -- a P&H  
25 agreement from a different lab?

1 12:37 PM A. Not that I recall.

2 12:37 PM Q. Ms. Flippo, did the conversation with Emily Barron's  
3 attorney, Brian Dickerson, continue into the month of September  
4 2013?

5 12:37 PM A. I only recall the one conversation with -- well, I guess  
6 two conversations. One with Mark White on there, and then one  
7 I think that Gene Sellers and I had.

8 12:38 PM Q. And had Mr. Sellers spoken to Mr. Dickerson?

9 12:38 PM A. I think Mr. Sellers spoke to Mr. Dickerson separate and  
10 apart from me as well.

11 12:38 PM Q. Did Mr. Sellers tell you what Mr. Dickerson's issues were?

12 12:38 PM A. I don't recall a specific discussion with Gene about it.

13 12:38 PM Q. If you could look at the next tab in your binder,  
14 Exhibit 7003. And I'll point you to the second paragraph  
15 concerning one of their discussions.

16 12:38 PM Does that refresh your recollection about what  
17 Mr. Dickerson's concerns were for his client Emily Barron?

18 12:39 PM A. Yes.

19 12:39 PM Q. Is Mr. Dickerson concerned that BlueWave's structure could  
20 possibly violate the Stark Law?

21 12:39 PM A. That was one of Mr. Dickerson's concerns.

22 12:39 PM Q. Was it your understanding that Mr. Dickerson was  
23 recommending that BlueWave get an opinion from a health care  
24 attorney?

25 12:39 PM A. I believe that's what he wanted BlueWave to do.



1 12:39 PM Q. I'm sorry?

2 12:39 PM A. That's what Mr. Dickerson wanted BlueWave to do.

3 12:39 PM Q. Did BlueWave do that?

4 12:39 PM A. I don't -- I don't know. I never saw one.

5 12:39 PM Q. Do you know whether HDL provided the LeClairRyan letter to  
6 Mr. Dickerson?

7 12:39 PM A. I don't know.

8 12:39 PM Q. I'm looking at this same exhibit, 7003, the paragraph that  
9 begins "we then called Laura Hoey."

10 12:40 PM A. Okay. Yes. Laura -- Laura said she would not provide  
11 Mr. Dickerson the LeClairRyan letter.

12 12:40 PM Q. Do you know why HDL declined to provide the LeClairRyan  
13 letter?

14 12:40 PM A. My recollection is that HDL was still in discussion with  
15 the government about the privilege issue and still negotiating  
16 privilege language on that document.

17 12:40 PM Q. Okay. Did you have conversations -- additional  
18 conversations with Ms. Hoey about HDL's discussions with the  
19 government?

20 12:41 PM A. I believe we did.

21 12:41 PM Q. Do you recall having a discussion with Laura Hoey in  
22 December of 2013 about the government's investigation?

23 12:41 PM A. I don't recall a specific discussion in December of 2013.

24 12:41 PM Q. Can I ask you to look at the next tab in your binder,  
25 Plaintiffs' Exhibit 1231. And I will point you to the third

1 paragraph.

2 A. Okay.

3 Q. I guess, first, let me ask you, did you have a  
4 discussion -- does this help refresh your recollection of  
5 having a discussion with Laura Hoey in December of 2013?

6 A. Yes.

7 Q. And did you and Ms. Hoey talk about the scope of the  
8 government's investigation at that point?

9 A. Yes.

10 Q. What was your understanding from Ms. Hoey as to the scope  
11 of the government's investigation?

12 A. That not only would -- was the government investigating  
13 the validity of P&H fees, but that they were also looking at  
14 whether or not providers were ordering the tests -- were  
15 medically necessary -- the tests were medically necessary as  
16 they were ordered by the providers. And also to look at the  
17 structure of BlueWave.

18 Q. During your representation of Mr. Johnson and Mr. Dent,  
19 did they change some of their opinions or some of their  
20 statements about how Bluewave operated?

21 A. I don't -- I don't have any specific recollection of them  
22 doing that.

23 Q. If you look at the last paragraph of Plaintiffs' Exhibit  
24 1231 --

25 A. Oh, yes. I see.

1 1 2 : 4 3 P M 1 Q. Do you recall Mr. Dent and Mr. Johnson -- specifically,  
2 1 2 : 4 3 P M 2 Mr. Johnson -- saying things that were contrary to what he had  
3 1 2 : 4 3 P M 3 told you in your initial meeting?

4 1 2 : 4 3 P M 4 A. I remember that when Brad said that -- that the P&H fee  
5 1 2 : 4 3 P M 5 wasn't a requirement, I was -- I went back and looked at our  
6 1 2 : 4 3 P M 6 initial memo. And Hope had written that it was something that  
7 1 2 : 4 3 P M 7 the provider had to sign.

8 1 2 : 4 3 P M 8 So I wrote that this was contrary to what I had  
9 1 2 : 4 4 P M 9 understood initially -- or not what I understood but what had  
10 1 2 : 4 4 P M 10 been written initially in Hope's memo -- or the memo that Hope  
11 1 2 : 4 4 P M 11 and I had worked on.

12 1 2 : 4 4 P M 12 Q. well, weren't you really saying that what you had written  
13 1 2 : 4 4 P M 13 in the initial memo was --

14 1 2 : 4 4 P M 14 A. well, in the very first meeting we had where you're  
15 1 2 : 4 4 P M 15 meeting somebody for the first time, Hope had written initially  
16 1 2 : 4 4 P M 16 that -- from her notes, that -- and I think it was in the  
17 1 2 : 4 4 P M 17 document we looked at a little bit ago -- that for every new  
18 1 2 : 4 4 P M 18 account, you had to have a new account form, a W-9 form, and a  
19 1 2 : 4 4 P M 19 P&H agreement.

20 1 2 : 4 4 P M 20 And then, later in discussions, Brad said, well,  
21 1 2 : 4 4 P M 21 that's really not a requirement, to have the P&H agreement,  
22 1 2 : 4 4 P M 22 doctor didn't have to sign it. And I think I had a discussion  
23 1 2 : 4 4 P M 23 with one of the independent contractors who said the same  
24 1 2 : 4 4 P M 24 thing.

25 1 2 : 4 4 P M 25 Q. Let me ask you -- well, let me start with this: Did the

1 government's investigation continue into 2014?

2 A. Yes.

3 Q. Were you and your firm still providing documents and  
4 information to the United States in January of 2014?

5 A. Yes. I think that was -- I think that was pursuant to  
6 the -- a civil investigative demand document that we had  
7 received. So we were still continuing to produce pursuant to  
8 that.

9 Q. If you'll turn in your binder to the tab Plaintiffs'  
10 Exhibit 1159.

11 A. Okay.

12 Q. Let me ask you if you can identify this document.

13 A. Yes.

14 Q. What is it?

15 A. This is a document I wrote to Mark White, Augusta Dowd,  
16 and Hope Marshall about a visit that I had made up to  
17 Bluewave's offices to retrieve additional documents in response  
18 to the CID, not just documents, but to also gather information,  
19 because the CID had specific questions that we needed to  
20 answer.

21 Q. Okay. And while you were visiting Bluewave's offices, did  
22 you have a conversation with Brad Johnson?

23 A. I did.

24 Q. And does this email convey that conversation to your law  
25 partners?

1 12 : 46 PM 1 A. Yes.

2 MS. SHORT: Your Honor, I'd move for the admission of  
3 Plaintiffs' Exhibit 1159 into evidence.

4 MR. COOKE: We object, Your Honor.

5 THE COURT: And Mr. Ashmore?

6 MR. ASHMORE: No objection, Your Honor.

7 THE COURT: Ladies and gentlemen, I'm going to break  
8 for lunch. I'm going to look at this document, and we will  
9 address it after lunch. Please be back within an hour.

10 (Whereupon the jury was excused from the courtroom.)

11 THE COURT: Okay. Please be seated.

12 Ms. Short, what are you trying to get in here?

13 MS. SHORT: These are statements that the defendant  
14 conveyed to his attorney, and so they are party admissions.

15 THE COURT: Which paragraphs address that, because  
16 I'm concerned about things that --

17 MS. SHORT: Yeah. So, specifically, I had intended  
18 to focus on paragraphs 2 and 6.

19 THE COURT: Okay. Let me have a look at them.

20 why can't you simply ask the witness about this  
21 and then ask her to refresh her recollection? There's just a  
22 lot of other stuff in this memo.

23 MS. SHORT: There is, Your Honor. I believe what  
24 we've heard from this witness so far is that she does not  
25 recall details from testimony. This is a statement from the

1 defendant. It contradicts --

2 THE COURT: We haven't asked her about this  
3 statement. You could ask her to refresh her recollection. And  
4 if she doesn't remember it, then, you know, I will consider --  
5 it's just things in this other than that.

6 This is not unlike the June meeting, which is  
7 essentially a summary of the June meeting. There's just a lot  
8 more going on in this memo other than that exchange with  
9 Mr. Johnson. And so I'm -- what specific statement by  
10 Mr. Johnson are you concerned about?

11 MS. SHORT: Well, Your Honor, first of all, I believe  
12 this entire email is statements from the defendant. What I am  
13 focused on is information that frankly contradicts testimony  
14 given by Ms. Mallory last week, paragraph 2.

15 THE COURT: Okay.

16 MS. SHORT: Tonya says, "Ropes & Gray completely  
17 changed their opinion."

18 And then also going down to paragraph 6, as  
19 Ms. Flipppo has testified, she was responsible for gathering  
20 information from BlueWave and its subcontractors. And I think  
21 it goes to the defendants' state of mind in paragraph 6, where  
22 she explains what the government is asking for, and  
23 Mr. Johnson's response.

24 THE COURT: This is this thing, "I got a 10-minute  
25 lecture from Brad on how, if the government started contracting

1 all of his sub -- all of his subcontractors, then it's game  
2 over and the world would end." That statement? Is that what  
3 you're trying to get in?

4 MS. SHORT: Yes, Your Honor.

5 THE COURT: "Several times he asked if I understood  
6 what he was saying. I told him that I understood but that if  
7 the information related to these people fit within the request,  
8 we had to put it in the answer. In our discussion, we did  
9 learn that not all of Royal Blue's subcontract -- not all of  
10 Royal Blue's subcontractors do Bluewave business, so I said we  
11 would only need to list those that did."

12 Okay. Well, I understand you want to ask this  
13 statement. Do we know whether she -- first of all, I mean, the  
14 way you would do it is does she recall that conversation? It's  
15 a rather dramatic conversation. Do you think if you asked her  
16 whether she remembers that conversation and she could testify  
17 to it without putting this entire document in?

18 MS. SHORT: Your Honor, I have not asked her that  
19 question.

20 THE COURT: Let me help you.

21 MS. SHORT: There you go.

22 THE COURT: "Ms. Flippo, do you remember a  
23 conversation with Mr. Johnson when you went down to the  
24 Bluewave office and -- and he discussed with you about the --  
25 that if the government started questioning his subcontractors,

1 it would be game over? Do you remember that?"

2 MS. SHORT: Yes, sir.

3 THE COURT: "Can you describe that conversation from  
4 your recollection?"

5 MS. SHORT: Yes, sir.

6 THE COURT: I don't think you need the document. I  
7 figured she might remember that one.

8 MS. SHORT: Your Honor --

9 THE COURT: So what else do you need? I mean, I --  
10 I'm just struggling. There's a lot in this memo going on, and  
11 I'm just concerned. I mean, the first paragraph, "Brad was  
12 there, so I was able to get an \$11,000-plus check to replace  
13 one that the post office machine tore up."

14 MS. SHORT: That's not relevant. We agree with you.

15 THE COURT: Not relevant.

16 Second paragraph, I get it. It's inconsistent.  
17 We can ask her about it. If she -- we could find out if she  
18 remembers about that. And if she doesn't, she could see if her  
19 recollection would be refreshed. I might consider -- if she  
20 didn't, I might then consider the admissibility of this  
21 document. But, you know, we don't know yet. Would you like me  
22 to ask Ms. Flippo if she remembers that?

23 MS. SHORT: Your Honor, I would be happy to. I'm  
24 just saying look beyond the first paragraph.

25 THE COURT: Okay. Let me keep looking.



1 12 : 53 PM 1 MS. SHORT: I believe the rest of it is --

2 12 : 53 PM 2 THE COURT: You've directed me to paragraphs 2 and 6,  
3 12 : 53 PM 3 so I was looking at those. Let me look at the rest of it.

4 12 : 53 PM 4 I don't think paragraph 3 is particularly  
5 12 : 53 PM 5 important.

6 12 : 53 PM 6 MS. SHORT: It's not terribly important, but it is  
7 12 : 53 PM 7 relevant to some of the testimony we saw this morning about  
8 12 : 53 PM 8 when HDL hired a compliance office and began providing  
9 12 : 53 PM 9 compliance training. So this confirms that was in early 2014.

10 12 : 53 PM 10 THE COURT: Okay.

11 12 : 53 PM 11 MS. SHORT: The next paragraph is relevant to these  
12 12 : 53 PM 12 issues.

13 12 : 53 PM 13 THE COURT: Hold on. Let me read it.

14 12 : 54 PM 14 (Pause.)

15 12 : 54 PM 15 THE COURT: I imagine the government -- the defendant  
16 12 : 54 PM 16 might want paragraph 4; right? I mean -- is there an objection  
17 12 : 54 PM 17 from the defendants to this document?

18 12 : 54 PM 18 MR. COOKE: There is an objection to the document.  
19 12 : 54 PM 19 And I have an -- I don't object to most of the questions that  
20 12 : 54 PM 20 you propose, but there is an objection to one. And I'd like to  
21 12 : 54 PM 21 address that when you're ready.

22 12 : 54 PM 22 THE COURT: well, first of all, do you object to the  
23 12 : 54 PM 23 document with any specific exception that can be blocked out?  
24 12 : 54 PM 24 Do you otherwise have objections to admission of the document?  
25 12 : 54 PM 25 That would make everything easier.

1 12:54 PM MR. COOKE: I generally object to the document for  
2 the same reason that we --

3 12:54 PM THE COURT: I understand. How about going specific?  
4 Paragraph 1 is probably of little consequence --

5 12:54 PM MR. COOKE: Okay.

6 12:54 PM THE COURT: -- one way or the other. I can see  
7 paragraph 2 and 6 being relevant. It involves a discussion.  
8 Brad -- paragraph 4, Mr. Johnson is discussing his state of  
9 mind at that time. She's documenting that. I can see how that  
10 could be relevant.

11 12:55 PM MR. COOKE: Yeah, I'm not particularly bothered by  
12 paragraph 4. One of my big concerns is about the "game over  
13 and the world would end."

14 12:55 PM THE COURT: Why?

15 12:55 PM MR. COOKE: Well -- and I don't want to explain it  
16 completely in the presence of the witness, but if you ask the  
17 witness what that meant, it's completely not what the words on  
18 the page might make a jury believe. And, therefore, it's --

19 12:55 PM THE COURT: Well, that's what you call examination  
20 and cross-examination.

21 12:55 PM MR. COOKE: Well, I just think you -- it's -- under  
22 Rule 403, the prejudicial value outweighs --

23 12:55 PM THE COURT: What do you understand, Ms. Flippo, to --  
24 the meaning of the statement "game over" in that context?

25 12:56 PM THE WITNESS: That if the government went out and

1 started interviewing all the independent contractors, they  
2 would all get spooked and stop working for BlueWave.

3 **THE COURT:** I think that's potentially relevant.

4 **MS. SHORT:** And, Your Honor, I'll just add that my  
5 plan was for this witness only to focus on those two  
6 paragraphs. Looking at this document again, we could do an  
7 examination and get her testimony with respect to almost every  
8 single paragraph in this email that would be relevant and would  
9 be reflective of the defendants' state of mind.

10 **THE COURT:** I think we just -- I just think right now  
11 it's just a lot easier and makes more sense just to ask her,  
12 you know, about these things, try to refresh her recollection.  
13 And to the extent she doesn't remember it, then we might  
14 consider, but it's just -- there's a lot mixed up in these  
15 documents. And some of it's relevant, and some of it isn't.

16 And I just think it's -- I just don't see the  
17 necessity of going through this brain damage when you can just  
18 have the witness testify to it.

19 **MS. SHORT:** Yes, Your Honor.

20 **THE COURT:** Under Rule 612 to refresh her  
21 recollection.

22 **MS. SHORT:** And I will likely then -- if that's Your  
23 Honor's decision, I likely will then go through all the  
24 relevant paragraphs.

25 **THE COURT:** That's fine, and we'll deal with

1 objections as they might come up.

2 But I take it the defendants are not offering  
3 Plaintiffs' Exhibit 1159?

4 MR. COOKE: That's correct.

5 MR. ASHMORE: That's correct, Your Honor.

6 THE COURT: I mean, I'm just -- I just think at this  
7 point I'm taking under advisement this issue. And with the  
8 questioning -- Ms. Flippo doesn't remember a lot of details. I  
9 think she's about my age. I know this problem of learning lots  
10 of details, and she does what I do, which is to document  
11 everything so I will remember things. And she's looked at it  
12 and just answered straight to you every time. I just don't  
13 think it's necessary.

14 Let's just go through and let's see if it  
15 doesn't refresh her recollection. And then I'll revisit it if  
16 you still feel this document needs to come in. I got a feeling  
17 you're not going to need it. I think you're going to get in  
18 your testimony without dragging the document in.

19 MS. SHORT: Yes, sir. In the interests of trying to  
20 streamline the witness's testimony, I was not planning to go  
21 through every paragraph, but if she --

22 THE COURT: But when you offer a document that has  
23 information that may have 401 or 403 issues interspersed, it  
24 presents a problem for the Court because I need to go through  
25 and redact the areas that have 403 problems. I don't know why

12:58 PM 1 we need to go through all of that. Okay?

12:58 PM 2 MS. SHORT: Okay.

12:58 PM 3 THE COURT: So let's break for lunch. And let's go  
12:58 PM 4 through Ms. Flipppo's testimony. And -- and I'll deal with it  
12:58 PM 5 again if you feel like you can't get what you need. Okay?

12:58 PM 6 MS. SHORT: Thank you, Your Honor.

12:58 PM 7 THE COURT: Let's break for lunch, about an hour.

12:58 PM 8 (Recess.)

1:58 PM 9 THE COURT: Please be seated. Any matters we need to  
1:58 PM 10 address before we bring the jury back in?

1:58 PM 11 MS. SHORT: Your Honor, just one thing. Because this  
1:58 PM 12 has taken a little longer than anticipated, we are shifting our  
1:58 PM 13 order a little bit to accommodate our other witness, so we will  
1:58 PM 14 be calling Mr. Dickerson right after Ms. Flipppo.

1:58 PM 15 THE COURT: Certainly your prerogative to do that.

1:58 PM 16 Is our jury back?

1:58 PM 17 THE DEPUTY: They are back.

1:58 PM 18 THE COURT: Defendants, do y'all have anything you  
1:58 PM 19 need to raise with me?

1:58 PM 20 MR. COOKE: No. We're fine. Thank you.

1:58 PM 21 MR. ASHMORE: No, sir.

1:58 PM 22 THE COURT: Very good. Bring the jury in. And have  
1:58 PM 23 the witness return to the stand. Yeah, bring her in.

2:00 PM 24 (Whereupon the jury entered the courtroom.)

2:00 PM 25 THE COURT: Please be seated. Very good.

2 : 0 0 P M 1 If Ms. Flippo could resume her seat on the  
2 : 0 0 P M 2 witness chair.

2 : 0 0 P M 3 Please continue direct examination.

2 : 0 0 P M 4 **BY MS. SHORT:**

2 : 0 0 P M 5 Q. Ms. Flippo, good afternoon.

2 : 0 0 P M 6 A. Thank you.

2 : 0 0 P M 7 Q. I wanted just to orient us a little bit. I think, when we  
2 : 0 0 P M 8 broke for lunch, I'd asked you if the government's  
2 : 0 1 P M 9 investigation was continuing into 2014.

2 : 0 1 P M 10 A. That's correct.

2 : 0 1 P M 11 Q. And do you remember going to visit BlueWave's offices in  
2 : 0 1 P M 12 2014 to gather documents?

2 : 0 1 P M 13 A. I do.

2 : 0 1 P M 14 Q. Do you remember having a conversation while you were there  
2 : 0 1 P M 15 with Mr. Johnson?

2 : 0 1 P M 16 A. I do.

2 : 0 1 P M 17 Q. Do you recall Mr. Johnson telling you that Ms. Mallory had  
2 : 0 1 P M 18 retained personal counsel at that point?

2 : 0 1 P M 19 A. I do.

2 : 0 1 P M 20 Q. What do you remember about Mr. Johnson's comments on  
2 : 0 1 P M 21 Ms. Mallory's counsel?

2 : 0 1 P M 22 A. Just that she had retained a personal counsel. I think he  
2 : 0 1 P M 23 said it was -- he thought the counsel was from Philadelphia,  
2 : 0 1 P M 24 and that -- let's see -- that her counsel had concluded that  
2 : 0 1 P M 25 there was not a problem with the P&H fees.

2 : 0 1 P M 1 Q. Okay. You recall that same conversation, Mr. Johnson  
2 making a statement about Ropes & Gray's position on P&H?

2 : 0 2 P M 3 A. I do.

2 : 0 2 P M 4 Q. What did he say about Ropes & Gray's position on P&H?

2 : 0 2 P M 5 A. He said it was his understanding that Ropes & Gray had  
6 changed their mind about the -- their prior position on the P&H  
7 fee and the LeClairRyan letter.

2 : 0 2 P M 8 Q. Okay. And what did you understand him to mean with that  
9 comment?

2 : 0 2 P M 10 A. I wasn't exactly sure what he meant, and so I reached out  
11 to Ropes & Gray to try to understand what -- what was meant by  
12 that.

2 : 0 2 P M 13 Q. Okay. What was your understanding of what Ropes & Gray's  
14 position had been before that discussion with Mr. Johnson?

2 : 0 2 P M 15 A. What was discussed at the Richmond meeting, that they did  
16 not think that the advice of counsel letter from LeClairRyan  
17 was accurate.

2 : 0 2 P M 18 Q. And did Ropes & Gray express an opinion about whether P&H  
19 fees were legal?

2 : 0 3 P M 20 A. Not to me. The only thing I heard them express was about  
21 the accuracy of the LeClairRyan letter.

2 : 0 3 P M 22 Q. Okay. And in your conversation with Mr. Johnson, what was  
23 your impression of where he was getting this information about  
24 what was going on with HDL?

2 : 0 3 P M 25 A. From Tonya Mallory.

2 : 0 3 P M 1 Q. During the course of your discussion about -- with  
2 : 0 3 P M 2 Mr. Johnson about Ms. Mallory and HDL, did Mr. Johnson make a  
2 : 0 3 P M 3 comment that sometimes Tonya says things that aren't true?

2 : 0 3 P M 4 A. Yes, he made that comment.

2 : 0 3 P M 5 Q. And you had just mentioned that you did follow-up with  
2 : 0 3 P M 6 HDL's counsel with Ropes & Gray?

2 : 0 3 P M 7 A. Correct.

2 : 0 3 P M 8 Q. Do you remember when you followed up with them?

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

2 : 0 3 P M 10 Q. Was it shortly after your conversation with Mr. Johnson?

2 : 0 3 P M 11 A. My best judgment would be that would be correct.

2 : 0 3 P M 12 Q. Okay. Would it be helpful for you to look at any -- a  
2 : 0 3 P M 13 document to confirm the date?

2 : 0 3 P M 14 A. Yes.

2 : 0 4 P M 15 Q. Okay. If you'll turn in your binder to Plaintiffs'  
2 : 0 4 P M 16 Exhibit 1030.

2 : 0 4 P M 17 A. Okay.

2 : 0 4 P M 18 Q. Ms. Flipppo, does this document help you refresh your  
2 : 0 4 P M 19 recollection as to when you spoke with the Ropes & Gray  
2 : 0 4 P M 20 attorneys?

2 : 0 4 P M 21 A. Yes, it does.

2 : 0 4 P M 22 Q. And have you tried to -- when was that? When did you --

2 : 0 4 P M 23 A. According to my email, it was February 6th of 2014.

2 : 0 4 P M 24 Q. And had you tried, before talking to Ropes & Gray, to  
2 : 0 4 P M 25 reach them in writing?



2 : 0 4 P M 1 A. Not that I recall.

2 : 0 4 P M 2 Q. If you look at the second paragraph of your email, does  
2 : 0 4 P M 3 that refresh your recollection?

2 : 0 4 P M 4 A. Yes. But I think that was an email and not a letter.

2 : 0 4 P M 5 Q. Okay. So you had sent --

2 : 0 4 P M 6 A. Yes.

2 : 0 4 P M 7 Q. You had sent -- who did you send an email to?

2 : 0 4 P M 8 A. I would have sent it to Laura Hoey.

2 : 0 4 P M 9 Q. What did you say to Ms. Hoey in your email?

2 : 0 5 P M 10 A. That in my discussions with Brad, that he understood that  
2 : 0 5 P M 11 Ropes & Gray had changed their position on the P&H fees.

2 : 0 5 P M 12 Q. Anything else that you can --

2 : 0 5 P M 13 A. Well, I wrote that, and that the government was through  
2 : 0 5 P M 14 with the P&H issue.

2 : 0 5 P M 15 Q. Was that consistent with your client's understanding?

2 : 0 5 P M 16 A. That's what he thought.

2 : 0 5 P M 17 Q. Okay. And then did you learn that Mr. Johnson's  
2 : 0 5 P M 18 understanding was incorrect on those issues?

2 : 0 5 P M 19 A. Yes.

2 : 0 5 P M 20 Q. Were you surprised to learn that Mr. Johnson's  
2 : 0 5 P M 21 understanding was incorrect on those issues?

2 : 0 5 P M 22 A. No.

2 : 0 5 P M 23 Q. When you had an opportunity to speak to HDL's attorneys at  
2 : 0 5 P M 24 Ropes & Gray, do you remember who you spoke to?

2 : 0 5 P M 25 A. I believe it was Brien O'Connor and David Rhinesmith.

2 : 0 5 P M 1 Q. And what did they tell you about what Ropes & Gray's  
2 : 0 5 P M 2 position was on whether or not the P&H fee was legal?

2 : 0 5 P M 3 A. That they had not changed their position. Just that, that  
2 : 0 6 P M 4 they had not changed their position since the prior discussions  
2 : 0 6 P M 5 in Richmond and since then.

2 : 0 6 P M 6 Q. Okay. And so what was your understanding of that -- of  
2 : 0 6 P M 7 Ropes & Gray's position?

2 : 0 6 P M 8 A. Well, the position -- I just want to be clear. We're  
2 : 0 6 P M 9 talking about the position about the LeClairRyan letter. Their  
2 : 0 6 P M 10 position on P&H, they had already told the government that they  
2 : 0 6 P M 11 were going to be getting away from -- that HDL was going to  
2 : 0 6 P M 12 phase out the P&H fees. So when we talk about their position,  
2 : 0 6 P M 13 really, in terms of the -- of the LeClairRyan letter.

2 : 0 6 P M 14 Q. Okay. Turning back to the document before that and  
2 : 0 6 P M 15 recounting your conversation with Mr. Johnson --

2 : 0 6 P M 16 A. Okay.

2 : 0 6 P M 17 Q. -- do you recall Mr. Johnson saying to you, "Ropes & Gray  
2 : 0 6 P M 18 have completely changed their opinion as to whether or not the  
2 : 0 7 P M 19 P&H fees violate the Anti-Kickback Statute"?

2 : 0 7 P M 20 A. Oh, I see that. Yes.

2 : 0 7 P M 21 Q. What was your understanding of Ropes & Gray's opinion as  
2 : 0 7 P M 22 to whether or not P&H fees violated the Anti-Kickback Statute?

2 : 0 7 P M 23 A. I recall Ropes & Gray talking in terms of the LeClairRyan  
2 : 0 7 P M 24 letter. I don't recall Ropes & Gray saying to us that P&H fees  
2 : 0 7 P M 25 violate the Anti-Kickback Statute.

2 : 0 7 P M 1 Q. Okay. So when -- in this document, Plaintiffs' Exhibit  
2 : 0 7 P M 2 1159, when you write, "I told Brad" -- I'm sorry --  
2 : 0 7 P M 3 "Ropes & Gray have completely changed their position as to  
2 : 0 7 P M 4 whether or not the P&H fees violate the Anti-Kickback Statute,"  
2 : 0 7 P M 5 were those the words of your client, then, Mr. Johnson?

2 : 0 7 P M 6 A. That is Brad saying what he understood Tonya to say. Brad  
2 : 0 8 P M 7 is telling me that Tonya says that Ropes & Gray has changed  
2 : 0 8 P M 8 their position on the P&H fees.

2 : 0 8 P M 9 Q. Okay. And then --

2 : 0 8 P M 10 THE COURT: From what to what? What had been the fee  
2 : 0 8 P M 11 and what is the --

2 : 0 8 P M 12 THE WITNESS: I didn't understand what the change  
2 : 0 8 P M 13 was. That's why I needed to talk to Ropes & Gray.

2 : 0 8 P M 14 MS. SHORT: Your Honor, I would like to move for the  
2 : 0 8 P M 15 admission of this exhibit, Plaintiffs' Exhibit 1159. This was  
2 : 0 8 P M 16 the document we were talking about before the lunch break, Your  
2 : 0 8 P M 17 Honor.

2 : 0 9 P M 18 THE COURT: Ladies and gentlemen, I hate to send you  
2 : 0 9 P M 19 back to the jury room, but I need to discuss something with  
2 : 0 9 P M 20 counsel outside your presence.

2 : 0 9 P M 21 (Whereupon the jury was excused from the courtroom.)

2 : 0 9 P M 22 THE COURT: Tell me -- please be seated.

