

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 29, 2018

REPORTER'S OFFICIAL TRANSCRIPT OF THE JURY TRIAL - DAY TEN
HELD BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE
January 29, 2018

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9 : 2 1 A M 1 **THE COURT:** Good morning. Please be seated. Okay.
9 : 2 1 A M 2 Are there any matters the parties need to raise with the Court
9 : 2 1 A M 3 before we bring in the jury?

9 : 2 1 A M 4 **MR. LEVENTIS:** I thought we'd just bring out the --
9 : 2 1 A M 5 counsel has been emailing over the weekend to kind of try to
9 : 2 1 A M 6 figure out our schedule for today and tomorrow.

9 : 2 1 A M 7 **THE COURT:** Yes.

9 : 2 1 A M 8 **MR. LEVENTIS:** So, as far as the United States, we do
9 : 2 1 A M 9 believe we're going to call, in rebuttal, our damages expert.
9 : 2 1 A M 10 we think it should only take 10, 20 minutes.

9 : 2 1 A M 11 **THE COURT:** Like I told Mr. Ashmore, whatever you
9 : 2 1 A M 12 need to do, y'all have -- y'all are going to do it. So
9 : 2 1 A M 13 whatever. So I'm not trying to limit you to that. Okay? And
9 : 2 1 A M 14 is that the only thing you're going to do in rebuttal at this
9 : 2 1 A M 15 point?

9 : 2 1 A M 16 **MR. LEVENTIS:** At this point, that's it, Your Honor.

9 : 2 1 A M 17 **THE COURT:** Yes, I understand.

9 : 2 1 A M 18 Mr. Ashmore, where do you stand on all of this?

9 : 2 1 A M 19 **MR. ASHMORE:** Your Honor, I'm leaning towards
9 : 2 1 A M 20 resting.

9 : 2 1 A M 21 **THE COURT:** Again, just hear all the testimony before
9 : 2 1 A M 22 you got to make that decision.

9 : 2 1 A M 23 **MR. ASHMORE:** Thank you, Your Honor.

9 : 2 1 A M 24 **THE COURT:** Is Mr. Johnson your last witness?

9 : 2 1 A M 25 **MR. COOKE:** Yes, Your Honor.

9 : 2 1 A M 1 THE COURT: You have your damages person here?

9 : 2 1 A M 2 MR. LEVENTIS: Yes, Your Honor.

9 : 2 1 A M 3 THE COURT: Okay. Because I -- I just suspect,
9 : 2 2 A M 4 without knowing the length of the examination, that I would
9 : 2 2 A M 5 love to have you guys close and we charge tomorrow morning.
9 : 2 2 A M 6 That would be the best of everything.

9 : 2 2 A M 7 MR. LEVENTIS: Absolutely.

9 : 2 2 A M 8 THE COURT: Mr. Griffith, what you got?

9 : 2 2 A M 9 MR. GRIFFITH: Your Honor, on their rebuttal witness,
9 : 2 2 A M 10 prior to having the jury out, we'd really like to know what
9 : 2 2 A M 11 they're going to rebut because rebuttal is quite limited. And
9 : 2 2 A M 12 we didn't present any new evidence or any evidence that they
9 : 2 2 A M 13 did not address the subject matter in their case in chief.

9 : 2 2 A M 14 And so, I mean, we have no objection if he's
9 : 2 2 A M 15 going to address something that was new, but we just would
9 : 2 2 A M 16 like --

9 : 2 2 A M 17 THE COURT: What's the general nature of that,
9 : 2 2 A M 18 without going into any detail?

9 : 2 2 A M 19 MR. LEVENTIS: I'll let Mr. Shaheen address this.

9 : 2 2 A M 20 MR. SHAHEEN: They give me all the fun tasks. I get
9 : 2 2 A M 21 the forensic accountant, after all. He is --

9 : 2 2 A M 22 THE COURT: That's not a compliment, you know.

9 : 2 3 A M 23 MR. SHAHEEN: Yes. He is just here to testify about
9 : 2 3 A M 24 the Singulex damages. There's been some testimony from
9 : 2 3 A M 25 defendants and from other witnesses that sort of clouds the

1 percentage of the HDL claims versus the Singulex claims. He's
2 just going to stand up and talk about that.

3 THE COURT: I think that's a fair reply.

4 MR. GRIFFITH: If he limits it to that, Your Honor --

5 THE COURT: And if he's not, I've noticed you and
6 Mr. Cooke know how to object. No secret about it.

7 Let's bring in the jury.

8 MR. LEVENTIS: Your Honor, could I bring up just one
9 quick thing?

10 THE COURT: Hold on a second.

11 MR. LEVENTIS: It's about Mr. Johnson's testimony.
12 So Mr. Cooke has provided to us some documents he was thinking
13 to go through today. One of those, we just -- it sounds like
14 he's not going to use it, but he had put in here about the
15 collaborate report. And in your order, you said the defendants
16 didn't know about this report, so it's not coming in. So I
17 just want to make sure.

18 MR. COOKE: Can we approach? I didn't want him to
19 hear us.

20 THE COURT: Yes.

21 (Whereupon the following proceedings were held at the
22 bench out of the hearing of the jury:)

23 MR. COOKE: We're not going to offer -- I put it in
24 to remind me to ask him if it was done. The Court said he
25 could testify it was done, he knew it was done, and no changes

9 : 2 4 A M 1 were required. But I didn't see the report itself, so we can't
9 : 2 4 A M 2 use that.

9 : 2 4 A M 3 THE COURT: Well, why would you even offer it at
9 : 2 4 A M 4 all -- what did he know?

9 : 2 4 A M 5 MR. COOKE: He knew that -- he knew that the audit
9 : 2 4 A M 6 was done and that there were no changes required as a result of
9 : 2 4 A M 7 it, so I'm not offering the document.

9 : 2 4 A M 8 THE COURT: Remind me. This is the document that was
9 : 2 4 A M 9 one of the audits done by Singulex?

9 : 2 4 A M 10 MR. COOKE: The second audit done by Singulex, yes.

9 : 2 4 A M 11 THE COURT: Do you have any problem with that?

9 : 2 4 A M 12 MR. LEVENTIS: If I stand up to object, it's because
9 : 2 4 A M 13 he think he's going into --

9 : 2 4 A M 14 MR. COOKE: It's not proper to show it to him. I
9 : 2 4 A M 15 didn't even mean to give it to you.

9 : 2 4 A M 16 MR. LEVENTIS: Because he saw it after starting the
9 : 2 5 A M 17 investigation. I don't want him to talk about what he saw
9 : 2 5 A M 18 during the investigation --

9 : 2 5 A M 19 THE COURT: He was aware there was report --

9 : 2 5 A M 20 MR. COOKE: Right.

9 : 2 5 A M 21 THE COURT: -- and that he was not required to make
9 : 2 5 A M 22 changes.

9 : 2 5 A M 23 MR. COOKE: Right.

9 : 2 5 A M 24 THE COURT: I think that's fair. Okay.

9 : 2 5 A M 25 (Whereupon the following proceedings were held in

open court in the presence and hearing of the jury:)

THE COURT: Bring in the jury.

(Whereupon the jury entered the courtroom.)

THE COURT: Please be seated. Good morning.

JURY: Good morning.

THE COURT: Hope everyone had a good weekend. A little bit of rest helps you. Let me give you a little bit of forecast. We think we're going to get the evidence completed today. There are some matters that I need to take up with the lawyers after the close of evidence. And my inclination is, if it's getting towards midday or thereafter, that I'll send you home early and bring you back tomorrow morning.

And the reason I do that is that your deliberations are important. I want you rested. I don't want you here late into the night trying to do something. And I think it's better to just start fresh in the morning. But if it ends earlier today -- we never know exactly -- then I'm going to -- we'll try to finish today. But, if not, I wanted to give you kind of a rough idea of sort of where we're heading with this. Okay?

I believe Mr. Johnson was on the stand.

Mr. Johnson, if you'd be kind enough to return. Reminding you you're still under oath, sir.

THE WITNESS: Yes, sir.

THE COURT: Mr. Cooke, please proceed, sir.

9 : 2 7 A M 1 MR. COOKE: Thank you, Your Honor.

9 : 2 7 A M 2 ROBERT BRADFORD JOHNSON,

9 : 2 7 A M 3 one of the defendants herein, called as a witness on his own
9 : 2 7 A M 4 behalf, being previously duly sworn, was examined and testified
9 : 2 7 A M 5 as follows:

9 : 2 7 A M 6 DIRECT EXAMINATION (CONTINUED)

9 : 2 7 A M 7 BY MR. COOKE:

9 : 2 7 A M 8 Q. Good morning, Mr. Johnson.

9 : 2 7 A M 9 A. Good morning.

9 : 2 7 A M 10 Q. Did you have a lonely weekend?

9 : 2 7 A M 11 A. I had a pretty good weekend.

9 : 2 7 A M 12 Q. Okay. Thank you.

9 : 2 8 A M 13 I'm going to pick up sort of where we left off on
9 : 2 8 A M 14 Friday. And got a lot to cover, so I'm going to try to move
9 : 2 8 A M 15 sort of quickly, but if there's something you need to elaborate
9 : 2 8 A M 16 on, I don't mean to rush you, but if I cut you off, it just
9 : 2 8 A M 17 means it's time to move on.

9 : 2 8 A M 18 A. Yes, sir.

9 : 2 8 A M 19 Q. I'm going to talk about the formation of Bluewave, and we
9 : 2 8 A M 20 were starting back in about 2009, I believe. And you've
9 : 2 8 A M 21 already talked about meeting with Tonya and some of the
9 : 2 8 A M 22 principals of HDL, but tell the jury, if you would, how you set
9 : 2 8 A M 23 about creating Bluewave.

9 : 2 8 A M 24 A. As far as forming the corporation?

9 : 2 8 A M 25 Q. Yes.

9 : 2 8 A M 1 A. well, obviously, after our meetings with HDL -- which was
9 : 2 8 A M 2 Tonya, Russ, and, I believe, Joe was at one of the meetings as
9 : 2 8 A M 3 well -- we had discussed sort of a foundation, what we wanted
9 : 2 8 A M 4 to do, to give you an idea.

9 : 2 9 A M 5 From there, it was getting bigger and bigger and
9 : 2 9 A M 6 bigger, which means we was coming -- getting closer to a -- an
9 : 2 9 A M 7 agreement, I would say. From that standpoint, then, in my
9 : 2 9 A M 8 situation, I reached out to Gene Sellers and Kristie, my
9 : 2 9 A M 9 accountant. And we would ask -- say, "Hey, listen, this is
10 what we're doing."

9 : 2 9 A M 11 Gene already had an idea. Kristie had a little bit
9 : 2 9 A M 12 of an idea, my accountant. She said, "Hey, okay, we need to go
9 : 2 9 A M 13 ahead and reserve the name." And so the name Bluewave was -- I
9 : 2 9 A M 14 don't know why. Blue has always been a color I've liked. And,
9 : 2 9 A M 15 for some reason, that's the name we chose, reserved the name,
9 : 2 9 A M 16 and the corporation was founded sometime first part of January.

9 : 2 9 A M 17 Q. Gene Sellers is the gentleman that we met last week?

9 : 2 9 A M 18 A. Gene Sellers is, yes, sir.

9 : 2 9 A M 19 Q. How did you happen to go to him?

9 : 2 9 A M 20 A. Good question. Gene and I had met -- he testified we met
9 : 2 9 A M 21 in 2009 the first time, but I really feel that we met about
9 : 3 0 A M 22 three years prior to that. And the reason I believe that is he
9 : 3 0 A M 23 was instrumental in forming some of the other corporations I've
9 : 3 0 A M 24 had.

9 : 3 0 A M 25 So he's someone that my accountant trusted immensely,

9 : 3 0 A M 1 plus Gene is like a granddad. That's the easiest way to
9 : 3 0 A M 2 describe it. If you say something wrong, he's going to say
9 : 3 0 A M 3 something back to you quick. He's also a man that is of the
9 : 3 0 A M 4 utmost integrity. And that was a big decision for us. So we
9 : 3 0 A M 5 felt like, hey, we got a business contract here we're looking
9 : 3 0 A M 6 at doing, and he said, "I have no problem with that." And so,
9 : 3 0 A M 7 from that standpoint, we -- we had hired Gene and his services.
9 : 3 0 A M 8 So --

9 : 3 0 A M 9 Q. Did he in any way hold himself out as a health care
9 : 3 0 A M 10 lawyer?

9 : 3 0 A M 11 A. No, he never -- he never said, "Hey, Brad, I'm a health
9 : 3 0 A M 12 care lawyer." He never stated that statement at all.

9 : 3 0 A M 13 we knew that LeClairRyan was taking the lead,
9 : 3 0 A M 14 which -- they're a 600-man firm. They're the biggest firm in
9 : 3 1 A M 15 the state of Virginia. And it's hard to question a firm that
9 : 3 1 A M 16 big and of that size coming down and saying something.

9 : 3 1 A M 17 And so they laid out the format of the agreement.
9 : 3 1 A M 18 And I think there's emails that can attest to that too,
9 : 3 1 A M 19 sometime the latter part of -- the first of December. We
9 : 3 1 A M 20 didn't feel that there was an issue.

9 : 3 1 A M 21 We gave Gene the contract -- or Gene got the
9 : 3 1 A M 22 contract. We said, "Hey, listen, go through it from A to Z,
9 : 3 1 A M 23 make sure we're good."

9 : 3 1 A M 24 Q. I'm going to get back to the sales contract in a few
9 : 3 1 A M 25 minutes. I just want to focus on the formation of Bluewave.

9 : 3 1 A M 1 A. Yes, sir.

9 : 3 1 A M 2 Q. So what -- there was some testimony last week about a
9 : 3 1 A M 3 nexus issue. Do you remember what that was?

9 : 3 1 A M 4 A. I do. Actually, when we first started, I actually -- the
9 : 3 1 A M 5 original five of us, we all had corporations. And so Kristie
9 : 3 1 A M 6 had the accounting stuff and Gene says, "Hey, you've already
9 : 3 1 A M 7 all got companies. Why don't you just be independent
9 : 3 2 A M 8 contractors?"

9 : 3 2 A M 9 And, actually, LeClairRyan had already recommended an
9 : 3 2 A M 10 independent contractor agreement with us. So I think that's
9 : 3 2 A M 11 where the news came from.

9 : 3 2 A M 12 The nexus issue came about a year later, and let me
9 : 3 2 A M 13 elaborate why. Nexus is a very complicated thing. And when I
9 : 3 2 A M 14 say "very complicated," you -- there's no way you could get a
9 : 3 2 A M 15 roomful of lawyers to agree on anything on it. So what had
9 : 3 2 A M 16 happened was -- is we was hiring people, and we had some as
9 : 3 2 A M 17 employees and as independent contractors. You cannot have
9 : 3 2 A M 18 both. You can't do it at all. And because of that, Kristie
9 : 3 2 A M 19 said, "Hey, listen." Her and Gene both stated, "You're setting
9 : 3 2 A M 20 yourself up to get hit by the law on this very hard." So Gene
9 : 3 2 A M 21 and Kristie recommended another set of attorneys, another set
9 : 3 2 A M 22 of tax attorneys, actually, very specialized in nexus laws.

9 : 3 2 A M 23 And the gist of nexus is this: You heard a simple
9 : 3 2 A M 24 example yesterday. Let me give you one that's a little bit
9 : 3 3 A M 25 more detailed. If we have a sales rep in Tennessee that sells

9 : 3 3 A M 1 a test and it goes to Virginia and it's billed in Virginia, and
9 : 3 3 A M 2 in Virginia they pay Bluewave, which is an Alabama corporation.
9 : 3 3 A M 3 And, in turn, we pay the sales representative in Virginia, who
9 : 3 3 A M 4 pays the taxes? We paid \$12,000-something for a two- or
9 : 3 3 A M 5 three-hour meeting to learn that they don't have a clue.