2 : 0 9 P M 23 Tell me what you're trying to prove by this  
2 : 0 9 P M 24 letter -- getting this in and what specific part you think is  
2 : 0 9 P M 25 relevant. She's already testified to much of what you had

2 : 0 9 P M 1 pointed to me earlier. So what is it that you're seeking?

2 : 0 9 P M 2 MS. SHORT: Yes, Your Honor. And I believe that  
2 : 1 0 P M 3 Ms. Flippo's -- the testimony that she just gave is not  
2 : 1 0 P M 4 consistent with her contemporaneous recording of that  
2 : 1 0 P M 5 conversation at the time.

2 : 1 0 P M 6 THE COURT: That's what we call impeachment.

2 : 1 0 P M 7 MS. SHORT: Yes, Your Honor.

2 : 1 0 P M 8 THE COURT: Impeach her on it. You don't need a  
2 : 1 0 P M 9 document to impeach her. "Isn't it true that?" We -- it's  
2 : 1 0 P M 10 a -- it may be a proper point for impeachment; it's simply  
2 : 1 0 P M 11 not -- you're getting an entire document in, and it has matters  
2 : 1 0 P M 12 which are both relevant and things that aren't relevant. And  
2 : 1 0 P M 13 the substance which you had pointed me out, what specific part  
2 : 1 0 P M 14 do you feel like on the impeachment? Is that paragraph 6?

2 : 1 0 P M 15 MS. SHORT: No, Your Honor. Ms. Flippo was just  
2 : 1 0 P M 16 testifying regarding her statement in paragraph 2.

2 : 1 0 P M 17 THE COURT: Okay. Let me make sure. Which document  
2 : 1 0 P M 18 are we talking about now?

2 : 1 0 P M 19 MS. SHORT: Yes. It's 1159.

2 : 1 0 P M 20 THE COURT: I got it. At paragraph 2.

2 : 1 0 P M 21 MS. SHORT: "Ropes & Gray have completely changed  
2 : 1 1 P M 22 their opinion as to whether the P&H fees violate the  
2 : 1 1 P M 23 Anti-Kickback Statute."

2 : 1 1 P M 24 THE COURT: You've gotten that out of her, that  
2 : 1 1 P M 25 that's what Mr. Johnson said. Okay? That's come in already.

2 : 1 1 P M 1 So what else are you trying to establish by this?

2 : 1 1 P M 2 MS. SHORT: I'd like to establish that that is what  
2 : 1 1 P M 3 she recorded in her --

2 : 1 1 P M 4 THE COURT: "Is it true that?" And you impeach her  
2 : 1 1 P M 5 on it. You don't need the document for that.

2 : 1 1 P M 6 what else?

2 : 1 1 P M 7 MS. SHORT: Your Honor, we're going to continue to  
2 : 1 1 P M 8 go -- I believe the document is --

2 : 1 1 P M 9 THE COURT: See, this is -- we're confusing the use  
2 : 1 1 P M 10 of a document in several different functions. One of them is  
2 : 1 1 P M 11 it contains relevant evidence. There's another one, that it  
2 : 1 1 P M 12 helps refresh recollection. And there's another one that is  
2 : 1 1 P M 13 used for impeachment.

2 : 1 1 P M 14 MS. SHORT: Yes, sir.

2 : 1 1 P M 15 THE COURT: They are different purposes. And you  
2 : 1 1 P M 16 don't need the document in to refresh her recollection or to  
2 : 1 1 P M 17 impeach her. You do not need to admit it. But when you admit  
2 : 1 1 P M 18 it, you raise a whole host of other problems when it's  
2 : 1 1 P M 19 commingled with all of this other information.

2 : 1 1 P M 20 So I'm going to say that I deny your -- I'm  
2 : 1 2 P M 21 going to sustain the objection.

2 : 1 2 P M 22 Is there an objection to this document? I  
2 : 1 2 P M 23 believe there has been already, Mr. Cooke; right?

2 : 1 2 P M 24 MR. COOKE: Yes.

2 : 1 2 P M 25 THE COURT: I'm going to sustain it as to just the

2 : 1 2 P M 1 admissibility of the whole document, but I'm not disallowing  
2 : 1 2 P M 2 you to impeach her on this.

2 : 1 2 P M 3 MS. SHORT: Yes.

2 : 1 2 P M 4 THE COURT: And I'm not disallowing you to have her  
2 : 1 2 P M 5 refresh her recollection, and it does it to impeach her on it.

2 : 1 2 P M 6 MS. SHORT: Yes, Your Honor. And I understand your  
2 : 1 2 P M 7 ruling. I will continue. I'd like to note for the record, I  
2 : 1 2 P M 8 believe the document is independently admissible as it's  
2 : 1 2 P M 9 relevant, it contains statements and admissions by party  
2 : 1 2 P M 10 opponent, and is the document of her conversation with her  
2 : 1 2 P M 11 client, Mr. Johnson.

2 : 1 2 P M 12 THE COURT: Party opponent is Mr. Johnson?

2 : 1 2 P M 13 MS. SHORT: Correct.

2 : 1 2 P M 14 THE COURT: You've been getting that in all along  
2 : 1 2 P M 15 what he's been saying. And I presume paragraph 6, you're going  
2 : 1 2 P M 16 to get that in.

2 : 1 2 P M 17 MS. SHORT: Yes, Your Honor.

2 : 1 3 P M 18 THE COURT: But you could impeach her on it, and I  
2 : 1 3 P M 19 will continue later. To the extent there's a problem, then  
2 : 1 3 P M 20 we'll talk about that, that statement. But commingled with  
2 : 1 3 P M 21 that paragraph 6 is all this other stuff. And it's just a  
2 : 1 3 P M 22 jumble of document -- of information. And I can't say, "Oh,  
2 : 1 3 P M 23 well, I get to ignore all the stuff that might have 403 or  
2 : 1 3 P M 24 which is not relevant and all of that, because you've got a  
2 : 1 3 P M 25 piece of this document, and frankly a fairly small piece, that

2 : 1 3 P M 1 you think is probative.

2 : 1 3 P M 2 I'm going to sustain the objection, but I'm  
2 : 1 3 P M 3 going to -- I think you can get the information you want in.  
2 : 1 3 P M 4 You just need to do it in a way through impeachment and  
2 : 1 3 P M 5 refreshing recollection.

2 : 1 3 P M 6 Bring the jury back in.

2 : 1 3 P M 7 (Whereupon the jury entered the courtroom.)

2 : 1 4 P M 8 (Whereupon the jury entered the courtroom.)

2 : 1 4 P M 9 **THE COURT:** Please be seated.

2 : 1 4 P M 10 I sustain the objection. Please continue.

2 : 1 4 P M 11 **BY MS. SHORT:**

2 : 1 4 P M 12 **Q.** Ms. Flippo, in your conversation with Mr. Johnson at the  
2 : 1 4 P M 13 BlueWave office, did Mr. Johnson -- what did Mr. Johnson  
2 : 1 5 P M 14 represent to you Tonya's personal attorney had told her about  
2 : 1 5 P M 15 P&H fees?

2 : 1 5 P M 16 **MR. ASHMORE:** Objection. Asked and answered, Your  
2 : 1 5 P M 17 Honor.

2 : 1 5 P M 18 **THE COURT:** Overruled.

2 : 1 5 P M 19 **THE WITNESS:** That there was not a problem with P&H  
2 : 1 5 P M 20 fees.

2 : 1 5 P M 21 **BY MS. SHORT:**

2 : 1 5 P M 22 **Q.** Did you discuss that with HDL's attorneys at Ropes & Gray?

2 : 1 5 P M 23 **A.** I contacted them to discuss -- I'm sorry. I didn't -- I  
2 : 1 5 P M 24 don't know if I discussed with them that Tonya's personal  
2 : 1 5 P M 25 lawyer had -- what Brad had told me that Tonya's personal

2 : 1 5 P M 1 lawyer had said.

2 : 1 5 P M 2 Q. Okay. If you'll flip again to Plaintiffs' Exhibit 1030,  
2 : 1 5 P M 3 and I'll point you to the third paragraph of that document.

2 : 1 5 P M 4 A. Yes. Thank you.

2 : 1 5 P M 5 Q. Does that refresh your recollection as to whether you and  
2 : 1 5 P M 6 Mr. O'Connor had any discussions about Tonya's personal lawyer?

2 : 1 5 P M 7 A. Yes. That and corrects where Mr. -- where Tonya's lawyer  
2 : 1 6 P M 8 was from.

2 : 1 6 P M 9 Q. I'm sorry. What was the correction?

2 : 1 6 P M 10 A. I'm sorry. And it corrects my initial testimony about  
2 : 1 6 P M 11 where I thought Tonya's lawyer was from.

2 : 1 6 P M 12 Q. Okay. Did Mr. O'Connor also respond to Mr. Johnson's  
2 : 1 6 P M 13 representation that Ms. Mallory's attorney had concluded that  
2 : 1 6 P M 14 P&H fees were okay?

2 : 1 6 P M 15 A. I don't recall the conversation, but according to the  
2 : 1 6 P M 16 email, Mr. O'Connor said that Tonya's lawyer was more  
2 : 1 6 P M 17 conservative in his view.

2 : 1 6 P M 18 Q. What did you take that to mean?

2 : 1 6 P M 19 A. That his -- that his view was different from Ropes &  
2 : 1 6 P M 20 Gray's view.

2 : 1 6 P M 21 Q. And how so?

2 : 1 6 P M 22 A. Well, because one lawyer said it was proper and one lawyer  
2 : 1 6 P M 23 said it wasn't.

2 : 1 7 P M 24 Q. Which attorney was saying that P&H fees were proper?

2 : 1 7 P M 25 A. My understanding from my discussion was Brad -- with Brad



2 : 1 7 P M 1 was that Tonya's personal lawyer was saying that there wasn't a  
2 : 1 7 P M 2 problem with P&H.

2 : 1 7 P M 3 Q. Mr. O'Connor disabused you of that notion, didn't he?

2 : 1 7 P M 4 A. He gave me his opinion.

2 : 1 7 P M 5 Q. well, you write, "Brien said Tonya's lawyer is more  
2 : 1 7 P M 6 conservative in his view of the matter than Ropes & Gray"?

2 : 1 7 P M 7 A. Correct.

2 : 1 7 P M 8 Q. And you took that to mean that Ms. Mallory's attorney told  
2 : 1 7 P M 9 her that P&H fees were okay?

2 : 1 7 P M 10 A. Not from -- from that statement. I did not know -- I  
2 : 1 7 P M 11 don't know what conversations Brien had with Tonya's lawyer  
2 : 1 7 P M 12 that would cause him to have said that he was more conservative  
2 : 1 7 P M 13 in his opinion.

2 : 1 7 P M 14 Q. well, I'm asking in your view, when you heard that from  
2 : 1 7 P M 15 Mr. O'Connor, you took that to confirm your client's  
2 : 1 8 P M 16 understanding that Ms. Mallory's attorney had told her that the  
2 : 1 8 P M 17 payment of P&H fees was appropriate?

2 : 1 8 P M 18 A. I did not see -- well, I saw that as -- just Mr. O'Connor  
2 : 1 8 P M 19 disagreeing with Ms. Mallory's lawyer.

2 : 1 8 P M 20 Q. Ms. Flipppo, can I point you to the paragraph above that  
2 : 1 8 P M 21 where you say, "Not surprisingly, our client's interpretation  
2 : 1 8 P M 22 of these matter was not correct."

2 : 1 8 P M 23 Do you see that?

2 : 1 8 P M 24 A. Yes.

2 : 1 8 P M 25 Q. So who was misinterpreting the position of Ms. Mallory's

2 : 1 8 P M 1 personal attorney?

2 : 1 8 P M 2 A. At the time I wrote that, I thought that Brad was not  
2 : 1 8 P M 3 understanding exactly what Ropes & Gray's position was and  
2 : 1 8 P M 4 what -- what Tonya's lawyer's position was.

2 : 1 8 P M 5 Q. Let's go back to your conversation with Mr. Johnson.

2 : 1 8 P M 6 Looking at paragraph 6 of Plaintiffs' Exhibit 1159,  
2 : 1 9 P M 7 were you surprised to see Mr. Johnson at Bluewave's offices?

2 : 1 9 P M 8 A. Yes. When I --

2 : 1 9 P M 9 Q. why is that?

2 : 1 9 P M 10 A. Because I had talked to -- I'm trying to think if Sandra  
2 : 1 9 P M 11 Tankersley was still there at the time, but I was planning to  
2 : 1 9 P M 12 go up there and meet with the staff and didn't realize Brad was  
2 : 1 9 P M 13 going to be in the office.

2 : 1 9 P M 14 Q. Had you ever met with Mr. Johnson in BlueWave's offices  
2 : 1 9 P M 15 before?

2 : 1 9 P M 16 A. Yeah.

2 : 1 9 P M 17 Q. was he typically in BlueWave's offices when you went to  
2 : 1 9 P M 18 gather documents?

2 : 1 9 P M 19 A. No.

2 : 1 9 P M 20 Q. who did you typically interact with in Bluewave's offices?

2 : 1 9 P M 21 A. Sandra Tankersley.

2 : 1 9 P M 22 Q. who else worked at Bluewave's offices?

2 : 1 9 P M 23 A. Sonja Stafford, I think was her last name. There may have  
2 : 1 9 P M 24 been one or two other people. It's a four-room house where the  
2 : 1 9 P M 25 offices are.

2 : 2 0 P M 1 Q. Do those other people work for Bluewave?

2 : 2 0 P M 2 A. I don't -- I think Sonja worked for another entity that  
2 : 2 0 P M 3 Mr. Johnson owned.

2 : 2 0 P M 4 Q. When you saw Mr. Johnson at the BlueWave offices, did you  
2 : 2 0 P M 5 spend some time explaining to him what kind of information you  
2 : 2 0 P M 6 were in the process of gathering?

2 : 2 0 P M 7 A. Yes, because the CID was different from the subpoena for  
2 : 2 0 P M 8 documents.

2 : 2 0 P M 9 Q. Okay. Can you tell the jury very briefly what a CID is?

2 : 2 0 P M 10 A. Civil investigative demand is a request for documents and  
2 : 2 0 P M 11 information from the Department of Justice.

2 : 2 0 P M 12 Q. And how is it different, how was it different than the  
2 : 2 0 P M 13 subpoena that you had been working on previously?

2 : 2 0 P M 14 A. It covered -- I think it had specific questions that the  
2 : 2 0 P M 15 government asked as opposed to asking just for documents.

2 : 2 0 P M 16 Q. And was the government asking for information about  
2 : 2 0 P M 17 Bluewave's subcontractors?

2 : 2 1 P M 18 A. I can't -- I can't remember all the things that were  
2 : 2 1 P M 19 requested in the CID, but I would not be surprised if it did.

2 : 2 1 P M 20 Q. If you look at paragraph 6 of Plaintiffs' Exhibit 1159, in  
2 : 2 1 P M 21 the middle of that paragraph, you reference why we have to  
2 : 2 1 P M 22 include subcontractors.

2 : 2 1 P M 23 A. Right.

2 : 2 1 P M 24 Q. Do you see that portion?

2 : 2 1 P M 25 A. I do.

2 : 2 1 P M 1 Q. Okay. Does that help refresh your recollection about a  
2 : 2 1 P M 2 conversation that you had with Mr. Johnson regarding BlueWave's  
2 : 2 1 P M 3 subcontractors?

2 : 2 1 P M 4 A. It does.

2 : 2 1 P M 5 Q. What did Mr. Johnson convey to you about BlueWave's  
2 : 2 1 P M 6 subcontractors?

2 : 2 1 P M 7 A. He was concerned. We knew that the government had  
2 : 2 1 P M 8 already -- that government agents had already spoken to at  
2 : 2 1 P M 9 least one of the subcontractors, and Brad was concerned that if  
2 : 2 1 P M 10 we provided all of the names of all the contractors and  
2 : 2 1 P M 11 subcontractors, that there would be more interviewed and that  
2 : 2 1 P M 12 would be problematic for business.

2 : 2 1 P M 13 Q. Okay. In fact, you found out, during that same  
2 : 2 2 P M 14 conversation with Mr. Johnson, that there were some  
2 : 2 2 P M 15 subcontractors, some BlueWave subcontractors, that had been  
2 : 2 2 P M 16 contacted by the government that you didn't even know about?

2 : 2 2 P M 17 A. I would have to --

2 : 2 2 P M 18 Q. If you look at paragraph 5 of Plaintiffs' 1159.

2 : 2 2 P M 19 A. Yes, that's correct.

2 : 2 2 P M 20 Q. Were you surprised to learn that BlueWave had  
2 : 2 2 P M 21 subcontractors being contacted by the government and that  
2 : 2 2 P M 22 Mr. Johnson and Mr. Dent had not told you about that before?

2 : 2 2 P M 23 A. I was surprised that we had not heard about it, yeah.

2 : 2 2 P M 24 Q. You would have expected your clients to give you that kind  
2 : 2 2 P M 25 of information, wouldn't you?

2 : 2 2 P M 1 A. Sure.

2 : 2 2 P M 2 Q. When you were talking to Mr. Johnson about BlueWave  
2 : 2 2 P M 3 subcontractors, do you remember him getting very upset?

2 : 2 2 P M 4 A. I don't remember him getting any -- specifically upset.

2 : 2 3 P M 5 Q. Do you remember getting a lecture?

2 : 2 3 P M 6 A. Oh, that's how I described it, yes.

2 : 2 3 P M 7 Q. What was Mr. Johnson lecturing you about?

2 : 2 3 P M 8 A. Well, he was explaining, as I said, that he was concerned  
2 : 2 3 P M 9 that, if government agents went out and talked to all of the  
2 : 2 3 P M 10 subcontractors, they would get spooked and would quit.

2 : 2 3 P M 11 Q. And would quit what precisely?

2 : 2 3 P M 12 A. Quit selling for BlueWave, quit -- quit -- not selling for  
2 : 2 3 P M 13 BlueWave. That's not the correct way to say it. But stop  
2 : 2 3 P M 14 their being independent contractors.

2 : 2 3 P M 15 Q. They would terminate their relationship with BlueWave?  
2 : 2 3 P M 16 Was that his concern?

2 : 2 3 P M 17 A. Right.

2 : 2 3 P M 18 Q. And is that what you meant when you wrote "it's game over  
2 : 2 3 P M 19 and the world would end"?

2 : 2 3 P M 20 A. Right.

2 : 2 3 P M 21 Q. And what -- how did you respond to Mr. Johnson's concerns?

2 : 2 4 P M 22 A. I don't recall any specific response other than to tell  
2 : 2 4 P M 23 him, whatever his concerns were, we still needed to respond to  
2 : 2 4 P M 24 the CID in full and that we were going to do that, and he was  
2 : 2 4 P M 25 fine with it.

2 : 2 4 P M 1 Q. All right. Ms. Flippo, as information was coming to you  
2 : 2 4 P M 2 and your firm about the views of HDL's counsel, about the  
2 : 2 4 P M 3 government's views on the case, were you conveying that  
2 : 2 4 P M 4 information to your client?

2 : 2 4 P M 5 A. Yes.

2 : 2 4 P M 6 Q. Do you remember receiving a letter from Elizabeth Strawn  
2 : 2 4 P M 7 at the Department of Justice in March of 2014?

2 : 2 4 P M 8 A. I do.

2 : 2 4 P M 9 Q. If you would turn to the tab that's marked Plaintiffs'  
2 : 2 5 P M 10 Exhibit 1497.

2 : 2 5 P M 11 A. Okay.

2 : 2 5 P M 12 Q. Do you recognize this document?

2 : 2 5 P M 13 A. I do.

2 : 2 5 P M 14 Q. What is it?

2 : 2 5 P M 15 A. It's an email that I sent to Brad and Cal and Gene Sellers  
2 : 2 5 P M 16 and John Galese forwarding Ms. Strawn's letter.

2 : 2 5 P M 17 MS. SHORT: Your Honor, I move for the admission of  
2 : 2 5 P M 18 Plaintiffs' Exhibit 1497.

2 : 2 5 P M 19 THE COURT: Any objection?

2 : 2 5 P M 20 MR. COOKE: No objection.

2 : 2 5 P M 21 MR. ASHMORE: No, sir.

2 : 2 5 P M 22 THE COURT: Plaintiffs' Exhibit 1497 admitted without  
2 : 2 5 P M 23 objection.

2 : 2 5 P M 24 BY MS. SHORT:

2 : 2 5 P M 25 Q. Ms. Flippo, your cover email, you suggest a conference

2 : 2 5 P M 1 call to discuss Ms. Strawn's letter.

2 : 2 5 P M 2 Did that call occur?

2 : 2 5 P M 3 A. I don't recall.

2 : 2 5 P M 4 Q. If you turn over to the letter from the Department of  
2 : 2 5 P M 5 Justice itself.

2 : 2 5 P M 6 A. Okay.

2 : 2 5 P M 7 Q. If we focus on the second paragraph of the letter,  
2 : 2 6 P M 8 Ms. Strawn writes, "Based on our investigation to date, it  
2 : 2 6 P M 9 appears to us that the laboratories' payments to referring  
2 : 2 6 P M 10 providers raise an inference that one purpose of those payments  
2 : 2 6 P M 11 was to induce referrals."

2 : 2 6 P M 12 Do you see that?

2 : 2 6 P M 13 A. I do.

2 : 2 6 P M 14 Q. Okay. Was this essentially the same issue that you and  
2 : 2 6 P M 15 HDL's attorneys had talked to Mr. Dent, Mr. Johnson,  
2 : 2 6 P M 16 Ms. Mallory about in June of 2013?

2 : 2 6 P M 17 A. Yes.

2 : 2 6 P M 18 Q. After receiving this letter, did your clients stop  
2 : 2 6 P M 19 offering the P&H payments from HDL and Singulex?

2 : 2 6 P M 20 A. Not to my knowledge.

2 : 2 6 P M 21 Q. Now, we spoke earlier about your work with the independent  
2 : 2 6 P M 22 contractors to BlueWave, gathering their documents and  
2 : 2 7 P M 23 producing those. Do you recall that?

2 : 2 7 P M 24 A. I do.

2 : 2 7 P M 25 Q. And then did there come a point in time where the

1 government was interested in speaking to some of those  
2 government contractors?

3 A. I believe so.

4 Q. Do you recall the name Jeff Steadman?

5 A. I do.

6 Q. Who was Jeff Steadman?

7 A. He was one of the independent contractors.

8 Q. For Bluewave; is that correct?

9 A. I think BlueWave, yes.

10 Q. Had Mr. Steadman produced documents to you to produce to  
11 the Department of Justice?

12 A. I believe he did, yes.

13 Q. And do you recall among those documents seeing what they  
14 call a pro forma?

15 A. No.

16 Q. Do you recall being asked to look for a pro forma that had  
17 been prepared by Mr. Steadman?

18 A. Yes.

19 Q. And what do you recall about that request?

20 A. I had gotten that call from Joe Dillard, who represented  
21 some of the independent contractors. And he said that  
22 Mr. Steadman was trying to locate a particular document and  
23 asked if we could locate it since we had handled the  
24 facilitation of the production of their documents.

25 Q. And did you in turn look for that document?



2 : 2 8 P M 1 A. I in turn asked Hope Marshall to look for those documents,  
2 as she had handled that production.

2 : 2 8 P M 3 Q. And how is the document described to you? What were you  
4 looking for?

2 : 2 8 P M 5 A. I don't remember the description of the document.

2 : 2 8 P M 6 Q. Ms. Flipppo, if you'll turn to the next tab, Plaintiffs'  
7 Exhibit 1234.

2 : 2 8 P M 8 A. Okay.

2 : 2 8 P M 9 Q. Does that help refresh your recollection as to the  
10 document and the nature of the document you were looking for?

2 : 2 8 P M 11 A. I still don't have an independent recollection of this  
12 document or this email, but it is my email to Hope Marshall.

2 : 2 9 P M 13 Q. And it forwards an email that you received from  
14 Mr. Dillard?

2 : 2 9 P M 15 A. That's correct.

2 : 2 9 P M 16 Q. Which in turn forwards an email that he received from  
17 Mr. Steadman?

2 : 2 9 P M 18 A. Yes.

2 : 2 9 P M 19 Q. Okay. What did Mr. Steadman say about the document? Do  
20 you remember?

2 : 2 9 P M 21 A. I don't recall what Mr. Steadman had to say. I don't  
22 recall Mr. Dillard's specific comment to me about what  
23 Mr. Steadman said about the memo -- or the document.

2 : 2 9 P M 24 Q. I'm looking at Mr. Steadman's email that was forwarded on  
25 to you. The clinic is Blackfoot Medical Clinic, Blackfoot,

2 : 2 9 P M 1 Idaho.

2 : 2 9 P M 2 A. Oh, I see.

2 : 3 0 P M 3 I see that.

2 : 3 0 P M 4 Q. What was your understanding of what that document revealed  
2 : 3 0 P M 5 looking at your email to Hope Marshall about what she was  
2 : 3 0 P M 6 looking for?

2 : 3 0 P M 7 A. That it was a document that would -- that would tell  
2 : 3 0 P M 8 doctors what -- what -- apparently what amount of money could  
2 : 3 0 P M 9 be made in P&H fees.

2 : 3 0 P M 10 Q. Was there a specific amount associated with that document?

2 : 3 0 P M 11 A. I wrote 100,000. In my email to Hope, I wrote 100,000.

2 : 3 0 P M 12 Q. All right. Ms. Flipppo, during your representation of the  
2 : 3 0 P M 13 defendants, did they ever ask you for your legal opinion  
2 : 3 0 P M 14 regarding whether P&H fees violated the Anti-Kickback Statute?

2 : 3 0 P M 15 A. No.

2 : 3 0 P M 16 Q. You didn't give one either, did you?

2 : 3 0 P M 17 A. No.

2 : 3 0 P M 18 Q. Did you ever give an opinion to your clients regarding the  
2 : 3 0 P M 19 structure of BlueWave, specifically the commission structure of  
2 : 3 0 P M 20 BlueWave?

2 : 3 1 P M 21 A. When you say "an opinion," you're talking about my opinion  
2 : 3 1 P M 22 and my firm's opinion as opposed to any opinion?

2 : 3 1 P M 23 Q. Well, you recall preparing a declaration in this case;  
2 : 3 1 P M 24 correct?

2 : 3 1 P M 25 A. Right.

2 : 3 1 P M 1 Q. Okay. And in your declaration, I believe you wrote that  
2 : 3 1 P M 2 you did not -- neither you nor your firm prepared a legal  
2 : 3 1 P M 3 opinion regarding the commission structure of Bluewave?

2 : 3 1 P M 4 A. That's correct.

2 : 3 1 P M 5 Q. Is that a fair --

2 : 3 1 P M 6 A. That's correct.

2 : 3 1 P M 7 Q. And did your clients ask you to opine on the commission  
2 : 3 1 P M 8 structure of BlueWave?

2 : 3 1 P M 9 A. No.

2 : 3 1 P M 10 Q. With respect to HDL's policy of zero-balance billing or  
2 : 3 1 P M 11 the waiver of copays and deductibles, did you or your law firm  
2 : 3 1 P M 12 provide a legal opinion regarding the legality of that  
2 : 3 1 P M 13 practice?

2 : 3 1 P M 14 A. No.

2 : 3 1 P M 15 Q. And did your clients ask you to provide a legal opinion  
2 : 3 1 P M 16 regarding the legality of that practice?

2 : 3 1 P M 17 A. No.

2 : 3 1 P M 18 Q. Thank you, Ms. Flipppo. The defendants will likely have  
2 : 3 2 P M 19 some questions for you.

2 : 3 2 P M 20 A. Thank you.

2 : 3 2 P M 21 THE COURT: Thank you.

2 : 3 2 P M 22 Cross-examination?

2 : 3 2 P M 23 MR. COOKE: Thank you, Your Honor.

2 : 3 2 P M 24 CROSS-EXAMINATION

2 : 3 2 P M 25 BY MR. COOKE:

2 : 3 2 P M 1 Q. Good afternoon, Ms. Flipppo.

2 : 3 2 P M 2 A. Good afternoon.

2 : 3 2 P M 3 Q. We've met. I'm Dawes Cooke, and I represent Brad Johnson,  
2 : 3 2 P M 4 Cal Dent, and Bluewave.

2 : 3 2 P M 5 A. Yes, sir.

2 : 3 2 P M 6 Q. I want to go through a few of the things that you talked  
2 : 3 2 P M 7 to us about. And can you look in your notebook there and go  
2 : 3 2 P M 8 back to your -- the first document that you were asked to look  
2 : 3 2 P M 9 at and refresh your memory. And it's Tab 7002.

2 : 3 3 P M 10 A. Yes, sir.

2 : 3 3 P M 11 Q. And those are your notes of your initial meeting with Brad  
2 : 3 3 P M 12 and Cal; correct?

2 : 3 3 P M 13 A. Correct.

2 : 3 3 P M 14 Q. would you look at page 3.

2 : 3 3 P M 15 A. Okay.

2 : 3 3 P M 16 Q. Do you -- do you remember Mr. Johnson and Mr. Dent telling  
2 : 3 3 P M 17 you what they thought was behind this subpoena that they had  
2 : 3 3 P M 18 received?

2 : 3 3 P M 19 A. Yes.

2 : 3 3 P M 20 Q. And what was that?

2 : 3 3 P M 21 A. That it was this Heritage Medical Group, somebody that --  
2 : 3 3 P M 22 I think a member of that group was friends with -- if I can  
2 : 3 3 P M 23 remember correctly, there was some connection back to Berkeley,  
2 : 3 3 P M 24 where Brad and Cal had previously worked.

2 : 3 3 P M 25 Q. Did they say anything to you about learning that sales

2 : 3 3 P M 1 reps from Berkeley had been out at physicians' practices saying  
2 : 3 4 P M 2 that -- that HDL and Bluewave were acting improperly? Do you  
2 : 3 4 P M 3 remember that?

2 : 3 4 P M 4 A. I don't specifically remember that statement.

2 : 3 4 P M 5 Q. So the long and short of it, though, is that they believed  
2 : 3 4 P M 6 at that time that this was prompted by some of their  
2 : 3 4 P M 7 competitors?

2 : 3 4 P M 8 A. That was my understanding.

2 : 3 4 P M 9 Q. And did that strike you as -- as odd or improbable, that  
2 : 3 4 P M 10 competitors would be out there trying to stir up an  
2 : 3 4 P M 11 investigation?

2 : 3 4 P M 12 A. No, sir.

2 : 3 4 P M 13 Q. Look at page 5. You see where --

2 : 3 4 P M 14 THE COURT: Mr. Cooke, the proper approach is to ask  
2 : 3 4 P M 15 her a question and then use it to refresh her recollection if  
2 : 3 4 P M 16 she doesn't remember it.

2 : 3 4 P M 17 MR. COOKE: Fine. Thank you. I'm a step ahead of  
2 : 3 4 P M 18 myself here.

2 : 3 4 P M 19 BY MR. COOKE:

2 : 3 4 P M 20 Q. Do you remember them telling you about anything about how  
2 : 3 4 P M 21 the physicians would select the tests that they wanted to  
2 : 3 4 P M 22 order?

2 : 3 5 P M 23 A. Only that the physicians selected the tests, that they had  
2 : 3 5 P M 24 I believe a -- sorry. I'm going to knock the microphone --  
2 : 3 5 P M 25 that they had a -- some kind of panel that they could check off

2 : 3 5 P M 1 what they wanted to order.

2 : 3 5 P M 2 Q. Was it ever your understanding at any time during your  
2 : 3 5 P M 3 investigation of this matter that somehow BlueWave would have  
2 : 3 5 P M 4 the ability to require doctors to order certain tests?

2 : 3 5 P M 5 A. No, sir.

2 : 3 5 P M 6 Q. And you talked earlier about the difference of what you  
2 : 3 5 P M 7 had understood about the P&H agreement from your initial  
2 : 3 5 P M 8 conversation from what they told you later. Do you remember  
2 : 3 5 P M 9 that?

2 : 3 5 P M 10 A. Right.

2 : 3 5 P M 11 Q. Okay. But was it clear to you from the beginning that a  
2 : 3 5 P M 12 physician's practice was not required to accept processing and  
2 : 3 5 P M 13 handling fees if they didn't want to?

2 : 3 5 P M 14 A. I don't remember specifically talking about that at this  
2 : 3 5 P M 15 meeting, but I do remember that being the discussion later.

2 : 3 5 P M 16 Q. Okay. Do you remember there -- do you remember learning  
2 : 3 6 P M 17 that in fact there were alternative ways that laboratories  
2 : 3 6 P M 18 could get the blood specimens to their laboratories?

2 : 3 6 P M 19 A. I don't remember a discussion about that.

2 : 3 6 P M 20 Q. Do you remember hearing about phlebotomists?

2 : 3 6 P M 21 A. Oh, yeah. Yes, sir. I'm sorry.

2 : 3 6 P M 22 Q. So that an alternative to processing and handling fees  
2 : 3 6 P M 23 would be that a laboratory could pay the salary of a  
2 : 3 6 P M 24 phlebotomist to work in the doctor's office?

2 : 3 6 P M 25 A. I believe that's -- that's my understanding of an

2 : 3 6 P M 1 alternative, yes.

2 : 3 6 P M 2 Q. And with any of these alternatives, was it ever your  
2 : 3 6 P M 3 understanding that Brad and Cal or BlueWave -- or HDL, for that  
2 : 3 6 P M 4 matter -- had invented this procedure?

2 : 3 6 P M 5 A. No, sir.

2 : 3 6 P M 6 Q. In fact, they told you just the opposite, didn't they,  
2 : 3 6 P M 7 that it was very common, that everybody in the industry, that  
2 : 3 6 P M 8 this was how they were getting their blood specimens to the  
2 : 3 6 P M 9 laboratories?

2 : 3 6 P M 10 A. You mean by -- by offering -- I'm sorry. I don't  
2 : 3 6 P M 11 understand your question.

2 : 3 6 P M 12 Q. Either by offering processing and handling fees so that  
2 : 3 6 P M 13 the doctors would be reimbursed for the costs of doing it or  
2 : 3 7 P M 14 providing phlebotomists to do --

2 : 3 7 P M 15 A. They did say that that was pretty standard across the  
2 : 3 7 P M 16 industry and it had occurred at their prior employers.

2 : 3 7 P M 17 Q. Did any of your investigation ever show anything to the  
2 : 3 7 P M 18 contrary?

2 : 3 7 P M 19 A. Nothing in the information that we gathered had anything  
2 : 3 7 P M 20 to the contrary.

2 : 3 7 P M 21 Q. There was some discussion during your testimony about -- I  
2 : 3 7 P M 22 guess, at some point, you gave them a homework assignment that  
2 : 3 7 P M 23 they were supposed to go try to get P&H agreements from other  
2 : 3 7 P M 24 laboratories or legal opinions that other laboratories had.

2 : 3 7 P M 25 A. I think we wanted to see what else was out there. And so

2 : 3 7 P M 1 they had indicated that they either had them or could get them,  
2 : 3 7 P M 2 and so we were looking to see those.

2 : 3 7 P M 3 Q. Now, would it be shocking to you to find out that it's not  
2 : 3 7 P M 4 that simple, that competing laboratories may not be willing to  
2 : 3 7 P M 5 part with their proprietary information and their legal  
2 : 3 8 P M 6 opinions?

2 : 3 8 P M 7 A. I wouldn't be surprised.

2 : 3 8 P M 8 Q. Okay. Did you talk about document retention?

2 : 3 8 P M 9 A. Yes.

2 : 3 8 P M 10 Q. And that's kind of what you do; right? You're a -- you do  
2 : 3 8 P M 11 e-discovery, electronic discovery, and document preservation  
2 : 3 8 P M 12 and production and searching?

2 : 3 8 P M 13 A. That's primarily what I do, yes.

2 : 3 8 P M 14 Q. And did you have a discussion about that with Brad and  
2 : 3 8 P M 15 Cal?

2 : 3 8 P M 16 A. I know that Mr. Galese and Mr. Sellers had a discussion  
2 : 3 8 P M 17 with them when the subpoena first came out. I can't remember  
2 : 3 8 P M 18 if we discussed it specifically at that meeting, but I believe  
2 : 3 8 P M 19 we did, because we did draft a -- a hold, a hold letter to --  
2 : 3 8 P M 20 for Bluewave to provide to everyone to hold on to documents.

2 : 3 8 P M 21 Q. Take a look at page 6.

2 : 3 9 P M 22 A. Okay.

2 : 3 9 P M 23 Q. Do you see that? You said there was a discussion there of  
2 : 3 9 P M 24 document retention policy of Bluewave?

2 : 3 9 P M 25 A. Yes, sir.



2 : 3 9 P M 1 Q. And did you learn that they had a standard retention  
2 : 3 9 P M 2 policy of retaining emails for 90 days?

2 : 3 9 P M 3 A. That's what they said at the time.

2 : 3 9 P M 4 Q. Okay. And they were informed to -- to stop that and to  
2 : 3 9 P M 5 keep their records; is that right?

2 : 3 9 P M 6 A. They were asked to -- I understood it was something that  
2 : 3 9 P M 7 their IT guy could turn off so that emails were not deleted.  
2 : 3 9 P M 8 But we later learned that they had not actually been deleted.

2 : 3 9 P M 9 Q. Right. I was going to get to that.

2 : 3 9 P M 10 Did they tell you at that meeting -- or did you learn  
2 : 3 9 P M 11 that they had had a meeting with their contractors and had  
2 : 3 9 P M 12 informed all the contractors to preserve all documentation?

2 : 3 9 P M 13 A. I understand that they did have that meeting.

2 : 3 9 P M 14 Q. And, in fact, when you went and started going into the  
2 : 4 0 P M 15 servers, you found emails going all the way back to the  
2 : 4 0 P M 16 beginning of BlueWave; right?

2 : 4 0 P M 17 A. Well, since I'm an e-discovery person, I won't say we went  
2 : 4 0 P M 18 into servers. We hired an outside e-discovery consultant  
2 : 4 0 P M 19 who -- what I do is more processing, and what he does is more  
2 : 4 0 P M 20 gathering. And so he talked to BlueWave's IT guy and  
2 : 4 0 P M 21 determined that their emails were on this outside source called  
2 : 4 0 P M 22 MonsterHost or HostMonster and determined that the emails were  
2 : 4 0 P M 23 there.

2 : 4 0 P M 24 Q. I didn't mean to get too technical about that.

2 : 4 0 P M 25 A. Sorry.

2 : 4 0 P M 1 Q. I just wanted to bring out the fact that, when you went to  
2 : 4 0 P M 2 look for the emails, they had not deleted the emails; right?  
2 : 4 0 P M 3 They were available all the way back from the beginning of  
2 : 4 0 P M 4 Bluewave?

2 : 4 0 P M 5 A. To my -- yes.

2 : 4 0 P M 6 Q. And what did you do with those?

2 : 4 0 P M 7 A. We looked at them, checked them for privilege, and  
2 : 4 1 P M 8 produced all that were responsive.

2 : 4 1 P M 9 Q. Okay. Never once did Brad Johnson or Cal Dent tell you  
2 : 4 1 P M 10 not to give something to the government that was responsive to  
2 : 4 1 P M 11 their subpoena or their CID?

2 : 4 1 P M 12 A. No.

2 : 4 1 P M 13 Q. Never once, did they?

2 : 4 1 P M 14 A. No.

2 : 4 1 P M 15 Q. Did they -- did they ever -- did they ever say anything to  
2 : 4 1 P M 16 you or do anything that suggested at all that they felt guilty  
2 : 4 1 P M 17 or that they thought that they had been breaking the law or  
2 : 4 1 P M 18 that they needed to hide anything from the government?

2 : 4 1 P M 19 A. No.

2 : 4 1 P M 20 Q. Ever?

2 : 4 1 P M 21 A. No.

2 : 4 1 P M 22 Q. Let's go to the meeting that occurred on -- in June of  
2 : 4 1 P M 23 2013. This is what -- I think you referred to it sometimes as  
2 : 4 1 P M 24 "the summit meeting"?

2 : 4 1 P M 25 A. Yes, sir.

2 : 4 1 P M 1 Q. You remember that?

2 : 4 1 P M 2 Leading up to that meeting, did you have an occasion  
2 : 4 1 P M 3 to talk to Laura Hoey with Ropes & Gray?

2 : 4 1 P M 4 A. Yes.

2 : 4 1 P M 5 Q. And that's the meeting where she -- or the telephone  
2 : 4 2 P M 6 conference -- excuse me -- where she told you that one of their  
2 : 4 2 P M 7 attorneys, Michael Lampert, was concerned about the letter that  
2 : 4 2 P M 8 had come out from LeClairRyan in 2013 -- or 2012; correct?

2 : 4 2 P M 9 A. Correct.

2 : 4 2 P M 10 Q. Now, I don't mean to make too sharp a distinction here,  
2 : 4 2 P M 11 but isn't it true that what they told you was that they didn't  
2 : 4 2 P M 12 agree with his conclusion that the processing and handling fees  
2 : 4 2 P M 13 fell within the safe harbor of the Anti-Kickback Statute?

2 : 4 2 P M 14 A. That's what Mr. Lampert was trying to explain to me.

2 : 4 2 P M 15 Q. Now, for the jury's benefit and for my benefit -- and none  
2 : 4 2 P M 16 of us are health lawyers specifically -- a safe harbor is kind  
2 : 4 2 P M 17 of what the terms implies; right? That it's an exception to  
2 : 4 2 P M 18 what might otherwise be a rule; right?

2 : 4 3 P M 19 A. I am not that versed in safe harbor provisions.

2 : 4 3 P M 20 Q. Okay. Do you -- is it your understanding that just  
2 : 4 3 P M 21 because you don't fit within a safe harbor doesn't mean you're  
2 : 4 3 P M 22 violating the law?

2 : 4 3 P M 23 A. I don't know that I can give you an opinion on that.

2 : 4 3 P M 24 Q. All right. Have you looked at any of the OIG opinions or  
2 : 4 3 P M 25 studied any of the opinion letters about processing and

2 : 4 3 P M 1 handling fees?

2 : 4 3 P M 2 A. I think I've read the one that was referenced in  
2 : 4 3 P M 3 Ms. Strawn's letter. And I'm trying to think. The only other  
2 : 4 3 P M 4 one was the special fraud alert that came out later.

2 : 4 3 P M 5 Q. Do you remember at that meeting Michael saying -- and who  
2 : 4 3 P M 6 is Michael, by the way?

2 : 4 3 P M 7 A. Michael Lampert. It was a telephone conversation that I  
2 : 4 3 P M 8 had with him.

2 : 4 3 P M 9 Q. Now I'm moving forward to the actual meeting.

2 : 4 3 P M 10 A. I'm sorry. He was at that meeting.

2 : 4 4 P M 11 Q. He was at that meeting.

2 : 4 4 P M 12 Do you remember him saying that he did not really see  
2 : 4 4 P M 13 an issue with the False Claims Act because he doesn't think  
2 : 4 4 P M 14 that the issue is a double-dipping situation? Do you remember  
2 : 4 4 P M 15 that?

2 : 4 4 P M 16 A. I remember him expressing on our telephone conversation  
2 : 4 4 P M 17 that -- about he didn't think that there was a double-dipping  
2 : 4 4 P M 18 issue. I don't remember Mr. Lampert saying anything at the  
2 : 4 4 P M 19 Richmond meeting.

2 : 4 4 P M 20 Q. Okay. When he discussed fair market value, he didn't tell  
2 : 4 4 P M 21 you that they had actually done another fair market value  
2 : 4 4 P M 22 analysis, did they?

2 : 4 4 P M 23 A. He, on the telephone call, mentioned about the fair market  
2 : 4 4 P M 24 value. And I think he mentioned another case he had been  
2 : 4 4 P M 25 involved with where there was -- he thought the fair market

2 : 4 4 P M 1 value was just a little lower, but that's all I think he said  
2 : 4 4 P M 2 about that.

2 : 4 4 P M 3 Q. Now, in this particular case, you're aware that the  
2 : 4 5 P M 4 Exponent study -- that is, the company called Exponent -- that  
2 : 4 5 P M 5 they had come out with \$35 -- actually, \$36, a little bit  
2 : 4 5 P M 6 more -- as being the appropriate fair market value for  
2 : 4 5 P M 7 processing and handling four tubes; right?

2 : 4 5 P M 8 A. I don't remember exactly what amount that they came out  
2 : 4 5 P M 9 with, but I know -- I do recall it being within a few dollars  
2 : 4 5 P M 10 of what was being paid by HDL.

2 : 4 5 P M 11 Q. Well, let's take a look at that. Look at page 4 of your  
2 : 4 5 P M 12 notes there, just to refresh your memory. And just take a  
2 : 4 5 P M 13 moment to look at that. Do you recall -- sorry. I don't want  
2 : 4 5 P M 14 to interrupt you while you're looking at it.

2 : 4 5 P M 15 A. I'm sorry. Am I looking at the Richmond meeting memo  
2 : 4 5 P M 16 or --

2 : 4 5 P M 17 Q. Yes. Yes. I'm sorry. 1080.

2 : 4 6 P M 18 A. Oh, 1080. I'm sorry. That's the -- oh, my discussion  
2 : 4 6 P M 19 with Mr. Lampert on the letter?

2 : 4 6 P M 20 Q. Right.

2 : 4 6 P M 21 A. Okay. I'm sorry. You said page 4?

2 : 4 6 P M 22 Q. Yeah. Just to refresh your memory about the discussion  
2 : 4 6 P M 23 about fair market value.

2 : 4 6 P M 24 A. Yes, sir. Let's see.

2 : 4 6 P M 25 Q. And do you remember him saying not that they had done a

2 : 4 6 P M 1 fair market study evaluation but that he had identified areas  
2 : 4 6 P M 2 in the Exponent study that the government would be able to  
2 : 4 6 P M 3 attack?

2 : 4 6 P M 4 A. Yes.

2 : 4 6 P M 5 Q. So he was referring to the position that the government  
2 : 4 6 P M 6 might be expected to take, not necessarily what any regulation  
2 : 4 6 P M 7 or law said; is that correct?

2 : 4 7 P M 8 A. According to what I wrote, yes.

2 : 4 7 P M 9 Q. And just -- and I don't mean to test your memory, but do  
2 : 4 7 P M 10 you actually remember what dollar amount the Exponent study  
2 : 4 7 P M 11 said would be fair value for the four specimens?

2 : 4 7 P M 12 A. No, sir.

2 : 4 7 P M 13 Q. would it surprise you if it was, like, \$36?

2 : 4 7 P M 14 A. No, sir.

2 : 4 7 P M 15 Q. And then there was a discussion about this CPT code 99000.  
2 : 4 7 P M 16 Remember that?

2 : 4 7 P M 17 A. Yes, sir.

2 : 4 7 P M 18 Q. And was the issue there a concern that a physician might  
2 : 4 7 P M 19 both get what Medicare would pay him for his services in his  
2 : 4 7 P M 20 office and also apply for a P&H fee?

2 : 4 7 P M 21 A. I'm sorry. Would you repeat that.

2 : 4 7 P M 22 Q. I'll rephrase it. How about that?

2 : 4 7 P M 23 A. Okay. Thank you.

2 : 4 7 P M 24 Q. was the concern there a double-dipping concern; that is,  
2 : 4 7 P M 25 that their concern was that a payment of a process and handling

2 : 4 8 P M 1 fee might duplicate what Medicare was already paying for  
2 reimbursement for the physician's services?

2 : 4 8 P M 3 A. I'm trying to think if there was just that -- the issue  
2 : 4 8 P M 4 was how much Medicare paid versus what was being paid by HDL as  
2 : 4 8 P M 5 opposed to the double dipping.

2 : 4 8 P M 6 Q. Look at page 6 of your notes and just read to yourself the  
2 : 4 8 P M 7 first sentence up there under CPT code section 99000.

2 : 4 8 P M 8 A. For Medicare patients?

2 : 4 8 P M 9 Q. Right. For Medicare patients. I'm sorry. You see that?

2 : 4 8 P M 10 A. Yes, sir.

2 : 4 8 P M 11 Q. All right. So do you agree that the concern there was  
2 : 4 9 P M 12 that processing and handling fees might be paid to doctors who  
2 : 4 9 P M 13 were already going to be paid for that through Medicare?

2 : 4 9 P M 14 A. For Medicare patients, correct.

2 : 4 9 P M 15 Q. Okay. All right.

2 : 4 9 P M 16 Now, I want to show you an exhibit. It's -- can you  
2 : 4 9 P M 17 get 1235?

2 : 4 9 P M 18 THE COURT: Is this in evidence?

2 : 4 9 P M 19 MR. COOKE: Yes, it is.

2 : 4 9 P M 20 BY MR. COOKE:

2 : 4 9 P M 21 Q. Can you scan down to paragraphs 5 and 7. I'm going to --  
2 : 4 9 P M 22 I'm going to represent to you that this is an exhibit that's  
2 : 4 9 P M 23 been introduced. And it's a draft of the original processing  
2 : 5 0 P M 24 and handling agreements. Did you ever see those?

2 : 5 0 P M 25 A. Not that I recall. The draft, I don't recall seeing one.

2 : 5 0 P M 1 Q. Did you have any discussion with Brad and Cal about what  
2 : 5 0 P M 2 safeguards were put into that agreement?

2 : 5 0 P M 3 A. No, sir.

2 : 5 0 P M 4 Q. Let me just ask you to look at these two. See that  
2 : 5 0 P M 5 paragraph 5, "Physician will not bill, receive, nor collect any  
2 : 5 0 P M 6 reimbursement from any third-party payer, including commercial  
2 : 5 0 P M 7 insurers and governmental programs such as Medicare and  
2 : 5 0 P M 8 Medicaid, for any processing and handling services or  
2 : 5 0 P M 9 collection services for which physician receives any fees from  
2 : 5 0 P M 10 HDL."

2 : 5 0 P M 11 Do you see that?

2 : 5 0 P M 12 A. Uh-huh.

2 : 5 0 P M 13 Q. And you see paragraph 7, where it says, "Each of the  
2 : 5 0 P M 14 parties to this agreement shall comply with all applicable  
2 : 5 0 P M 15 laws, and, specifically, physician shall provide the processing  
2 : 5 0 P M 16 and handling services and the collection services in accordance  
2 : 5 1 P M 17 with all applicable laws, rules, and regulations"?

2 : 5 1 P M 18 MS. SHORT: Objection, Your Honor. This is beyond  
2 : 5 1 P M 19 the scope of the direct, and it's a document that the witness  
2 : 5 1 P M 20 does not have familiarity with.

2 : 5 1 P M 21 MR. COOKE: The document's in evidence, and this  
2 : 5 1 P M 22 relates directly to her direct testimony about this discussion  
2 : 5 1 P M 23 of the CPT code issue.

2 : 5 1 P M 24 THE COURT: Was there a discussion of the CPT code?

2 : 5 1 P M 25 MS. SHORT: There was a discussion of the CPT code,



2 : 5 1 P M 1 but I don't see anything in this document that talks about the  
2 : 5 1 P M 2 CPT code.

2 : 5 1 P M 3 MR. COOKE: well, the document says that the doctor  
2 : 5 1 P M 4 is not allowed to apply for reimbursement if he's receiving P&H  
2 : 5 1 P M 5 fees.

2 : 5 1 P M 6 THE COURT: If this witness hasn't seen the document,  
2 : 5 1 P M 7 I don't know how it's proper to use it with her. I'm going to  
2 : 5 1 P M 8 sustain that objection, but you can question her further, but  
2 : 5 1 P M 9 questioning her about a document she's never seen is not  
2 : 5 1 P M 10 proper.

2 : 5 1 P M 11 BY MR. COOKE:

2 : 5 1 P M 12 Q. If, in fact, the processing and handling fees included a  
2 : 5 1 P M 13 safety provision that said that a physician could not both  
2 : 5 2 P M 14 receive P&H fees and apply for reimbursement, would that have  
2 : 5 2 P M 15 given you some degree of comfort that there was not going to be  
2 : 5 2 P M 16 double dipping by the physician?

2 : 5 2 P M 17 A. Yes.

2 : 5 2 P M 18 Q. You don't sound so sure about that, so I'll move on.

2 : 5 2 P M 19 You're not a --

2 : 5 2 P M 20 A. I'm not a health care person.

2 : 5 2 P M 21 Q. I didn't mean to stretch you there.

2 : 5 2 P M 22 Did -- at the June meeting, did Tonya speak during  
2 : 5 2 P M 23 the meeting?

2 : 5 2 P M 24 A. I believe she did.

2 : 5 2 P M 25 Q. If somebody else had said or testified that she never

2 : 5 2 P M 1 spoke during the whole meeting, would you have to disagree with  
2 : 5 2 P M 2 that?

2 : 5 2 P M 3 A. Yeah. Sorry. Yes, sir.

2 : 5 2 P M 4 Q. Okay. Good.

2 : 5 2 P M 5 At that discussion -- and I'm trying to put myself in  
2 : 5 2 P M 6 the position that you were in -- there were some really  
2 : 5 3 P M 7 top-notch health care lawyer experts there, weren't there?

2 : 5 3 P M 8 A. I think Mr. Lampert, to my knowledge, was the -- the  
2 : 5 3 P M 9 person that was -- probably did more health care work than  
2 : 5 3 P M 10 anyone else in the room.

2 : 5 3 P M 11 Q. All right. Did anybody at that meeting raise an issue  
2 : 5 3 P M 12 about the commission structure being a problem under the  
2 : 5 3 P M 13 Anti-Kickback Statute?

2 : 5 3 P M 14 A. I don't remember that being discussed.

2 : 5 3 P M 15 Q. And you didn't put that in your notes?

2 : 5 3 P M 16 A. No, sir. I don't believe, in -- my review of it recently,  
2 : 5 3 P M 17 I don't believe it's in there.

2 : 5 3 P M 18 Q. When the lawyers were discussing the issue of the  
2 : 5 4 P M 19 Anti-Kickback Statute, was anybody able to pull out a book  
2 : 5 4 P M 20 anywhere or a regulation or a statute that said that either you  
2 : 5 4 P M 21 could or you could not reimburse physicians for the cost -- for  
2 : 5 4 P M 22 their costs of providing this service?

2 : 5 4 P M 23 A. No, I don't believe anybody did that.

2 : 5 4 P M 24 Q. And, in fact, wasn't almost all of the discussion focused  
2 : 5 4 P M 25 on trying to anticipate what position the government was going

2 : 5 4 P M 1 to take with regard to the law?

2 : 5 4 P M 2 A. I think that was part of it.

2 : 5 4 P M 3 Q. Now, as a lawyer, don't you usually like to go -- be able  
2 : 5 4 P M 4 to go look up what the law is somewhere?

2 : 5 4 P M 5 A. Yes, sir.

2 : 5 4 P M 6 Q. Okay. Does it put you in an untenable position to be  
2 : 5 4 P M 7 forced to advise your clients based on guessing what position  
2 : 5 4 P M 8 the government lawyers might take?

2 : 5 4 P M 9 A. Yes, sir.

2 : 5 4 P M 10 Q. Okay. If you ever knew that your client was actually  
2 : 5 5 P M 11 breaking the law, wouldn't you tell them to stop?

2 : 5 5 P M 12 A. If we did an independent investigation and an independent  
2 : 5 5 P M 13 review of the law and concluded -- for purposes of our  
2 : 5 5 P M 14 representation in this matter, which was as criminal lawyers,  
2 : 5 5 P M 15 if we had concluded that there was a criminal violation, we  
2 : 5 5 P M 16 would have advised our clients to not engage in that conduct.

2 : 5 5 P M 17 Q. Well -- and, actually, I didn't mean to point the finger  
2 : 5 5 P M 18 at you. I mean you collectively, lawyers. Sorry.

2 : 5 5 P M 19 I mean, isn't that what any responsible lawyer would  
2 : 5 5 P M 20 do, Ropes & Gray, that if they believed that their client was  
2 : 5 5 P M 21 currently knowingly and willfully violating the law, wouldn't  
2 : 5 5 P M 22 they tell them to stop? Isn't that what a lawyer is supposed  
2 : 5 5 P M 23 to do?

2 : 5 5 P M 24 A. That's what a lawyer does.

2 : 5 6 P M 25 Q. But, instead, what Ropes & Gray was doing was having a

2 : 5 6 P M 1 dialogue with the government prosecutors or the government  
2 : 5 6 P M 2 investigators; isn't that true?

2 : 5 6 P M 3 A. My understanding was they were continuing to have  
2 : 5 6 P M 4 discussions with the government as well.

2 : 5 6 P M 5 Q. And they were talking about moving away from or phasing  
2 : 5 6 P M 6 out processing and handling fees, weren't they? Isn't that  
2 : 5 6 P M 7 what you were told?

2 : 5 6 P M 8 A. Yes, sir, that's my understanding, that that's what HDL  
2 : 5 6 P M 9 was going to do.

2 : 5 6 P M 10 Q. Now, Cal got revved up at the meeting. Those were your  
2 : 5 6 P M 11 words?

2 : 5 6 P M 12 A. Yes, sir.

2 : 5 6 P M 13 Q. Did you -- before you walked into that meeting, had you  
2 : 5 6 P M 14 ever heard of something called Project Twilight?

2 : 5 6 P M 15 A. No, sir.

2 : 5 6 P M 16 Q. Do you know what it is now?

2 : 5 6 P M 17 A. No, sir.

2 : 5 6 P M 18 Q. What if I told you that that was a project that HDL had  
2 : 5 6 P M 19 going on to work on alternatives to processing and handling  
2 : 5 6 P M 20 fees, to phase out processing and handling fees? Were you  
2 : 5 6 P M 21 aware that they had such a thing going on?

2 : 5 6 P M 22 A. No, sir.

2 : 5 6 P M 23 Q. Had anybody, before you went to that meeting, briefed you  
2 : 5 7 P M 24 on what the alternative might be to paying the processing and  
2 : 5 7 P M 25 handling fees?

2 : 5 7 P M 1 A. I don't remember any discussions like that.

2 : 5 7 P M 2 Q. Did you know enough, by the time you got to this meeting,  
2 : 5 7 P M 3 to appreciate that the laboratories have to have a way to get  
2 : 5 7 P M 4 the blood from the doctor's office to their laboratories;  
2 : 5 7 P M 5 otherwise, they can't test it?

2 : 5 7 P M 6 A. I would think that's correct.

2 : 5 7 P M 7 Q. Brad and Cal had explained that to you, hadn't they?

2 : 5 7 P M 8 A. That you have to get the blood to the labs in order for  
2 : 5 7 P M 9 them to process it?

2 : 5 7 P M 10 Q. Yes.

2 : 5 7 P M 11 A. Yes, sir.

2 : 5 7 P M 12 Q. And that the processing and handling fees was a way of  
2 : 5 7 P M 13 doing that, to pay a reasonable amount to the physician to  
2 : 5 7 P M 14 underwrite or to help defray part of his cost of doing that for  
2 : 5 7 P M 15 you?

2 : 5 7 P M 16 A. Yes, sir.

2 : 5 7 P M 17 Q. And so up to that point, as far as you know, Cal had heard  
2 : 5 7 P M 18 nothing about any lawyers telling the government that they were  
2 : 5 7 P M 19 going to stop paying processing and handling fees; is that  
2 : 5 7 P M 20 true?