9 : 3 3 A M 6 So -- and here's the catch to that. And this is
9 : 3 3 A M 7 really what got your attention was, if you pay the taxes, say,
9 : 3 3 A M 8 in Alabama in that situation. Okay? But let's say three years
9 : 3 3 A M 9 come by and Virginia says, "Hey, no, you were wrong. We get
9 : 3 3 A M 10 the taxes." So now you have to write a check or hire a firm to
9 : 3 3 A M 11 find that in the state of Virginia. And if we're wrong, we
9 : 3 3 A M 12 still don't get the money back from Alabama. So we'll have to
9 : 3 3 A M 13 pay taxes in Alabama and Virginia.

9 : 3 4 A M 14 And you got to realize, right now, they're a
9 : 3 4 A M 15 corporate culture, a lot of states are going bankrupt. So they
9 : 3 4 A M 16 just don't have the money to fund everything. So they are
9 : 3 4 A M 17 looking at this harder. So we could end up paying taxes in all
9 : 3 4 A M 18 three states and not have a concrete issue -- or a concrete
9 : 3 4 A M 19 answer.

9 : 3 4 A M 20 So after we learned that from the meeting with those,
9 : 3 4 A M 21 we discussed with Gene, Kristie, and everybody, and it was
9 : 3 4 A M 22 like, well, this is a no-brainer. Everybody needs to roll
9 : 3 4 A M 23 towards the independent contractor agreement, because, if not,
9 : 3 4 A M 24 we're going to get drilled.

9 : 3 4 A M 25 Q. What is the Bradley Arant firm?

9 : 3 4 A M 1 A. That's actually the big firm that we hired in Birmingham
9 : 3 4 A M 2 to do the -- the tax consulting on the nexus issues. And
9 : 3 4 A M 3 they're --

9 : 3 4 A M 4 Q. Was there any discussion about if you went with
9 : 3 4 A M 5 independent contractor -- now, first of all, you're talking
9 : 3 4 A M 6 about using the -- making the sales representatives independent
9 : 3 4 A M 7 contractors?

9 : 3 4 A M 8 A. Yes, sir. Actually, you know, the first five of us all
9 : 3 5 A M 9 had companies. So -- and when LeClairRyan made the
9 : 3 5 A M 10 recommendation to be independent contractors, it would reduce
9 : 3 5 A M 11 our risk because of the Berkeley lawsuit fixing to be coming,
9 : 3 5 A M 12 because we had an idea they were going to sue us because -- not
9 : 3 5 A M 13 because of the noncompete; because of confidentiality. They
9 : 3 5 A M 14 thought what we had in our brains couldn't be used against
9 : 3 5 A M 15 them. So that's how it started.

9 : 3 5 A M 16 And then, when we started expanding, we started
9 : 3 5 A M 17 hiring some people as sales reps. And we realized real
9 : 3 5 A M 18 quick-like that's going to increase your account. And Gene
9 : 3 5 A M 19 said, "Whoa, whoa, whoa. I'll risk the funds." An independent
9 : 3 5 A M 20 contractor is someone you cannot tell what to do. You can't
9 : 3 5 A M 21 tell them how much vacation they got. You can't tell them any
9 : 3 5 A M 22 of these things. A sales representative or an employee, you
9 : 3 5 A M 23 govern, tell them what to do, and all this stuff all the way
9 : 3 5 A M 24 across the board.

9 : 3 5 A M 25 Q. Was there any discussion, though, about if they were going

9 : 3 5 A M 1 to be independent contractors, how could you get them to follow
9 : 3 6 A M 2 the rules with your training and compliance and so forth? Did
9 : 3 6 A M 3 you discuss that with the lawyers?

9 : 3 6 A M 4 A. Actually, what happened was -- is -- in our independent
9 : 3 6 A M 5 contractor agreements, it states that they have to maintain
9 : 3 6 A M 6 compliance across the board in those situations. But we also
9 : 3 6 A M 7 offered training at BlueWave. And, later on, we offered
9 : 3 6 A M 8 training at Singulex, came in and did a lot of our corporate
9 : 3 6 A M 9 training, so did HDL come in and did our corporate training.
9 : 3 6 A M 10 Plus, we also knew, one of the nice advantages is, in our
9 : 3 6 A M 11 Singulex contract, we had independent audits.

9 : 3 6 A M 12 Q. I'm going to -- I don't want to get too far ahead. I told
9 : 3 6 A M 13 you I was going to cut you off and --

9 : 3 6 A M 14 A. It's no big thing. Take your time.

9 : 3 6 A M 15 Q. -- and we can come back to it.

9 : 3 6 A M 16 Did anybody -- during the formation of BlueWave, any
9 : 3 6 A M 17 of the lawyers that reviewed it or any of the professionals
9 : 3 6 A M 18 suggest to you that it could present a violation of the
9 : 3 6 A M 19 Anti-Kickback Statute?

9 : 3 6 A M 20 A. Never, not one time, not one word, not one statement.

9 : 3 7 A M 21 Q. When was the first time that it was ever suggested to you
9 : 3 7 A M 22 that it would be considered a violation of Anti-Kickback
9 : 3 7 A M 23 Statute to be in an independent contractor sales relationship?

9 : 3 7 A M 24 A. Actually, that was November 2014. What it was is it was
9 : 3 7 A M 25 said to us -- it says the government is now saying that, hey,

9 : 3 7 A M 1 your independent contractor relationship could violate the
9 : 3 7 A M 2 anti-kickback. This is what our attorneys were conveying.

9 : 3 7 A M 3 So Mark White in our group of attorneys out of
9 : 3 7 A M 4 Birmingham, which is a pretty heavy-hitter firm, they reached
9 : 3 7 A M 5 out and discussed that with -- I believe it was the OIG or
9 : 3 7 A M 6 something like that. What was communicated back to us was a
9 : 3 7 A M 7 lot of people will throw up things to try to skate what's
9 : 3 7 A M 8 fixing to happen. And what ended up happening is HDL couldn't
9 : 3 7 A M 9 pay us. So they had actually -- they just ran out of money
9 : 3 7 A M 10 right there at the end. And they was doing everything they
9 : 3 7 A M 11 could not to pay us.

9 : 3 8 A M 12 Q. So that was 2015?

9 : 3 8 A M 13 A. Yeah, actually -- actually, January 4th or 5th -- 9th,
9 : 3 8 A M 14 somewhere in there, of 2015 is when they actually terminated
9 : 3 8 A M 15 our contract. We knew they was having an issue to pay us in
9 : 3 8 A M 16 November. We knew it was a big issue. We had already been
9 : 3 8 A M 17 told through the grapevine that, hey, listen, you know, this is
9 : 3 8 A M 18 a big issue on paying us, and that was for October initially
9 : 3 8 A M 19 and stuff like that.

9 : 3 8 A M 20 Q. So HDL stopped paying you in -- in January 2015, and they
9 : 3 8 A M 21 canceled your contract?

9 : 3 8 A M 22 A. They did it simultaneously. What's even more interesting
9 : 3 8 A M 23 about that is the same minute they terminated the contract,
9 : 3 8 A M 24 they called all of our independent contractors and asked them
9 : 3 8 A M 25 to hire them, come on as sales employees, every single one of

9 : 3 8 A M 1 them. And basically all offered them the exact same contract
9 : 3 8 A M 2 that we already had.

9 : 3 8 A M 3 So with the exception now you get a car allowance,
9 : 3 8 A M 4 now you get expenses paid. So all those things would be
9 : 3 9 A M 5 covered, but they actually offered the exact same commission
9 : 3 9 A M 6 structure, which is pretty much interesting when you start
9 : 3 9 A M 7 looking at it, because it was sort of like what's good for the
9 : 3 9 A M 8 goose should be good for the gander.

9 : 3 9 A M 9 Q. That's another day and another lawsuit.

9 : 3 9 A M 10 A. Yes, sir. Sorry.

9 : 3 9 A M 11 Q. So talking about the sales representatives, did -- who
9 : 3 9 A M 12 paid for their cars?

9 : 3 9 A M 13 A. They did. They were actually independent contractors.
9 : 3 9 A M 14 with an independent contractor agreement, if you look at the
9 : 3 9 A M 15 IRS guidelines -- and you have to look at their guidelines
9 : 3 9 A M 16 because this is -- this is a hot subject. You can't cross that
9 : 3 9 A M 17 line. And an independent contractor has to take care of all
9 : 3 9 A M 18 their expenses.

9 : 3 9 A M 19 Actually, one of the discussions in the first five
9 : 3 9 A M 20 months is we can't even have their expenses. We can't even
9 : 3 9 A M 21 collect their expenses. And what that means is I can't tell
9 : 3 9 A M 22 them, as a corporation, "Hey, send me your expenses so I can
9 : 3 9 A M 23 see what you're spending money on." I can't even ask for that
9 : 3 9 A M 24 according to Gene and Kristie and everybody.

9 : 3 9 A M 25 Q. And who set their hours, their working hours?

9 : 4 0 A M 1 A. They do 100 percent. So we don't have a clue if they take
9 : 4 0 A M 2 two months off to go to Hawaii or whatnot.

9 : 4 0 A M 3 Q. Who would tell them what doctors to -- practices to call
9 : 4 0 A M 4 on?

9 : 4 0 A M 5 A. They would. They would actually find their own.

9 : 4 0 A M 6 Q. And did you -- did you pay them on a W-2 or a 1099?

9 : 4 0 A M 7 A. What is it? A 1099 is independent contractor?

9 : 4 0 A M 8 Q. All right. Let's move on and talk about the entry into
9 : 4 0 A M 9 the relationship, negotiating the contracts with HDL, and then
9 : 4 0 A M 10 we'll talk about Singulex.

9 : 4 0 A M 11 A. Please.

9 : 4 0 A M 12 MR. COOKE: Could we see Mallory 46, which is already
9 : 4 0 A M 13 in evidence.

9 : 4 0 A M 14 BY MR. COOKE:

9 : 4 0 A M 15 Q. All right. This is an email, just to give you a point of
9 : 4 0 A M 16 reference, dated December 30, 2009. And it's from Tonya to you
9 : 4 0 A M 17 and Cal.

9 : 4 0 A M 18 And it says, "After talking this morning and
9 : 4 0 A M 19 reviewing all of Gene's changes with Dennis, attached is a copy
9 : 4 1 A M 20 of the revised term sheet that I am willing to sign
9 : 4 1 A M 21 immediately. I understand that Section 13 may be the big topic
9 : 4 1 A M 22 for discussion this afternoon on our 3 p.m. call."

9 : 4 1 A M 23 First of all, who is Gene?

9 : 4 1 A M 24 A. Gene Sellers. That would be our attorney.

9 : 4 1 A M 25 Q. And who is Dennis?

9 : 4 1 A M 1 A. That's Dennis Ryan. He is actually the lead guy for
9 : 4 1 A M 2 LeClairRyan. So he's been in practice for -- I don't know --
9 : 4 1 A M 3 30 years.

9 : 4 1 A M 4 Q. Can I -- I'd like to scroll down to three different
9 : 4 1 A M 5 paragraphs. One is paragraph numbered 4. Go ahead and scroll
9 : 4 1 A M 6 down.

9 : 4 1 A M 7 Okay. This is one of the elements of the term sheet.
9 : 4 1 A M 8 "Bluewave will be paid commissions equal to 16.4 percent of the
9 : 4 1 A M 9 revenue collected by HDL on sales generated by Bluewave in the
9 : 4 1 A M 10 territory. Commissions will be paid monthly on the 15th day of
9 : 4 1 A M 11 the month in which the revenue from such sales is collected by
9 : 4 1 A M 12 HDL."

9 : 4 1 A M 13 The next one I'd like to look at is paragraph 6.
9 : 4 2 A M 14 "HDL shall pay a processing and handling fee to physicians
9 : 4 2 A M 15 based on a time and motion study, estimated to be \$15 to 21 per
9 : 4 2 A M 16 patient and 19 to 25 to outside labs."

9 : 4 2 A M 17 And then the third would be paragraph 10, "Except as
9 : 4 2 A M 18 otherwise mutually agreed, HDL will provide zero-balance
9 : 4 2 A M 19 billing in the territory for Medicare, PPOs, POSSs, and
9 : 4 2 A M 20 Medicaid. HDL will review the same zero-balance billing for
9 : 4 2 A M 21 HMOs."

9 : 4 2 A M 22 what are PPOs?

9 : 4 2 A M 23 A. I think it's point of care. It's basically just insurance
9 : 4 2 A M 24 companies.

9 : 4 2 A M 25 Q. How about POSSs?

9 : 4 2 A M 1 A. Point of service.

9 : 4 2 A M 2 Q. And HMOs?

9 : 4 2 A M 3 A. Health maintenance organizations.

9 : 4 2 A M 4 Q. Was there any mention made of TRICARE? Did that come up
9 : 4 2 A M 5 in your discussions?

9 : 4 2 A M 6 A. No, sir.

9 : 4 2 A M 7 Q. And did that -- did anything about TRICARE show up in your
9 : 4 3 A M 8 contract?

9 : 4 3 A M 9 A. No, sir, it did not. As I said Friday in my discussions,
9 : 4 3 A M 10 the first time I ever heard the word of "you need to bill
9 : 4 3 A M 11 TRICARE patients" was right after Ms. Strawn had stated, you
9 : 4 3 A M 12 know, why are you not billing Medicare patients? And I stated
9 : 4 3 A M 13 we do not bill Medicare. And then I stated it's illegal to
9 : 4 3 A M 14 bill Medicare for lab services.

9 : 4 3 A M 15 And then she said, "Well, how about TRICARE?"

9 : 4 3 A M 16 And I says, "Is it not the exact same?"

9 : 4 3 A M 17 And that's when I discussed all the people I called
9 : 4 3 A M 18 after I walked out.

9 : 4 3 A M 19 Q. That was later in 2014?

9 : 4 3 A M 20 A. That was 2014, April or May of 2014, correct.

9 : 4 3 A M 21 Q. Well into the investigation?

9 : 4 3 A M 22 A. That's right.

9 : 4 3 A M 23 Q. Okay. But going back to this, did the attorneys review
9 : 4 3 A M 24 these terms of the term sheet and approve those?

9 : 4 3 A M 25 A. Yes, sir. Actually, they reviewed the whole contract and

9 : 4 3 A M 1 approved it. What's interesting about this contract -- and
9 : 4 4 A M 2 this is something that's probably not going to be shared and
9 : 4 4 A M 3 you won't want to hear -- but this contract was actually
9 : 4 4 A M 4 reviewed -- or not reviewed per se -- looked at by at least 11
9 : 4 4 A M 5 to 12 sets of attorneys over the next year.

9 : 4 4 A M 6 Q. Could you explain that?

9 : 4 4 A M 7 A. Sure.

9 : 4 4 A M 8 Gene, obviously, and LeClairRyan was number one and
9 : 4 4 A M 9 two. Well, Berkeley sued us because they said -- they used --
9 : 4 4 A M 10 not a noncompete, but they used a confidentiality agreement to
9 : 4 4 A M 11 say, "Hey, listen, you can't go out and sell for somebody
9 : 4 4 A M 12 else." So they tried to tie us up.

9 : 4 4 A M 13 So we hired a firm in Virginia, because that's where
9 : 4 4 A M 14 they sued us. Hugh Fain and them -- which is another 80- to
9 : 4 4 A M 15 100-man law firm -- reviewed our contracts and looked at
9 : 4 4 A M 16 everything. Berkeley's lawyers looked at our contracts. And
9 : 4 4 A M 17 then we had Galese & Ingram look at our contracts because we
9 : 4 4 A M 18 utilized them as litigation attorneys as well.

9 : 4 4 A M 19 And then, this contract, if you look at the template
9 : 4 4 A M 20 of it, is almost identical to our Singulex contract. I mean,
9 : 4 5 A M 21 there's very little verbiage in there that's different. But it
9 : 4 5 A M 22 was also reviewed by Gene and sent to Ballard and Spain -- or
9 : 4 5 A M 23 Spahr, whatnot, which is another huge health care firm.

9 : 4 5 A M 24 But also, on top of that, you had the Goliases. The
9 : 4 5 A M 25 Goliases are the largest shareholders within HDL. They own,

9 : 4 5 A M 1 like, 52, 53 percent of the corporation. They own a huge lab
9 : 4 5 A M 2 in Texas. And their attorneys out of Minnesota reviewed the
9 : 4 5 A M 3 contract as well. And never, not one time, did somebody say,
9 : 4 5 A M 4 "Oh, listen, you got to do this." We never heard those words
9 : 4 5 A M 5 at all.