2 : 5 7 P M 21 A. I'm sorry. Ask your question again.

2 : 5 8 P M 22 Q. Up to that point, neither you nor your clients had been  
2 : 5 8 P M 23 told anything about the Ropes & Gray lawyers telling the  
2 : 5 8 P M 24 government that they were going to stop paying processing and  
2 : 5 8 P M 25 handling fees?

2 : 5 8 P M 1 A. I only know what the Ropes & Gray lawyers told us that  
2 : 5 8 P M 2 they had told the government.

2 : 5 8 P M 3 Q. You were in communication with them. You were in  
2 : 5 8 P M 4 communication with your clients up to that point. The point  
2 : 5 8 P M 5 I'm driving to is, is it possible in your mind that Cal felt  
2 : 5 8 P M 6 that he had been ambushed there and now being told for the very  
2 : 5 8 P M 7 first time that commitment had already been made to start  
2 : 5 8 P M 8 moving away from processing and handling fees?

2 : 5 8 P M 9 A. I can't say that.

2 : 5 8 P M 10 Q. Okay. Did anybody talk at the meeting about what the  
2 : 5 8 P M 11 alternatives were? How were we going to get the blood to the  
2 : 5 8 P M 12 laboratory if we don't pay P&H fees?

2 : 5 8 P M 13 A. I think there were some -- there was some discussion.  
2 : 5 9 P M 14 There was -- I know there was some discussion about  
2 : 5 9 P M 15 alternatives to P&H fees, but I don't specifically recall what  
2 : 5 9 P M 16 they were.

2 : 5 9 P M 17 Q. Did you understand discussions that were going on about  
2 : 5 9 P M 18 safe harbor?

2 : 5 9 P M 19 A. Very little.

2 : 5 9 P M 20 Q. Did you ever have an occasion to sit down afterwards with  
2 : 5 9 P M 21 Brad and Cal and walk them through and say, "Now, this is what  
2 : 5 9 P M 22 we heard from Ropes & Gray. This is how the Anti-Kickback  
2 : 5 9 P M 23 Statute works, and this is what a safe harbor is"? Did you  
2 : 5 9 P M 24 ever have occasion to have that discussion?

2 : 5 9 P M 25 A. We did not have that discussion after Ropes & Gray lawyers

2 : 5 9 P M 1 had described it at the meeting.

2 : 5 9 P M 2 Q. As a lawyer, did you find the discussion to be confusing  
2 : 5 9 P M 3 about what is allowed and what's not allowed?

2 : 5 9 P M 4 A. Yes, sir.

2 : 5 9 P M 5 Q. Even after that meeting, did Brad and Cal ever do or say  
2 : 5 9 P M 6 anything that suggested that they believed or understood that  
3 : 0 0 P M 7 it was wrong or illegal to pay processing and handling fees?

3 : 0 0 P M 8 A. They never understood that there -- if there was a  
3 : 0 0 P M 9 problem. They understood that people were looking at it, but  
3 : 0 0 P M 10 in their minds, they didn't see that there was -- they didn't  
3 : 0 0 P M 11 understand it was -- if there was a problem.

3 : 0 0 P M 12 Q. Well, did you believe that what was going to happen was  
3 : 0 0 P M 13 that there -- that Ropes & Gray and HDL were going to come to  
3 : 0 0 P M 14 some agreement with the government on what they could and  
3 : 0 0 P M 15 couldn't do?

3 : 0 0 P M 16 A. Yes.

3 : 0 0 P M 17 Q. And did they communicate to you from time to time what  
3 : 0 0 P M 18 they were doing with the government?

3 : 0 0 P M 19 A. Yes.

3 : 0 0 P M 20 Q. Did Brad and Cal or either or both of them tell you that  
3 : 0 0 P M 21 they would abide by whatever was decided with regard to P&H  
3 : 0 0 P M 22 fees?

3 : 0 0 P M 23 A. Yes.

3 : 0 1 P M 24 Q. That statement that was made by Brad about having  
3 : 0 1 P M 25 investigators come out and talk to his independent contractors,

3 : 0 1 P M 1 did he relate to you that that had already happened? Did he  
3 : 0 1 P M 2 ever tell you about government investigators showing up at one  
3 : 0 1 P M 3 of his contractors' homes and, in an intimidating way,  
3 : 0 1 P M 4 questioning him?

3 : 0 1 P M 5 A. I don't remember Brad saying that. I remember Cal telling  
3 : 0 1 P M 6 me that he had gotten a call from Mr. Maimone about the  
3 : 0 1 P M 7 government's interview with Mr. Blasko. That's the only  
3 : 0 1 P M 8 incident I remember.

3 : 0 1 P M 9 Q. Did you ever hear anything from Mr. Carnaggio about that,  
3 : 0 1 P M 10 about a visit that he received?

3 : 0 1 P M 11 A. Not directly from Mr. Carnaggio.

3 : 0 2 P M 12 Q. Who did you hear it from?

3 : 0 2 P M 13 A. Cal.

3 : 0 2 P M 14 Q. Okay. And what did he tell you?

3 : 0 2 P M 15 A. That someone had come out to interview Mr. Carnaggio, and  
3 : 0 2 P M 16 I can't remember if that's the one where there was some concern  
3 : 0 2 P M 17 that he had -- that an investigator had talked to a spouse or a  
3 : 0 2 P M 18 neighbor or -- that's all I remember.

3 : 0 2 P M 19 Q. So do you think that perhaps that's what Brad was  
3 : 0 2 P M 20 concerned about, about having similar visits to all of his  
3 : 0 2 P M 21 contractors?

3 : 0 2 P M 22 A. When Brad said "the end of the world" comment?

3 : 0 2 P M 23 Q. Uh-huh.

3 : 0 2 P M 24 A. Yes.

3 : 0 2 P M 25 Q. Did he ever say to you that "well, I don't want them



3 : 0 2 P M 1 talking to investigators because they might say something wrong  
3 : 0 2 P M 2 that hurts us."

3 : 0 2 P M 3 A. No.

3 : 0 2 P M 4 Q. In fact, didn't you get a little irritated with Brad  
3 : 0 2 P M 5 himself for returning a phone call from an investigator?

3 : 0 2 P M 6 A. I sure did.

3 : 0 2 P M 7 Q. All right. As a criminal defense attorney, you don't want  
3 : 0 2 P M 8 your clients talking to anybody; right?

3 : 0 3 P M 9 A. That's correct.

3 : 0 3 P M 10 Q. whether they're innocent or guilty?

3 : 0 3 P M 11 A. That's correct.

3 : 0 3 P M 12 Q. Okay. But if your client is convinced that he hasn't done  
3 : 0 3 P M 13 anything wrong, he might just do that; right? He might just  
3 : 0 3 P M 14 return a phone call from an investigator without clearing it  
3 : 0 3 P M 15 with you first?

3 : 0 3 P M 16 A. Yes, sir.

3 : 0 3 P M 17 Q. Do you believe that was the case with Brad and Cal, that  
3 : 0 3 P M 18 they didn't believe they had anything to hide and hadn't done  
3 : 0 3 P M 19 anything wrong?

3 : 0 3 P M 20 A. Yes, sir.

3 : 0 3 P M 21 Q. You were shown some notes about later conversations that  
3 : 0 3 P M 22 you had with Laura Hoey about the status of Ropes & Gray. Do  
3 : 0 3 P M 23 you remember that? The question of whether they had changed  
3 : 0 3 P M 24 their view about processing and handling fees?

3 : 0 3 P M 25 A. Yes, sir.

3 : 0 3 P M 1 Q. And, in fact, when you followed up with them, what you  
3 : 0 3 P M 2 specifically found was that they had not changed their mind  
3 : 0 3 P M 3 about the safe harbor, that they -- whether the process and  
3 : 0 3 P M 4 handling fee came within safe harbor; isn't that right?

3 : 0 3 P M 5 A. I think it was really, the different issues that I'd  
3 : 0 4 P M 6 talked about with Mr. Lampert, Ropes & Gray had not changed its  
3 : 0 4 P M 7 opinion on the safe harbor and the LeClairRyan letter and --

3 : 0 4 P M 8 Q. Were you -- were you aware that not only that, but that  
3 : 0 4 P M 9 Ropes & Gray actually was revising the processing fee -- the  
3 : 0 4 P M 10 processing and handling fee agreement to make the documentation  
3 : 0 4 P M 11 of compliance clearer as late as the fall of 2013?

3 : 0 4 P M 12 A. I don't remember that.

3 : 0 4 P M 13 Q. Did you -- you wouldn't have participated in that  
3 : 0 4 P M 14 redrafting, would you?

3 : 0 4 P M 15 A. No.

3 : 0 4 P M 16 Q. Did you ever see a PowerPoint presentation that  
3 : 0 4 P M 17 Ropes & Gray put together explaining why processing and  
3 : 0 4 P M 18 handling fees were appropriate?

3 : 0 4 P M 19 A. I don't recall it.

3 : 0 4 P M 20 Q. Did you -- do you know if they did one?

3 : 0 4 P M 21 A. I don't know.

3 : 0 5 P M 22 Q. Did you ever become aware that, at least as of January  
3 : 0 5 P M 23 2014, the Department of Justice had not taken a position on  
3 : 0 5 P M 24 processing and handling fees?

3 : 0 5 P M 25 A. They had expressed some opinions, but I don't think they

3 : 0 5 P M 1 had taken a final -- I don't recall a final position.

3 : 0 5 P M 2 MR. COOKE: Can you show us Mallory 10. This is in  
3 : 0 5 P M 3 evidence. Go to the second page, if you would, and blow up the  
3 : 0 5 P M 4 center part.

3 : 0 5 P M 5 BY MR. COOKE:

3 : 0 5 P M 6 Q. Were you ever made aware that, at least as of January of  
3 : 0 6 P M 7 2014, there had been this communication between Ropes & Gray  
3 : 0 6 P M 8 and the Justice Department? That is, Ropes & Gray made clear  
3 : 0 6 P M 9 that HDL was putting further waiver discussions on hold in  
3 : 0 6 P M 10 light of DOJ's present refusal to take a position on the  
3 : 0 6 P M 11 straight payment of P&H fees?

3 : 0 6 P M 12 A. I'm not aware of that.

3 : 0 6 P M 13 Q. I'm not asking about this specific email, but were you  
3 : 0 6 P M 14 made aware by Ropes & Gray that, as of January, that they had  
3 : 0 6 P M 15 not been able to get the government to take a position on P&H  
3 : 0 6 P M 16 fees?

3 : 0 6 P M 17 A. No, sir, I'm not aware of that.

3 : 0 6 P M 18 Q. And then take a look at Exhibit -- Plaintiffs' Exhibit  
3 : 0 6 P M 19 1497.

3 : 0 6 P M 20 THE COURT: Is that in?

3 : 0 6 P M 21 MR. COOKE: Sir?

3 : 0 6 P M 22 THE COURT: Is that document in?

3 : 0 6 P M 23 MR. COOKE: It is, yes. 1497.

3 : 0 7 P M 24 THE COURT: Thank you, sir.

3 : 0 7 P M 25 BY MR. COOKE:

3 : 0 7 P M 1 Q. This is a letter that your firm received on March 18,  
3 : 0 7 P M 2 2014, from Elizabeth Strawn, who's seated here; correct?

3 : 0 7 P M 3 A. Correct.

3 : 0 7 P M 4 Q. Go ahead and forward to the letter.

3 : 0 7 P M 5 You see in the middle paragraph, it says, "Based on  
3 : 0 7 P M 6 our investigation to date, it appears to us that the  
3 : 0 7 P M 7 laboratories' payments to referring providers raise an  
3 : 0 7 P M 8 inference" -- an inference -- "that one purpose of those  
3 : 0 7 P M 9 payments was to induce referrals."

3 : 0 7 P M 10 You see that?

3 : 0 7 P M 11 A. Yes, sir.

3 : 0 7 P M 12 Q. Now, does that letter say anything about the independent  
3 : 0 7 P M 13 contractor commission fee arrangement being improper?

3 : 0 7 P M 14 A. No, sir.

3 : 0 7 P M 15 Q. Does it say anything about waivers of copays and  
3 : 0 7 P M 16 deductibles being improper?

3 : 0 7 P M 17 A. No, sir.

3 : 0 8 P M 18 Q. So it refers to processing and handling fees; correct?

3 : 0 8 P M 19 A. Yes, sir.

3 : 0 8 P M 20 Q. And does it say you are to stop paying processing and  
3 : 0 8 P M 21 handling fees?

3 : 0 8 P M 22 A. No, sir.

3 : 0 8 P M 23 Q. Okay. In fact, the preface of the letter is this is the  
3 : 0 8 P M 24 direction that our investigation is going; right?

3 : 0 8 P M 25 A. Correct.

3 : 0 8 P M 1 Q. So does that suggest to you that they're still  
3 : 0 8 P M 2 investigating the matter?

3 : 0 8 P M 3 A. Yes, sir.

3 : 0 8 P M 4 Q. As a result of receiving this letter, did you or did  
3 : 0 8 P M 5 Ropes & Gray give instructions to stop immediately paying  
3 : 0 8 P M 6 processing and handling fees?

3 : 0 8 P M 7 A. No, sir.

3 : 0 8 P M 8 Q. Do you remember special fraud alert finally coming out on  
3 : 0 8 P M 9 June 5th, 2014?

3 : 0 8 P M 10 A. Yes, sir.

3 : 0 8 P M 11 Q. What's a special fraud alert?

3 : 0 8 P M 12 A. That's the first one I had seen. It was a document that I  
3 : 0 9 P M 13 believe concluded that P&H fees were not proper and the  
3 : 0 9 P M 14 practice should be stopped.

3 : 0 9 P M 15 Q. Okay. Do you remember the day that you got that letter --  
3 : 0 9 P M 16 excuse me -- the special fraud alert?

3 : 0 9 P M 17 A. I don't remember, no, sir.

3 : 0 9 P M 18 Q. Can you show BlueWave Exhibit 465. This is in evidence.

3 : 0 9 P M 19 It says in the middle paragraph, "Laura and Brien."  
3 : 0 9 P M 20 Do you know who that refers to?

3 : 0 9 P M 21 A. Laura Hoey and Brien O'Connor.

3 : 0 9 P M 22 Q. They're from Ropes & Gray?

3 : 0 9 P M 23 A. Yes.

3 : 0 9 P M 24 Q. This is dated, by the way, June 30. So this would be just  
3 : 0 9 P M 25 a few days after the special fraud alert came out.

3 : 0 9 P M 1 A. Yes, sir.

3 : 0 9 P M 2 Q. "Laura and Brien said they spoke to Elizabeth for about 20  
3 : 1 0 P M 3 minutes. Elizabeth told R&G that they have never had a  
3 : 1 0 P M 4 situation like this in the past where an advisory was written  
3 : 1 0 P M 5 in the middle of the investigation and admitted that these are  
3 : 1 0 P M 6 typically written when there are areas that are vague or not  
3 : 1 0 P M 7 spoken that need to be clarified. Elizabeth clarified that the  
3 : 1 0 P M 8 intention of this advisory was to state that there is no  
3 : 1 0 P M 9 possible scenario in which P&H payments were okay and to stop  
3 : 1 0 P M 10 the practice in the market."

3 : 1 0 P M 11 Did you receive that information?

3 : 1 0 P M 12 A. Yes, sir.

3 : 1 0 P M 13 Q. And before you received that information, do you remember  
3 : 1 0 P M 14 there being some discussions with Ropes & Gray about what that  
3 : 1 0 P M 15 special fraud alert actually meant?

3 : 1 0 P M 16 A. I don't remember any specific discussion.

3 : 1 0 P M 17 Q. Do you remember Brad or Cal saying that they wanted  
3 : 1 0 P M 18 somebody to call Elizabeth Strawn or the government and find  
3 : 1 0 P M 19 out for sure whether this meant that the process set and  
3 : 1 1 P M 20 handling fees should stop?

3 : 1 1 P M 21 A. I believe there -- yes, I believe I wrote an email or Brad  
3 : 1 1 P M 22 sent -- actually, Brad sent us an email.

3 : 1 1 P M 23 Q. Do you remember being on a phone call with your partner,  
3 : 1 1 P M 24 Mark White, and -- and others in which he said that, from this  
3 : 1 1 P M 25 day forward, BlueWave will not sell any tests for any

3 : 1 1 P M 1 laboratory that pays processing and handling fees?

3 : 1 1 P M 2 A. That -- a discussion which Mark said that?

3 : 1 1 P M 3 Q. Yes. Or somebody -- I'm sorry. Somebody speaking on  
3 : 1 1 P M 4 behalf of Bluewave. Do you remember that conversation?

3 : 1 1 P M 5 A. I don't remember the conversation, but I mean, I remember  
3 : 1 1 P M 6 that it stopped.

3 : 1 1 P M 7 Q. Do you remember it stopping at the insistence of your  
3 : 1 1 P M 8 clients, Bluewave?

3 : 1 1 P M 9 A. I think it was -- I don't know that it was necessarily at  
3 : 1 1 P M 10 their insistence, but that it was -- everyone agreed that it  
3 : 1 2 P M 11 was going to stop. Bluewave didn't pay the fees. The HDL paid  
3 : 1 2 P M 12 the fees, and they weren't going to pay the fees anymore.

3 : 1 2 P M 13 Q. So from the beginning to end of your representation of  
3 : 1 2 P M 14 Bluewave, first of all, did they ever try to hide anything from  
3 : 1 2 P M 15 the government about what they were doing?

3 : 1 2 P M 16 A. No, sir.

3 : 1 2 P M 17 Q. Did they ever indicate any sense of guilt or knowing and  
3 : 1 2 P M 18 willful violation of the Anti-Kickback Statute?

3 : 1 2 P M 19 A. No, sir.

3 : 1 2 P M 20 Q. Did they always tell you that all they wanted to know was  
3 : 1 2 P M 21 what they were allowed to do and what they weren't allowed to  
3 : 1 2 P M 22 do and that they would follow the law?

3 : 1 2 P M 23 A. Yes, sir.

3 : 1 2 P M 24 MR. COOKE: Just a moment, if I may, Your Honor.

3 : 1 2 P M 25 THE COURT: Yes.

(Pause.)

**MR. COOKE:** Thank you. That's all.

**THE COURT:** Mr. Ashmore?

**MR. ASHMORE:** No questions, Your Honor.

**THE COURT:** Very good.

Any from the government, redirect?

**MS. SHORT:** Yes, Your Honor.

**REDIRECT EXAMINATION**

**BY MS. SHORT:**

**Q.** Ms. Flippo, you remember talking just a few minutes ago, again, about that initial meeting that you had with your clients?

**A.** Right.

**Q.** And Mr. Cooke pointed you to your memo where you talked about where your clients thought these allegations might be coming from?

**A.** Yes.

**Q.** Coming from the competitors?

**A.** Right.

**Q.** Do you remember whether those competitors had paid P&H?

**A.** I don't know.

**Q.** If you will look at your memo, Plaintiff's Exhibit 7002 at page 3 --

**A.** Yes, I see. Quest had stopped.

**Q.** Yeah. So the competitors that Mr. Dent and Mr. Johnson



3 : 1 4 P M 1 were concerned about had actually -- they had paid P&H, but  
3 : 1 4 P M 2 they had stopped paying P&H fees; is that right?

3 : 1 4 P M 3 A. That's what we were told.

3 : 1 4 P M 4 Q. Did your clients tell you why those competitors had  
3 : 1 4 P M 5 stopped paying P&H fees?

3 : 1 4 P M 6 A. Not that I recall.

3 : 1 4 P M 7 Q. Mr. Cooke also asked you about what lawyers advise their  
3 : 1 4 P M 8 clients. If you see something, if your client is doing  
3 : 1 4 P M 9 something illegal, you'll advise them on that?

3 : 1 5 P M 10 A. Uh-huh, yes.

3 : 1 5 P M 11 Q. Now, and he asked you about Ropes & Gray's advice to HDL  
3 : 1 5 P M 12 and Ms. Mallory. Do you recall that?

3 : 1 5 P M 13 A. Yes.

3 : 1 5 P M 14 Q. Were you privy to all of Ropes & Gray's discussions with  
3 : 1 5 P M 15 HDL and Ms. Mallory?

3 : 1 5 P M 16 A. No.

3 : 1 5 P M 17 Q. So you don't know what they told HDL or Ms. Mallory about  
3 : 1 5 P M 18 the legality of their practices, do you?

3 : 1 5 P M 19 A. That's correct, unless they told me and I wrote it down.

3 : 1 5 P M 20 Q. Likewise, you don't know what Ms. Mallory's personal  
3 : 1 5 P M 21 attorney told her about the P&H fees and the waivers of copays  
3 : 1 5 P M 22 and deductibles; is that right?

3 : 1 5 P M 23 A. That's correct.

3 : 1 5 P M 24 Q. And you testified earlier that you did not give advice to  
3 : 1 5 P M 25 Mr. Dent or Mr. Johnson about the legality of P&H fees; is that

3 : 1 5 P M 1 right?

3 : 1 5 P M 2 A. That's correct.

3 : 1 5 P M 3 Q. Likewise, you did not give your clients advice about the  
3 : 1 5 P M 4 legality of commission payments; is that right?

3 : 1 5 P M 5 A. That's correct.

3 : 1 5 P M 6 Q. And you didn't give them advice on the legality of waivers  
3 : 1 5 P M 7 of copays and deductibles; is that right?

3 : 1 5 P M 8 A. That's correct.

3 : 1 5 P M 9 Q. And they didn't ask you for that advice; isn't that right?

3 : 1 6 P M 10 A. That's correct.

3 : 1 6 P M 11 MS. SHORT: Thank you, Ms. Flippo.

3 : 1 6 P M 12 THE COURT: Thank you. You may step down.

3 : 1 6 P M 13 (Witness excused.)

3 : 1 6 P M 14 THE COURT: Government, call your next witness. How  
3 : 1 6 P M 15 lengthy is this witness likely to be?

3 : 1 6 P M 16 MR. TERRANOVA: About an hour, Your Honor.

3 : 1 6 P M 17 THE COURT: Let's take your afternoon break.

3 : 1 6 P M 18 (Whereupon the jury was excused from the courtroom.)

3 : 1 7 P M 19 THE COURT: Please be seated.

3 : 1 7 P M 20 we're thinking that the -- just the direct on  
3 : 1 7 P M 21 the next witness is an hour or are we thinking direct and  
3 : 1 7 P M 22 cross? I'm just trying to figure out estimate here about trial  
3 : 1 7 P M 23 time.

3 : 1 7 P M 24 MR. TERRANOVA: I would hope to complete the direct  
3 : 1 7 P M 25 in less than an hour. I wanted to be conservative, not to

1 overpromise how long or how short the direct would take.

2           **THE COURT:** well, I'm just trying to figure out today  
3 here. I know that we got -- let's see. We've got two one-hour  
4 videos following this, and it's now 3:20. I'm really trying to  
5 get at this about when -- I don't think we're going to get any  
6 defense witnesses up today. I'm just trying to get defense  
7 counsel sort of alerted to that. And it's not entirely clear  
8 to me that we're going to get all the video in today. It just  
9 doesn't look that way. And I'm not trying to rush anybody.  
10 I'm just trying to organize this trial. And I don't want to  
11 wear my jury out.

12           So if we go -- you know, we come back here  
13 around 3:30 and we take -- I mean, we haven't even gotten -- if  
14 you're going it take nearly an hour, we haven't gotten to  
15 cross-examination. We could well be near 5:00 even before we  
16 get to videos.

17           I'm not going to keep the jury here watching  
18 videos. I think they will tune that out at 5:00. You start  
19 playing a video, nobody will remember anything. And I will  
20 push y'all on getting people up and so forth, but I'm not going  
21 to push where the evidence is not going to be fairly  
22 considered.

23           So it may well be that we will play the videos  
24 in the morning before -- I would love to get one of them in  
25 today, but I'm not going to keep everybody here late. I'm just

3 : 1 9 P M 1 going to say that right now.

3 : 1 9 P M 2 So does that help defense counsel a little bit  
3 : 1 9 P M 3 in terms of your schedule?

3 : 1 9 P M 4 MR. COOKE: Depends on what you mean by "help." It's  
3 : 1 9 P M 5 useful to know, yes.

3 : 1 9 P M 6 THE COURT: Yes. I'm sure there's a lot of rulings  
3 : 1 9 P M 7 you don't really feel like I've helped you too much. I assure  
3 : 1 9 P M 8 you the government feels the same way. As they say in this  
3 : 1 9 P M 9 business, if you're looking for a friend, get a dog.

3 : 1 9 P M 10 Very good. Let's take a break.

3 : 1 9 P M 11 (Recess.)

3 : 3 1 P M 12 THE COURT: Be seated. Anything we need to address  
3 : 3 1 P M 13 from the government?

3 : 3 1 P M 14 MR. LEVENTIS: No, Your Honor.

3 : 3 1 P M 15 THE COURT: From defense?

3 : 3 1 P M 16 MR. COOKE: Nothing, thanks.

3 : 3 1 P M 17 THE COURT: Let's bring the jury in.

3 : 3 1 P M 18 MR. COOKE: There is one thing.

3 : 3 1 P M 19 THE COURT: Yes, sir.

3 : 3 1 P M 20 MR. COOKE: I gave a wrong exhibit number. I think I  
3 : 3 1 P M 21 called it Bluewave 465, and it really should have been Mallory  
3 : 3 1 P M 22 10.

3 : 3 1 P M 23 THE COURT: 465, Mallory 10. Okay. You've now said  
3 : 3 1 P M 24 it for the record.

3 : 3 1 P M 25 MR. COOKE: Yes.

3 : 3 1 P M 1 THE COURT: We've clarified. Okay. Thank you.

3 : 3 1 P M 2 Bring in the jury.

3 : 3 2 P M 3 (Whereupon the jury entered the courtroom.)

3 : 3 3 P M 4 THE COURT: Please be seated.

3 : 3 3 P M 5 Government, call your next witness.

3 : 3 3 P M 6 MR. TERRANOVA: Your Honor, the United States calls  
3 : 3 3 P M 7 Brian Dickerson.

3 : 3 3 P M 8 THE DEPUTY CLERK: Please come forward to be sworn,  
3 : 3 3 P M 9 sir. Please place your left hand on the Bible, raise your  
3 : 3 3 P M 10 right, state your full name for the record, please.

3 : 3 3 P M 11 THE WITNESS: Brian E. Dickerson.

3 : 3 3 P M 12 THE DEPUTY CLERK: Thank you.

3 : 3 4 P M 13 (Witness sworn.)

3 : 3 4 P M 14 THE DEPUTY CLERK: Thank you, be seated.

3 : 3 4 P M 15 BRIAN DICKERSON,  
3 : 3 4 P M 16 a witness called on behalf of the plaintiff, being first duly  
1 1 : 0 3 A M 17 sworn, was examined and testified as follows:

1 1 : 0 3 A M 18 DIRECT EXAMINATION

3 : 3 4 P M 19 BY MR. TERRANOVA:

3 : 3 4 P M 20 Q. Good afternoon, Mr. Dickerson.

3 : 3 4 P M 21 A. Good afternoon.

3 : 3 4 P M 22 Q. What is your profession?

3 : 3 4 P M 23 A. Lawyer.

3 : 3 4 P M 24 Q. Are you currently practicing law?

3 : 3 4 P M 25 A. Yes.

3 : 3 4 P M 1 Q. where?

3 : 3 4 P M 2 A. Offices in Washington, D.C., and Naples, Florida, but my  
3 : 3 4 P M 3 practice is nationwide.

3 : 3 4 P M 4 Q. How long have you practiced law?

3 : 3 4 P M 5 A. Since 1996.

3 : 3 4 P M 6 Q. what types of cases have you handled?

3 : 3 4 P M 7 A. Predominantly white-collar criminal defense, health care  
3 : 3 4 P M 8 fraud cases. I'd say since 2002, practice is basically 90  
3 : 3 4 P M 9 percent health care-related. I represent doctors, physicians,  
3 : 3 4 P M 10 pharmacies, medical device companies.

3 : 3 4 P M 11 Q. You're a defense attorney?

3 : 3 4 P M 12 A. Yes.

3 : 3 4 P M 13 Q. Typically, when you come into a courtroom, you sit on this  
3 : 3 4 P M 14 side of the courtroom?

3 : 3 5 P M 15 A. Correct.

3 : 3 5 P M 16 Q. Have you specialized in any area of the law?

3 : 3 5 P M 17 A. The practice is health care, pharmacy, strong  
3 : 3 5 P M 18 concentration on that.

3 : 3 5 P M 19 Q. why have you specialized in health care law?

3 : 3 5 P M 20 A. Because the government has been very aggressive against  
3 : 3 5 P M 21 health care companies.

3 : 3 5 P M 22 Q. Do you have any prior experience in the health care law?

3 : 3 5 P M 23 A. I was a prosecutor, and when I was prosecutor for two  
3 : 3 5 P M 24 years, I prosecuted several doctors that were -- bad writing  
3 : 3 5 P M 25 habits with regard to -- back then it was Percocet, but

3 : 3 5 P M 1 opioids.

3 : 3 5 P M 2 Q. Have you given any presentations on health care law?

3 : 3 5 P M 3 A. Two to three a year, if not more, for the last 15-plus  
3 : 3 5 P M 4 years. I've got one in two weeks at the American Bar  
3 : 3 5 P M 5 Association midyear conference speaking to health care lawyers  
3 : 3 5 P M 6 on pharmacies and compounding health care law; and then  
3 : 3 6 P M 7 February 2nd, I'm speaking in Florida at the American College  
3 : 3 6 P M 8 of Apothecary conference on health care law, Stark violations,  
3 : 3 6 P M 9 anti-kickback violations.

3 : 3 6 P M 10 Q. For how long have you given presentations to other lawyers  
3 : 3 6 P M 11 on health care issues?