9 : 4 5 A M 6 Q. As to any of these terms?

9 : 4 5 A M 7 A. Any of those terms.

9 : 4 5 A M 8 Q. Let's look at Plaintiffs' 1288.

9 : 4 5 A M 9 This is an email that's already been in evidence and
9 : 4 5 A M 10 we've -- and we've talked about it. This is dated March 16,
9 : 4 6 A M 11 2010, from Tonya to you guys. "Did you guys look at the
9 : 4 6 A M 12 contract before I got it from Gene's office?"

9 : 4 6 A M 13 And I think there was -- I think there was some
9 : 4 6 A M 14 testimony last week -- or maybe the week before now -- about
9 : 4 6 A M 15 the fact that you didn't actually sign this contract until
9 : 4 6 A M 16 sometime later?

9 : 4 6 A M 17 A. That's correct. Actually, we was supposed to initially
9 : 4 6 A M 18 sign the contract the 1st of January. But, due to the fact
9 : 4 6 A M 19 Berkeley hit us with a lawsuit, I think, the first week of
9 : 4 6 A M 20 January, LeClairRyan and Gene Sellers both made the
9 : 4 6 A M 21 recommendation, "Hey, we need to hold off on signing the
9 : 4 6 A M 22 contract right now. Let's just sit tight."

9 : 4 6 A M 23 And so, actually, after we had negotiated our --
9 : 4 6 A M 24 LeClairRyan had negotiated an agreement with Berkeley
9 : 4 6 A M 25 pertaining to everything. That's when the agreement came back

9 : 4 6 A M 1 on the table, and that's when the Goliases, Tonya, Cal, and
9 : 4 7 A M 2 myself met in -- in Atlanta to just discuss some more specifics
9 : 4 7 A M 3 about the numbers. And the reason behind it was because of the
9 : 4 7 A M 4 money that was paid to Berkeley, and they wanted make sure we
9 : 4 7 A M 5 would stay and not leave.

9 : 4 7 A M 6 Q. And you ultimately made the contract retroactive to the
9 : 4 7 A M 7 first of the year?

9 : 4 7 A M 8 A. That is correct.

9 : 4 7 A M 9 Q. I want to call your attention -- go down. There's a
9 : 4 7 A M 10 section that's entitled "smaller issues" down toward the
9 : 4 7 A M 11 bottom. It's says "bigger issues." Now keep going down, and
9 : 4 7 A M 12 there's one that says "smaller issues."

9 : 4 7 A M 13 You see this Number 2? It says, "We are not going to
9 : 4 7 A M 14 agree that we cannot change any of the fees or any other
9 : 4 7 A M 15 operational thing, like P&H, without your approval. I realize
9 : 4 7 A M 16 that the P&H is a critical door-opener, but if there are
9 : 4 7 A M 17 regulatory or legal reasons that we have to change that, we
9 : 4 7 A M 18 will. We can agree to give you advance notice."

9 : 4 8 A M 19 Now, you testified on Friday that you never
9 : 4 8 A M 20 considered P&H fees to be a sales tool, but Tonya here refers
9 : 4 8 A M 21 to it as "a critical door-opener."

9 : 4 8 A M 22 what did you understand by that?

9 : 4 8 A M 23 A. well, I just looked at it as she just put that in there,
9 : 4 8 A M 24 because, you got to realize, remember, how do you get the blood
9 : 4 8 A M 25 is one of the critical aspects. So, from my standpoint, I had

9 : 4 8 A M 1 no problem with it. I read this whole paragraph to look at one
9 : 4 8 A M 2 big point. We're going to tell you if we do something
9 : 4 8 A M 3 different.

9 : 4 8 A M 4 Because, you got to realize, we just came from a
9 : 4 8 A M 5 company that would change something, like your commission, and
9 : 4 8 A M 6 it'd be like you go into work today, and you agreed to make \$20
9 : 4 8 A M 7 an hour or whatever, and you get there, and they give you a
9 : 4 8 A M 8 check and they pay you 10. So I looked at it from that
9 : 4 8 A M 9 standpoint as, "Hey, listen, you're going to communicate with
10 me on that."

9 : 4 8 A M 11 Q. In your verbiage, does the word -- does the phrase
9 : 4 9 A M 12 "process and handling" have a meaning apart from process and
9 : 4 9 A M 13 handling fees?

9 : 4 9 A M 14 A. Yes, sir. Process and handling is just the blood. I
9 : 4 9 A M 15 mean, we really look at it as how you get the blood. It's
9 : 4 9 A M 16 actually all the steps involved in getting the blood. And, I
9 : 4 9 A M 17 mean, it's -- it's still probably -- it is the number one
9 : 4 9 A M 18 obstacle we all deal with.

9 : 4 9 A M 19 You could say "getting the blood" or "process and
9 : 4 9 A M 20 handling fee." They both are the same because we look at a
9 : 4 9 A M 21 practice, and that is one of the critical parts of it.

9 : 4 9 A M 22 Q. Was process and handling of blood critical?

9 : 4 9 A M 23 A. Oh, yes. I mean -- yes. If you didn't do it right or
9 : 4 9 A M 24 samples were destroyed, things like that, people had to re-come
9 : 4 9 A M 25 back. There's a lot of issues pertaining to that.

9 : 4 9 A M 1 And, I mean, you got to realize you got a
9 : 4 9 A M 2 phlebotomist that might be drawing blood for four different
9 : 4 9 A M 3 companies. And you also need to realize HDL did not take work
9 : 4 9 A M 4 off the practice. That physician was drawing typically, on
9 : 4 9 A M 5 average, three to four tubes before we came in the door.

9 : 4 9 A M 6 When we came in the door, we added four more tubes to
9 : 5 0 A M 7 it. Okay? So it's not easier. It's not like we took these
9 : 5 0 A M 8 four tubes away. It didn't work that way.

9 : 5 0 A M 9 Because HDL, even though it had a lot of tests, we
9 : 5 0 A M 10 offer a lot of stuff, we couldn't do stuff you needed that day.
9 : 5 0 A M 11 You know, CBCs, things like that, you need that day, that
9 : 5 0 A M 12 quick. And our turnaround, I think, when we first started was
9 : 5 0 A M 13 almost two weeks. And it got better and better and better
9 : 5 0 A M 14 to -- I think it was close to a week.

9 : 5 0 A M 15 Q. So did you agree, then, that process and handling is a
9 : 5 0 A M 16 critical door opener? Did that seem like a reasonable phrase
9 : 5 0 A M 17 to use?

9 : 5 0 A M 18 A. When I looked at it, I didn't think anything about it.

9 : 5 0 A M 19 Q. And did you have any disagreement with allowing there to
9 : 5 0 A M 20 be changes in the processing and handling fees or other fees if
9 : 5 0 A M 21 there were regulatory or legal reasons to do that?

9 : 5 0 A M 22 A. We didn't have any problems with change. If you told us
9 : 5 0 A M 23 we couldn't to do it, we had no problem dropping it.

9 : 5 0 A M 24 Q. Let me pull up Exhibit 1047. This is already in evidence.
9 : 5 1 A M 25 This is the final sales agreement; is that right?

9 : 5 1 A M 1 And it's effective as of the 4th day of January,
9 : 5 1 A M 2 2010. Is that what you agreed to?

9 : 5 1 A M 3 A. Yes, sir.

9 : 5 1 A M 4 Q. This is the agreement that you signed?

9 : 5 1 A M 5 A. Uh-huh.

9 : 5 1 A M 6 Q. Let me scroll down to paragraph 3d -- I'm sorry, 3b.

9 : 5 1 A M 7 Do you see that, that the agreement was that the
9 : 5 1 A M 8 company, meaning HDL, would provide process and handling fees
9 : 5 1 A M 9 to physicians in the range of 18 to \$21 and process and
9 : 5 1 A M 10 handling fees to outside labs in the range of \$18 to \$25
9 : 5 1 A M 11 provided that any fee change shall be mutually agreed upon by
9 : 5 1 A M 12 the parties unless required by any state or federal laws or
9 : 5 2 A M 13 regulations?

9 : 5 2 A M 14 A. Correct.

9 : 5 2 A M 15 Q. So did you agree that the fees could change without your
9 : 5 2 A M 16 agreement if required by state or federal laws or regulations?

9 : 5 2 A M 17 A. I'm sorry. I don't think I heard your question.

9 : 5 2 A M 18 Q. So did you wind up in the final version of your contract
9 : 5 2 A M 19 agreeing that a fee change shall be mutually agreed upon by the
9 : 5 2 A M 20 parties unless required by any state or federal laws or
9 : 5 2 A M 21 regulations?

9 : 5 2 A M 22 A. That's correct. If they were required by state and
9 : 5 2 A M 23 federal laws, we'd drop it. You know, one thing that's
9 : 5 2 A M 24 critical here, you see the numbers 18 to 21, we actually -- 17
9 : 5 2 A M 25 was the actual amount.

9 : 5 2 A M 1 So, I mean, that was something else to keep in mind.
9 : 5 2 A M 2 we actually was under the -- Tonya and HDL was under the amount
9 : 5 2 A M 3 the whole time.

9 : 5 2 A M 4 Q. So this -- did this include the draw fee?

9 : 5 2 A M 5 A. I would have assumed it would have, but I'm not sure.

9 : 5 2 A M 6 Q. Okay. I mean, this paragraph, when you refer to process
9 : 5 3 A M 7 and handling --

9 : 5 3 A M 8 A. When I read this paragraph, process and handling fees
9 : 5 3 A M 9 period, not draw fee.

9 : 5 3 A M 10 Q. Okay.

9 : 5 3 A M 11 A. And again there's a big distinction between draw fee and
9 : 5 3 A M 12 process and handling fees.

9 : 5 3 A M 13 Q. Let me take a look at subparagraph e. And it says they
9 : 5 3 A M 14 agree to provide zero-balance billing in the territory for
9 : 5 3 A M 15 Medicare, PPOs, POSS, and Medicaid except as otherwise mutually
9 : 5 3 A M 16 agreed to by the company and the contractor.

9 : 5 3 A M 17 Do you see that?

9 : 5 3 A M 18 A. Yes, sir, I do.

9 : 5 3 A M 19 Q. Is that pretty much what was in your term sheet?

9 : 5 3 A M 20 A. Yes, sir, it was.

9 : 5 3 A M 21 Q. And does it make any mention of TRICARE?

9 : 5 3 A M 22 A. No, sir. As I said, again, the TRICARE thing -- as I
9 : 5 3 A M 23 said, I called most of the companies. One of the nice things
9 : 5 3 A M 24 about this business is the business being relatively small.
9 : 5 3 A M 25 It's growing pretty fast at this time.

9 : 5 3 A M 1 I had the ability to reach out and call my number one
9 : 5 3 A M 2 competitor. I could call them today and say, "Hey, listen.
9 : 5 3 A M 3 what are y'all doing with this?" And they would tell me.

9 : 5 4 A M 4 I actually -- we ended up hiring a ton of our
9 : 5 4 A M 5 competitive reps. So we always could -- what was your total?
9 : 5 4 A M 6 what was said? So we always had a good idea of what was going
9 : 5 4 A M 7 on.

9 : 5 4 A M 8 Q. All right. So that gets us through the HDL contract
9 : 5 4 A M 9 formation. You testified earlier that you also had
9 : 5 4 A M 10 negotiations with Singulex.

9 : 5 4 A M 11 A. We did.

9 : 5 4 A M 12 Q. Did you use the HDL contract and the negotiations there as
9 : 5 4 A M 13 a starting point to negotiate the Singulex contract?

9 : 5 4 A M 14 A. Yeah. I think they asked us could we give them some sort
9 : 5 4 A M 15 of template on what we used with HDL. And, to my knowledge,
9 : 5 4 A M 16 Gene forwarded that to Singulex in this situation.

9 : 5 4 A M 17 Q. So tell the jury, then, who were the players that were
9 : 5 4 A M 18 involved in the negotiation of the Singulex agreement?

9 : 5 4 A M 19 A. Actually, Singulex is a little different. And I'm going
9 : 5 4 A M 20 to jump back and lay the foundation here so you understand
9 : 5 4 A M 21 where we're going with this.

9 : 5 4 A M 22 Because of the fact is -- is Singulex had called me
9 : 5 4 A M 23 in December of 2009, near the end of it, and asked me to fly in
9 : 5 5 A M 24 for a day. I says, "what do you need?"

9 : 5 5 A M 25 And they says, "well, we'd like to pay you a

9 : 5 5 A M 1 consulting fee. We'll pay you \$5,000 if you'll come in and
9 : 5 5 A M 2 spend a day with us."

9 : 5 5 A M 3 And I said, "what's up?"

9 : 5 5 A M 4 And they says, "Can't say anything we're doing at
9 : 5 5 A M 5 Berkeley or anything like that." They said, "We just want you
9 : 5 5 A M 6 to tell us what we're doing."

9 : 5 5 A M 7 So I met with them for a day because they actually
9 : 5 5 A M 8 had a former CEO of Berkeley working for them and stuff like
9 : 5 5 A M 9 this. And what they were doing was they were burning up money
9 : 5 5 A M 10 massively and not moving forward.

9 : 5 5 A M 11 So long story short from that meeting, it spawned,
9 : 5 5 A M 12 "Hey, let's start talking."

9 : 5 5 A M 13 And Singulex said, "Hey, listen. We want to talk to
9 : 5 5 A M 14 y'all about selling for us."

9 : 5 5 A M 15 So the first thing Cal and I discussed with Singulex
9 : 5 5 A M 16 is we don't want to sell Singulex. And so when people talk
9 : 5 5 A M 17 about, hey, money, money, money, we didn't want to sell for
9 : 5 5 A M 18 Singulex. We wanted Singulex to outsource their Singulex
9 : 5 6 A M 19 troponin test, their cardiac troponin test to HDL for one
9 : 5 6 A M 20 reason because, one, we didn't want to hire another sales
9 : 5 6 A M 21 force; two, we didn't want to have to deal with all this. We
9 : 5 6 A M 22 wanted it over here with HDL because it is the best test since
9 : 5 6 A M 23 sliced bread and butter.

9 : 5 6 A M 24 Q. Was there precedent for that? Was there another lab that
9 : 5 6 A M 25 was outsourcing its tests to --

9 : 5 6 A M 1 A. Oh, yeah, there was. The whole concept of HDL -- and this
9 : 5 6 A M 2 is one of the best things about them -- is Tonya was a lab
9 : 5 6 A M 3 expert. She could look at products being made and everything
9 : 5 6 A M 4 else and say, "Hey, we're buying this test from LipoScience and
9 : 5 6 A M 5 we're paying 29, \$35 a test for it." Then she realized that I
9 : 5 6 A M 6 can spend a million dollars on a machine in Germany, and we can
9 : 5 6 A M 7 do the same test for \$2. So she was expert at it.

9 : 5 6 A M 8 But what makes it superior was it's technology
9 : 5 6 A M 9 mutual. And what I mean by that is, when we all sat down and
9 : 5 7 A M 10 met, what is the best test in the country? Where are they?
9 : 5 7 A M 11 All right. You got Diadexus, stroke test. Okay. Let's grab
9 : 5 7 A M 12 that. You've got gradient gel electrophoresis from Berkeley.
9 : 5 7 A M 13 Let's get that test. You've got LipoScience's NMR test,
9 : 5 7 A M 14 nuclear magnetic resonance. We'll see if we can get that test.

9 : 5 7 A M 15 We talked about getting Atherotech's test, which is a
9 : 5 7 A M 16 competitor of ours, but the studies were hammering so hard we
9 : 5 7 A M 17 didn't feel it was a viable competitor to us. And so -- we
9 : 5 7 A M 18 also looked out there, BG Medicine's galectin-3. So there's
9 : 5 7 A M 19 another test we wanted.