3 : 3 6 P M 12 A. I would say going back to 2002, if not earlier.

3 : 3 6 P M 13 Q. Have you ever taught any courses involving law?

3 : 3 6 P M 14 A. Yeah. At one point in time I taught. Harvard University  
3 : 3 6 P M 15 had a sports administration program, and I taught a class on  
3 : 3 6 P M 16 negotiations there as well as just contracts.

3 : 3 6 P M 17 Q. Have you received any recognition for your legal work?

3 : 3 6 P M 18 A. I'm Martindale Hubbell AV-rated; Chambers Ranking, which  
3 : 3 6 P M 19 is for -- it's another ranking service that ranks how lawyers  
3 : 3 6 P M 20 practice; and then other awards here and there.

3 : 3 7 P M 21 MR. TERRANOVA: Mr. Phaneuf, could you please put up  
3 : 3 7 P M 22 on the screen Plaintiffs' Demonstrative 10. would you please  
3 : 3 7 P M 23 zoom in on the top ten BlueWave sales representatives in this  
3 : 3 7 P M 24 slide that was created by the United States.

3 : 3 7 P M 25 MR. GRIFFITH: Your Honor, objection. There's no

3 : 3 7 P M 1 foundation that he's familiar with this.

3 : 3 7 P M 2 MR. TERRANOVA: I'll ask --

3 : 3 7 P M 3 THE COURT: Why don't you ask a few more questions to  
3 : 3 7 P M 4 lay the foundation.

3 : 3 7 P M 5 BY MR. TERRANOVA:

3 : 3 7 P M 6 Q. Mr. Dickerson, are you familiar with any of the names  
3 : 3 7 P M 7 among the top ten sales representatives listed in this  
3 : 3 7 P M 8 demonstrative?

3 : 3 7 P M 9 A. Yes.

3 : 3 7 P M 10 Q. Which ones?

3 : 3 7 P M 11 A. Ocean Diagnostics & Consulting/Emily Barron and then  
3 : 3 7 P M 12 Disease Testing and Management, LLC/Kyle Martel.

3 : 3 7 P M 13 Q. How are you familiar with Bluewave sales representative  
3 : 3 7 P M 14 Emily Barron?

3 : 3 7 P M 15 A. She was referred to me late July 2013 with regard to her  
3 : 3 7 P M 16 concerns related to Bluewave, and she became a client of mine.  
3 : 3 8 P M 17 Well, the entity did.

3 : 3 8 P M 18 Q. For whom was Ms. Barron working when she retained you as  
3 : 3 8 P M 19 counsel?

3 : 3 8 P M 20 A. Her partner was Kyle Martel, disease testing and  
3 : 3 8 P M 21 management.

3 : 3 8 P M 22 Q. And who is -- was Ms. Barron working for a company when  
3 : 3 8 P M 23 she retained you as counsel?

3 : 3 8 P M 24 A. She had her own company, Ocean Diagnostic Consulting, but  
3 : 3 8 P M 25 the entity she was coming to me with regard to was Bluewave



3 : 3 8 P M 1 Consulting and her contract with BlueWave and the legalities  
3 : 3 8 P M 2 around the Bluewave operations.

3 : 3 8 P M 3 Q. You mentioned that Kyle Martel was Emily Barron's partner.  
3 : 3 8 P M 4 Did Kyle Martel retain you as counsel?

3 : 3 8 P M 5 A. No, not at all.

3 : 3 8 P M 6 Q. In what state did Ms. Barron work with Bluewave?

3 : 3 8 P M 7 A. Florida.

3 : 3 8 P M 8 Q. Why did Ms. Barron retain you as counsel?

3 : 3 8 P M 9 A. Ms. Barron had -- I guess there was discussion -- there  
3 : 3 8 P M 10 was a meeting in Orlando early July 2013, where she was present  
3 : 3 9 P M 11 with Kyle Martel, Brad Johnson, and Cal Dent, related to a  
3 : 3 9 P M 12 splitting up of the territory and wanting her to sign a new  
3 : 3 9 P M 13 contract. She had that contract and the business model of  
3 : 3 9 P M 14 Bluewave and HDL reviewed by another lawyer prior to coming to  
3 : 3 9 P M 15 me. And that lawyer had a legal opinion stating that the HDL  
3 : 3 9 P M 16 model of paying the shipping and handling of doctors violated  
3 : 3 9 P M 17 the Anti-Kickback Statute and that the Bluewave model with the  
3 : 3 9 P M 18 1099 consultants being paid in that manner was also indicative  
3 : 3 9 P M 19 of possibly violating the Anti-Kickback Statute.

3 : 3 9 P M 20 And she was concerned about that legal opinion. And  
3 : 3 9 P M 21 so she had referred to me to review that legal opinion and to  
3 : 3 9 P M 22 look into the new contract that they had with Bluewave -- or  
3 : 4 0 P M 23 proposed contract with BlueWave.

3 : 4 0 P M 24 Q. So before Ms. Barron retained you, she had received a  
3 : 4 0 P M 25 legal opinion from another attorney?

3 : 4 0 P M 1 A. Correct.

3 : 4 0 P M 2 Q. Who was that other attorney who gave Ms. Barron a legal  
3 : 4 0 P M 3 opinion?

3 : 4 0 P M 4 A. Josh Entin, E-n-t-i-n.

3 : 4 0 P M 5 Q. And what did Mr. Entin's legal opinion conclude?

3 : 4 0 P M 6 A. It concluded that the shipping and handling payments by  
3 : 4 0 P M 7 HDL to the doctor violated the Anti-Kickback Statute because  
3 : 4 0 P M 8 the fees that were set were based upon volume. And since they  
3 : 4 0 P M 9 were based upon volume, it violated the Anti-Kickback Statute.

3 : 4 0 P M 10 And he did a good job of writing a report. In the  
3 : 4 0 P M 11 opinion, he cited advisory opinions from the Office of  
3 : 4 0 P M 12 Inspector General from 2005, I believe, in there -- 2007, maybe  
3 : 4 0 P M 13 '9, and 2011 -- but the 2005 opinion was an important opinion.  
3 : 4 0 P M 14 And he quoted that and --

3 : 4 1 P M 15 Q. And after Ms. Barron retained you, did she provide you  
3 : 4 1 P M 16 with any documents?

3 : 4 1 P M 17 A. We received of course the opinion letter; what was  
3 : 4 1 P M 18 referred to as this time and motion study that HDL, Tonya  
3 : 4 1 P M 19 Mallory was on the signature for that; the agreement that she  
3 : 4 1 P M 20 had -- that Ocean Diagnostics had with Bluewave; the proposed  
3 : 4 1 P M 21 change in the territory letter from July of 2013; and then  
3 : 4 1 P M 22 there were some emails as well.

3 : 4 1 P M 23 Q. In addition to those documents that you received from  
3 : 4 1 P M 24 Ms. Barron, did you speak with her about the practices that she  
3 : 4 1 P M 25 saw while working for BlueWave?

3 : 4 1 P M 1 A. Yes.

3 : 4 1 P M 2 Q. Mr. Dickerson, could you please turn to Tab 1 of your  
3 : 4 1 P M 3 binder, which is Plaintiffs' Exhibit 1545.

3 : 4 1 P M 4 Are you familiar with Exhibit 1545?

3 : 4 1 P M 5 A. Yes.

3 : 4 2 P M 6 MR. GRIFFITH: Your Honor, objection. May we  
3 : 4 2 P M 7 approach?

3 : 4 2 P M 8 THE COURT: You may. I haven't seen Exhibit 1545,  
3 : 4 2 P M 9 have I?

3 : 4 2 P M 10 MR. GRIFFITH: I don't think so, Your Honor.

3 : 4 2 P M 11 MR. TERRANOVA: I'll bring a copy, Your Honor.

3 : 4 2 P M 12 (Whereupon the following proceedings were held at the  
3 : 4 2 P M 13 bench out of the hearing of the jury:)

3 : 4 2 P M 14 THE COURT: This is the one from the first -- lawyer  
3 : 4 2 P M 15 number 1?

3 : 4 2 P M 16 MR. TERRANOVA: Correct.

3 : 4 2 P M 17 THE COURT: And is it -- is this letter shared with  
3 : 4 2 P M 18 anybody?

3 : 4 2 P M 19 MR. TERRANOVA: It was sent directly to Bluewave  
3 : 4 2 P M 20 sales representative Emily Barron.

3 : 4 2 P M 21 THE COURT: Okay. And does she then -- did she first  
3 : 4 2 P M 22 show it to this witness? Does he share this with anybody?

3 : 4 2 P M 23 MR. TERRANOVA: He describes that two -- both the  
3 : 4 2 P M 24 Bluewave attorneys and HDL's attorneys.

3 : 4 3 P M 25 MR. GRIFFITH: But he did provide a copy of it, Your

3 : 4 3 P M  
1 Honor.

3 : 4 3 P M 2 THE COURT: I think -- again, we're in this issue  
3 : 4 3 P M 3 where y'all are trying to use a document that -- that it wasn't  
3 : 4 3 P M 4 received by someone, and you're using it to -- where you can  
3 : 4 3 P M 5 just have them do it by narrative. This gentleman is very  
3 : 4 3 P M 6 articulate. Let him just describe what he told him. I don't  
3 : 4 3 P M 7 know why this letter would come in if he didn't provide it to  
3 : 4 3 P M 8 the Bluewave defendants.

3 : 4 3 P M 9 MR. TERRANOVA: Bluewave defendant did receive it,  
3 : 4 3 P M 10 Ms. Barron.

3 : 4 3 P M 11 THE COURT: But her -- so she received it, but she  
3 : 4 3 P M 12 goes against legal advice.

3 : 4 3 P M 13 MR. GRIFFITH: This is not Bluewave defendant.

3 : 4 3 P M 14 THE COURT: well, she's an agent -- agent. She could  
3 : 4 3 P M 15 be considered a co-conspirator. I haven't heard enough to  
3 : 4 3 P M 16 establish that.

3 : 4 3 P M 17 MR. TERRANOVA: It's another warning that was  
3 : 4 3 P M 18 received.

3 : 4 3 P M 19 THE COURT: Let him say what he told the Bluewave --  
3 : 4 3 P M 20 the Bluewave folks. who did he talk to? Yeah, who did he talk  
3 : 4 3 P M 21 to?

3 : 4 3 P M 22 MR. TERRANOVA: Linda Flipppo, the previous witness.

3 : 4 3 P M 23 THE COURT: He can tell you what he told her. I'm  
3 : 4 4 P M 24 going to sustain the objection as to 1545.

3 : 4 4 P M 25 (whereupon the following proceedings were held in

3 : 4 4 P M 1 open court in the presence and hearing of the jury:)

3 : 4 4 P M 2 THE COURT: Objection sustained.

3 : 4 4 P M 3 BY MR. TERRANOVA:

3 : 4 4 P M 4 Q. Mr. Dickerson, do you recall Josh Entin's legal opinion  
3 : 4 4 P M 5 that he sent to Emily Barron?

3 : 4 4 P M 6 A. Yes.

3 : 4 4 P M 7 Q. What do you recall about Mr. Entin's legal opinion?

3 : 4 4 P M 8 A. The legal opinion recited the facts and circumstances as  
3 : 4 4 P M 9 far as how HDL had the shipping and handling, process payment  
3 : 4 4 P M 10 fee, how much it was, the business model for that, how the  
3 : 4 4 P M 11 doctors were reimbursed for that, and then also how, then, the  
3 : 4 4 P M 12 consultants, the sales staff for BlueWave, the contractors, how  
3 : 4 4 P M 13 they were compensated. And then it went into the legal  
3 : 4 5 P M 14 analysis of the Anti-Kickback Statute. And then it went into  
3 : 4 5 P M 15 citing an analysis of various advisory opinions and came to a  
3 : 4 5 P M 16 conclusion.

3 : 4 5 P M 17 Q. What was the conclusion that attorney Entin conveyed to  
3 : 4 5 P M 18 BlueWave sales representative Emily Barron?

3 : 4 5 P M 19 A. The conclusion was that the model of paying the physicians  
3 : 4 5 P M 20 based upon volume, so \$20 total, paying them based upon volume,  
3 : 4 5 P M 21 violated the Anti-Kickback Statute because it did not fit into  
3 : 4 5 P M 22 one of the safe harbors, specifically the management service  
3 : 4 5 P M 23 portion, personal management service section, that requires any  
3 : 4 5 P M 24 type of fees or compensation to be up-front, aggregated, and  
3 : 4 5 P M 25 not based upon volume. And --

3 : 4 5 P M 1 Q. Sorry to interrupt. When you say "based upon volume," can  
3 : 4 5 P M 2 you explain what you're referring to?

3 : 4 5 P M 3 A. That's what I was going to get to.

3 : 4 5 P M 4 Based upon -- so if it's a flat fee or a fee set  
3 : 4 5 P M 5 up-front, then the physician isn't enticed to write more lab  
3 : 4 6 P M 6 work, request more lab work. When you're paid \$25 every time  
3 : 4 6 P M 7 you write a lab, it entices the doctors for that \$20 for every  
3 : 4 6 P M 8 time you write a lab versus whether or not the lab is actually  
3 : 4 6 P M 9 medically necessary.

3 : 4 6 P M 10 So under the Anti-Kickback Statute, it has  
3 : 4 6 P M 11 specifically in there that requirement that you do not set your  
3 : 4 6 P M 12 compensation based upon volume. And this was definitely a  
3 : 4 6 P M 13 volume-based reimbursement.

3 : 4 6 P M 14 Q. Did you advise Ms. Barron about Mr. Entin's legal opinion?

3 : 4 6 P M 15 A. Yes.

3 : 4 6 P M 16 Q. What did you advise her?

3 : 4 6 P M 17 A. I agreed with the legal opinion.

3 : 4 6 P M 18 Q. Why is that?

3 : 4 6 P M 19 A. Because it was correct.

3 : 4 6 P M 20 Q. Did you find the Anti-Kickback Statute too vague or  
3 : 4 6 P M 21 confusing to advise Ms. Barron?

3 : 4 6 P M 22 A. Not at all.

3 : 4 6 P M 23 Q. What about the fact that the Anti-Kickback Statute doesn't  
3 : 4 6 P M 24 say the specific words "processing and handling fee"?

3 : 4 7 P M 25 A. Well, when laws are drafted, they can't think of every way

3 : 4 7 P M 1 that -- remuneration is what's in the statute. Remuneration  
3 : 4 7 P M 2 means fees or paying. And then you have every example. The  
3 : 4 7 P M 3 Office of Inspector General has advisory opinions that gives  
3 : 4 7 P M 4 examples of how people are paying doctors and whether it's  
3 : 4 7 P M 5 proper or not.

3 : 4 7 P M 6 So the statute isn't going to be able to think of  
3 : 4 7 P M 7 every word to describe how one is to be paid, but remuneration,  
3 : 4 7 P M 8 as it's defined, is paying a practice, a health care provider.  
3 : 4 7 P M 9 So it's whatever you want to call it from thereafter.

3 : 4 7 P M 10 Q. Can you please turn to Tab 2 in your binder.

3 : 4 7 P M 11 This is Plaintiffs' Exhibit 1155, previously  
3 : 4 7 P M 12 admitted.

3 : 4 7 P M 13 Are you familiar with Plaintiffs' Exhibit 1155?

3 : 4 7 P M 14 A. Yes.

3 : 4 7 P M 15 Q. What is it?

3 : 4 7 P M 16 A. It was what was referred to as the time and motion study  
3 : 4 7 P M 17 that Emily Barron provided to me. And this is what she was  
3 : 4 8 P M 18 told by BlueWave and HDL to provide to the actual physicians as  
3 : 4 8 P M 19 the time and motion study showing that the payments were  
3 : 4 8 P M 20 justified.

3 : 4 8 P M 21 Q. And at the top of the document in the re line, it mentions  
3 : 4 8 P M 22 "HDL's position statement" --"

3 : 4 8 P M 23 A. Yes.

3 : 4 8 P M 24 Q. -- "on processing and handling fees"?

3 : 4 8 P M 25 Did you review this physician statement,

3 : 4 8 P M 1 Exhibit 1155?

3 : 4 8 P M 2 A. Yes.

3 : 4 8 P M 3 Q. Did you advise Ms. Barron your opinion of this position  
3 : 4 8 P M 4 letter?

3 : 4 8 P M 5 A. Yes.

3 : 4 8 P M 6 Q. Excuse me -- position statement?

3 : 4 8 P M 7 what did you advise Ms. Barron about the HDL position  
3 : 4 8 P M 8 statement?

3 : 4 8 P M 9 A. Well, one of the foremost things was the summary and  
3 : 4 8 P M 10 background. And I would assume someone reviewed this before  
3 : 4 8 P M 11 they started handing this out to their physician that they  
3 : 4 8 P M 12 wanted to actually do business with. And it may sound like a  
3 : 4 8 P M 13 technical typo, but they don't even have the correct advisory  
3 : 4 8 P M 14 opinion in here, so I thought that was odd.

3 : 4 8 P M 15 Q. Can you show us what you're referring to?

3 : 4 9 P M 16 A. In the summary and background, it starts, second sentence,  
3 : 4 9 P M 17 "an ordering physician for the collection of specimens on June  
3 : 4 9 P M 18 6, 2005 (OIG Advisory Opinion 05-018)."

3 : 4 9 P M 19 How advisory opinions are numbered are based upon the  
3 : 4 9 P M 20 year. So 2005 would be 05. And then 18 would be the 18th  
3 : 4 9 P M 21 advisory opinion of the year. This is -- it's the 8th advisory  
3 : 4 9 P M 22 opinion of the year. So that was one thing.

3 : 4 9 P M 23 And then, when you actually read the correct advisory  
3 : 4 9 P M 24 opinion with her -- with the summation that Ms. Mallory signs  
3 : 4 9 P M 25 to, it's incorrect. That's not what the advisory opinion says.



3 : 4 9 P M 1 Q. And what did you advise Ms. Barron was incorrect about the  
3 : 4 9 P M 2 HDL position statement?

3 : 4 9 P M 3 A. Well, the position statement specifically saying that -- I  
3 : 4 9 P M 4 mean, that this is a proper end conclusion -- I'll jump to the  
3 : 5 0 P M 5 conclusion, saying, "The process and handling fee arrangement  
3 : 5 0 P M 6 described above is consistent with the 'arm's length, fixed in  
3 : 5 0 P M 7 advance, fair market value' requirements of the applicable safe  
3 : 5 0 P M 8 harbor provisions of the federal Anti-Kickback Statute and  
3 : 5 0 P M 9 Stark Law."

3 : 5 0 P M 10 THE COURT: Slow down. My court reporter is good,  
3 : 5 0 P M 11 but not that good.

3 : 5 0 P M 12 BY MR. TERRANOVA:

3 : 5 0 P M 13 Q. Could you please turn to page 2. I think, Mr. Dickerson,  
3 : 5 0 P M 14 you were referring to a conclusion at the bottom of Plaintiffs'  
3 : 5 0 P M 15 Exhibit 1155. Sorry.

3 : 5 0 P M 16 Sorry. Exhibit 1155.

3 : 5 0 P M 17 MR. PHANEUF: You want to go to the end?

3 : 5 0 P M 18 MR. TERRANOVA: I think we're on Exhibit 1014. Thank  
3 : 5 0 P M 19 you. If you could please turn to the second page, the  
3 : 5 0 P M 20 conclusion. If you could just pull that up for the jury to be  
3 : 5 0 P M 21 able to see.

3 : 5 1 P M 22 BY MR. TERRANOVA:

3 : 5 1 P M 23 Q. Sorry to interrupt you, Mr. Dickerson. What were you  
3 : 5 1 P M 24 explaining about this conclusion in HDL's position statement?

3 : 5 1 P M 25 A. So slower, that statement right there is what is stated as

3 : 5 1 P M 1 the conclusion as far as the basis for not violating the  
3 : 5 1 P M 2 Anti-Kickback Statute and specifically saying it's within the  
3 : 5 1 P M 3 safe harbor provision.

3 : 5 1 P M 4 That safe harbor provision is -- it does require  
3 : 5 1 P M 5 advanced and acknowledged fee, but it's not based upon volume.  
3 : 5 1 P M 6 And that's the largest sticking point of everything with  
3 : 5 1 P M 7 setting up contracts between physicians' offices and ancillary  
3 : 5 1 P M 8 services, which is, like, a lab, is you can't be -- the fees  
3 : 5 1 P M 9 can't be paid based upon volume. So there in this conclusion,  
3 : 5 1 P M 10 there's nothing even discussing the volume.

3 : 5 1 P M 11 And then if you go back to the summary and  
3 : 5 1 P M 12 background, page 1, the correct cite, the 508, within that  
3 : 5 2 P M 13 advisory opinion, it's specifically stating it cannot be based  
3 : 5 2 P M 14 upon volume.

3 : 5 2 P M 15 Q. So you're saying that the OIG advisory opinion that  
3 : 5 2 P M 16 defendant Mallory cited in this document has language in there  
3 : 5 2 P M 17 that's squarely inconsistent with the conclusion in defendant  
3 : 5 2 P M 18 Mallory's position statement?

3 : 5 2 P M 19 A. That and the Anti-Kickback Statute does.

3 : 5 2 P M 20 Q. After reviewing Mr. Entin's legal opinion, HDL's position  
3 : 5 2 P M 21 statement, and speaking with Ms. Barron, did you advise  
3 : 5 2 P M 22 Ms. Barron about how to act in relation to her work for  
3 : 5 2 P M 23 Bluewave?

3 : 5 2 P M 24 A. I told her at that point in time that she should not be  
3 : 5 2 P M 25 doing any business for them, soliciting to doctors the process

1 and handling fee, that I needed to speak with counsel for HDL  
2 and Bluewave to see if there was some internal mechanism that  
3 they had to justify why they had a system where they were  
4 paying the physicians based upon a referral basis.

5 Q. why did you advise Bluewave sales representative  
6 Ms. Barron to stop doing work for Bluewave?

7 A. Because if she went on and continued to do that, that was  
8 a violation of the Anti-Kickback Statute.

9 Q. Did you have any difficulty convincing Ms. Barron to  
10 follow your advice and stop working for Bluewave?

11 A. I wouldn't say I had difficulty in telling her not to work  
12 for Bluewave, because this was August 2013. what I had  
13 difficulty doing is convincing her that this is what the  
14 Anti-Kickback Statute said, this is what the advisory rule  
15 said, and she couldn't be going out talking to the doctors and  
16 promoting this.

17 And she had this profound, I would say, belief that  
18 Mr. Dent and Mr. Johnson had told her this was legitimate, this  
19 was legal, their lawyers told them this, that she was following  
20 that. And it took a while to be able to show her that a real  
21 health care lawyer looking at this would see this quickly, that  
22 it's a -- per-click is what we call it in the field -- but a  
23 per-referral fee and a violation of the Anti-Kickback Statute.

24 Q. And why did you face some resistance at first in getting  
25 Ms. Barron to understand what the law actually was?

3 : 5 4 P M 1 A. I think because her reliance upon what she was told by  
3 : 5 4 P M 2 Mr. Johnson and Mr. Dent. And I know at one time she went up  
3 : 5 4 P M 3 to Virginia to HDL and met with Ms. Mallory. And she -- she  
3 : 5 4 P M 4 was adamant. Here's this study. They have lawyers with these  
3 : 5 4 P M 5 opinions. That's the reason she came to me, because Josh gave  
3 : 5 4 P M 6 her that opinion and she wanted to bring it to another lawyer  
3 : 5 4 P M 7 and one that focuses on health care law.

3 : 5 5 P M 8 Q. Was Ms. Barron friends with defendant Johnson?

3 : 5 5 P M 9 A. I don't know about friends. I would say, with Brad  
3 : 5 5 P M 10 Johnson, that she had a good relationship with him.

3 : 5 5 P M 11 Q. Would it be called a mentorship relationship?

3 : 5 5 P M 12 A. To an extent.

3 : 5 5 P M 13 Q. Did you reach out to any of the defendants about  
3 : 5 5 P M 14 Mr. Entin's legal opinion?

3 : 5 5 P M 15 A. I could not reach out to them.

3 : 5 5 P M 16 Q. Did you reach out to -- first of all, can you explain why.

3 : 5 5 P M 17 A. Well, I knew at the time that they were represented by  
3 : 5 5 P M 18 counsel because one of the documents that Ms. Barron provided  
3 : 5 5 P M 19 us was an email from Linda Flipppo and her firm basically  
3 : 5 5 P M 20 telling the sales representatives that there is a subpoena and  
3 : 5 5 P M 21 they couldn't destroy any documents and records.

3 : 5 5 P M 22 So I knew that Linda Flipppo was already representing  
3 : 5 6 P M 23 Bluewave. So that's why I contacted her because ethically I  
3 : 5 6 P M 24 could not contact Mr. Dent or Mr. Johnson.

3 : 5 6 P M 25 Q. Is it fair to say, as an attorney, you had a professional

3 : 5 6 P M 1 obligation not to contact directly a represented party?

3 : 5 6 P M 2 A. When I know they're represented by counsel, I need to go  
3 : 5 6 P M 3 through counsel.

3 : 5 6 P M 4 Q. Did you in fact go through counsel?

3 : 5 6 P M 5 A. Yes, I contacted Ms. Flipppo.

3 : 5 6 P M 6 Q. Did you contact any other Bluewave attorneys about  
3 : 5 6 P M 7 Mr. Entin's memo and your conclusions?

3 : 5 6 P M 8 A. Ms. Flipppo then directed me to Gene Sellers, who I was  
3 : 5 6 P M 9 told was their corporate lawyer. And I talked to Gene Sellers.  
3 : 5 6 P M 10 And then I can't remember -- there was a third lawyer that  
3 : 5 6 P M 11 became involved in October when we were negotiating trying to  
3 : 5 6 P M 12 resolve our concerns. And I can't remember at this time, but  
3 : 5 6 P M 13 there was a third lawyer.

3 : 5 6 P M 14 Q. What did you tell the Bluewave attorneys about Mr. Entin's  
3 : 5 6 P M 15 letter and your conclusion?

3 : 5 6 P M 16 A. I told all of the lawyers representing Bluewave that the  
3 : 5 7 P M 17 business model violates the Anti-Kickback Statute. And my  
3 : 5 7 P M 18 client, Ocean Diagnostic, Emily Barron, was saying there's  
3 : 5 7 P M 19 these legal opinions that justify.

3 : 5 7 P M 20 So I asked all of the lawyers, if you have these  
3 : 5 7 P M 21 legal opinions, let me look at these legal opinions, because  
3 : 5 7 P M 22 when I see this business model or whatever it is, I see it's  
3 : 5 7 P M 23 paying doctors based upon referrals, not based upon any other  
3 : 5 7 P M 24 arrangement, and it violates the Anti-kickback Safe harbor.

3 : 5 7 P M 25 So I asked that from Ms. Flipppo. She passed me on to

3 : 5 7 P M 1 Mr. Sellers. I talked to Mr. Sellers about it. And I would  
3 : 5 7 P M 2 say Mr. Sellers probably had zero health care experience,  
3 : 5 7 P M 3 because I used an OIG -- Office of Inspector General -- AKS --  
3 : 5 7 P M 4 Anti-Kickback Statute -- terminology that health care lawyers  
3 : 5 7 P M 5 use all the time, and he didn't know what the Office of  
3 : 5 7 P M 6 Inspector General was.

3 : 5 7 P M 7 So, that said, I went on his website, and looked at  
3 : 5 8 P M 8 his website, and found out that his firm was a real estate,  
3 : 5 8 P M 9 title, trust, and estates law firm.

3 : 5 8 P M 10 Q. Did you ask any of the BlueWave defendants to produce  
3 : 5 8 P M 11 documents to you regarding the issues and legal concerns that  
3 : 5 8 P M 12 you had?

3 : 5 8 P M 13 A. I asked their lawyers to produce me any records,  
3 : 5 8 P M 14 documents, expert opinions that would justify this.

3 : 5 8 P M 15 Ms. Flipppo, she was representing BlueWave in response  
3 : 5 8 P M 16 to the government's subpoenas. And that's why she had  
3 : 5 8 P M 17 introduced me to Mr. Sellers, because she said Mr. Sellers was  
3 : 5 8 P M 18 the lawyer dealing with it day by day. And then I asked  
3 : 5 8 P M 19 Mr. Sellers for the same thing.

3 : 5 8 P M 20 Q. Did you ever receive legal opinions that you had  
3 : 5 8 P M 21 requested?

3 : 5 8 P M 22 A. Never received any of the legal opinions or -- I'm not  
3 : 5 8 P M 23 going to say there was a legal opinion. I didn't receive any  
3 : 5 8 P M 24 opinion at all.

3 : 5 8 P M 25 Q. Could you please turn to Tab 3. This is Plaintiffs'

3 : 5 8 P M 1 Exhibit 1031.

3 : 5 8 P M 2 Are you familiar with Exhibit 1031?

3 : 5 9 P M 3 A. Yes.

3 : 5 9 P M 4 Q. What is it?

3 : 5 9 P M 5 A. It's email communications between myself, Ms. Flipppo, and  
3 : 5 9 P M 6 then one of my associates, Andrew Feldman. And then I believe  
3 : 5 9 P M 7 Gene Sellers is on some of these emails, yeah.

3 : 5 9 P M 8 Q. And what's the date of the correspondence on the first  
3 : 5 9 P M 9 page?

3 : 5 9 P M 10 A. It's from September 16th to the first page, Tuesday,  
3 : 5 9 P M 11 September 17th, 2013.

3 : 5 9 P M 12 Q. And who are the individuals involved in this email?

3 : 5 9 P M 13 A. Linda Flipppo was counsel for Bluewave. She was at White  
3 : 5 9 P M 14 Arnold & Dowd out of Birmingham. I think it's Birmingham.  
3 : 5 9 P M 15 Yeah, Birmingham, Alabama. She told me she represented  
3 : 5 9 P M 16 Bluewave with regard to responding to the government's  
3 : 5 9 P M 17 subpoena.

3 : 5 9 P M 18 Gene Sellers is the lawyer that she represented to  
3 : 5 9 P M 19 me, and Gene confirmed he was counsel for Bluewave. And Andrew  
3 : 5 9 P M 20 Feldman, who was on this email, was an associate of mine.

4 : 0 0 P M 21 MR. TERRANOVA: Your Honor, we move for the admission  
4 : 0 0 P M 22 of Plaintiffs' Exhibit 1031.

4 : 0 0 P M 23 THE COURT: Any objection?

4 : 0 0 P M 24 MR. GRIFFITH: Your Honor, our previous objections.

4 : 0 0 P M 25 THE COURT: Can I see that document?

(Pause.)

**THE COURT:** Any objection from Mallory?

**MR. ASHMORE:** No, sir.

**THE COURT:** Overrule the objection. Plaintiffs' 1031 is admitted over BlueWave's objection.

**BY MR. TERRANOVA:**

**Q.** Mr. Dickerson, could you please go down to the last email on the first page. I want to talk about a few sentences that you wrote to Ms. Flippo.

First one, do you see "this should not take this long to set up call"?

**A.** Yes.

**Q.** What were you explaining to Ms. Flippo in this sentence?

**A.** We were trying to set up a telephone call with Ms. Flippo and anybody involved in their legal team to discuss the issues. This had been going on for weeks, and we could never set up a telephone call. We could never just get someone on the phone to talk about the issues. And it was being -- I mean, I know all lawyers are busy, I'm busy, but you can set up a conference call to talk about an issue like this, and it was taking forever.

**Q.** In the third sentence, you said, "I would rather talk than write about the outstanding issues." Do you see that?

**A.** Yes.

**Q.** What were you trying to convey to Ms. Flippo by saying



4 : 0 2 P M 1 you'd rather talk than write about the outstanding issues we've  
4 : 0 2 P M 2 raised?

4 : 0 2 P M 3 A. Because we'd been going on, by this time, a month. And  
4 : 0 2 P M 4 emails, and there's no answer to emails. If you don't have  
4 : 0 2 P M 5 someone on the phone talking to them directly, they can be  
4 : 0 2 P M 6 evasive in responding to your emails. So I'm kind of  
4 : 0 2 P M 7 old-fashioned. Instead of an email, let's get on the phone,  
4 : 0 2 P M 8 let's talk it out. If you've got something to say, let's say  
4 : 0 2 P M 9 it.

4 : 0 2 P M 10 Q. In your last sentence in this email to Ms. Flippo, you  
4 : 0 2 P M 11 wrote, "whomever set up the BlueWave structure and is  
4 : 0 3 P M 12 contending it is viable needs to be on the call."

4 : 0 3 P M 13 Do you see that sentence?

4 : 0 3 P M 14 A. Yes.

4 : 0 3 P M 15 Q. Why did you tell that to Ms. Flippo?

4 : 0 3 P M 16 A. Because we were getting the runaround. I mean, if -- I  
4 : 0 3 P M 17 wanted the person responsible for how the business operations  
4 : 0 3 P M 18 were set up between BlueWave and their sales associates and the  
4 : 0 3 P M 19 HDL processing and handling. I wanted them on the call so I  
4 : 0 3 P M 20 could talk.

4 : 0 3 P M 21 Otherwise, I knew what was going to happen.  
4 : 0 3 P M 22 Ms. Flippo would get on the phone. I'd talk to her. She'd  
4 : 0 3 P M 23 say, "well, I don't know. I didn't do that. Someone else did  
4 : 0 3 P M 24 that." well, I wanted them on the phone so we could get this  
4 : 0 3 P M 25 packed up and get to the bottom of it.

4 : 0 3 P M 1 Q. How did Ms. Flippo respond to your email?

4 : 0 3 P M 2 A. We had a call at one time.

4 : 0 3 P M 3 Q. And Ms. Flippo says, "As we discussed in our last call,  
4 Mark White and I, we are not Bluewave's corporate counsel."

4 : 0 3 P M 5 what did you understand that to mean?

4 : 0 3 P M 6 A. Like she told me, they were defending Bluewave with regard  
4 : 0 4 P M 7 to the subpoena, but they were not the corporate counsel  
4 : 0 4 P M 8 advising Bluewave on their day-to-day operations.

4 : 0 4 P M 9 Q. Who did you understand was advising Bluewave on day-to-day  
4 : 0 4 P M 10 operations?

4 : 0 4 P M 11 A. As of this email, Mr. Sellers.

4 : 0 4 P M 12 Q. Did you ultimately reach out to Mr. Sellers?

4 : 0 4 P M 13 A. I eventually had telephone conversations with Mr. Sellers,  
4 : 0 4 P M 14 yes.

4 : 0 4 P M 15 Q. What did you say to Mr. Sellers?

4 : 0 4 P M 16 A. I had a conversation with him trying to find out what his  
4 : 0 4 P M 17 role was. He did say that he advised Bluewave on -- as their  
4 : 0 4 P M 18 corporate counsel, as it was being called, and who had  
4 : 0 4 P M 19 recommended the system that they'd set up between the  
4 : 0 4 P M 20 compensation with the 1099 sales reps and then the processing  
4 : 0 4 P M 21 and handling. And that's when I basically get the runaround  
4 : 0 4 P M 22 that they didn't have an expert opinion.

4 : 0 4 P M 23 There was still the comment that HDL had an expert  
4 : 0 5 P M 24 opinion on their process and handling, but Bluewave did not  
4 : 0 5 P M 25 have any expert opinion. And then I had a conversation with

4 : 0 5 P M 1 him recommending that he consults with a health care lawyer  
4 : 0 5 P M 2 that understands this part of the business, have that  
4 : 0 5 P M 3 conversation, and have a -- an assessment done to see if that  
4 : 0 5 P M 4 lawyer agrees with him or not.

4 : 0 5 P M 5 Q. Let me break that down a little bit. Did you speak with  
4 : 0 5 P M 6 Mr. Sellers about any concerns that you had regarding process  
4 : 0 5 P M 7 and handling fees?

4 : 0 5 P M 8 A. I raised with Sellers, with Flipppo, will every lawyer I  
4 : 0 5 P M 9 could talk to on that side the concern of the Anti-Kickback  
4 : 0 5 P M 10 Statute and how it violated the Anti-Kickback Statute.

4 : 0 5 P M 11 Q. Did you raise with Mr. Sellers any concerns you had about  
4 : 0 5 P M 12 the commission compensation that BlueWave paid to its sales  
4 : 0 5 P M 13 representatives?

4 : 0 5 P M 14 A. Yes. It was the same concern. When you have contracts  
4 : 0 5 P M 15 and you have 1099 sales reps, under the safe harbors if you're  
4 : 0 6 P M 16 an employee that fits under one of the safe harbors. When  
4 : 0 6 P M 17 you're not an employee, when you're a 1099 sales rep, as we  
4 : 0 6 P M 18 have here, then the contracts between BlueWave and Ocean  
4 : 0 6 P M 19 Diagnostic sales reps with 1099, independent contractors, that  
4 : 0 6 P M 20 the only way, then, those independent contractors could fit  
4 : 0 6 P M 21 under a safe harbor -- which means it doesn't violate the  
4 : 0 6 P M 22 Anti-Kickback Statute -- is, again, that the compensation is  
4 : 0 6 P M 23 agreed to, aggregated before our time, and that that fee is not  
4 : 0 6 P M 24 based upon a per-click or referral basis.

4 : 0 6 P M 25 And the agreements that I saw were based upon

1 percentage of either collection recovered or revenue recovered  
2 from the billings. So it was based upon the more the doctors  
3 wrote, the more reimbursement there was, the more percentage  
4 the sales reps would receive.

5 And so that was my concern, that that violated the  
6 Anti-Kickback Statute. And I kept bringing up what kind of  
7 fair market value study they had on any of this to deem it  
8 beyond -- that the fee wasn't proper because it was based upon  
9 referrals, that it was a fair market value fee. And nothing  
10 was provided.

11 Q. What was Mr. Sellers' response when you raised your legal  
12 concerns about processing and handling fees and commission  
13 payments?

14 A. He really didn't have one.

15 Q. Why not?

16 A. I don't think he knew.

17 Q. And you had mentioned before some difficulty in speaking  
18 with him about health care law issues?

19 A. He -- he did not understand the basic acronyms, principles  
20 of the health care industry, and what BlueWave and HDL were  
21 doing.

22 Q. Were you surprised by that?

23 A. I was very surprised since Ms. Flippo was the one that  
24 told me this is their corporate counsel.

25 Q. What did you do after finding out that it was clear that

4 : 0 7 P M 1 Mr. Sellers did not understand the Anti-Kickback Statute?

4 : 0 7 P M 2 A. Well, I went on his website, like I said, and looked at  
4 : 0 7 P M 3 his website and confirmed that he didn't have any health care  
4 : 0 7 P M 4 experience. And then I recommended to him to hire an expert.  
4 : 0 8 P M 5 I said, "Hire any expert you can get to get a true health care  
4 : 0 8 P M 6 lawyer to look at this." And then I even recommended a lawyer  
4 : 0 8 P M 7 for him to look at.

4 : 0 8 P M 8 Q. Mr. Dickerson, could you please turn to Tab 4, which is  
4 : 0 8 P M 9 Plaintiffs' Exhibit 1185.98.

4 : 0 8 P M 10 Are you familiar with this exhibit?

4 : 0 8 P M 11 A. Yes. It's an email between myself and Lester Perling at a  
4 : 0 8 P M 12 law firm named Broad and Cassel. And then we forwarded that  
4 : 0 8 P M 13 information about Lester Perling to Gene Sellers.

4 : 0 8 P M 14 MR. TERRANOVA: Your Honor, we offer Plaintiffs'  
4 : 0 8 P M 15 Exhibit 1185.98.

4 : 0 8 P M 16 THE COURT: Any objections?

4 : 0 8 P M 17 MR. GRIFFITH: No objection, Your Honor.

4 : 0 8 P M 18 MR. ASHMORE: No, sir.

4 : 0 8 P M 19 THE COURT: Plaintiffs' 1185.98 is admitted without  
4 : 0 8 P M 20 objection.

4 : 0 8 P M 21 BY MR. TERRANOVA:

4 : 0 8 P M 22 Q. Mr. Dickerson, if you could please focus on the first  
4 : 0 8 P M 23 email on this page at the top. Do you see that you write to  
4 : 0 9 P M 24 Mr. Sellers, "Per our discussion today, I am sending the  
4 : 0 9 P M 25 contact information for Lester Perling, who I highly recommend

4 : 0 9 P M 1 your client retaining to understand the issues with the  
4 : 0 9 P M 2 kickback stature. His contact information is below"?

4 : 0 9 P M 3 A. Yes. I guess that should be "statute" and not "stature."

4 : 0 9 P M 4 Q. Why were you recommending that Mr. Sellers' client,  
4 : 0 9 P M 5 Bluewave, retain Mr. Perling to understand the issues with the  
4 : 0 9 P M 6 kickback statute?

4 : 0 9 P M 7 A. It is because we kept hearing from the Bluewave side that  
4 : 0 9 P M 8 everything was legal, justified, and complied with the  
4 : 0 9 P M 9 Anti-Kickback Statute. From everything I saw, it did not. And  
4 : 0 9 P M 10 Mr. Sellers did not have, what I would say, the health care  
4 : 0 9 P M 11 knowledge to be able to understand it as well.

4 : 0 9 P M 12 So I was trying to, basically, gave a little kick and  
4 : 1 0 P M 13 say, "Talk to this individual, Lester Perling. He can come in.  
4 : 1 0 P M 14 won't be me. Outsider. You can bring someone in. They can  
4 : 1 0 P M 15 look at it. They can give you their opinion."

4 : 1 0 P M 16 But I was trying to get him to get to a health care  
4 : 1 0 P M 17 lawyer that was knowledgeable. The reason I picked Lester  
4 : 1 0 P M 18 Perling is because Bluewave was -- really had a large business  
4 : 1 0 P M 19 in Florida, and Florida has its own state statutes -- not  
4 : 1 0 P M 20 relevant here -- that said Lester should be reviewing as well.

4 : 1 0 P M 21 Q. Had you known Lester Perling before you recommended him to  
4 : 1 0 P M 22 Bluewave's counsel?

4 : 1 0 P M 23 A. Yeah, I've worked with Lester Perling for many years.

4 : 1 0 P M 24 Q. What's your evaluation of Mr. Perling?

4 : 1 0 P M 25 MR. GRIFFITH: Objection, Your Honor.

4 : 1 0 P M 1 MR. TERRANOVA: I will rephrase.

4 : 1 0 P M 2 THE COURT: Sustained.

4 : 1 0 P M 3 BY MR. TERRANOVA:

4 : 1 0 P M 4 Q. why did you recommend Mr. Perling to BlueWave's counsel?

4 : 1 0 P M 5 A. I've worked with Lester Perling on many cases, false  
4 : 1 0 P M 6 claims cases like these right here. I've worked with  
4 : 1 0 P M 7 Mr. Perling on setting up business models where he represents  
4 : 1 0 P M 8 the practitioner. I represent the payment service. And if  
4 : 1 1 P M 9 there's anybody I would really trust with not only knowing the  
4 : 1 1 P M 10 federal Anti-Kickback Statute, Stark statutes, and the health  
4 : 1 1 P M 11 care laws, he is one of the top five that I would trust.

4 : 1 1 P M 12 Q. And below your email, it appears you provided Lester  
4 : 1 1 P M 13 Perling's contact information?

4 : 1 1 P M 14 A. Correct.

4 : 1 1 P M 15 Q. What is Mr. Perling's email address?

4 : 1 1 P M 16 A. You said what is it?

4 : 1 1 P M 17 Q. Yes.

4 : 1 1 P M 18 A. lperling@broadandcassel.com.

4 : 1 1 P M 19 Q. Did Bluewave follow your advice and retain Mr. Perling?

4 : 1 1 P M 20 A. No.

4 : 1 1 P M 21 Q. Did Bluewave tell you it had retained some other expert on  
4 : 1 1 P M 22 health care law?

4 : 1 1 P M 23 A. No.

4 : 1 1 P M 24 Q. What did Bluewave do?

4 : 1 1 P M 25 A. Bluewave fired -- or terminated the contract with Emily

4 : 1 1 P M 1 Barron.

4 : 1 1 P M 2 Q. Did Bluewave explain why they fired Ms. Barron?

4 : 1 1 P M 3 A. There's a letter dated September 30th, but it wasn't sent  
4 : 1 2 P M 4 on September 30th. I think it was sent, like, on the 27th but  
4 : 1 2 P M 5 dated September 30th, saying that they terminated her for  
4 : 1 2 P M 6 cause.

4 : 1 2 P M 7 Q. Mr. Dickerson, could you please turn to Tab 6 of your  
4 : 1 2 P M 8 binder, Plaintiffs' Exhibit 1025.

4 : 1 2 P M 9 Are you familiar with Exhibit 1025?

4 : 1 2 P M 10 A. Yes.

4 : 1 2 P M 11 Q. What is it?

4 : 1 2 P M 12 A. It's Brad Johnson's termination letter of the independent  
4 : 1 2 P M 13 contractor Ocean Diagnostic in care of Emily Barron.

4 : 1 2 P M 14 MR. TERRANOVA: Your Honor, we offer Plaintiffs'  
4 : 1 2 P M 15 Exhibit 1025.

4 : 1 2 P M 16 THE COURT: Any objection?

4 : 1 2 P M 17 MR. GRIFFITH: No objection.

4 : 1 2 P M 18 MR. ASHMORE: No, sir.

4 : 1 2 P M 19 THE COURT: Plaintiff 1025 admitted without  
4 : 1 2 P M 20 objection.

4 : 1 2 P M 21 BY MR. TERRANOVA:

4 : 1 2 P M 22 Q. Do you see in the first paragraph of the letter that  
4 : 1 2 P M 23 defendant Johnson writes that Ocean Diagnostics "failed to  
4 : 1 2 P M 24 perform services in accordance with the highest standards of  
4 : 1 3 P M 25 skill and care, which is a material breach"?



4 : 1 3 P M 1 A. I see that, yes.

4 : 1 3 P M 2 Q. Did you agree with that?

4 : 1 3 P M 3 A. No.

4 : 1 3 P M 4 Q. Why not.

4 : 1 3 P M 5 A. Because she was terminated because, for the previous 45  
4 : 1 3 P M 6 days at least, or not -- the previous, yeah, 45 days, maybe 50,  
4 : 1 3 P M 7 we are reaching out to Linda Flipppo and Gene Sellers, saying  
4 : 1 3 P M 8 that the business operation, the business model violated the  
4 : 1 3 P M 9 Anti-Kickback Statute and we needed to have a conversation to  
4 : 1 3 P M 10 see whether or not she can continue to work for them under this  
4 : 1 3 P M 11 model or whether the company is going to change their model.  
4 : 1 3 P M 12 And I told her as well don't go out and solicit any more  
4 : 1 3 P M 13 doctors with regard to this because it's a violation of the  
4 : 1 3 P M 14 Anti-Kickback Statute.

4 : 1 3 P M 15 So it's a -- it's a quandary. If she went out there  
4 : 1 3 P M 16 and tried to contact any more, she'd be violating the  
4 : 1 3 P M 17 Anti-Kickback Statute, because at that point in time, she knew  
4 : 1 3 P M 18 that the model and the structure was in violation of the  
4 : 1 3 P M 19 Anti-Kickback Statute.

4 : 1 3 P M 20 Q. What did you do after you received this termination letter  
4 : 1 4 P M 21 of Ms. Barron?

4 : 1 4 P M 22 A. I -- I can't remember if I called. I know I emailed,  
4 : 1 4 P M 23 trying -- we did a letter -- I know that -- back to Sellers. I  
4 : 1 4 P M 24 can't remember if we carbon-copied Flipppo, but we contacted  
4 : 1 4 P M 25 Gene Sellers.

4 : 1 4 P M 1 Q. will you please turn to Tab 7 in your binder, Plaintiffs'  
4 : 1 4 P M 2 Exhibit 1185.32.

4 : 1 4 P M 3 Are you familiar with this exhibit?

4 : 1 4 P M 4 A. Yes.

4 : 1 4 P M 5 Q. what is it?

4 : 1 4 P M 6 A. well, the email below is email to me to Gene Sellers and  
4 : 1 4 P M 7 Linda Flipppo. It's September -- Saturday the 28th. So the  
4 : 1 4 P M 8 letter was dated the 30th, but we received it either the 27th  
4 : 1 4 P M 9 or the 28th.

4 : 1 4 P M 10 Q. And what did your email to Gene Sellers and Linda Flipppo  
4 : 1 4 P M 11 concern?

4 : 1 4 P M 12 A. Again, just -- I was shocked that she was terminated. We  
4 : 1 4 P M 13 were in discussions, and she was terminated because we were  
4 : 1 4 P M 14 talking to them about their business being illegal, violating  
4 : 1 5 P M 15 the kickback statute, and -- I mean, the termination, on its  
4 : 1 5 P M 16 face, is a retaliation because she was bringing up and raising  
4 : 1 5 P M 17 the issues that this was an illegal business operation.

4 : 1 5 P M 18 MR. TERRANOVA: Your Honor, we'd move for  
4 : 1 5 P M 19 admission of Plaintiffs' Exhibit 1185.

4 : 1 5 P M 20 THE COURT: 1185.32?

4 : 1 5 P M 21 MR. TERRANOVA: Yes. Thank you.

4 : 1 5 P M 22 THE COURT: Very good. Any objection?

4 : 1 5 P M 23 MR. GRIFFITH: No objection.

4 : 1 5 P M 24 MR. ASHMORE: No objection.

4 : 1 5 P M 25 THE COURT: Plaintiffs' 1185.32 admitted without

4 : 1 5 P M 1 objection.

4 : 1 5 P M 2 MR. TERRANOVA: Mr. Phaneuf, could you please  
4 : 1 5 P M 3 highlight the first paragraph?

4 : 1 5 P M 4 BY MR. TERRANOVA:

4 : 1 5 P M 5 Q. Mr. Dickerson, I wanted to walk you through this email  
4 : 1 5 P M 6 that you sent to BlueWave's counsel.

4 : 1 5 P M 7 In the first sentence, you wrote, "I was shocked to  
4 : 1 5 P M 8 learn today that my client, Ocean Diagnostics and Emily Barron,  
4 : 1 5 P M 9 received a termination letter authored by R. Bradford Johnson  
4 : 1 6 P M 10 for Bluewave, dated September 30th, 2013."

4 : 1 6 P M 11 Do you see that?

4 : 1 6 P M 12 A. Yes.

4 : 1 6 P M 13 Q. What were you communicating to the BlueWave attorneys with  
4 : 1 6 P M 14 that sentence?

4 : 1 6 P M 15 A. That I was shocked. I mean, I thought it was odd that  
4 : 1 6 P M 16 we -- I was talking with Mr. Sellers the week before about  
4 : 1 6 P M 17 this, and then out of the blue, Mr. Johnson sends this letter.

4 : 1 6 P M 18 Q. Why would you be shocked if, a week after you raised  
4 : 1 6 P M 19 concerns about the legality of Bluewave's business practices,  
4 : 1 6 P M 20 Bluewave fired a client that you were representing?

4 : 1 6 P M 21 A. It goes to the fact that most lawyers would make sure  
4 : 1 6 P M 22 that, if their client is being made aware that you have a  
4 : 1 6 P M 23 whistle-blower saying you're doing something wrong, that you  
4 : 1 6 P M 24 don't fire that person because that's retaliation.

4 : 1 6 P M 25 And so I was shocked that she was fired, and then, if

4 : 1 7 P M 1 you notice on the document, there's no carbon copy. The  
4 : 1 7 P M 2 termination letter, there's no carbon copy to the lawyers. So  
4 : 1 7 P M 3 I didn't know if the lawyers even knew at that point in time.  
4 : 1 7 P M 4 Q. So to go back to the termination letter -- I believe it's  
4 : 1 7 P M 5 Exhibit 1025 -- can you explain what you were referring to  
4 : 1 7 P M 6 about the carbon copy on this termination letter that defendant  
4 : 1 7 P M 7 Johnson sent Ms. Barron?

4 : 1 7 P M 8 A. Well, normally at the bottom of the letters, I mean, if  
4 : 1 7 P M 9 you're carbon-copying your lawyers or somebody else, you always  
4 : 1 7 P M 10 put it at the bottom who you included. That's also seen in  
4 : 1 7 P M 11 this document. And there's no notation at all that the lawyers  
4 : 1 7 P M 12 even received a copy of this. That's why I was also  
4 : 1 7 P M 13 questioning whether or not the lawyers did receive a copy of  
4 : 1 7 P M 14 this or even knew about this.

4 : 1 7 P M 15 Q. If we go back to Plaintiff's Exhibit 1185.32, in the  
4 : 1 7 P M 16 second sentence, you reference repercussions of terminating a  
4 : 1 7 P M 17 contract after that person has placed a company on notice of  
4 : 1 8 P M 18 wrongful or illegal conduct.

4 : 1 8 P M 19 Do you see that?

4 : 1 8 P M 20 A. Yes.

4 : 1 8 P M 21 Q. What were you telling the Bluewave attorneys with that  
4 : 1 8 P M 22 sentence?

4 : 1 8 P M 23 A. I mean, Ms. Flipppo would understand it, that the  
4 : 1 8 P M 24 termination of a whistle-blower has repercussions. You can't  
4 : 1 8 P M 25 fire a whistle-blower. So its retaliation claim would be

4 : 1 8 P M 1 forthcoming.

4 : 1 8 P M 2 Terminating her while she's trying to retaliate -- I  
4 : 1 8 P M 3 mean, while she's trying to whistle-blow, they're then trying  
4 : 1 8 P M 4 to retaliate because she's a whistle-blower.

4 : 1 8 P M 5 Q. Why can't you just fire a whistle-blower when she raises  
4 : 1 8 P M 6 those issues with the legality of your practice?

4 : 1 8 P M 7 A. It's protected by statute.

4 : 1 8 P M 8 Q. Would Ms. Barron have been able to seek any recourse?

4 : 1 8 P M 9 A. Yes.

4 : 1 8 P M 10 Q. What?

4 : 1 8 P M 11 A. She could have easily sued BlueWave for terminating her as  
4 : 1 8 P M 12 a whistle-blower and retaliation termination, wrongful  
4 : 1 8 P M 13 termination.

4 : 1 8 P M 14 Q. If you go to the second paragraph in this email to  
4 : 1 8 P M 15 BlueWave's counsel, do you see that you begin the paragraph,  
4 : 1 8 P M 16 "Prior to this termination letter, my client, through my  
4 : 1 8 P M 17 communication with Mr. Sellers, placed BlueWave on notice of  
4 : 1 9 P M 18 the legal issues with BlueWave's operations and the independent  
4 : 1 9 P M 19 contractor agreement."

4 : 1 9 P M 20 A. Yes, I see that.

4 : 1 9 P M 21 Q. What were you communicating here to the BlueWave  
4 : 1 9 P M 22 attorneys?

4 : 1 9 P M 23 A. That Mr. Sellers and Ms. Flippo both knew that I had  
4 : 1 9 P M 24 brought to their attention the illegality of the independent  
4 : 1 9 P M 25 contractor agreement, the anti-kickback violations.

4 : 1 9 P M 1 Q. If you go down to the third paragraph in the same email,  
4 : 1 9 P M 2 you see at the end of the paragraph, you quote "material  
4 : 1 9 P M 3 breach" language that was in defendant Johnson's termination  
4 : 1 9 P M 4 letter, and you wrote, "We know the true reason for the  
4 : 1 9 P M 5 termination."

4 : 1 9 P M 6 A. Correct.

4 : 1 9 P M 7 Q. What were you referencing here to the BlueWave attorneys?

4 : 1 9 P M 8 A. They terminated her because she was a whistle-blower in  
4 : 1 9 P M 9 bringing to their attention the illegality of the business  
4 : 1 9 P M 10 operations.

4 : 1 9 P M 11 Q. And the last section I wanted to focus you in on for this  
4 : 1 9 P M 12 email, the first paragraph, last sentence, you wrote to the  
4 : 2 0 P M 13 BlueWave attorneys, "Further, there are concerns with your  
4 : 2 0 P M 14 client's action in recent telephone conferences deemed illegal  
4 : 2 0 P M 15 training within the context of the False Claims Act."

4 : 2 0 P M 16 Do you see that?

4 : 2 0 P M 17 A. Yes.

4 : 2 0 P M 18 Q. What were you referring to here?

4 : 2 0 P M 19 A. There was a legal training -- I think it was on  
4 : 2 0 P M 20 September 13th -- that the BlueWave had their employees and  
4 : 2 0 P M 21 independent contractors attend. And it was a training, and  
4 : 2 0 P M 22 then they said that they would be receiving, like, a test, a  
4 : 2 0 P M 23 questionnaire about that. But they told them the answers to  
4 : 2 0 P M 24 what the questionnaire was.

4 : 2 0 P M 25 So when you do compliance training, you never give

4 : 2 0 P M 1 the answer. You say here's the training. You provide them  
4 : 2 0 P M 2 with the questionnaire later, and they have to answer it on  
4 : 2 0 P M 3 their own. But in this training -- I mean, it was a mock  
4 : 2 1 P M 4 training, if anything.

4 : 2 1 P M 5 Q. what did you do after alerting Bluewave defendants'  
4 : 2 1 P M 6 counsel about the repercussions of terminating someone who had  
4 : 2 1 P M 7 raised concerns about the legality of Bluewave's operations?

4 : 2 1 P M 8 A. I mean, we sent them a litigation hold letter, if that's  
4 : 2 1 P M 9 what you're getting at.

4 : 2 1 P M 10 Q. would you please turn to Tab 9 of your binder. That's  
4 : 2 1 P M 11 Plaintiffs' Trial Exhibit 1070.

4 : 2 1 P M 12 Are you familiar with Exhibit 1070?

4 : 2 1 P M 13 A. Yes, I am.

4 : 2 1 P M 14 Q. what is it?

4 : 2 1 P M 15 A. It's a litigation hold letter. It was a letter I sent to  
4 : 2 1 P M 16 Gene Sellers placing him on notice that my client, with the  
4 : 2 1 P M 17 termination of her contract, was intent on proceeding with a  
4 : 2 1 P M 18 whistle-blower termination retaliation case and for Mr. Sellers  
4 : 2 1 P M 19 to advise his client and everybody within the company not to  
4 : 2 1 P M 20 destroy any records, terminate records, delete emails. Keep  
4 : 2 2 P M 21 them all so that the evidence was preserved for the forthcoming  
4 : 2 2 P M 22 litigation.

4 : 2 2 P M 23 Q. And you referenced litigation hold. was does that refer  
4 : 2 2 P M 24 to?

4 : 2 2 P M 25 A. Litigation hold means most systems, your emails can be

4 : 2 2 P M 1 deleted after 10, 20 days automatically. It's a hold. Place  
4 : 2 2 P M 2 all hold on any type of termination, shredding the records,  
4 : 2 2 P M 3 deleting emails. When we receive one of these as counsel, you  
4 : 2 2 P M 4 and your client basically have to have your IT department  
4 : 2 2 P M 5 preserve all emails, don't let any emails get deleted, and tell  
4 : 2 2 P M 6 the employees you can't delete anything with regards to these  
4 : 2 2 P M 7 matters.

4 : 2 2 P M 8 MR. TERRANOVA: Your Honor, we offer Plaintiffs'  
4 : 2 2 P M 9 Exhibit 1070.

4 : 2 2 P M 10 THE COURT: Any objection?