9 : 5 7 A M 20 Then Tonya acquired the omega-3 point, which is a
9 : 5 7 A M 21 cutting-edge test. And so we also acquired an early CT lung
9 : 5 7 A M 22 cancer test. Not many people know that. We had a lung cancer
9 : 5 7 A M 23 test which was probably the best lung cancer test of all time
9 : 5 7 A M 24 and still is. And not many people even knew it existed.

9 : 5 7 A M 25 So what had happened was she that contracted to bring

9 : 5 7 A M 1 it in to put it on one piece of paper. So now a physician,
9 : 5 8 A M 2 instead of saying, "Hey, I'm going to order this test from here
9 : 5 8 A M 3 and this test from here and this test from here and this test
9 : 5 8 A M 4 from here," she brought them all, to give you an idea.

9 : 5 8 A M 5 Q. Just out of curiosity, if they did order from a bunch of
9 : 5 8 A M 6 different labs, would they be able to get process and handling
9 : 5 8 A M 7 fees from all those different labs?

9 : 5 8 A M 8 A. Actually, most all of them, yes, they would. If they drew
9 : 5 8 A M 9 from LipoScience, which offered a process and handling fee --
9 : 5 8 A M 10 Boston offered a process and handling fee. Cleveland HeartLabs
9 : 5 8 A M 11 offered a process and handling fee. Atherotech offered a
9 : 5 8 A M 12 process and handling fee. HunterLab offered a process and
9 : 5 8 A M 13 handling fee. Natera offers a process and handling fee.
9 : 5 8 A M 14 Pathway Genomics offers a process and handling fee. Let's see
9 : 5 8 A M 15 here. Tethys offers a process and handling fee.

9 : 5 8 A M 16 So you got to realize, in the industry, this was, I
9 : 5 8 A M 17 mean, common. So you -- in 2013, 2014, right in there,
9 : 5 9 A M 18 those -- those years, you would go into an account and nobody
9 : 5 9 A M 19 would ever even say, "Hey, listen. Is there any issues about
9 : 5 9 A M 20 process and handling fees and" -- because it was common. It
9 : 5 9 A M 21 was just common across the industry.

9 : 5 9 A M 22 Q. Getting back to your Singulex negotiations -- and by the
9 : 5 9 A M 23 way, was that Philippe Goix who we saw last week?

9 : 5 9 A M 24 A. That was Philippe, yes.

9 : 5 9 A M 25 Q. Okay. And that's who you met with?

9 : 5 9 A M 1 A. Sir, I'm sorry?

9 : 5 9 A M 2 Q. You met with him?

9 : 5 9 A M 3 A. Yes, sir, we did.

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

9 : 5 9 A M 5 A. So --

9 : 5 9 A M 6 Q. And describe him generally. What was -- we couldn't all
9 : 5 9 A M 7 understand everything he said.

9 : 5 9 A M 8 So what exactly did you understand about him?

9 : 5 9 A M 9 A. Well, I actually have a hard time understanding Philippe.
9 : 5 9 A M 10 A lot of people do. He's cutting edge, wicked smart. I mean,
9 : 5 9 A M 11 wicked smart.

9 : 5 9 A M 12 His whole focus with Singulex was to take the company
9 : 5 9 A M 13 public. They wanted to sell off the machines that do the
1 0 : 0 0 A M 14 cardiac troponin I primarily to the hospital marketplace, to
1 0 : 0 0 A M 15 give you an idea. But they needed some sort of revenue coming
1 0 : 0 0 A M 16 in in order to increase their valuations in order to dump more
1 0 : 0 0 A M 17 money into the machine in order to get it ready to be sold and
1 0 : 0 0 A M 18 in order to take the company to a public offering.

1 0 : 0 0 A M 19 Q. So you had wanted them to outsource their test to HDL?

1 0 : 0 0 A M 20 A. HDL, yes, sir. And --

1 0 : 0 0 A M 21 Q. And --

1 0 : 0 0 A M 22 A. And I understand why Philippe didn't want to do it. One,
1 0 : 0 0 A M 23 you lose control. Okay. Two, Singulex has a reimbursement on
1 0 : 0 0 A M 24 the troponin I of \$18.

1 0 : 0 0 A M 25 In the lab industry -- and this is according to Tonya

1 and this is according to the experts that I've heard of -- if
2 you've got a phenomenal test -- let's say you've got the best
3 test in the world -- you know, you try to sell it to LabCorp or
4 Quest, you're only going to get 5 percent to 10 percent of the
5 reimbursement.

6 So think about that for a second. You got a test you
7 put 20 million into and that test now is going to reimburse at
8 18 and you're going to make \$3 every time it's sold. And you
9 really don't have anybody selling it in that situation.

10 So the thing is, you know, if you look at it, he was
11 like, "well, that can't do what we need to do in order to be
12 where we want to be." So ...

13 Q. So they brought you in, and you agreed to be a sales
14 representative for them?

15 A. Yes, sir. They actually -- we was talking back and forth.
16 Gary Tom, who actually worked with me at Berkeley HeartLabs, he
17 was actually in charge of the billing at Berkeley. He also was
18 in charge of process and handling fees at Berkeley. He cut all
19 our checks. He did all the commission calculations. He knew
20 all that stuff backwards and forwards.

21 He also -- I actually had left Berkeley right when --
22 he's the one that informed me what Berkeley was fixing to do
23 when he had told me those statements. And he said, "Brad, be
24 prepared. It's going to be bad. This is what's going to
25 happen."

1 He had left and went to Singulex to be their
2 comptroller/the same person as well at Berkeley. well, Tonya
3 actually brought him in as a consultant for about a month at
4 HDL to get some idea as well. And he also ended up being the
5 chief biller, CEO of another corporation, another lab as well
6 after that.

7 Q. And did you have to get HDL's permission to allow you to
8 sell for Singulex as well?

9 A. Yes, we did. Actually, we've been an open book with Tonya
10 from day one. we've been an open book period. And Singulex
11 wasn't offering a lot of tests, and we said can't do it.
12 Sorry, just can't do it.

13 Again, we tried to talk Philippe into outsourcing the
14 test over to HDL, which would have been a lot easier, a lot,
15 lot easier for us. It would have cost us a lot of money, but
16 it was just easier.

17 And -- but we could not -- could not get him to do
18 that. But Tonya and us had a discussion, and Tonya was fine
19 with that. And we said we're only going to work in these
20 number of states. And we also told her we were going to keep a
21 very close eye on Singulex.

22 Let me elaborate on what that means. Do you mind?

23 Q. Briefly, because then I got to ask you about something
24 else.

25 A. Go ahead. Then I'll talk about it later.

10:03AM 1 MR. COOKE: May I approach?

10:03AM 2 THE COURT: You may.

10:03AM 3 BY MR. COOKE:

10:03AM 4 Q. I'm going to show you BW521. See if you remember
10:03AM 5 receiving that communication. I believe it's the Singulex
10:03AM 6 contract.

10:03AM 7 It looks like it's the Singulex contract; is that
10:03AM 8 correct?

10:03AM 9 A. Yes, sir.

10:03AM 10 MR. COOKE: Thank you. I would offer this as --

10:03AM 11 MR. LEVENTIS: Your Honor, is he asking his attorney
10:03AM 12 a question about the document?

10:03AM 13 THE COURT: Yeah. Does he -- does he know that is --

10:03AM 14 THE WITNESS: I can read it.

10:04AM 15 THE COURT: Mr. Johnson, do you know what that
10:04AM 16 document is?

10:04AM 17 BY MR. COOKE:

10:04AM 18 Q. And do you see your name on the address line?

10:04AM 19 A. I do. It actually looks like the marked-up contract, the
10:04AM 20 Singulex contract. "Attached are clean and marked versions of
10:04AM 21 the agreement." So this is our sales agreement right here,
10:04AM 22 shows the test.

10:04AM 23 Q. And are you listed as a recipient of that email?

10:04AM 24 A. I am. Yes, sir, I am.

10:04AM 25 MR. COOKE: I would offer it.

1 THE COURT: Is this an objection?

2 MR. LEVENTIS: No objection, Your Honor.

3 MR. ASHMORE: No objection.

4 THE COURT: Very good. Bluewave 521 admitted without
5 objection.

6 MR. COOKE: Can we just bring up that cover page
7 there. I want to do this just to really introduce the parties
8 here. If you could pull up that -- going down to the bottom of
9 that message too. I'm sorry, let's get that whole section.
10 Yeah, that's good. All right. I'm sorry. Go down to the
11 next -- to the next block. There we go. All right.

12 BY MR. COOKE:

13 Q. That's an email from Mary Mullany and -- with, it looks
14 like, Ballard Spahr.

15 who was she?

16 A. She was Singulex's attorney that drafted the -- well,
17 worked the contract with Gene Sellers and Leatha. You can see
18 Leatha Gilbert in there. She worked with Gene as well. She's
19 an attorney as well.

20 Q. So who are the other people, just briefly, that are on
21 here? You mentioned Mr. Goix. You mentioned Mr. Tom. We know
22 Mr. Dent. We know Gene Sellers.

23 who are the other people there listed?

24 A. Leatha Gilbert was the attorney with him, and she was
25 actually slowly taking over Gene's practice. But unfortunately

1 10:05 AM when she was about 35, 37, she had a -- she had a stroke.

2 Q. But she was helping Mr. Sellers?

3 A. Yes, sir, she was. She was actually involved in a lot of
4 discussions with Gene. And so -- and the Sandra Cantu -- I'm
5 not sure who that person is, but Ballard Spahr is a huge law
6 firm. We knew that as well going into this, too.

7 Q. Did they review the contract?

8 A. Yes, sir, they did. I -- actually, you saw the marked-up
9 copy of this one as well.

10 Q. That's attached to this?

11 A. Yes, sir.

12 Q. All right. Let's take a look at Exhibit 1049, please.

13 Is this the final version of the sales agreement?

14 A. Looks like the first part is, yes. I mean, I --

15 MR. COOKE: Could we scroll down to Paragraph 3b.

16 BY MR. COOKE:

17 Q. And does this appear to be comparable to what we looked at
18 a few minutes ago with HDL?

19 A. Yes, sir, it does.

20 Q. And then let's look at 3e, "Provide zero-balance billing
21 in the territory for Medicare, Medicaid, PPOs, POSs, HMOs
22 except as expressed and mutually agreed by the company and
23 contractor."

24 Is there any expressed mention of TRICARE?

25 A. No, sir.

10:07AM 1 Q. And then there's a different provision in here I'd like to
10:07AM 2 look at. It's paragraph 5e. If we can go to the next page at
10:07AM 3 5e. This has a provision for an audit.

10:07AM 4 A. Uh-huh.

10:07AM 5 Q. When did that come up?

10:07AM 6 A. Actually Philippe had sent it back to us, and he had said
10:07AM 7 something about Mary Mullany, their attorney, had said they
10:07AM 8 wanted to do a compliance audit. Because you got to realize,
10:07AM 9 if you're going to try to take a company public, you got to
10:08AM 10 make sure all the books, all the records, everything is clean.
10:08AM 11 You can't have anything tarnished in there.

10:08AM 12 And so -- or if you're going to sell a corporation,
10:08AM 13 because that sets you up for corporate liability in that
10:08AM 14 situation. And Philippe had made the recommendation, which we
10:08AM 15 thought, "Okay. This is great for us. This will actually
10:08AM 16 validate everything we're doing and will actually make us
10:08AM 17 stronger across the board." Actually, after reading this, I
10:08AM 18 wish we would have went back to HDL and said, Hey, put this in,
10:08AM 19 too to make it stronger.

10:08AM 20 Q. It says, "Company shall engage an independent third party
10:08AM 21 who specializes in anti-kickback laws and Stark laws to perform
10:08AM 22 an annual compliance audit for the parties." And in a little
10:08AM 23 while, we'll talk about the audits that were actually done.

10:08AM 24 A. Great.

10:08AM 25 Q. Did the HDL and Singulex develop process and handling

10:08 AM 1 agreements?

10:08 AM 2 A. Yes, sir. HDL developed them as well as did Singulex,
10:08 AM 3 correct.

10:08 AM 4 Q. Was Bluewave to be an actual party to that agreement?

10:09 AM 5 A. I'm confused on your question.

10:09 AM 6 Q. Well, who was the processing and handling agreement
10:09 AM 7 between?

10:09 AM 8 A. The labs, HDL, Singulex, and the physician offices.

10:09 AM 9 Q. Physician offices and the laboratories?

10:09 AM 10 A. Yes, sir.

10:09 AM 11 Q. Let's look at Exhibit 1144, which is already in evidence.

10:09 AM 12 Does this appear to be the HDL process and handling
10:09 AM 13 agreement?

10:09 AM 14 A. Yes, sir, it does.

10:09 AM 15 Q. And that one just happens to have a doctor's practice, a
10:09 AM 16 family practice on it.

10:09 AM 17 But is this similar to the other agreements that they
10:09 AM 18 entered into?

10:09 AM 19 A. Yes, sir.

10:09 AM 20 Q. Did you draft those agreements?

10:09 AM 21 A. No, sir.

10:09 AM 22 Q. Did your lawyers draft them?

10:09 AM 23 A. No, sir.

10:09 AM 24 Q. Who did?

10:09 AM 25 A. I would assume LeClairRyan drafted them all. I think

1 actually Tonya even testified that LeClairRyan did that.

2 Q. Let's go to paragraph 5. Do you see that provision,
3 "Physician will not bill, receive, nor collect any
4 reimbursement from any third-party payer, including commercial
5 insurers and governmental programs such as Medicare and
6 Medicaid, for any process and handling services or collection
7 services for which physician receives any fees from HDL."

8 Do you know what the reason for putting that in there
9 was?

10 A. Yeah. I believe it was for the -- actually, the
11 venipuncture fee, the draw fee, so that they wouldn't be double
12 billing, so a physician's office wouldn't say, "Hey, we billed
13 for it" and then bill us for the same thing.

14 Q. Is anybody from the laboratory in the doctor's office when
15 they fill out their claim forms for insurance or for Medicare
16 reimbursement?

17 A. Is anybody -- I'm confused. Is anybody what now? Are we
18 there?

19 Q. Well, is anybody from the lab -- I'm going to get to you.

20 A. Okay.

21 Q. But the way that a normal physician practice works, is
22 there somebody from the lab there checking on the doctor's
23 office to see what reimbursement they're applying for for their
24 services?

25 A. You mean from HDL or Singulex?

10:11 AM 1 Q. Yeah.

10:11 AM 2 A. No, they don't have a crew.

10:11 AM 3 Q. How about Bluewave? Is there anybody from Bluewave?

10:11 AM 4 A. No, sir, nobody.

10:11 AM 5 Q. So who bills for the physician's services?

10:11 AM 6 A. The physician would bill for their services.

10:11 AM 7 Q. And who bills the laboratory services?

10:11 AM 8 A. The lab would bill for the laboratory services.

10:11 AM 9 Q. All right. Do you recall whether there was a similar
10 provision to that in the P&H agreements that Berkeley HeartLabs
11 used?

10:11 AM 12 A. Actually, it's pretty much standard in every single one of
13 them that I've ever seen, and I've seen most of them.

10:11 AM 14 Q. Sorry?

10:11 AM 15 A. I've seen most of them.

10:11 AM 16 Q. Let's look at paragraph 7. "Each of the parties to this
17 agreement shall comply with all applicable laws and
18 specifically physicians shall provide the process and handling
19 services and the collection service in accordance with all
20 applicable laws, rules, and regulations."

10:12 AM 21 And then Paragraph 8, please.

10:12 AM 22 "Nothing in this agreement or in any other written or
23 oral agreement between HDL and the physician with respect to
24 the subject matter hereof nor any consideration offered or paid
25 in connection with this agreement is intended to be an

1 inducement to the referral of any item or service to HDL. Any
2 consideration paid by HDL to physician as compensation for the
3 process and handling services and the collection services
4 provided hereunder is consistent with what the parties
5 reasonably believe to be fair market value."

6 Is that also a common provision to have in a process
7 and handling fee agreement?

8 A. Very much so, especially the fair market value
9 conversation. That's definitely come up.

10 Q. And let's just close the loop. Bring up 1052, Singulex
11 P&H agreement.

12 Did you draft the Singulex agreement?

13 A. No, sir.

14 Q. Do you know who drafted theirs?

15 A. I would assume Ballard and Spahr, but I would not know
16 specifically. I would assume Philippe always had lawyers, and
17 he stated he did.