4 : 2 2 P M 11 MR. GRIFFITH: No objection.

4 : 2 2 P M 12 MR. ASHMORE: No, sir.

4 : 2 2 P M 13 THE COURT: Plaintiffs' 1070 admitted without  
4 : 2 2 P M 14 objection.

4 : 2 2 P M 15 BY MR. TERRANOVA:

4 : 2 2 P M 16 Q. What happened after you sent counsel for the Bluewave  
4 : 2 2 P M 17 defendants a litigation hold letter regarding the retaliation  
4 : 2 3 P M 18 that you had believed had occurred?

4 : 2 3 P M 19 A. Then a new lawyer stepped in and offered a settlement, and  
4 : 2 3 P M 20 a settlement was negotiated. And my client decided to take the  
4 : 2 3 P M 21 settlement and not proceed.

4 : 2 3 P M 22 Q. Could you please turn to Tab 10 of Plaintiffs'  
4 : 2 3 P M 23 Exhibit 1032.

4 : 2 3 P M 24 Are you familiar with Exhibit 1032?

4 : 2 3 P M 25 A. Yes.



4 : 2 3 P M 1 Q. what is that?

4 : 2 3 P M 2 A. That is the correspondence from the new lawyer, John  
4 : 2 3 P M 3 Galese, with the settlement terms, wound up being a settlement  
4 : 2 3 P M 4 agreement. They sent a check with a settlement amount, and  
4 : 2 3 P M 5 then they had an endorsement on the check basically saying  
4 : 2 3 P M 6 that, if this payment was ever -- the check ever endorsed,  
4 : 2 3 P M 7 deposited, that was a complete and full settlement of any and  
4 : 2 3 P M 8 all claims related to any whistle-blower tort or anything that  
4 : 2 4 P M 9 Ms. Barron and Ocean Diagnostics would have against BlueWave.

4 : 2 4 P M 10 MR. TERRANOVA: Your Honor, we offer Plaintiffs'  
4 : 2 4 P M 11 Exhibit 1032.

4 : 2 4 P M 12 THE COURT: Any objection?

4 : 2 4 P M 13 MR. GRIFFITH: No objection.

4 : 2 4 P M 14 MR. ASHMORE: No objection.

4 : 2 4 P M 15 THE COURT: Plaintiffs' 1032 admitted without  
4 : 2 4 P M 16 objection.

4 : 2 4 P M 17 BY MR. TERRANOVA:

4 : 2 4 P M 18 Q. Let's take a look at page 3 of Exhibit 1032.

4 : 2 4 P M 19 Is this the settlement check that you had referenced  
4 : 2 4 P M 20 earlier?

4 : 2 4 P M 21 A. Yes.

4 : 2 4 P M 22 Q. Okay. Did you negotiate the specific amount of the  
4 : 2 4 P M 23 settlement?

4 : 2 4 P M 24 A. I don't recall negotiation on the amount.

4 : 2 4 P M 25 MR. TERRANOVA: And, Mr. Phaneuf, if you could please

4 : 2 4 P M 1 go down a little bit.

4 : 2 4 P M 2 **BY MR. TERRANOVA:**

4 : 2 4 P M 3 **Q.** Do you know whether the amount was based on the Quarter 3  
4 : 2 4 P M 4 2013 commission that Ms. Barron would have received if she  
4 : 2 4 P M 5 hadn't been terminated?

4 : 2 4 P M 6 **A.** That's what the regarding section of the check, the memo  
4 : 2 5 P M 7 says.

4 : 2 5 P M 8 **MR. TERRANOVA:** And if you could -- Mr. Phaneuf, if  
4 : 2 5 P M 9 you could please highlight this section in the memo. Thank  
4 : 2 5 P M 10 you.

4 : 2 5 P M 11 **BY MR. TERRANOVA:**

4 : 2 5 P M 12 **Q.** It says, "Endorsement and/or negotiation of this check by  
4 : 2 5 P M 13 payee constitutes acceptance of proceeds hereof as payment in  
4 : 2 5 P M 14 full of all claims of any kind, in tort, contract, or  
4 : 2 5 P M 15 otherwise, from the beginning of time to the day and date  
4 : 2 5 P M 16 hereof except as to the October 2013 commissions."

4 : 2 5 P M 17 Do you see that?

4 : 2 5 P M 18 **A.** Yes.

4 : 2 5 P M 19 **Q.** What did you understand that to mean?

4 : 2 5 P M 20 **A.** Well, that's an -- that's a limitation. So if someone  
4 : 2 5 P M 21 endorses that check and deposits that check, they're agreeing  
4 : 2 5 P M 22 to those terms. So under contract law, negotiable instruments,  
4 : 2 5 P M 23 that was a settlement.

4 : 2 5 P M 24 **Q.** Did Ms. Barron accept BlueWave's settlement offer?

4 : 2 5 P M 25 **A.** She eventually deposited the check.

4 : 2 5 P M 1 Q. Could you please turn to Tab 5 in your binder. This is  
4 : 2 5 P M 2 Plaintiffs' Exhibit 1266 which already has been admitted into  
4 : 2 6 P M 3 evidence.

4 : 2 6 P M 4 would you please turn to page 2 of Exhibit 1266. If  
4 : 2 6 P M 5 you go to the signature block on this page, do you see who  
4 : 2 6 P M 6 appears to have wrote the email on this page?

4 : 2 6 P M 7 A. Yeah. Yes.

4 : 2 6 P M 8 Q. who is that?

4 : 2 6 P M 9 A. Lester Perling.

4 : 2 6 P M 10 Q. If you go up to the top for the email address.

4 : 2 6 P M 11 A. I see it.

4 : 2 6 P M 12 Q. Okay. What's the email address you see?

4 : 2 6 P M 13 A. That's Lester Perling's email address,  
4 : 2 6 P M 14 lperling@broadandcassel.com.

4 : 2 6 P M 15 Q. Is that the same email address that you had sent to Gene  
4 : 2 6 P M 16 Sellers in September 2013?

4 : 2 6 P M 17 A. Yes.

4 : 2 6 P M 18 Q. The same Lester Perling that you had advised the Bluewave  
4 : 2 6 P M 19 defendants to seek an expert opinion from?

4 : 2 6 P M 20 A. Yes.

4 : 2 6 P M 21 Q. Did any BlueWave attorney tell you that in December 2010  
4 : 2 6 P M 22 Mr. Perling had advised that Health Diagnostic Laboratories'  
4 : 2 6 P M 23 agreement is, quote, "as blatantly illegal as anything that  
4 : 2 7 P M 24 I've seen in a long time"?

4 : 2 7 P M 25 A. No.

4 : 2 7 P M 1 Q. "And a violation of a federal and state kickback  
4 : 2 7 P M 2 statutes"?

4 : 2 7 P M 3 A. Nobody told me that, no.

4 : 2 7 P M 4 Q. "And could form the basis for liability under the False  
4 : 2 7 P M 5 Claims Act"?

4 : 2 7 P M 6 A. Nobody told me that either.

4 : 2 7 P M 7 Q. If you go to page 1 of Plaintiffs' Exhibit 1266, did any  
4 : 2 7 P M 8 BlueWave attorney tell you each defendant was made aware in  
4 : 2 7 P M 9 December 2010 of Mr. Perling's opinion that the processing and  
4 : 2 7 P M 10 handling fees -- fee agreement was as blatantly illegal as  
4 : 2 7 P M 11 any-- anything he had seen in a long time?

4 : 2 7 P M 12 A. No.

4 : 2 7 P M 13 Q. Did you know of Mr. Perling's conclusion in December 2010  
4 : 2 7 P M 14 when you recommended him in September 2013 to the BlueWave  
4 : 2 7 P M 15 defendants?

4 : 2 7 P M 16 A. Not at all.

4 : 2 7 P M 17 Q. Were you surprised to see Mr. Perling's conclusion?

4 : 2 8 P M 18 A. I was surprised when I saw this -- I wasn't surprised at  
4 : 2 8 P M 19 the conclusion. I was surprised when I saw the document, yeah,  
4 : 2 8 P M 20 the coincidence.

4 : 2 8 P M 21 Q. Why were you not surprised by Mr. Perling's conclusion?

4 : 2 8 P M 22 A. Because, again, it's correct.

4 : 2 8 P M 23 MR. TERRANOVA: No further questions, Your Honor.

4 : 2 8 P M 24 THE COURT: Cross-examination?

4 : 2 8 P M 25 CROSS-EXAMINATION

BY MR. GRIFFITH:

Q. Good afternoon, Mr. Dickerson.

A. Good afternoon, sir.

Q. So I want to start from the end of you testifying, with this Lester Perling and Plaintiffs' Exhibit 1266.

Do you remember talking about that?

A. What we just talked about a second ago? Yeah, I remember.

Q. And that Lester Perling said it was the most blatant violation he'd ever seen.

You remember talking about that?

A. I remember talking about this. I'm just getting the actual email so I can see the actual language.

Q. Okay. Well, would it surprise you that Dr. Reddy's client became a Bluewave physician?

A. No.

Q. And entered into the P&H fee agreement?

A. Not at all.

Q. Okay. Even though you believe now that he said it was the most blatant violation of the Anti-Kickback Statute he's ever seen?

A. Physician clients fail to follow their lawyer's advice many times.

Q. But you don't know whether he failed to -- whether his client failed to follow his advice or not?

A. No different than you don't know.

4 : 3 0 P M 1 Q. You don't know anything about the information other than  
4 : 3 0 P M 2 what you read on that email; correct?

4 : 3 0 P M 3 A. That's correct.

4 : 3 0 P M 4 Q. Okay. Now, I understood you to say that you have  
4 : 3 0 P M 5 experience in both health care and white-collar criminal  
4 : 3 0 P M 6 defense; is that correct?

4 : 3 0 P M 7 A. Correct.

4 : 3 0 P M 8 Q. And so what -- what exactly -- I mean for the jury -- is  
4 : 3 1 P M 9 white-collar criminal defense?

4 : 3 1 P M 10 A. White-collar criminal defense is representing the  
4 : 3 1 P M 11 executives of companies, the physicians, the professionals of  
4 : 3 1 P M 12 companies and businesses that are then investigated by federal  
4 : 3 1 P M 13 agencies and government agencies. It can even be like IRS,  
4 : 3 1 P M 14 tax. That all fits into white-collar. And my white-collar  
4 : 3 1 P M 15 practice is focusing on the health care: doctors,  
4 : 3 1 P M 16 physicians, hospital, pharmacies.

4 : 3 1 P M 17 Q. And so have you defended clients who have been prosecuted  
4 : 3 1 P M 18 by the Department of Justice?

4 : 3 1 P M 19 A. Many times.

4 : 3 1 P M 20 Q. And have you defended -- and you said you had a -- I  
4 : 3 1 P M 21 believe you said you had a False Claims Act practice as well?

4 : 3 1 P M 22 A. That falls within the white-collar and health care  
4 : 3 1 P M 23 practice.

4 : 3 1 P M 24 Q. Okay. And so -- and so have you ever defended any False  
4 : 3 1 P M 25 Claims Act clients who were being sued by the Department of

4 : 3 1 P M 1 Justice?

4 : 3 2 P M 2 A. Many.

4 : 3 2 P M 3 Q. And did you ever take a position with any of your clients  
4 that the DOJ was wrong to sue your particular client?

4 : 3 2 P M 5 A. Yes.

4 : 3 2 P M 6 Q. Huh?

4 : 3 2 P M 7 A. Yes.

4 : 3 2 P M 8 Q. Okay. Now, you never spoke directly with Brad Johnson,  
9 did you?

4 : 3 2 P M 10 A. No.

4 : 3 2 P M 11 Q. Okay. And you never spoke directly with Cal Dent;  
12 correct?

4 : 3 2 P M 13 A. I couldn't. So no.

4 : 3 2 P M 14 Q. And I just want to understand. Did you believe that what  
15 you were dealing with at any time with respect to Ms. Barron  
16 and Bluewave was a contractual dispute?

4 : 3 3 P M 17 A. It came to me as an issue with regard to this July 13th  
18 time frame territory agreement dispute that then developed into  
19 analyzing the business of it and looking at that document and  
20 also saying "Let me see your independent contractor agreement,  
21 your agreement." And that's when she handed me the January  
22 2013 contract agreement that basically has the compensation is  
23 based out on commissions based upon referrals of these labs  
24 from the doctors to HDL.

4 : 3 3 P M 25 So it was a contract issue at first. You look at the

4 : 3 4 P M 1 contract, and you say this contract, on its face, violates the  
4 : 3 4 P M 2 Anti-Kickback Statute.

4 : 3 4 P M 3 Q. well, you didn't, to my knowledge -- and you can point out  
4 : 3 4 P M 4 if I'm wrong, but you never said that the contract violates the  
4 : 3 4 P M 5 Anti-Kickback Statute; and, therefore, it's an illegal  
4 : 3 4 P M 6 contract, did you?

4 : 3 4 P M 7 A. I said that many times to Ms. Flippo and Mr. Sellers.  
4 : 3 4 P M 8 And, actually, if you look at the -- let me see here.

4 : 3 4 P M 9 "As Mr. Sellers is well aware from our telephone and  
4 : 3 4 P M 10 email communications with him within the last two weeks, there  
4 : 3 5 P M 11 are significant concerns with the independent contractor  
4 : 3 5 P M 12 agreement and its legality with the various kickback statutes."

4 : 3 5 P M 13 So I --

4 : 3 5 P M 14 Q. Okay. So -- well -- well, let me be more specific. I  
4 : 3 5 P M 15 mean, do you generally agree with me that a contract that  
4 : 3 5 P M 16 violates a statute is void ab initio from the very start?

4 : 3 5 P M 17 A. A contract can be voided by the parties if it is illegal.

4 : 3 5 P M 18 Q. And so -- and so, I mean, you're here under oath. You're  
4 : 3 5 P M 19 telling me that a contract that's illegal can be -- one party  
4 : 3 5 P M 20 can decide whether or not to void it?

4 : 3 5 P M 21 A. It can be deemed unenforceable, yes, and one party can  
4 : 3 5 P M 22 always assert that the contract is illegal. Yes.

4 : 3 5 P M 23 Q. So if a contract is illegal, there is no enforceable right  
4 : 3 6 P M 24 under it; correct?

4 : 3 6 P M 25 A. No. The parties can move forward under an illegal



4 : 3 6 P M 1 contract.

4 : 3 6 P M 2 Q. The parties what?

4 : 3 6 P M 3 A. Can move forward under a contract that has illegal terms.

4 : 3 6 P M 4 I think what you're confusing is the contract on its  
4 : 3 6 P M 5 face violated the Anti-Kickback Statute based upon the  
4 : 3 6 P M 6 compensation. That's why I was trying to talk with your  
4 : 3 6 P M 7 client's counsel to try to figure out, is there some exception,  
4 : 3 6 P M 8 some business operation I'm not aware of? Because you and I  
4 : 3 6 P M 9 both know the contracts can say one thing but how they're  
4 : 3 6 P M 10 applied are another.

4 : 3 6 P M 11 And so that's what I was trying to get out from the  
4 : 3 6 P M 12 counsel for your clients.

4 : 3 6 P M 13 Q. well, I understand that. And you talked earlier about you  
4 : 3 6 P M 14 gave a recommendation to Mr. Sellers and my clients to go get  
4 : 3 6 P M 15 another lawyer; right?

4 : 3 6 P M 16 A. No. I didn't say get another lawyer. I said go get an  
4 : 3 7 P M 17 expert opinion on this. Mr. Sellers not only -- you could tell  
4 : 3 7 P M 18 by the conversation -- acknowledged he's not a health care  
4 : 3 7 P M 19 lawyer.

4 : 3 7 P M 20 Q. Okay. well, when other lawyers tell you what to do in  
4 : 3 7 P M 21 representing your client, do you follow the other lawyer's  
4 : 3 7 P M 22 advice?

4 : 3 7 P M 23 A. I can tell you, sir, if somebody came to me and asked me  
4 : 3 7 P M 24 to get advice on trusts and estates because it's not my area of  
4 : 3 7 P M 25 practice, I'd be saying, "Please, give me the lawyer you think

4 : 3 7 P M 1 I should talk to because that's not my area of practice."

4 : 3 7 P M 2 Q. Okay. Fair enough.

4 : 3 7 P M 3 And so -- but, generally, parties hire lawyers to  
4 represent them; true?

4 : 3 7 P M 5 A. That's a true statement.

4 : 3 7 P M 6 Q. Okay. And lawyers have a duty to represent clients  
7 vigorously and zealously; correct?

4 : 3 7 P M 8 A. And ethically under what they have -- their realm of  
9 concept of knowledge of the subject matter.

4 : 3 7 P M 10 Q. And what? I didn't --

4 : 3 7 P M 11 A. Knowledge of the subject matter.

4 : 3 7 P M 12 Q. Okay. And you were certainly trying to represent  
13 Ms. Barron zealously; right?

4 : 3 8 P M 14 A. Yes.

4 : 3 8 P M 15 Q. And, in fact, I mean, you're a lawyer in the Florida bar;  
16 correct?

4 : 3 8 P M 17 A. As well as others.

4 : 3 8 P M 18 Q. And the Florida rules, ethical rules, say, "As an  
19 advocate, a lawyer zealously asserts the client's position  
20 under the rules of the adversary system."

4 : 3 8 P M 21 Do you agree with that?

4 : 3 8 P M 22 A. I agree. That rule is probably in the majority of states  
23 as well.

4 : 3 8 P M 24 Q. Okay. Now -- so I want to make sure I understand this.  
25 So you looked at the contract -- the commission contract and

4 : 3 8 P M 1 believed that it was a violation of the Anti-Kickback Statute?

4 : 3 8 P M 2 Is that what you're saying?

4 : 3 8 P M 3 A. I wouldn't say I believe. It, in my opinion, is a  
4 : 3 8 P M 4 violation of the Anti-Kickback Statute.

4 : 3 8 P M 5 Q. All right. The -- but have you seen -- you talked about  
4 : 3 8 P M 6 OIG advisory opinions; right?

4 : 3 9 P M 7 A. Yes.

4 : 3 9 P M 8 Q. And you're very familiar with them; right?

4 : 3 9 P M 9 A. There's a lot out there, but I try to keep up with them.

4 : 3 9 P M 10 Q. It's very difficult, isn't it?

4 : 3 9 P M 11 A. Well, when you're in health care, you always have to have  
4 : 3 9 P M 12 somebody keeping up on them. And when you see new ones, you  
4 : 3 9 P M 13 have to review them.

4 : 3 9 P M 14 Q. Because it's constantly changing; correct?

4 : 3 9 P M 15 A. The practice of law is constantly changing.

4 : 3 9 P M 16 Q. Right. And it can be confusing?

4 : 3 9 P M 17 A. I think people can have -- I wouldn't say confusing. I  
4 : 3 9 P M 18 wouldn't use that term.

4 : 3 9 P M 19 Q. Well, people can have different -- look at the facts and  
4 : 3 9 P M 20 have different opinions; correct?

4 : 3 9 P M 21 A. That's in everyday life, yes.

4 : 3 9 P M 22 Q. Okay. And lawyers have different opinions from each  
4 : 3 9 P M 23 other; right?

4 : 3 9 P M 24 A. Lawyers can have different opinions from each other, but  
4 : 3 9 P M 25 in this case it was the fact that there wasn't a health care

4 : 3 9 P M 1 lawyer there to have any discussion or opinion with.

4 : 3 9 P M 2 Q. But going back to the OIG advisory opinions, aren't you  
4 : 3 9 P M 3 familiar with OIG advisory opinions which address commission  
4 : 4 0 P M 4 agreements that say that the commission agreement does not  
4 : 4 0 P M 5 violate the Anti-Kickback Statute?

4 : 4 0 P M 6 A. A commission agreement that isn't based upon the  
4 : 4 0 P M 7 referrals, so if you have a commission agreement based upon  
4 : 4 0 P M 8 some type of profit arrangement. But this commission agreement  
4 : 4 0 P M 9 was specifically based upon however many tests were in Ocean  
4 : 4 0 P M 10 Diagnostic's referral base that those physicians then referred  
4 : 4 0 P M 11 to HDL, the compensation was based upon that and it fell down.  
4 : 4 0 P M 12 So it was completely based upon a volume incentive.

4 : 4 0 P M 13 Q. Okay. So I just -- but my question is, are you familiar  
4 : 4 0 P M 14 with any OIG opinion -- advisory opinion which has said that a  
4 : 4 0 P M 15 commission agreement does not violate the Anti-Kickback  
4 : 4 1 P M 16 Statute?

4 : 4 1 P M 17 A. There are advisory opinions backed by fact that have been  
4 : 4 1 P M 18 approved based upon non-volume.

4 : 4 1 P M 19 Q. Commission agreements; correct?

4 : 4 1 P M 20 A. Based upon the commission non-volume.

4 : 4 1 P M 21 Q. Okay. Now -- and I was looking up your ethical rules.  
4 : 4 1 P M 22 And it said under 4-1.2 that "Under criminal or fraudulent  
4 : 4 1 P M 23 conduct, a lawyer must not counsel to engage, assist a client  
4 : 4 1 P M 24 in conduct the lawyer knows or reasonably should know is  
4 : 4 1 P M 25 criminal or fraudulent."

4 : 4 1 P M 1 You're familiar with that; right?

4 : 4 1 P M 2 A. Well, it's not my rule; it's the Florida bar rule.

4 : 4 1 P M 3 Q. Yeah, Florida bar rule. I'm sorry.

4 : 4 1 P M 4 And so I just want to make sure I understand what  
4 : 4 1 P M 5 you're saying. You're saying that you took a position that the  
4 : 4 2 P M 6 commission agreement violated the Anti-Kickback Statute; right?

4 : 4 2 P M 7 A. I'm saying, as I've said this entire time, my opinion was  
4 : 4 2 P M 8 the face of the contract, the way it was written, violated the  
4 : 4 2 P M 9 Anti-Kickback Statute.

4 : 4 2 P M 10 Q. Right.

4 : 4 2 P M 11 A. That's why I reached out to Ms. Flippo, and eventually  
4 : 4 2 P M 12 sellers, to have a conversation with him, and to have them  
4 : 4 2 P M 13 provide me with whoever they could, provide an expert opinion  
4 : 4 2 P M 14 that, from their standpoint, it did not.

4 : 4 2 P M 15 At the same time I was having this discussion, sir,  
4 : 4 2 P M 16 the -- which the last letter from another lawyer of BlueWave  
4 : 4 2 P M 17 with a settlement check, they're again still asserting that  
4 : 4 2 P M 18 they did not believe that this was in violation of the  
4 : 4 2 P M 19 Anti-Kickback Statute. But, again, this lawyer wasn't a health  
4 : 4 2 P M 20 care lawyer.

4 : 4 2 P M 21 Q. Okay. But I just want to make sure I understand. So you  
4 : 4 2 P M 22 were asking them to go find a lawyer because you thought that  
4 : 4 2 P M 23 there may be the possibility that this commission agreement  
4 : 4 3 P M 24 could fit within the Anti-Kickback Statute?

4 : 4 3 P M 25 A. Like I said in your previous questions, the way a contract

1 is written, how a business is actually operated, are two  
2 things. So I was trying to get them to get an expert opinion  
3 to say how their business actually operated. It wasn't like  
4 the contract was drafted and was legal.

5 Q. But if you -- I'm just trying to understand this.  
6 Honestly, if you think that the anti- -- that the commission  
7 agreement violated the Anti-Kickback Statute, then you're  
8 familiar with money laundering; right?

9 Right?

10 A. I'm familiar with the statute on money laundering.

11 Q. All right. Are you familiar with money laundering  
12 prosecutions?

13 A. Yes, I am, Counselor.

14 Q. And so you know that a violation of the Anti-Kickback  
15 Statute is a specified unlawful activity under the money  
16 laundering statutes; right?

17 A. If somebody knowingly and willfully violates the  
18 Anti-Kickback Statute, criminally, then it becomes the issue  
19 with the money laundering statute.

20 Q. Okay. And so -- but -- and so the proceeds of any kind of  
21 contract that you're claiming is a violation of the  
22 Anti-Kickback Statute would be proceeds that were -- would  
23 violate the money laundering statute; right?

24 A. If somebody knowingly and willfully entered into a  
25 contract and they knowingly and willfully knew that contract

4 : 4 4 P M 1 was illegal, then that makes it different.

4 : 4 4 P M 2 Q. Okay. But you -- but, nevertheless, you and your client,  
4 : 4 4 P M 3 who you were zealously representing; correct? You were --

4 : 4 4 P M 4 A. well, if you say I was zealously representing, I'll take  
4 : 4 4 P M 5 that.

4 : 4 4 P M 6 Q. Okay. If you'd go to BlueWave 387.

4 : 4 5 P M 7 THE COURT: Is this in, by the way?

4 : 4 5 P M 8 MR. GRIFFITH: I think it's without objection. It's  
4 : 4 5 P M 9 already in in another --

4 : 4 5 P M 10 MR. TERRANOVA: It's the same as Plaintiffs'  
4 : 4 5 P M 11 Exhibit 1032.

4 : 4 5 P M 12 THE COURT: Very good. Go right ahead.

4 : 4 5 P M 13 MR. GRIFFITH: Let me just make it so the record is  
4 : 4 5 P M 14 clear. BlueWave 387 is a duplicate of another document.  
4 : 4 5 P M 15 Nonetheless, we'll put it in as an exhibit without objection.

4 : 4 5 P M 16 MR. TERRANOVA: Thank you.

4 : 4 5 P M 17 BY MR. GRIFFITH:

4 : 4 5 P M 18 Q. And if you'd go to the third page, really, it was just the  
4 : 4 5 P M 19 money that you were looking for for your client; correct?

4 : 4 5 P M 20 A. No. If it was the money I was looking for, I would have  
4 : 4 5 P M 21 told her to keep working in August and keep working for the  
4 : 4 5 P M 22 company because the company was making a lot of money. So if  
4 : 4 6 P M 23 it was about the money, that's what I would have done.

4 : 4 6 P M 24 Q. well, if it was illegal to do what you said, to actually  
4 : 4 6 P M 25 have a commission agreement which was legal, then this \$324,525

4 : 4 6 P M 1 was proceeds from an unlawful activity; right?

4 : 4 6 P M 2 A. No. You want me to explain?

4 : 4 6 P M 3 Q. well, it -- and you believe that --

4 : 4 6 P M 4 THE COURT: well, he has a right to explain.

4 : 4 6 P M 5 BY MR. GRIFFITH:

4 : 4 6 P M 6 Q. Okay. Explain.

4 : 4 6 P M 7 A. We were in the process with -- from the two lawyers at the  
4 : 4 6 P M 8 time at BlueWave, resolving whether we were going to sue for  
4 : 4 6 P M 9 the termination, because it was retaliatory. So whatever  
4 : 4 6 P M 10 BlueWave decided to put on their check in the dollar amount,  
4 : 4 6 P M 11 that was the settlement amount that they offered and whatever  
4 : 4 6 P M 12 they put in the memo as far as commissions.

4 : 4 6 P M 13 We were discussing back and forth what -- the reason  
4 : 4 7 P M 14 the commissions came up -- is to defeat the claim that your  
4 : 4 7 P M 15 client said that she materially breached. If Q3 commissions  
4 : 4 7 P M 16 equaled \$324,000, I don't see how that was a breach.

4 : 4 7 P M 17 So this check, the endorsement, and the reason your  
4 : 4 7 P M 18 client put on there the endorsement was to resolve any claim  
4 : 4 7 P M 19 that she would have for a retaliatory whistle-blower case.

4 : 4 7 P M 20 Q. Now, come on. If you do whistle-blower activities, you  
4 : 4 7 P M 21 know that you can't release a whistle-blower claim; right?

4 : 4 7 P M 22 A. I don't agree with that.

4 : 4 7 P M 23 Q. Are you telling the Court that there's not cases out there  
4 : 4 7 P M 24 that say that you cannot release a whistle-blower claim?

4 : 4 7 P M 25 A. I'm telling you that I can't say in every jurisdiction I



4 : 4 7 P M 1 know what their whistle-blower releasing claims are. This is  
4 : 4 7 P M 2 in Alabama.

4 : 4 7 P M 3 Q. But the fact of the matter is your client never filed any  
4 : 4 8 P M 4 kind of whistle-blower action; correct?

4 : 4 8 P M 5 A. No, she did not.

4 : 4 8 P M 6 Q. She didn't allege that there was anything -- in federal  
4 : 4 8 P M 7 court that there was any wrongdoing; right?

4 : 4 8 P M 8 A. Did not allege it in federal court but cooperated with the  
4 : 4 8 P M 9 fed -- federal authorities in their investigation.

4 : 4 8 P M 10 Q. Now, you mention the -- the OIG opinion, Advisory Opinion  
4 : 4 8 P M 11 05-08; right?

4 : 4 8 P M 12 A. That's been mentioned, yes.

4 : 4 8 P M 13 Q. Okay. And -- and you correct me if I'm wrong, but I'm  
4 : 4 8 P M 14 trying to take notes.

4 : 4 8 P M 15 But did you say that -- what did you say about 05-08?

4 : 4 8 P M 16 A. Well, specifically, I said that Tonya Mallory had the  
4 : 4 8 P M 17 wrong quote and Tonya Mallory's conclusion did not take into  
4 : 4 8 P M 18 account the volume paying. And that in 05-08, they discuss  
4 : 4 9 P M 19 that you can't have volume paying when you're doing a personal  
4 : 4 9 P M 20 service management agreement.

4 : 4 9 P M 21 Q. Okay. And did they say it was a violation of the  
4 : 4 9 P M 22 Anti-Kickback Statute?