18 Q. Let's go down to the first numbered paragraph. I just
19 want to point one thing out there and ask you about it. You
20 see that theirs provides for \$17.

21 Now, does that include the draw fee in one?

22 A. No, sir. If you read, it's "will reimburse the
23 physician's office a process and handling fee." So that's
24 process and handling fee.

25 Q. And did Singulex ultimately reduce the process and

10:14 AM 1 handling fee that they paid?

10:14 AM 2 A. They did.

10:14 AM 3 Q. Do you know why they did that?

10:14 AM 4 A. I think to made sure that there -- it was below fair
10:14 AM 5 market value.

10:14 AM 6 Q. And in setting up your relationship with HDL, did you have
10:14 AM 7 an agreement with them as to who would be responsible for
10:14 AM 8 compliance with health care laws?

10:14 AM 9 A. One more time, please.

10:14 AM 10 Q. I said in setting up your relationship with HDL, did you
10:14 AM 11 reach an agreement with them as to who would be responsible for
10:14 AM 12 the laboratory's compliance with health care laws?

10:14 AM 13 A. Yeah, I mean, are you asking was it in the agreement? I'm
10:14 AM 14 just confused by your question. I'm not sure --

10:14 AM 15 Q. No, we've got the written agreement, but what was your
10:14 AM 16 understanding about who would provide the real services to
10:14 AM 17 ensure compliance?

10:15 AM 18 A. Well, I mean, HDL obviously will provide legal compliance
10:15 AM 19 as well as Bluewave provide compliance to their side as well.
10:15 AM 20 HDL actually ended up coming back and doing a lot of our
10:15 AM 21 compliance training at well.

10:15 AM 22 Q. Did you have a health care law firm to advise you?

10:15 AM 23 A. I never hired one. We only hired one at the end of 2013,
10:15 AM 24 and actually I utilized one of my lawyers to get someone to
10:15 AM 25 grade one of our legal tests. Because everything else was

1 under scrutiny, I did not want to have anything out there that
2 had not been consulted.

3 Q. And we'll get to that in just a little while, but why
4 didn't you -- you were a growing company making a lot of money.

5 why didn't you have your own legal department and
6 your own health care law firm to advise you about compliance?

7 A. Good question. One, we already had LeClairRyan, a 600-man
8 firm. It's hard to -- I don't know even know if there's a firm
9 in the state of Alabama that that's big.

10 So it's hard to say, hey, listen, we've got a firm
11 over here that's doing everything correct in this situation.
12 Then you look over here at Singulex, they're getting all this.
13 Then you look and go Atherotech has a process and handling fee
14 out there, they got a legal opinion. LipoScience is out there.
15 They've been doing it for years as well. They've got a legal
16 opinion too. We knew Boston was out there. We knew they was a
17 huge competitor. We knew they was out there and they had
18 something as well.

19 So you got to realize we sort of knew what was going
20 on in the industry 100 percent. So from that standpoint, it
21 was like, I guess, why would I try to find somebody to counter
22 what everybody else is doing, I suppose.

23 Q. When questions would arise about compliance, if somebody
24 raised an issue about something of whether it was legal or not,
25 what would you do with that information?

10:16 AM 1 A. Actually, we always sent them to Tonya and Tonya forwarded
10:16 AM 2 everything to LeClairRyan, and they handled it from that end.

10:17 AM 3 Q. Then later in 2013 when they obtained Ropes & Gray, what
10:17 AM 4 would they do with inquiries that came through?

10:17 AM 5 A. I think Tonya still actually used LeClairRyan somewhat as
10:17 AM 6 well as she'd forward it to Ropes & Gray. So you actually had
10:17 AM 7 a 1200-man law firm now looking at it as well as a 600-man law
10:17 AM 8 firm looking at stuff.

10:17 AM 9 Q. Did Bluewave and HDL and Singulex provide training to the
10:17 AM 10 Bluewave sales representatives?

10:17 AM 11 A. Yes, sir, we did.

10:17 AM 12 Q. Would you just describe -- and I'm going to show you a few
10:17 AM 13 examples, but would you just describe to the jury what kind of
10:17 AM 14 training was provided for your sales representatives.

10:17 AM 15 A. Yes, sir. We provided training on how to sell the tests.
10:17 AM 16 That's obviously something right there, went through the
10:17 AM 17 science and stuff on the tests.

10:17 AM 18 You got to realize, one thing we did, we went after
10:17 AM 19 people that was already in the industry. So we knew they came
10:17 AM 20 from corporations that there was -- as far as the difference
10:18 AM 21 between us and them, it was miniscule. We knew that. So we
10:18 AM 22 knew they had some sort of foundation, some sort of basis.

10:18 AM 23 But we actually -- our PowerPoint presentation. We
10:18 AM 24 also brought in HDL. We brought in Singulex as well in
10:18 AM 25 compliance training. So -- and we offered our legal training

1 test as well. And our legal training test was a little
2 different. We put some trick questions in it. It was real
3 simple. And when I say "real simple," let me elaborate.

4 We didn't want something out there that was so hard
5 to read, you looked at it and said, "I don't understand what
6 this means." We wanted a question that was real-life. And so
7 somebody could look at it and go, is this right or wrong? And
8 if you looked at certain questions, to give a -- something that
9 would be a perfect question here, "Can you provide gift cards?"

10 Well, when I started with Berkeley, people could
11 provide gift cards all day long. That was not even a problem.
12 In the first five years, six years, we could provide them.
13 Now, of course, you couldn't give them to the health care
14 provider, you couldn't give them to any provider, but,
15 basically, you could give them to the phlebotomist and things
16 like that.

17 And then they went away with that. But LipoScience,
18 one of our biggest competitors out there in the market at the
19 time, that was pretty much open to a policy for them across the
20 board. So when you're bringing somebody from another
21 corporation, you'd say, "Okay, they'd done something they" --
22 we'd say, "Okay. We're not going that route." That's how they
23 dealt with it.

24 Q. What kind of people did you look for to hire as sales
25 reps?

10:19 AM 1 A. I think the first person we looked for is someone who had
10:19 AM 2 relationships on the ground already, had been in the business,
10:19 AM 3 so they had an idea. And if you've got somebody who already
10:19 AM 4 had success in the business, that's super huge. And if we
10:19 AM 5 looked for anybody in the pharmaceutical industry, we looked
10:19 AM 6 for people that had cardiovascular background on it. So
10:19 AM 7 whether they'd been with Pfizer for 10 years or 12 years, all
10:19 AM 8 those types of people.

10:19 AM 9 So we wanted people that have real good foundations
10:19 AM 10 and worked a lot of geography, so they knew a lot of people.
10:20 AM 11 They had relationships and they had personality. We wanted
10:20 AM 12 people that could talk and socialize. And that was very
10:20 AM 13 critical in our business as well. I think if you look at every
10:20 AM 14 person we hired, we only hired one person in the entire time
10:20 AM 15 that didn't have any medical sales experience.

10:20 AM 16 And that particular person was a commercial real
10:20 AM 17 estate agent. He was over here in South Carolina, and he was
10:20 AM 18 moving to Boston, he was going to open the Boston market. Cal
10:20 AM 19 had called him. He knew him. And he had asked myself to
10:20 AM 20 interview him and Richard to interview him.

10:20 AM 21 You know, we was like, he's going to have a real
10:20 AM 22 big-time uphill battle learning the science. So he actually
10:20 AM 23 worked in the field with Cal for almost two months, I would
10:20 AM 24 say. He actually worked longer than anybody we had combined
10:20 AM 25 because we had a real hard time learning the stuff.

10:20AM 1 Q. Aside from that individual, what, if anything, did you
10:20AM 2 expect your employees to have by way of compliance training
10:21AM 3 before they came to work for you?

10:21AM 4 A. We had expected them all to have already had anti-kickback
10:21AM 5 training. And, actually, if you knew what pharmaceutical
10:21AM 6 company they worked for, you knew what kind of compliance
10:21AM 7 training they already had. Because, you know, in the
10:21AM 8 beginning, in the initial filings, and then with -- with about
10:21AM 9 one, two -- with about 10 different pharmaceutical companies,
10:21AM 10 that's a lot of companies out there. And we're dealing with
10:21AM 11 the heaviest hitters in the industry as well.

10:21AM 12 Q. I'm going to show you Exhibit 1075. This is in evidence.
10:21AM 13 This is entitled the "BlueWave new employee training booklet."

10:21AM 14 Do you remember seeing that?

10:21AM 15 A. Yes, sir, I do.

10:21AM 16 Q. Who created that?

10:21AM 17 A. Actually, we utilized one of our administrators that
10:21AM 18 worked on it as well. Cal and me consulted with it as well.

10:21AM 19 Q. What did you use it for?

10:21AM 20 A. Actually, it was a training packet. So when we brought
10:21AM 21 somebody on board, we sent them all the information and sort of
10:22AM 22 gave them some idea of the steps across the board what we
10:22AM 23 wanted them to do when they started.

10:22AM 24 Q. And the jury will have this in hard copy when they go, but
10:22AM 25 can you just sort of scroll through the pages. And then I want

1 to draw your attention to one in particular, but just to give
2 them an idea of what it looked like.

3 (Pause.)

4 Q. Stop on that one, if you would --

5 And blow up down here. Let's just see the bottom
6 section.

7 Down there, it says, "Things you should learn:
8 Targeting, sales presentation, lab setup, and common lab
9 problems, how to convince the doctor to utilize testing, RD" --
10 that's registered dietitian; is that right?

11 A. Yes, sir.

12 Q. "Support. How to utilize, how they can assist."

13 And then "most common obstacles." And the very first
14 one is P&H. Does that mean that P&H fees are the most common
15 obstacle?

16 A. No, sir, it's processing and handling.

17 Q. Explain to the jury what that whole section means there.

18 A. Processing and handling is how you get blood. It's as
19 simple as that. If you looked at my targeting criteria, the
20 first and most important on that whole list would be the drug
21 on the market. That was number one, because if I am going into
22 an account and it's owned by a hospital -- which we know 47, 48
23 percent of the country is practices owned by hospitals.

24 We know right there out of the gate I'm going to have
25 to jump through some hoops in order to get it. Now, if that

1 physician has a real strong personality and is real good
2 friends with the hospital, they'll say no problem, we'll do it.

3 Now, if he does not, it's big, big hospital, I have
4 to go to the lab director at the hospital in order to get with
5 them. Then I have to go from there to get to the CFO. We have
6 to have the legal processing and handling fees sent in.
7 Lawyers have to typically talk back and forth for all these
8 agreements to get signed.

9 So the whole first thing was process and handling.
10 How you going to get the blood? And, I mean, that's the key
11 critical point to this. And, I mean, so it's --

12 Q. What are these other bullets there?

13 A. No-balance billing. So the no billing part, you always
14 got questions about the billing part. And let me explain what
15 I mean by that.

16 Physicians ask typically one question pertaining to
17 billing, one question and one question only 95 percent of the
18 time. You mean you take Aetna and Cigna insurance? And what I
19 mean by that is Aetna, Cigna, even United somewhat are really
20 overall bad insurances. I'm not trying to be mean to them, but
21 they don't pay crap. And so what happens is most physicians,
22 when we discuss about billing, the first thing they'd say is
23 "You take Cigna and Aetna?"

24 And so that was always a question right there. So --
25 and that was a big question because, you know, the LipoScience

1 reps, that's one of the reasons, when we brought them on board,
2 they were so gung ho excited because their insurance patients
3 could not get the testing before because they were paying 3, 4,
4 \$500 out of pocket.

5 Q. what about the lab tech and the ordering?

6 A. The lab tech. You would be stunned -- and I know a lot of
7 people think there's no way a lab tech runs the office, but
8 here's the thing: If you have a disgruntled employee in an
9 office, does it make it hard? Is your job harder? The thing
10 is, you remember, I made the statement they're drawing already
11 three to four tubes out of the gate. Now, I'm fixing to say,
12 "Hey, you got to draw four more tubes."

13 So, in essence, what have I done? I've doubled their
14 work; correct? Most people here, if I asked you today, if I
15 come in and called you and says, "Hey, listen, I know you've
16 been working hard. I know you're doing a good job, but you're
17 going to have to do twice as much." What would you say first
18 thing?

19 You'd say, "I can't do it. I need a raise. You're
20 going to have to hire somebody." All this stuff. So all these
21 were issues and obstacles right out of the gate. So -- and we
22 learned through this, and I learned this at Berkeley. If you
23 had a physician doing advanced testing, the max that they could
24 do is around 30, 35 tests with one phlebotomist with their
25 additional workload what they already had.

1 So -- and so, I mean, a lot of people were under the
2 impression that, say, so-and-so made \$100,000 in process and
3 handling fees. They don't realize that person had to have
4 three phlebotomists in that practice doing all that work.
5 That's something that's a misnomer. And, you know, across the
6 board, people look at it and go, "Wait a minute. No."

7 It's just like when you look at a sales graph, some
8 people will put up a sales graph and say it's supposed to go
9 straight up at all times. That's not true. That's never true.
10 And it's just like a -- one phlebotomist can't do a hundred
11 specimens a week; it's not possible.

12 Q. When you said that they typically do 30 to 35, is that a
13 week?

14 A. That's a week, correct.

15 Q. For a single phlebotomist?

16 A. That's correct. And, I mean, you take that and throw it
17 in with their other work, some with other work -- because you
18 can't say, "Hey, I'm taking your other work away," but when you
19 got -- at 50, 55, everybody had two, and then it goes up from
20 there. And the rule of thumb has always been 30 or 35, and
21 that's -- you're maxing out right in there. Okay? And that's
22 what we always saw in all our practices.

23 Q. And the last bullet point there is "ordering"?

24 A. Ordering.

25 Q. What does that mean?

10:27AM 1 A. Oh, this was a tough one too.

10:27AM 2 Okay. You're a physician. Nowadays, all physicians
10:27AM 3 have what? Electronic medical records; right? Y'all have been
10:27AM 4 to their office where they're scribbling on a notepad or typing
10:27AM 5 on the computer. Well, here's the question: Our test is not
10:27AM 6 on that notepad -- or our lab tests are not on those computers.
10:27AM 7 How does the physician order the test? You've got to call HDL.
10:27AM 8 Okay. We got to see if we can get an electronic medical
10:28AM 9 records interface, which costs, on average I think, \$10,000 per
10:28AM 10 practice, to give you an idea.

10:28AM 11 So you're all of a sudden now looking how is -- how
10:28AM 12 are you going to get the blood ordered to the lab? Are they
10:28AM 13 going to be carrying paper requisitions back and forth? All
10:28AM 14 those types of things were huge issues in our practices. And
10:28AM 15 you've always got to look at the things -- the things that's
10:28AM 16 the simplest, it seems like, in your mind are actually the
10:28AM 17 hardest in this job.

10:28AM 18 Q. Let's go to the next page, see if there are any other
10:28AM 19 bullet points.

10:28AM 20 Okay. "Materials you'll receive." I don't think we
10:28AM 21 need to go over that any more.

10:28AM 22 Did you have specific training on kickback and
10:28AM 23 conflicts of interest and gratuities to physicians?

10:28AM 24 A. Yes, sir. Are you talking about the anti-kickback
10:28AM 25 training?

10:28 AM 1 Q. Yes.

10:28 AM 2 A. Yes, sir. We did at Berkeley as well. I did in all
10:28 AM 3 pharmaceutical companies I worked for. I did at Berkeley as
10:28 AM 4 well. As I mentioned, at Berkeley, I didn't have one
10:29 AM 5 compliance officer. I ended up having three compliance
10:29 AM 6 officers. And all of them trained pretty much 100 percent
10:29 AM 7 identical. There was really not a difference between them.

10:29 AM 8 One of them just might say, "Okay. I think we're
10:29 AM 9 going to go away from these gift cards because people are doing
10:29 AM 10 excessive amounts of them," or something like that. And that
10:29 AM 11 was the biggest issue. All of them still said the same thing.
10:29 AM 12 You focus on the science first. The science is the critical
10:29 AM 13 component in the test. And it was always. And, I mean,
10:29 AM 14 because -- you've got to sell them. If you don't convince them
10:29 AM 15 that the test is worthwhile, they're not going to do a test.

10:29 AM 16 MR. COOKE: May I approach, Your Honor?

10:29 AM 17 THE COURT: You may.

10:29 AM 18 BY MR. COOKE:

10:29 AM 19 Q. I'm going to show you what's been marked as BW141 and ask
10:29 AM 20 if you recognize that.

10:29 AM 21 A. Yes, it's on of our PowerPoints on kickbacks and bribes,
10:29 AM 22 all the standard stuff. I think we actually took a lot of this
10:30 AM 23 off the government's website to begin with.

10:30 AM 24 MR. COOKE: Let me introduce that into evidence.

10:30 AM 25 Thank you. I'd like to offer that.

10:30 AM 1 MR. LEVENTIS: No objection, Your Honor.

10:30 AM 2 THE COURT: Mr. Ashmore?

10:30 AM 3 MR. ASHMORE: No objection, Your Honor.

10:30 AM 4 THE COURT: Very good. Bluewave 141 admitted without
10:30 AM 5 objection.

10:30 AM 6 MR. COOKE: Could we just bring up the first page.
10:30 AM 7 And then go to the second page.

10:30 AM 8 BY MR. COOKE:

10:30 AM 9 Q. "Introduction. Honesty and fairness are two components of
10:30 AM 10 Bluewave values. Our ethics and compliance guide require all
10:30 AM 11 independent contractors to make a committed effort to do the
10:30 AM 12 right things at all times and to be honest and fair in their
10:30 AM 13 dealings. Compromising those values and standards by offering
10:30 AM 14 or soliciting kickbacks, gratuities, or bribes in order to
10:30 AM 15 receive favorable treatment is prohibited by company policy and
10:30 AM 16 federal law."

10:30 AM 17 would you mind just scrolling? I just want them to
10:30 AM 18 see "kickbacks, bribes, Anti-Kickback Act, compliance,
10:31 AM 19 penalties, gratuities, conflict of interest, rules of the road,
10:31 AM 20 false Claims Act."

10:31 AM 21 when you would present this, would you normally have
10:31 AM 22 somebody presenting it and explaining it as they go?

10:31 AM 23 A. Actually, when we presented this, most -- 99.9 percent of
10:31 AM 24 the people we had outside of the one person we hired that
10:31 AM 25 didn't have any medical sales experience knew it sort of like

1 the back of their hands. So it was one of those things that
2 was simple.

3 we had also asked them, do you have questions
4 pertaining to it? The biggest questions we always had was when
5 we brought somebody from another lab. And the reason or
6 rationale that was behind it was they might have been doing
7 something that we weren't doing. So they were saying, "well,
8 hey, our attorneys at Atherotech said we could give tests away
9 for \$3 for their time."

10 well, this is the way we're doing it. We're not
11 going that route. That's the mentality we looked at, even at
12 the end. Because I'm sure everybody that's going to read about
13 this meeting, every lawyer is going to have a different
14 opinion. And that's what we saw over and over and over again.

15 when it came to the process and handling fee, they
16 was all over the table as well, even the numbers, fair market
17 value, how they was determined and everything else.

18 Q. And in a couple of minutes, I'm going to ask you some
19 specific examples, but I just want to introduce everybody to
20 some of the training materials.

21 Could you show us BW6.

22 This is an email. Who is Sandra Tankersley?

23 A. She was actually our administrative assistant at the time.

24 Q. This is dated November 1, 2012. And it just says, "Hey,
25 do you have an agenda for this?" And the attachment, the

1 agenda is "agenda for training call on P&Hs, kickbacks,
2 gratuities, and conflicts of interest PowerPoint."

3 Do you see that? That was an attachment.

4 A. Correct.

5 Q. And it says, "Hey, do you have an agenda for this? Also
6 please let me know of any additional changes to the attached
7 PowerPoint and if it needs to go out for tomorrow's call. I'm
8 going to send out the information that Cal forwarded to me this
9 afternoon."

10 Do you happen to know whether the PowerPoint that was
11 used there was the one that we just looked at?

12 A. I believe it was, 100 percent, yes.

13 Q. Do you know what prompted that particular presentation?

14 A. I couldn't tell you verbatim what prompted it. The thing
15 was -- is -- the first year at Bluewave, we were going mach 2.
16 And you got to realize, we were working just daylight to dark.
17 People were taking off. I mean, 125, 130,000 miles on your car
18 was no problem. I mean, you got to realize there was the
19 initial five of us. We slowly started hiring more people
20 because we had people calling us asking us could they come work
21 for us, especially our competitors.

22 When I say our competitors, it's hard to explain who
23 was a competitor. A competitor of LipoScience, they don't want
24 to show anybody their tests. They weren't initially, but they
25 were at the end. And so all those types of people out there,

1 so we was flying at mach 2. So that's one of the reasons we
2 brought on people that had medical experience, number one.

3 Number two is we started going so fast, we started
4 thinking, "Hey, wait, we need to do more of this." And that's
5 when we started addressing all that.

6 Q. Did HDL also provide compliance training?

7 A. They did. They did.

8 Q. What about Singulex?

9 A. They did as well. So --

10 Q. And --

11 MR. COOKE: May I approach, Your Honor?

12 THE COURT: You may.

13 BY MR. COOKE:

14 Q. I'm going to show you what's been marked as BW212 and ask
15 if you've seen that before.

16 A. Yes. Okay.

17 MR. COOKE: I would offer that as an exhibit.

18 THE COURT: Exhibit number? I'm sorry.

19 MR. COOKE: I'm sorry. BW212.

20 THE COURT: Is there an objection?

21 MR. LEVENTIS: No objection, Your Honor.

22 MR. ASHMORE: No objection.

23 THE COURT: BlueWave 212 admitted without objection.

24 MR. COOKE: Can we just bring up the first page of
25 that, and just scroll through it.

1 10:35 AM BY MR. COOKE:

2 10:35 AM Q. Is this the typical compliance program that Singulex would
3 provide?

4 10:35 AM A. Yes, sir. It's typical for most companies to give you an
5 idea.

6 10:35 AM Q. So would you make that available to your contractors?

7 10:35 AM A. Yes, sir. Especially the ones that were selling Singulex
8 particularly, yes.

9 10:35 AM Q. Okay. I believe we've already seen some of the HDL
10 presentations. Let me give you a few specific examples that
11 have been asked about here.

12 10:36 AM A cruise, could you -- did you tell people that they
13 could send a doctor or a doctor's staff on a cruise?

14 10:36 AM A. No. Never would say that in a million years. And that's
15 actually one of the physician test questions. So if you look
16 at it, that's one of the things on there. Because I think the
17 reason we put that as one of the test questions is because, you
18 got to realize, what happens is, in the medical field, you have
19 what's called continuing medical education programs. So it's
20 just no different than lawyers going to continuing medical
21 education programs. I think Dawes said he's going to Vancouver
22 next week.

23 10:36 AM The thing is people do these and they provide
24 sponsorships. And so they might be going on a cruise for a CME
25 program or they might be going to the Cayman Islands, or

1 wherever, and stuff. And so we wanted to put that in there,
2 that, no, we don't pay for any aspect of this. We're not
3 involved in this, period. You need to understand this is a CME
4 function deal and -- so you know.

5 Q. Are you aware of any situation where HDL provided CME on a
6 cruise?

7 A. Yeah. HDL actually -- which is interesting -- they didn't
8 know many specifics about that. Dr. Fillingane says, "Hey, I'm
9 going to a CME lecture on cruise." They called it the HDL
10 cruise. And I think it was sponsored by a hospital, to give
11 you an idea.

12 I know that chief scientific officer, Joe McConnell,
13 is the one that put it together. And the thing was -- is the
14 reason we had questions like this, we wanted to make sure
15 nobody says, "Hey, can you send me on a cruise?" We wanted to
16 eliminate those issues. Any physician in the world, regardless
17 of whether they did our testing or not, can go to a CME
18 program. Most of the hospitals offer CME programs, some of
19 them during working, some of them during other days.

20 But if a physician went on a CME program, what they
21 typically did -- and the reason they did it at some of these
22 lavish places is because they wrote it off as a business
23 expense. They would take their family and write it all off,
24 just like y'all do when y'all go. But if a physician went on a
25 CME program, what they typically did -- and the reason they did

1 it at some of these lavish places is because they wrote it off
2 as a business expense. They would take their family and write
3 it all off, just y'all do when y'all go.

1 10:38 AM 4 Q. So then, on that particular occasion, did HDL pay for any
5 of the physicians to go on the cruise?

1 10:38 AM 6 A. No, sir, not to my knowledge at all, on any level.

1 10:38 AM 7 Q. And would you have ever instructed your sales folks that
8 they could help a doctor pay for the cost of going on a cruise?

1 10:38 AM 9 A. I would have probably shot them if they did something like
10 that. I would have probably shot them in they did something like
11 that.

1 10:38 AM 12 Q. How about free testing? That was one of the questions
13 that was on your --

1 10:38 AM 14 A. Actually, that's interesting, because we learned -- more
15 and more light got shed on that during this. Cal and I
16 philosophy out of the gate was no free testing. Why? We have
17 a no-balance billing policy. Why would you do it? It makes no
18 sense whatsoever.

1 10:38 AM 19 So we had an issue at HDL somewhere near the end of
20 2013, I believe. And what had happened was we found out a lot
21 of people had gotten free testing. We needed to figure out
22 where, why, and what was the rationale behind it. And so it
23 was something we had to address and had to deal with because we
24 was on instinct.

1 10:38 AM 25 But we learned, if one of our contractors called into

1 HDL, the client services, the client services would say, "Hey,
2 no problem." So we had to nip that in the bud, to give you an
3 idea. Because we had our biggest -- Boomer, who was here on
4 the stand a couple of weeks ago, he was actually our number one
5 problem that we had with it. But we learned if one of our
6 contractors called into HDL, the client services, the client
7 services would say, "Hey, no problem." So we had to nip that
8 in the bud, to give you an idea. Because we had our biggest --
9 Boomer, who was here on the stand a couple of weeks ago, he was
10 actually our number one problem that we had with it.

11 And I called Boomer and says, "Boomer, what is going
12 on?"

13 He says, "I did not condone this. I did not offer
14 this. It was the phlebotomist in the practice. She didn't
15 want to fill out the paperwork, so she was just writing 'free'
16 on everything across the board."

17 So we addressed that issue then. And that was
18 something we really focused on, because our competitors were
19 offering free tests. That was a big thing with them. We
20 didn't want to do it just because you got the \$379 -- or \$69
21 Medicare fee for a health care professional. And a health care
22 professional is defined as any person in a physician's office.
23 It's not defined just as the doctor. It is defined as the
24 receptionist is considered as well.

25 Q. So it was your policy to not offer it?

10:40 AM 1 A. That was Bluewave's policy. We did not want that offered
2 at all under any circumstances.

10:40 AM 3 Q. And HDL was going to do the testing for whatever insurance
4 would pay anyway?

10:40 AM 5 A. That's why I don't even understand why somebody would ask
6 for it. That was still amazing to me. Someone would say,
7 "Hey, can we do this?" I don't understand what the rationale
8 would be behind it.

10:40 AM 9 Q. What about gift cards? That was another question. Can
10 you give gift cards?

10:40 AM 11 A. As I mentioned to you, no, no gift cards. It was
12 something that when -- you know, when I was at Berkeley, it
13 initially started, it was good. You could do it no problem.
14 LipoScience was notorious for offering them. Actually, they
15 have a policy where they had so many they could give away. And
16 we started bringing on LipoScience tests, and that's one of the
17 reasons we put down there "no gift cards."

10:40 AM 18 Now, we actually had to address certain issues with
19 some of the LipoScience reps because they were trying to go
20 over and above the situation too. And that was causing
21 problems as well. We wanted to emphasize no gift cards across
22 the board. And we just wanted to take it off the table so it
23 would not be an issue.

10:41 AM 24 Q. How about speaker fees? We had a witness last week,
25 Dr. Hollins, who testified he would go all over the country

1 speaking and be paid to do that. What was your understanding
2 about what was allowed? How about speaker fees? We had a
3 witness last week, Dr. Hollins who testified he would go all
4 over the country speaking and be paid to do that. What was
5 your understanding about what was allowed?

6 A. Speaker fees. Actually, here's what happened initially.
7 Tonya had spoken to us about, "Hey, I want to start paying for
8 speaker fee, CME credits, a grant for CME credits," stuff like
9 this. Myself, Cal, we were a hundred percent against it. We
10 didn't see the value in it.

11 Now, she proved us 100 percent wrong. CME credits
12 were fantastic. Physicians would show up in herds. HDL
13 started sponsoring -- at all these meetings across the board
14 starting sponsoring CME lectures. A CME lecture might have 40
15 physicians at it to speak. Not one, 40, to give you an idea.
16 So that was something that did take off.

17 Now, in the medical field, this is as common as
18 everything, because you'll have a physician from Charleston
19 come down, go down to Savannah, Georgia, to speak to a group of
20 physicians of 5 to 10 physicians and stuff like that. That's
21 pretty much common. Those fees, we have nothing to do with
22 setting those fees or doing those fees. They're typically set
23 from a fair market value standpoint from the lab or the
24 pharmaceutical industry. And, actually, I think there are
25 companies that specialize in what those fees are actually

10:42AM 1 supposed to be and the dollar amounts.

10:42AM 2 Q. You sort of glossed over this, but what role, if any, did
10:42AM 3 BlueWave have in negotiating or arranging for doctors to speak
10:42AM 4 on behalf of laboratories?

10:42AM 5 A. We had nothing. As far as speaking fees, dollar amounts,
10:42AM 6 none of that stuff, period, none at all. We had nothing. As far
7 as speaking fees, dollar amounts, none of that stuff period,
8 none at all.

10:42AM 9 Q. Well, with all that said, you had been top salesperson at
10:42AM 10 Berkeley HeartLabs; correct?

10:42AM 11 A. I did okay.

10:42AM 12 Q. And Cal Dent had also been a top salesperson at Berkeley?

10:43AM 13 A. Yes, sir.

10:43AM 14 Q. So they had a good -- they had a pretty good book of
10:43AM 15 business.

10:43AM 16 How were you able to come over and convince doctors
10:43AM 17 to move their business to HDL if you couldn't offer them
10:43AM 18 cruises and free testing and gift cards and lavish speaker fees
10:43AM 19 and lavish dinners and high processing and handling fees? How
10:43AM 20 were you able to come over and convince doctors to move their
21 business to HDL if you couldn't offer them cruises and free
22 testing and gifts cards and lavish speaker fees and lavish
23 dinners and high processing and handling fees?

10:43AM 24 Tell the jury how it is that you were able to be
10:43AM 25 successful in convincing doctors that they should leave

1 Berkeley HeartLab or whatever they were using before and come
2 to HDL and Singulex? Tell the jury how it is that you were able
3 to be successful in convincing doctors that they should leave
4 Berkeley HeartLab or whatever they were using before and come
5 to HDL and Singulex?

6 A. Well, the first thing is, as I think I mentioned a while
7 ago, we took the best tests from all the labs. We didn't
8 just -- Berkeley had some good tests, but they didn't have the
9 LipoScience, things like that.

10 LipoScience has got a guy by the name of Tom
11 Dayspring, who is considered the number one lipid guy in the
12 world. He has a following of about 5,000 people. If he tells
13 them to jump off a cliff, most physicians will run and jump,
14 which is amazing in itself. LipoScience has got a guy by the
15 name of Tom Dayspring and is considered the number one lipid
16 guy in the world. He has a following of about 5,000 people.
17 If he tells them to jump off a cliff, most physicians will run
18 and jump, which is amazing in itself.

19 But, you know, we partnered with people that had the
20 best tests in the country. So immediately people wanted the
21 best. Number one, we sold on the clinics. And that was huge.
22 The science behind the tests are -- is phenomenal. The stuff
23 is coming out so fast all the time. Most physicians can't stay
24 ahead of it. It's almost impossible because these things are
25 popping left and right.