4 : 4 9 P M 23 A. They never really say in their opinions it's a violation.  
4 : 4 9 P M 24 They say it's a strong likelihood, it's a risk of. And so in  
4 : 4 9 P M 25 the example that they had there -- I don't have it in front of

4 : 4 9 P M 1 me, but what I recall off the top of my head, it was a strong  
4 : 4 9 P M 2 likelihood or a risk of it being a violation of the  
4 : 4 9 P M 3 Anti-Kickback Statute.

4 : 4 9 P M 4 Q. Okay.

4 : 4 9 P M 5 MR. GRIFFITH: Eunice, can we put on the ELMO real  
4 : 4 9 P M 6 quick?

4 : 4 9 P M 7 THE DEPUTY CLERK: Okay.

4 : 4 9 P M 8 THE COURT: It's up.

4 : 4 9 P M 9 BY MR. GRIFFITH:

4 : 5 0 P M 10 Q. Okay. So if you -- if you look at the conclusion in  
4 : 5 0 P M 11 05-08, it says, "Based on the facts certified in your request  
4 : 5 0 P M 12 for an advisory opinion and supplemental submissions, we  
4 : 5 0 P M 13 conclude that the proposed agreement could potentially" --  
4 : 5 0 P M 14 right? -- "generate prohibited remuneration."

4 : 5 0 P M 15 It doesn't say it's a violation of the Anti-Kickback  
4 : 5 0 P M 16 Statute, does it?

4 : 5 0 P M 17 A. No. They never do.

4 : 5 0 P M 18 Q. Okay. And in the limitations section, it says, "This  
4 : 5 0 P M 19 advisory opinion is issued only to" -- name redacted -- "the  
4 : 5 0 P M 20 requestor of this opinion. The advisory opinion has no  
4 : 5 0 P M 21 application to and cannot be relied upon by any other  
4 : 5 0 P M 22 individual or entity." Correct?

4 : 5 0 P M 23 A. That's what all advisory opinions say.

4 : 5 0 P M 24 Q. Okay.

4 : 5 1 P M 25 A. Because they're advisory.

4 : 5 1 P M 1 Q. Okay.

4 : 5 1 P M 2 You want to bring up 387. If you could go to the  
4 : 5 1 P M 3 third paragraph.

4 : 5 1 P M 4 So Mr. Galese -- as I understand it, you talked to  
4 : 5 2 P M 5 Ms. Flippo, she referred you to Mr. Sellers, and Mr. Sellers  
4 : 5 2 P M 6 referred you to Mr. Galese; is that correct?

4 : 5 2 P M 7 A. I don't recall Sellers ever referring me to Galese; I just  
4 : 5 2 P M 8 recall this Galese popping up.

4 : 5 2 P M 9 Q. Yeah. Well, that was the progression of the  
4 : 5 2 P M 10 representation; right?

4 : 5 2 P M 11 A. Sellers was still involved at this point in time.

4 : 5 2 P M 12 Q. Okay. And that was because you threatened to sue in your  
4 : 5 2 P M 13 letter of October 3rd; right?

4 : 5 2 P M 14 A. The litigation hold letter was to preserve all evidence  
4 : 5 2 P M 15 because we're going to have a claim. We're going to determine  
4 : 5 2 P M 16 whether we're going to sue.

4 : 5 2 P M 17 Q. Yeah. I mean, so it's a threat to sue; right?

4 : 5 2 P M 18 A. Sometimes you don't sue. This time, we didn't sue. It  
4 : 5 2 P M 19 was be aware that we have a claim. That's what a litigation  
4 : 5 2 P M 20 hold is.

4 : 5 2 P M 21 Q. Okay. And so his response to your threat to a suit was  
4 : 5 2 P M 22 this letter, October 31st. And it says in part, "Initially, it  
4 : 5 2 P M 23 is now and has always been my client's position that his  
4 : 5 3 P M 24 operation is wholly within applicable and controlling  
4 : 5 3 P M 25 governmental rules, and any suggestion by you or your clients

4 : 5 3 P M 1 to the contrary is incorrect and unfortunate."

4 : 5 3 P M 2 He stated that; right?

4 : 5 3 P M 3 A. That's his self-serving statement, yes.

4 : 5 3 P M 4 Q. Okay. And, "Also, we believe that there is no basis for  
4 : 5 3 P M 5 your claim that my client breached any agreement that it had  
4 : 5 3 P M 6 with Ocean Diagnostics and Consulting, LLC. If fact -- in  
4 : 5 3 P M 7 fact" -- it says "if fact," typo there -- "there is ample  
4 : 5 3 P M 8 evidence that your client failed to faithfully and properly  
4 : 5 3 P M 9 execute its obligations under the agreements in place with  
4 : 5 3 P M 10 Bluewave Healthcare Consultants, which can and, if necessary,  
4 : 5 3 P M 11 be easily documented."

4 : 5 3 P M 12 So you threatened to sue them -- to sue my clients.  
4 : 5 4 P M 13 He responded with this letter. Y'all accepted the payment.  
4 : 5 4 P M 14 And that was it; right? I mean, there was no further  
4 : 5 4 P M 15 litigation whatsoever; correct?

4 : 5 4 P M 16 A. Well, there was no further litigation, but between the  
4 : 5 4 P M 17 October 3rd letter and this document, there was conversations  
4 : 5 4 P M 18 going back with me and Mr. Galese, again asking for the  
4 : 5 4 P M 19 opinions. And how about this, asking for this alleged proof of  
4 : 5 4 P M 20 the breach of material agreement, which was never provided.

4 : 5 4 P M 21 Q. Okay. But I looked through millions of documents in this  
4 : 5 4 P M 22 case, millions. And I didn't see any response from you. You  
4 : 5 4 P M 23 would think if somebody said -- makes all these claims, and you  
4 : 5 4 P M 24 disagree, that you would immediately say, well, I disagree with  
4 : 5 4 P M 25 all of your assertions in your letter of October 31st, 2013.

4 : 5 5 P M 1 But you didn't do that, did you?

4 : 5 5 P M 2 A. Why would I? I've been telling them that for 60-plus  
4 : 5 5 P M 3 days, and it didn't do any good.

4 : 5 5 P M 4 Q. Okay. But you didn't do it. Isn't that the answer?

4 : 5 5 P M 5 A. I did not write a response to this letter, you're correct.

4 : 5 5 P M 6 Q. Okay. Because your client got your money -- got her  
4 : 5 5 P M 7 money, and you recommended that she accept the money; correct?

4 : 5 5 P M 8 A. That is incorrect.

4 : 5 5 P M 9 Q. Okay. So you didn't recommend one way or the other?

4 : 5 5 P M 10 A. I didn't make a recommendation.

4 : 5 5 P M 11 Q. Okay. But you didn't -- you didn't feel you had an -- you  
4 : 5 5 P M 12 didn't feel like she had willfully violated any law?

4 : 5 5 P M 13 A. She had not.

4 : 5 5 P M 14 Q. Okay. And she was a Bluewave contractor who had not  
4 : 5 5 P M 15 violated any Anti-Kickback Statute; correct?

4 : 5 5 P M 16 A. No. The reason she didn't is because you have to  
4 : 5 5 P M 17 knowingly and willfully violate it, and she did not knowingly  
4 : 5 5 P M 18 and willfully.

4 : 5 5 P M 19 As I said in my direct testimony, it took me time to  
4 : 5 6 P M 20 show and convince her what the Anti-Kickback Statute was and  
4 : 5 6 P M 21 what it said because of her belief that Brad had told her this  
4 : 5 6 P M 22 was legitimate, we have legal opinions. And she trusted that.

4 : 5 6 P M 23 Q. Okay. And so is that kind of natural, that when you have  
4 : 5 6 P M 24 a client who's been told one thing by her attorney, that it  
4 : 5 6 P M 25 takes a while for it to process through and for the client to

4 : 5 6 P M 1 understand what's going on sometimes?

4 : 5 6 P M 2 A. I can't answer for every client, but I can say for Emily  
4 : 5 6 P M 3 Barron, since she trusted Brad and had been told about all  
4 : 5 6 P M 4 these opinion letters -- and that's why we were asking for the  
4 : 5 6 P M 5 opinion letters, because she had been told there's opinion  
4 : 5 6 P M 6 letters that say this is legitimate.

4 : 5 6 P M 7 Since she believed that there was opinion letters  
4 : 5 6 P M 8 from HDL and BlueWave, that then my one opinion was not --  
4 : 5 6 P M 9 necessarily could defeat these other opinions. So it did take  
4 : 5 6 P M 10 time. And that's why, when the opinion letters were never  
4 : 5 7 P M 11 produced, it was kind of obvious at that point in time for her.

4 : 5 7 P M 12 Q. Okay. Bear with me one second.

4 : 5 7 P M 13 (Pause.)

4 : 5 7 P M 14 MR. GRIFFITH: Can we bring up Bluewave 64, please.

4 : 5 8 P M 15 THE COURT: Is this in?

4 : 5 8 P M 16 MR. COOKE: I'm not sure it's in yet. Why don't you  
4 : 5 8 P M 17 show it to him first.

4 : 5 8 P M 18 MR. GRIFFITH: Your Honor, I'm not sure it's in, but  
4 : 5 8 P M 19 I can ask him -- can he see it?

4 : 5 8 P M 20 THE WITNESS: Do it old school.

4 : 5 8 P M 21 Are you asking me if I recognize this?

4 : 5 8 P M 22 BY MR. GRIFFITH:

4 : 5 8 P M 23 Q. Yes. Do you recognize BlueWave 64?

4 : 5 8 P M 24 A. Yes, I recognize this document.

4 : 5 8 P M 25 Q. And what is it?

4 : 5 8 P M 1 A. It's an email chain -- you want me to start at the top or  
4 : 5 9 P M 2 the first email?

4 : 5 9 P M 3 Q. Well, in the first email.

4 : 5 9 P M 4 A. The first email is from Derek Kung, general counsel for  
4 : 5 9 P M 5 HDL. And it was -- it's an odd email, "It's my understanding  
4 : 5 9 P M 6 that you're not waiting in anything from HDL."

4 : 5 9 P M 7 And then my response to that, and then somehow Tonya  
4 : 5 9 P M 8 Mallory's on the email after that. So I don't know how she  
4 : 5 9 P M 9 received a copy of it. Oh, she was actually carbon-copied on  
4 : 5 9 P M 10 it with Gene Sellers and Laura Hoey.

4 : 5 9 P M 11 Q. But is this an email between you and Derek Kung regarding  
4 : 5 9 P M 12 documents from HDL?

4 : 5 9 P M 13 A. Not necessarily, no.

4 : 5 9 P M 14 Q. I mean in part of the chain?

4 : 5 9 P M 15 A. Well, I was asking for the opinion letter from HDL, that  
4 : 5 9 P M 16 HDL had. And I never received it.

4 : 5 9 P M 17 Q. Okay.

4 : 5 9 P M 18 A. And my response is "well, I would agree that we have  
5 : 0 0 P M 19 received the guidance" -- and that's that document that was  
5 : 0 0 P M 20 introduced in late September. Tonya sent out a guidance that  
5 : 0 0 P M 21 changed -- I can't remember the specifics on it, sir. It was  
5 : 0 0 P M 22 changing something what they were doing with the shipping and  
5 : 0 0 P M 23 handling -- process and handling. And we received that -- "and  
5 : 0 0 P M 24 understand you will not be providing the opinion letter relied  
5 : 0 0 P M 25 upon in the past."

5 : 0 0 P M 1 Q. Okay.

5 : 0 0 P M 2 A. That's what I asked, and I never received the opinion  
5 : 0 0 P M 3 letter.

5 : 0 0 P M 4 Q. Okay. But you were -- in Bluewave 65, you were  
5 : 0 0 P M 5 negotiating --

5 : 0 0 P M 6 THE COURT: I thought you said 64.

5 : 0 0 P M 7 MR. GRIFFITH: I mean 64. I'm sorry, Your Honor.

5 : 0 0 P M 8 And I move to admit this into evidence.

5 : 0 0 P M 9 THE COURT: Is there an objection?

5 : 0 0 P M 10 MR. TERRANOVA: No, Your Honor.

5 : 0 0 P M 11 MR. ASHMORE: No, sir.

5 : 0 0 P M 12 THE COURT: Bluewave 64 is admitted without  
5 : 0 0 P M 13 objection.

5 : 0 0 P M 14 BY MR. GRIFFITH:

5 : 0 0 P M 15 Q. But the fact is you were in conversations with HDL's  
5 : 0 0 P M 16 attorney regarding documents that you wanted; correct?

5 : 0 0 P M 17 A. This conversation is trying to get the opinion letter that  
5 : 0 0 P M 18 HDL allegedly had that they told all the sales reps they had so  
5 : 0 1 P M 19 I could see what it said.

5 : 0 1 P M 20 Q. And just following up with Mr. Perling, did you ever  
5 : 0 1 P M 21 discuss with Mr. Perling whether or not he had analyzed one of  
5 : 0 1 P M 22 the P&H fee agreements of HDL?

5 : 0 1 P M 23 A. Did I ever? I don't -- post this probably 2000 maybe '14,  
5 : 0 1 P M 24 '15, we had a discussion about that. Because I -- we had a  
5 : 0 2 P M 25 discussion about the Bluewave. And Bluewave never retained



5 : 0 2 P M 1 him. And then we put together the BlueWave HDL, but Lester  
5 : 0 2 P M 2 never told me that he had clients that he advised on HDL. I  
5 : 0 2 P M 3 didn't see that until the exhibit.

5 : 0 2 P M 4 Q. Okay. Well, did you ever learn from Mr. Perling that he  
5 : 0 2 P M 5 did back down on his comments that the P&H fee agreements were  
5 : 0 2 P M 6 illegal?

5 : 0 2 P M 7 A. Never.

5 : 0 2 P M 8 Q. Did you ever specifically ask him?

5 : 0 2 P M 9 A. No.

5 : 0 2 P M 10 Q. And so you don't know the reason why he backed down from  
5 : 0 2 P M 11 his initial opinion; right?

5 : 0 2 P M 12 A. It would be hard for me to know that since I don't know he  
5 : 0 2 P M 13 ever backed down.

5 : 0 2 P M 14 MR. GRIFFITH: That's all, Your Honor.

5 : 0 2 P M 15 THE COURT: Very good.

5 : 0 2 P M 16 Mr. Ashmore?

5 : 0 2 P M 17 MR. ASHMORE: Thank you, Your Honor.

5 : 0 2 P M 18 CROSS-EXAMINATION

5 : 0 2 P M 19 BY MR. ASHMORE:

5 : 0 3 P M 20 Q. Mr. Dickerson, I'm Beattie Ashmore. I represent Tonya  
5 : 0 3 P M 21 Mallory. How are you?

5 : 0 3 P M 22 A. I'm good. Nice to meet you, Mr. Ashmore.

5 : 0 3 P M 23 Q. Nice to meet you as well.

5 : 0 3 P M 24 Did you ever talk to Tonya Mallory?

5 : 0 3 P M 25 A. I don't believe so. She may have been on a call with the

5 : 0 3 P M 1 general counsel, but I don't recall a conversation with  
5 : 0 3 P M 2 Ms. Mallory.

5 : 0 3 P M 3 Q. And when you say "general counsel," are you talking about  
5 : 0 3 P M 4 Derek Kung?

5 : 0 3 P M 5 A. Correct.

5 : 0 3 P M 6 Q. And so that would be when you would be talking to the  
5 : 0 3 P M 7 lawyer for HDL; correct?

5 : 0 3 P M 8 A. Correct.

5 : 0 3 P M 9 Q. Sure. A couple of names. Let me ask you, did you ever  
5 : 0 3 P M 10 talk with Joe McConnell at HDL?

5 : 0 3 P M 11 A. That name rings a bell. He may have been on a -- I only  
5 : 0 3 P M 12 had maybe one or two conference calls with Kung.

5 : 0 3 P M 13 Q. And then one last name I need to run by you, Russ Warnick.  
5 : 0 4 P M 14 Do you remember --

5 : 0 4 P M 15 A. I remember seeing his name, but I don't remember having a  
5 : 0 4 P M 16 conversation with him.

5 : 0 4 P M 17 Q. Let's talk about lawyers. Do you know Laura Hoey?

5 : 0 4 P M 18 A. Hoey?

5 : 0 4 P M 19 Q. Hoey. My apologies.

5 : 0 4 P M 20 A. Yes, I know Laura Hoey.

5 : 0 4 P M 21 Q. Sure. And how do you know her?

5 : 0 4 P M 22 A. From American Bar Association white color crime  
5 : 0 4 P M 23 conferences and speaking together.

5 : 0 4 P M 24 Q. And what is her reputation in the legal community when it  
5 : 0 4 P M 25 comes to health care law?

5 : 0 4 P M 1 A. Very good.

5 : 0 4 P M 2 Q. And she is with the Ropes & Gray firm?

5 : 0 4 P M 3 A. She is.

5 : 0 4 P M 4 Q. Okay. Do you know Peter Holman with that firm?

5 : 0 4 P M 5 A. I know him but not like I know Laura.

5 : 0 4 P M 6 Q. Michael Lampert?

5 : 0 4 P M 7 A. I know Michael.

5 : 0 4 P M 8 Q. Brien O'Connor?

5 : 0 4 P M 9 A. Don't know Brien.

5 : 0 4 P M 10 Q. And are you aware that the Ropes & Gray firm was  
5 : 0 4 P M 11 representing HDL?

5 : 0 4 P M 12 A. well aware of that, yes.

5 : 0 4 P M 13 Q. well, tell me what you know about that.

5 : 0 4 P M 14 A. Derek is the one that brought Laura Hoey into the emails.  
5 : 0 4 P M 15 And then I had conversations with Laura as well and was trying  
5 : 0 4 P M 16 to get the opinion letter from her. And she didn't get  
5 : 0 5 P M 17 approval from her client to give me a copy of the opinion  
5 : 0 5 P M 18 letter.

5 : 0 5 P M 19 Q. Did you have any knowledge or involvement in  
5 : 0 5 P M 20 Ropes & Gray's conversations with the Department of Justice?

5 : 0 5 P M 21 A. No.

5 : 0 5 P M 22 Q. Or the OIG?

5 : 0 5 P M 23 A. No.

5 : 0 5 P M 24 Q. And as you pointed out earlier, lawyers give opinions;  
5 : 0 5 P M 25 correct?

5 : 0 5 P M 1 A. Say that again.

5 : 0 5 P M 2 Q. Lawyers give opinions?

5 : 0 5 P M 3 A. Correct.

5 : 0 5 P M 4 Q. And you had a fairly strong opinion when you first talked  
5 : 0 5 P M 5 with your client in this case about P&H fees?

5 : 0 5 P M 6 A. I had a strong concern with it that developed into an  
5 : 0 5 P M 7 opinion and was further strengthened by the fact that there was  
5 : 0 5 P M 8 no opinion letter provided to me from HDL that supported what  
5 : 0 5 P M 9 they were doing. I mean, a company that size, if you're going  
5 : 0 5 P M 10 to go out and do this type of compensation structure to a  
5 : 0 5 P M 11 physician -- I mean, every reasonable company would get an  
5 : 0 6 P M 12 opinion letter to say this is justified, what we're doing.

5 : 0 6 P M 13 And so when I didn't -- didn't receive that -- and  
5 : 0 6 P M 14 you don't get the chance to peel back the onion when you're  
5 : 0 6 P M 15 outside. I couldn't see what was going on, so I was even more  
5 : 0 6 P M 16 concerned.

5 : 0 6 P M 17 Q. Did you ever talk with Laura Hoey about her legal opinion  
5 : 0 6 P M 18 concerning P&H fees?

5 : 0 6 P M 19 A. Laura would not necessarily give me her legal opinion as  
5 : 0 6 P M 20 to defending because she was in the middle of defending the  
5 : 0 6 P M 21 case.

5 : 0 6 P M 22 Q. And that was communicating with the Department of Justice?

5 : 0 6 P M 23 A. Correct.

5 : 0 6 P M 24 Q. And, again, I think you cleared this up already, but you  
5 : 0 6 P M 25 knew that Ropes & Gray was in communication with the Department

5 : 0 6 P M 1 of Justice?

5 : 0 6 P M 2 A. Yeah, she advised -- or informed me of that, whether it  
5 : 0 6 P M 3 was in October 2013 or whether it was at the bar conference in  
5 : 0 6 P M 4 Miami in March of 2014.

5 : 0 6 P M 5 Q. Let me shift gears.

5 : 0 7 P M 6 Were you aware of what other labs were doing in the  
5 : 0 7 P M 7 industry concerning P&H fees?

5 : 0 7 P M 8 A. I mean, there's so many labs, I can't tell you every lab,  
5 : 0 7 P M 9 but I was aware that a lot of labs had tried different types of  
5 : 0 7 P M 10 ways to compensate the physicians to get the physician to use  
5 : 0 7 P M 11 their lab over another lab, whether it be the \$3 fees, the \$5  
5 : 0 7 P M 12 fees. There were labs out there doing a \$10 fee.

5 : 0 7 P M 13 Q. And health care law is complicated?

5 : 0 7 P M 14 A. Facts are what complicates it.

5 : 0 7 P M 15 Q. The health care law involves how many statutes and rules  
5 : 0 7 P M 16 and regulations?

5 : 0 7 P M 17 A. It's not a fact of how many; it's how many pages they are.

5 : 0 7 P M 18 Q. And it's a lot of pages, is it not?

5 : 0 7 P M 19 A. It is.

5 : 0 7 P M 20 Q. How many pages are we talking?

5 : 0 7 P M 21 A. Excuse me?

5 : 0 7 P M 22 Q. How many pages is it?

5 : 0 7 P M 23 A. I have no idea. The Affordable Care Act in itself is  
5 : 0 7 P M 24 probably a couple thousand.

5 : 0 8 P M 25 Q. Did you discuss with Laura Hoey the Exponent time and

5 : 0 8 P M 1 motion study?

5 : 0 8 P M 2 A. I asked her about it, yes.

5 : 0 8 P M 3 Q. And tell us about that conversation.

5 : 0 8 P M 4 A. It was simply I was asking her for the legal opinion.

5 : 0 8 P M 5 There's two things we were talking about. A time and motion  
5 : 0 8 P M 6 study and a legal opinion that HDL said that they had to  
5 : 0 8 P M 7 support this, this business model.

5 : 0 8 P M 8 And we had the general discussion about it, and it  
5 : 0 8 P M 9 was the typical, since we're her company -- Ropes & Gray is  
5 : 0 8 P M 10 defending HDL with regard to the Department of Justice -- she  
5 : 0 8 P M 11 wasn't inclined to want to talk about any opinions or what they  
5 : 0 8 P M 12 were going to do.

5 : 0 8 P M 13 Q. And would it surprise you -- of course, you've represented  
5 : 0 8 P M 14 clients in this similar situation before; correct?

5 : 0 8 P M 15 A. Correct.

5 : 0 8 P M 16 Q. And would it surprise you that she couldn't give you those  
5 : 0 8 P M 17 documents because she was in the negotiations and discussions  
5 : 0 8 P M 18 with the Department of Justice?

5 : 0 9 P M 19 A. I wouldn't necessarily say that. I mean, if you feel  
5 : 0 9 P M 20 confident in your opinion letters, in your outside third-party  
5 : 0 9 P M 21 studies, it doesn't matter because you've already probably  
5 : 0 9 P M 22 given them over to somebody. So the privilege is waived. So  
5 : 0 9 P M 23 that -- that did shock me that I was never given the -- this  
5 : 0 9 P M 24 great expert legal opinion.

5 : 0 9 P M 25 Q. And let me ask you about a couple of other firms, and then

5 : 0 9 P M 1 we'll wrap up.

5 : 0 9 P M 2 The Saul Ewing firm in Philadelphia?

5 : 0 9 P M 3 A. Good firm.

5 : 0 9 P M 4 Q. Do you know Chris Hall with that firm?

5 : 0 9 P M 5 A. Yes.

5 : 0 9 P M 6 Q. What's his reputation?

5 : 0 9 P M 7 A. Good lawyer.

5 : 0 9 P M 8 Q. LeClairRyan firm out of Richmond?

5 : 0 9 P M 9 A. I'm aware of LeClairRyan.

5 : 0 9 P M 10 Q. And tell us what you know about LeClairRyan.

5 : 0 9 P M 11 A. LeClairRyan has -- has had -- has good lawyers. During  
5 : 1 0 P M 12 this time frame -- the 2013, 2012, '14 time period -- they had  
5 : 1 0 P M 13 some lawyers in it that I would never have recommended for  
5 : 1 0 P M 14 health care that were representing themselves as health care  
5 : 1 0 P M 15 lawyers.

5 : 1 0 P M 16 Q. But you felt comfortable, at the end of the day, that  
5 : 1 0 P M 17 Ropes & Gray and Laura Hoey was representing HDL?

5 : 1 0 P M 18 A. Well, that's the only firm I was told that was  
5 : 1 0 P M 19 representing them.

5 : 1 0 P M 20 Q. Well, I mean, again, what's your assessment of that? Is  
5 : 1 0 P M 21 there a better firm out there? Are they one of the better  
5 : 1 0 P M 22 firms? Are they --

5 : 1 0 P M 23 A. I mean, if that's the question, if the question is do I  
5 : 1 0 P M 24 think they're a good firm, well, I think Ropes & Gray is a  
5 : 1 0 P M 25 great firm to come in to a health care company when you have a

5 : 1 0 P M 1 government investigation. When the government is looking at  
5 : 1 0 P M 2 you for Anti-Kickback Statutes and violations, Laura is very  
5 : 1 0 P M 3 good. Ropes & Gray is good.

5 : 1 0 P M 4 But the problem when you come in at that is the  
5 : 1 0 P M 5 damage has already been done. I mean, the government is  
5 : 1 0 P M 6 already looking at you. So something's -- the smoke's there,  
5 : 1 1 P M 7 the fire's there; you just have to figure out the best way to  
5 : 1 1 P M 8 do it. Either put it out or resolve the situation.

5 : 1 1 P M 9 Q. Any lawyer, if they see their client is committing an  
5 : 1 1 P M 10 illegal act, they're going to tell their client to stop doing  
5 : 1 1 P M 11 what you're doing, aren't they?

5 : 1 1 P M 12 A. I don't know about every lawyer, but they should.

5 : 1 1 P M 13 Q. We all should; right?

5 : 1 1 P M 14 MR. ASHMORE: That's all I have, Your Honor.

5 : 1 1 P M 15 THE COURT: Redirect?

5 : 1 1 P M 16 MR. TERRANOVA: I have no further questions, Your  
5 : 1 1 P M 17 Honor.

5 : 1 1 P M 18 THE COURT: You may step down.

5 : 1 1 P M 19 THE WITNESS: Thank you.

5 : 1 1 P M 20 (Witness excused.)

5 : 1 1 P M 21 THE COURT: Ladies and gentlemen, it's been a long  
5 : 1 1 P M 22 day. Worked hard. Everybody is paying attention. Thank you  
5 : 1 1 P M 23 very much for that. We're going to break for the day. Be here  
5 : 1 1 P M 24 at 9:00 tomorrow morning. Do not discuss the case with anyone.  
5 : 1 1 P M 25 Do not independently research.



5 : 1 1 P M 1 See you tomorrow morning bright and early.

5 : 1 1 P M 2 (Whereupon the jury was excused from the courtroom.)

5 : 1 2 P M 3 **THE COURT:** Please be seated.

5 : 1 2 P M 4 Any matters we need to address?

5 : 1 2 P M 5 **MR. LEVENTIS:** Not from the government, Your Honor.

5 : 1 2 P M 6 **THE COURT:** Okay. So we've got two depositions to be  
5 : 1 2 P M 7 published tomorrow, and then we're going to have any motions --  
5 : 1 2 P M 8 directed verdict motions, and then the defendants, assuming  
5 : 1 2 P M 9 that that motion is denied, we then proceed with the defense  
5 : 1 2 P M 10 case.

5 : 1 2 P M 11 Defense counsel ready to present their  
5 : 1 2 P M 12 witnesses?

5 : 1 2 P M 13 **MR. COOKE:** Yes, Your Honor.

5 : 1 2 P M 14 **THE COURT:** Please remember, have them ready. I  
5 : 1 3 P M 15 don't want to be heard that someone is not here or they thought  
5 : 1 3 P M 16 it would be the next day, any of that. I expect you to have  
5 : 1 3 P M 17 your witnesses queued up.

5 : 1 3 P M 18 Okay. Have y'all shared witness lists and so  
5 : 1 3 P M 19 forth? Y'all continue to do that? Okay.

5 : 1 3 P M 20 Anything else I can help any of y'all with?

5 : 1 3 P M 21 **MR. LEVENTIS:** Your Honor, just one thing for  
5 : 1 3 P M 22 scheduling tomorrow. We are going to look tonight, now  
5 : 1 3 P M 23 thinking of the idea of these two videos tomorrow morning. So  
5 : 1 3 P M 24 we'll see if we can shorten them or what we can do. But we'll  
5 : 1 3 P M 25 see.

5 : 1 3 P M 1 THE COURT: Okay. That's y'all's strategy.

5 : 1 3 P M 2 MR. LEVENTIS: Thank you, Your Honor.

5 : 1 3 P M 3 THE COURT: Thank you.

5 : 1 3 P M 4  
5 : 1 3 P M 5 \* \* \* \* \*

5 : 1 3 P M 6 CERTIFICATE

5 : 1 3 P M 7 I, Tana J. Hess, CCR, FCRR, Official Court Reporter  
5 : 1 3 P M 8 for the United States District Court, District of South  
5 : 1 3 P M 9 Carolina, certify that the foregoing is a true and correct  
5 : 1 3 P M 10 transcript, to the best of my ability and understanding, from  
5 : 1 3 P M 11 the record of proceedings in the above-entitled matter.

5 : 1 3 P M 12  
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Tana J. Hess, CRR, FCRR, RMR  
Official Court Reporter