1 Like I talked about early CT lung cancer test. Most
2 people won't know it. I didn't know it existed. Correct. And
3 if you went to -- if every one of you went to your doctor today
4 and asked him about a lung cancer test, they'd all look at you
5 dumbfounded. Most people don't know these things even exist.

6 So the science was number one. What I have to say
7 about Berkeley is Berkeley wanted us to order. And what I mean
8 is, when they started sending out the retail bills, not knowing
9 if a person owed a bill or not, that made the lab look really
10 bad. So we were able to capitalize off that as well. That was
11 a huge advantage in our situation.

12 But when we met with Tonya, brought in the best
13 tests, we already had a book of business. And our
14 physicians -- when you walk into a physician's office and he's
15 screaming at you and I'm going, "I didn't have anything to do
16 with that. I don't know what happened, why this happened. I'm
17 sorry this happened."

18 You know, a lot of them will listen to you, and then
19 some of them will say, "Get out. Don't come back ever again."

20 We lost tons. I mean, if that had not happened at
21 Berkeley, we probably would have had 10 times more business
22 just because of all the advanced tests that we had on the
23 market. So --

24 Q. Mr. Lively testified last week. He said when he switched
25 over to HDL, it was just like taking a car and switching the

1 stamp from one to the other.

2 Did you agree with that? Was the product the same
3 that HDL as it was at Berkeley?

4 A. I would say -- I would probably disagree with him a little
5 bit, and let me elaborate why. Because it's sort of like a
6 Model T to a Ferrari. That's the easy analogy. You've got
7 good testing here or good transportation here. Now you've got
8 phenomenal transportation here. And that's the mentality,
9 because the tests that were offered from Berkeley to HDL were
10 so -- so many more, so much more as well. And that's a huge,
11 huge advantage.

12 So, I mean, that -- that made all the difference in
13 the world right there. That opened the door to a lot of
14 people's eyes.

15 Q. Did you find that every doctor that you visited agreed to
16 use advanced lipid studies?

17 A. No. I mean, you're -- I used to -- I wrote the sales
18 process Berkeley. It's a six step sales process. So they'd
19 asked me to draft something on how the test was sold and walk
20 through the process. And you typically in the first five
21 minutes -- I can tell you in the first five minutes if there
22 was even a possibility that I was going to get some help.

23 If the physician looked at the test report, case
24 study and went okay, I'd say he's probably not going to do that
25 right then and there. And you may go, "well, why is that?"

10:47AM 1 Because he's not susceptible to listen to anything new. He is
2 stuck where he is, and he's going to stay where he is. So you
3 learn real quick-like and -- you learn from that situation
4 who's going to do the test or not.

10:47AM 5 If you call an account, they can draw their own
6 blood, I'll go ahead and tell you here and now, odds of you
7 getting the business went down probably 80 percent right there.
8 And the reason behind it is -- you got to realize -- and this
9 is something you got to understand. LabCorp did not look at
10 HDL as a partner; they looked at us as a competitor. Why would
11 you let your competitor in the door? You wouldn't; right? I
12 mean, any business-minded person would think that.

10:48AM 13 I mean, we know HDL actually -- LabCorp actually
14 talked to HDL about buying HDL. So, you know, we know those
15 types of things, and we know that they do not want us to come
16 in.

10:48AM 17 It's just like Singulex. Even though Singulex -- we
18 were partners with Singulex out of the gate, we knew Singulex
19 had -- they wanted their own sales force nationwide. They
20 wanted to push us out.

10:48AM 21 And so we was always leary at giving them what we
22 were doing at HDL because of the fact that we knew, sooner or
23 later, just a matter of time, we were going to be a competitor
24 of them.

10:48AM 25 Q. How many doctors' practices during your tenure with

1 10:48AM Bluewave indicated to you that they were on the fence about
2 whether to adopt the tests or not but the processing and
3 handling fee was the one that -- was the thing that tipped them
4 over in favor of taking the test?

5 A. I never heard a physician say that ever. So, I mean,
6 that's -- if they didn't buy the science, they weren't going to
7 buy the test, and that's pretty clear-cut and simple across the
8 board.

9 Q. Did you ever suggest to a physician or a physician's
10 administrator this is a -- if you're thinking about it, if you
11 hadn't quite decided, P&H -- the P&H is a good enticement for
12 you to do these tests?

13 A. No, no, no. You didn't do that at all.

14 Q. Did all of the doctors that -- or doctors' practices that
15 accepted HDL or Singulex testing, did they all opt to accept
16 process and handling fees?

17 A. No. I think actually the numbers at HDL, there was only
18 40 percent of physicians that actually accepted process and
19 handling fees. So you got to realize, I mean, 60 percent of
20 the people never took one.

21 Q. How many doctors' practices that you knew of would
22 routinely order both from HDL and from Singulex?

23 A. Say the question one more time. I'm sorry.

24 Q. Of the practices that you dealt with, how many of them
25 would you say or what percentage of them would routinely order

1 both from HDL and Singulex?

2 A. Burt, Richard, and my territory -- since we shared
3 Alabama, Georgia, a little bit of Tennessee, Mississippi, that
4 geography, we have this 5 percent. 5 percent did Singulex
5 testing. We did HDL testing. The company with BlueWave was
6 less than 11 percent nationwide. So Singulex was a real hard
7 test to sell.

8 You're changing paradigms. And, you know, you heard
9 physicians speak in here and say, hey, that troponin test is
10 the best test in the country. If you start to have chest pain
11 today and you go to the emergency room, the first test they're
12 going to run on you is troponin.

13 The difference was this one's so much more sensitive.
14 It's a thousand times more sensitive. And we know that it's
15 being leaked in your system at all times. And we know if it
16 popped high, hey, something is going on. We knew that.

17 But the thing about that test is, as I said, it's one
18 of the hardest tests because you don't see it elevated that
19 often as well. That's another big issue. And because you
20 don't see real bad results, a lot of people go, "I like it, but
21 I don't want to do it anymore." And they just fall off.

22 Q. In your interactions with doctors, would you from time to
23 time talk to them about what criterion they would use to decide
24 when to order the tests?

25 A. When a physician asks -- says -- you know, he'd ask the

10:51AM 1 question like -- he may say, "who do I order these tests on?"
10:51AM 2 my response was going to be, "who do you think you want to
10:51AM 3 order them on?"

10:51AM 4 You want to engage him. You want him to speak to you
10:51AM 5 to tell you what he thinks. Particularly after that, I would
10:51AM 6 say I understand, I agree and stuff. And I would say, "Some of
10:51AM 7 the experts are doing this" and let them make their own
10:51AM 8 decision on who they would do the test on -- who they would do
10:52AM 9 the test on.

10:52AM 10 So they are not really changing their paradigm on who
10:52AM 11 they would view to order this test on.

10:52AM 12 Q. Did all the doctors that you visited know that you were
10:52AM 13 not a doctor yourself?

10:52AM 14 A. Yes, sir, every one of them. And I wasn't about to -- you
10:52AM 15 learn real quick-like you don't argue with them. That's a
10:52AM 16 mistake. Any rule in sales, you don't argue with somebody.
10:52AM 17 You're not going to win, and you're not going to get the sale
10:52AM 18 at the end anyway.

10:52AM 19 Q. Did they all know that you were a salesman?

10:52AM 20 A. Oh, every one of them knew I was a salesman, yes, sir.

10:52AM 21 Q. Did they all know that's how you made your living was by
10:52AM 22 trying to sell these tests?

10:52AM 23 A. Actually, right out of the gate, when I presented myself,
10:52AM 24 I said, "I'm Brad Johnson, president of Bluewave Health Care.
10:52AM 25 I represent Health Diagnostic Laboratories and Singulex

1 laboratories. And for the sake of this discussion, we're going
2 to talk about Health Diagnostic Laboratories." And then I
3 started selling the tests from there.

4 Now, I never sold HDL and Singulex together. I
5 actually don't know if you can do it. I'll be honest with you,
6 I figured it would be almost an impossible task, in my opinion.
7 There's so many questions just from the HDL, and then you've
8 got a paradigm shift from the Singulex. It's an impossibility.

9 Q. Did you consider yourself qualified to recommend specific
10 tests to specific doctors for specific patients?

11 A. I never recommended any. What our job was is to sell. I
12 mean, period. So my job was to sell that position on this
13 test. Here's the clinicals. Here's the data. Here's what the
14 experts are saying. You make your own decision.

15 All physicians make their own decisions on what tests
16 they want to run. I've been in accounts before and watched a
17 physician want 40 tests, and I'm sitting here looking at him
18 going "what"?

19 And -- but he said this is what I want, and I'm
20 looking at him, and I'm like -- you know, you look and go, I
21 don't even know if I know what that test is."

22 And so -- but you have that out there. And so you
23 have physicians that "I want this test no matter what." And by
24 all means, hey, that is your choice. Insulin is a perfect
25 example. It's one of the best tests in the country to diagnose

1 a diabetic, but I've had physicians fight me tooth and nail
2 wanting it on all their patients or not wanting it on their
3 patients.

4 Q. Did you ever encourage any physician practices to try to
5 order from multiple labs, including Singulex and HDL, so that
6 they could get more of a process and handling fee?

7 A. No. As I said, I actually don't know if you can sell HDL
8 and Singulex simultaneously at the same time. I couldn't do
9 it. I'll be honest with you. I never told my sales reps to do
10 it because it's too many questions.

11 Remember, I made the statement the average drug rep
12 spends 3 minutes and 20 seconds with a pharmaceutical rep. So
13 the pharmaceutical rep walks in and talks to the doctors
14 3 minutes and 20 seconds. That's the rule of thumb. And I
15 know that from Merck when I trained everybody.

16 My average talk time to a physician is anywhere from
17 45 minutes to an hour and 15. That's on Sales Step 1. Then
18 you got Sales Step 2, 3, 4, all the way down the list. There's
19 a lot of more steps involved, and so --

20 Q. I want to show you a few documents that have already been
21 put into evidence and get your take on them. First is 1311.
22 That is a document we called "If a Physician Meets The
23 Criteria."

24 A. Sorry. Didn't mean to -- I'm so used to my iPad
25 brightening everything up so I can see it.

10:55 AM 1 Q. Okay. Do you see that?

10:55 AM 2 A. I do.

10:55 AM 3 Q. And do you remember seeing this before?

10:55 AM 4 A. I do. If -- can I open the whole -- see the whole
10:55 AM 5 document, please.

10:56 AM 6 Yes, I actually drafted this. I did, yes, sir.

10:56 AM 7 Q. And right there in the middle, it says, "Do not try and
10:56 AM 8 sell the tests."

10:56 AM 9 A. Mm-hmm.

10:56 AM 10 Q. "This will hurt the sales in the long run."

10:56 AM 11 A. Right.

10:56 AM 12 Q. This is a third-person, unbiased sales technique.

10:56 AM 13 So I want you to tell the jury what this document was
10:56 AM 14 and why did you tell these people to not try and sell the
10:56 AM 15 tests.

10:56 AM 16 A. All right. This is actually -- this one came out because
10:56 AM 17 of LipoScience. I had to write this because of them. We
10:56 AM 18 actually got sued because of LipoScience. That's one of the
10:56 AM 19 reasons Berkeley sued us the second time. They said we was
10:56 AM 20 going into accounts that were on the Do Not Call list.

10:56 AM 21 Part of the Berkeley lawsuit was we agreed, if we
10:56 AM 22 didn't have the account already, we wouldn't talk to that
10:56 AM 23 customer. If you picked up the phone and called me and said,
10:56 AM 24 "Hey, Brad, I want to do this test with you," I'm like, "I
10:56 AM 25 can't. I'm sorry." If he was on that Do Not Call list, I

1 couldn't call him.

2 well, LipoScience, they had that LipoScience panel,
3 and they was working with us hand over fist as quickly as they
4 could. So we ended up drafting this basically saying, hey,
5 listen, you got to check first from the Do Not Call list
6 because I can't have you going in and starting to sell this.

7 Number two is I don't want them selling any tests for
8 us. Just like helpers, they're not supposed to ever sell a
9 test for us, period. That is not their job. I don't know how
10 many times I've emphasized that and said that throughout the
11 course of training, but it's not their job.

12 Their job is to generate somebody that's elite.
13 Their job is to -- what's the word to say? We're going to rely
14 on their trust with that physician in order to get into that
15 account, period.

16 And so -- but the Do Not Call list, we checked it
17 19,000 times in one year, to give you an idea. And the
18 LipoScience reps, I would have to call them all the time and
19 say, "Listen, I cannot have you in these accounts. I cannot
20 have you talking to these accounts."

21 And I said -- when you go into an account, they would
22 actually go in and try to sell our test for their company. And
23 because -- let me explain why. They got paid a commission.

24 And so since we purchased the test from LipoScience,
25 if HDL sold it, they got paid. So it was a good working

1 relationship.

2 what happened is, after about the first year and a
3 half, the reps were making more than all the managers and the
4 regional directors. And so what do you think they did? They
5 said if the test is sold through HDL, you're not going to get
6 paid anymore. So then we became a competitive relationship.

7 Q. Okay. So this was a list of -- there was a list of
8 physician practices that you were not supposed to call on
9 because of your settlement with Berkeley?

10 A. That is correct.

11 Q. And so the LipoScience people, maybe being well meaning,
12 would go visit those people and then you'd get in trouble for
13 it?

14 A. That is correct.

15 Q. And so that's what this document --

16 A. Actually, a Dr. Reddy in Houston, Texas, was -- they had
17 booked a lunch the day after the Do Not Call list went away,
18 and that was an issue right there. And even though I didn't
19 know Dr. Reddy, didn't know anything about the rep, didn't know
20 anything about anything, just by coincidence, I was there that
21 day working with one of my contractors there. That was a big
22 issue, so --

23 Q. Let me show Exhibit 1204. This was a message from Brad.
24 And you see right down there Number 4, "Be sure that all of
25 your accounts have CYP2C19 on their HDL panels."

10:59AM 1 A. Okay.

10:59AM 2 Q. Now, did you -- did you send that message out to -- well,
11:00AM 3 you just tell me what that --

11:00AM 4 A. Okay. No problem. All right. Pretty simple. You go to
11:00AM 5 the local restaurant next door. They give you a menu, and it's
11:00AM 6 a year old. What's the manager going to say? Can I have a new
11:00AM 7 menu with all the updated stuff on it; correct?

11:00AM 8 So what happens is our representatives were out
11:00AM 9 there, and a lot of them had tons of requisitions. Well, it's
11:00AM 10 just like tons of old menus in a restaurant; you end up having
11:00AM 11 to chunk those away.

11:00AM 12 So what happened is we tell them all, hey, listen,
11:00AM 13 get those -- get the new one, the CYP2C19, on their HDL panels.
11:00AM 14 So that was the whole thing. In addition to that, when you say
11:00AM 15 push the CYP2C19, it's to sell the test -- sell the benefits of
11:00AM 16 the test. If the physician didn't want it, they didn't want
11:00AM 17 it. I mean, I like the test, but I didn't like it for
11:00AM 18 everybody. And I may not reflect that. I even mentioned that
11:00AM 19 to physicians and our contractors as well.

11:01AM 20 Because here's the thing. At times you get to the
21 point where you see a test and you go, "I don't like it too
22 well." And it's hard to sell some of those things. Our focus
23 is to bring the information to the physician, and they're to
24 make the decision one way or another whether they like it or
25 not.

11:01AM 1 THE COURT: Mr. Cooke, we've been going about an hour
2 and a half. Is this a good time to break?

11:01AM 3 MR. COOKE: Yes, I think it is.

11:01AM 4 THE COURT: Ladies and gentlemen, let's take our
5 morning break.

11:01AM 6 (Whereupon the jury was excused from the courtroom.)

11:02AM 7 THE COURT: Please be seated.

11:02AM 8 Any matters we need to address before the break?

11:02AM 9 MR. LEVENTIS: Not for the government.

11:02AM 10 THE COURT: Mr. Cooke, how much longer do you
11 estimate on your direct?

11:02AM 12 MR. COOKE: I think probably another hour and a half.

11:02AM 13 THE COURT: Very good. Okay. Very good. Thank you.

11:02AM 14 (Recess.)

11:20AM 15 THE COURT: Any matters we need to address before we
16 bring in the jury?

11:20AM 17 MR. LEVENTIS: No, thank you, Your Honor.

11:20AM 18 THE COURT: Very good. Let's bring in the jury.

11:22AM 19 (Whereupon the jury entered the courtroom.)

11:22AM 20 THE COURT: Please be seated.

11:23AM 21 Mr. Cooke, please continue your direct.

11:23AM 22 MR. COOKE: Thank you, Your Honor.

11:23AM 23 BY MR. COOKE:

11:23AM 24 Q. Mr. Johnson, you made an agreement with the court reporter
25 to slow down a little bit. Now, the bad news for you is that

1 means I'm probably going to cut you off a little sooner
2 sometimes because we do have quite a few things we need to
3 cover. I appreciate your elaborating.

4 Let me show you Exhibit 1230.

5 Have you ever seen this? Do you see that?

6 A. Yes, sir.

7 Q. Right in the middle of that is an email from you to Tonya
8 and Cal. Subject is regarding Dr. Karam.

9 And it says, "FYI to all. I want to refocus that
10 this is a PH fee and not a draw fee. One word makes it legal
11 and the other illegal."

12 what did you mean by that?

13 A. Actually, when I was trained at Berkeley HeartLabs by Rob
14 Lewis, because I came from the pharmaceutical industry, I would
15 say, "Walk me through this \$20 draw fee." And he stopped me on
16 the spot.

17 So myself, Grace, Michael Gottfried, and all of us
18 was there. And he said, "Okay. Stop." He said, "The
19 government has defined a draw fee, a venipuncture fee as \$3,
20 period." He said, "The other, the 17, is a process and
21 handling fee. It is to offset the physicians' costs. It is a
22 fee for services done."

23 Q. And so you carried that on with your training at HDL?

24 A. Yes, sir. Actually, looking at the legal documents on
25 processing and handling fees from the labs, one word states

1 processing and handling fee of, say, 17. Another says draw fee
2 of \$3. It makes logical sense when you think about it.

3 Q. Okay. I want to ask you about two people, and they came
4 up in the testimony of Mr. Nick Pace a couple of weeks ago.

5 Do you remember that?

6 A. I do.

7 Q. And the first one was a gentleman by the name of Larry
8 Cushing.

9 Do you remember Larry Cushing?

10 A. You might have to refresh my memory, but I'm not sure.

11 Q. Well, the story had something to do with a relative of
12 somebody who worked in the office.

13 A. I do now.

14 Q. Okay.

15 A. Yes, sir.

16 Q. So tell us about that, and what did you do --

17 A. Actually, what had happened was we got a call from --
18 somebody at HDL said, "Hey, there's this Larry Cushing guy out
19 there trying to sell tests for HDL."

20 And I'm like, "Who is Larry Cushing? What are you
21 talking about?"

22 And what had happened was he was -- Kyle knew his
23 wife, and he was trying to do something on the side.

24 Q. Kyle Martel?

25 A. Kyle Martel.

11:26 AM 1 Q. Down in Florida?

11:26 AM 2 A. That is correct. And obviously I don't know the extent on
11:26 AM 3 what all Kyle had told him and what they were doing, but I do
11:26 AM 4 know I called Kyle and said, "Who is this guy?" And he said it
11:26 AM 5 was a friend of one of my -- of his wife or somebody -- his
11:26 AM 6 husband or something like that.

11:26 AM 7 And all I remember saying, "Get rid of him today."
11:26 AM 8 And that was pretty much the end of the conversation. I says,
11:26 AM 9 "I don't know what you're doing, but you don't need to do any
11:26 AM 10 of that. Do you understand me?"

11:26 AM 11 And he said, "Done." And that was it.

11:26 AM 12 Q. And that was in response to a complaint from HDL?

11:26 AM 13 A. I'm sorry?

11:26 AM 14 Q. That was in response to a complaint from HDL?

11:26 AM 15 A. Yes. I heard about it from HDL, correct.

11:26 AM 16 Q. The next one is a guy by the name of Chad Sloat.

11:26 AM 17 A. Okay.

11:26 AM 18 Q. And we heard that he had criminal charges against him or
11:27 AM 19 was a felon or something like that.

11:27 AM 20 A. Correct.

11:27 AM 21 Q. Would you just briefly tell the jury what you found out
11:27 AM 22 about that and what you did about it.

11:27 AM 23 A. Chad, I met at a conference, really liked him, interacted
11:27 AM 24 with him. And we ended up hiring him. And two years later, he
11:27 AM 25 calls me and says, "Hey, Brad. I've got an issue in North

1 Carolina." And it's pertaining to some investment fund that he
2 used to work for as a sales representative or a financial
3 adviser or something like that.

4 I says, "Okay. What is it?"

5 And he says, "Well, the government is looking at it.
6 The head of it got 25 years in prison," and all this stuff.
7 And he says, you know, "Right now, I'm being accused of it."

8 So I said okay. So I said, "I need to know if
9 anything changes from there."

10 So I called John Galese, one of our attorneys, and
11 told him about the issue, what had happened. And John Galese
12 said okay. He says, "If anything changes" -- he put a -- some
13 sort of search system in his computer, whatnot, to know if
14 something changed.

15 well, lo and behold, Chad ended up pleading -- a plea
16 deal in the case. And John Galese called us and said, "Hey,
17 Brad. He pled guilty." So I said okay. And he said,
18 "Terminate him immediately."

19 So that's how it went down. So I flew up there and
20 terminated Chad on the spot.

21 Q. And did you report that back to HDL?

22 A. Yes, we did. We told him -- we terminated him immediately
23 because -- actually, when John Galese said he pled guilty, that
24 was the end of it.

25 Q. Let's go back and talk about HDL and Singulex.

1 Sometime near the startup of HDL, did they come out
2 with a position statement about process and handling fees?

3 A. Which one? HDL?

4 Q. Yes.

5 A. Yes, sir, they did. Tonya had one in May 2010 right out
6 of the gate.

7 MR. COOKE: Could we bring up 1136, please. And this
8 is already in evidence.

9 BY MR. COOKE:

10 Q. Is this the statement that they -- that they came out with
11 on May 1st, 2010?

12 A. Yes, sir.

13 Q. Would you just briefly tell the jury what the background
14 for this was and why it was important to have that.

15 A. Well, we needed a statement to show the legality of the
16 processing and handling fee. So if a physician says, "Hey,
17 listen, I need to know if this is legal," this is what was
18 provided to them in that situation.

19 Over the course of the next year, year and a half,
20 these got to be less common. And the reason behind it is you
21 had so many labs offering process and handling fee. As I said,
22 there's 12, 13 of them out there then offering process and
23 handling fee in the cardiovascular arena and in some cancer
24 arenas. And so -- but Tonya got LeClairRyan, to my
25 understanding, and they drafted this.

11:30 AM 1 MR. COOKE: Let's go down to the next page of this.
11:30 AM 2 And see that part right under that dot. Let's highlight that
11:30 AM 3 and that. There we go.

11:30 AM 4 BY MR. COOKE:

11:30 AM 5 Q. See what she says there?

11:30 AM 6 well, first of all, do you know who -- or did you
11:30 AM 7 understand at the time who worked on preparing this?

11:30 AM 8 A. Yeah. I was under the impression that Tonya did an
11:30 AM 9 internal study -- or internal time and motion study out of the
11:30 AM 10 gate and got LeClairRyan to, I guess, sign off on it, from my
11:30 AM 11 understanding. And from there -- but we had already encouraged
11:30 AM 12 her to get an external time and motion study so that nobody
11:30 AM 13 could say, hey, it's a conflict.

11:30 AM 14 Q. What is a time and motion study?

11:30 AM 15 A. A time and motion study -- I think it's already been
11:30 AM 16 discussed, but I'll touch on it real quick. It is basically
11:30 AM 17 the time and energy and effort of a phlebotomist in doing the
11:30 AM 18 work that's required for the lab.

11:31 AM 19 So from my understanding, somebody physically sits
11:31 AM 20 there with a stopwatch going click, click, click, click on all
11:31 AM 21 the time that's associated with it and any cost associated with
11:31 AM 22 it as well.

11:31 AM 23 Q. We'll talk about the external study that was later done,
11:31 AM 24 but initially it was your understanding that -- who had done
11:31 AM 25 the time and motion study?

1 A. Actually, the first one that -- this was an internal one,
2 from my understanding. And then the second one was an external
3 one, which was done by Exponent, which is a super-huge company.

4 Q. Yeah. We're going to get that in just a minute, but did
5 you -- were you privy to whether Tonya got legal advice on
6 developing the position statement?

7 A. Yeah, she -- everything we asked Tonya, she said, "I've
8 talked to LeClairRyan." I mean, every email we sent when we
9 had somebody questioning the legality, you could see it being
10 forwarded as well.

11 Q. And I'm going to show you a document that's BW59. And I
12 don't know whether you've seen it or not, but I'm just going to
13 ask you whether you recognize it. And if you don't, just say
14 no. If you do, say yes.

15 A. I did see this.

16 Q. When did you see it?

17 A. I actually saw it -- I can't remember the exact dates, but
18 I think it was the two to three months after we had this one --
19 after we had a position statement, I believe.

20 MR. COOKE: All right. I would offer that --

21 THE COURT: What's the number?

22 MR. COOKE: It's 59, BW59.

23 THE COURT: Okay. Any objection?

24 MR. LEVENTIS: No objection, Your Honor.

25 MR. ASHMORE: No objection, Your Honor.

1 THE COURT: BlueWave 59 admitted without objection.

2 BY MR. COOKE:

3 Q. And for the jury's benefit, what is this document?

4 A. It looks like basically a real simplistic format of a time
5 and motion study.

6 Q. Okay.

7 Can you blow it up there.

8 Okay. And going down to the bottom, "summary of
9 costs, sample for site draw."

10 Can you blow that up.

11 Do you see what the total of her study came up with?

12 A. Yes, sir. \$34.83.

13 Q. And is that what HDL paid in process and handling fees?

14 A. No, sir. 17 was what HDL paid.

15 Q. Do you know why they didn't pay more?

16 A. I think to keep it from being under scrutiny at all times.

17 Q. Did you try to argue to have HDL pay more?

18 A. No, no. Did not.

19 Q. You said earlier that, in your experience, a single
20 phlebotomist could be expected to do between 30 and 35 tests a
21 week?

22 A. Correct.

23 Q. And that's specialized laboratory studies, like HDL's?

24 A. Well, yes, sir, that's -- doing the blood work as well as
25 the HDL testing, correct.

11:34 AM 1 Q. Do you know what the range of cost of a phlebotomist is?

11:34 AM 2 A. I know it, and I know it very well.

11:34 AM 3 Quest is 48,000 a year, to give you an idea. HDL
11:34 AM 4 actually paid 52,000 a year. And if you did what's called a
11:34 AM 5 part-time phlebotomist, where I have a physician who wants to
11:34 AM 6 do the tests but let's say we promoted and sold the part-time
11:34 AM 7 phlebotomist in the practice, then it was \$36 an hour from a
11:34 AM 8 company called Aerotek. And we knew Atherotech utilized them a
11:34 AM 9 lot. I knew Madeline, who was in charge of that at Atherotech
11:34 AM 10 as well. As I said, \$36 an hour there, not yearly, 36 an hour.

11:35 AM 11 Q. Okay. You said earlier -- so I'm not going to get you to
11:35 AM 12 repeat it in great detail, but you said earlier that you
11:35 AM 13 actually learned about process and handling fees that other
11:35 AM 14 labs were paying?

11:35 AM 15 A. Oh, yes, sir.

11:35 AM 16 Q. And what were the ranges that were being paid back in 2010
11:35 AM 17 through 2015?

11:35 AM 18 A. You got them all across the board. So when I started with
11:35 AM 19 Berkeley, Atherotech was one that was offering a process and
11:35 AM 20 handling fee. LipoScience was another. And theirs was
11:35 AM 21 anywhere from -- Atherotech had a floating scale. They
11:35 AM 22 averaged up to \$14. And LipoScience averaged, I want to say,
11:35 AM 23 \$13. And then we knew Hunter HeartLabs -- or HunterLabs --
11:35 AM 24 excuse me -- was 15.

11:35 AM 25 we also knew that you had Boston Heart at 18. And we

1 also had heard of 20 from Boston, but I think that was a
2 one-off occasion. So knew that as well. We also knew later on
3 as well that Tethys had one already too at 13. We also knew
4 Cleveland had one at 10. And that's Cleveland HeartLabs. So
5 everybody knows the Cleveland Clinic and stuff. So Cleveland
6 HeartLabs had one at 10.

7 we also knew that Natera offered one in 2012, 2013 --
8 they actually called us and asked us about selling for them.
9 And they offered 35. And we knew Pathway Genomics offered
10 around 40, to give you an idea as well in that situation.
11 So -- and that was CardioDx, they also offered one. And I want
12 to say it was 15.

13 So we knew the industry standards across the board,
14 what was kind of being offered. And as I said, it got to the
15 point where there was so many companies offering process and
16 handling fees that we never questioned when somebody, "Can you
17 do this or not?" That kind of went out the door.

18 Q. Some of the numbers that you mentioned were less than \$17.

19 A. Correct.

20 Q. How did you guys justify \$17 when some other laboratories
21 were doing it for less?

22 A. Well, I think, as I mentioned, since I'm not an expert on
23 doing time and motion study, you know, you've got to take into
24 account how much time is involved, how much work is involved,
25 how many tubes are involved. Is each tube different? It's

1 just like I think you had somebody up here talk about pathology
2 labs offering process and handling fees. And some of their
3 process and handling fees range for unbelievable dollars
4 because you're doing different types of work in order to get
5 the sales.

6 So each one of them ranged a different number. And I
7 knew Atherotech had a time and motion study. And the reason I
8 know that is we ended up hiring some of their sales reps.
9 LipoScience, I knew they had one as well. We had heard Boston
10 had one, but they really kept it tightly guarded to their
11 chest. And they was probably our biggest competitor in the
12 advanced cardiovascular arena.

13 As I said, Tethys offered Bluewave all their sales
14 rights as well. We had a meeting with them. We knew what they
15 offered because they told us, their vice president of sales.

16 We knew what Natera offered us because they was
17 asking us would we be interested in taking all their sales
18 rights as well. And Pathway Genomics, I actually knew what
19 they offered because we had some friends that worked for them.
20 And they had a meeting with us as well.

21 Q. Why did HDL need four tubes to be processed and handled
22 rather than just one or two?

23 A. Because each lab requires different tubes, different
24 specifications on what you need to get the blood. And so Tonya
25 is going to be a better person to answer the questions on that,

1 or even the lab companies, because some of them, you have to
2 invert it, spin it 15 minutes immediately. Some of them, you
3 invert, you put in the fridge for 30 minutes. Each one is a
4 little different on how you process it. And so I've seen
5 process and handling on blood specimens go all the way across
6 the board on what you do. Some have pour-offs before. I've
7 seen that.

8 Q. Let's take a look at BW157. You talked about having an
9 outside study done. Could you tell the jury what your role was
10 in having that study done?

11 A. I actually had no role in it. I think my business
12 partner, Cal, was one that says, "Tonya, we are going to
13 encourage you to get an external time and motion study so
14 nobody can ever say it's biased," which made sense.

15 Q. Let's go ahead and flip down so we can see.

16 This was by a company called Exponent.

17 A. Yes, sir.

18 Q. What was your understanding of who Exponent was?

19 A. They were a heavy hitter in the anti-kickback market as
20 well. They were someone who could come in and do an analysis
21 for you as well pertaining to fair market value of what you're
22 doing. And they could calculate all the numbers. They also
23 had lots of consultants that came in with them.

24 I think they was trying to be an all-round business
25 consultant for any type of people in the medical field as well.

11:40 AM 1 Q. Do you know who actually hired Exponent?

11:40 AM 2 A. To my knowledge, I would have thought it was HDL. It
11:40 AM 3 might have been LeClairRyan, but I'm not sure.

11:40 AM 4 Q. Were you ever told what the results of that time and
11:40 AM 5 motion study were?

11:40 AM 6 A. I was told the results.

11:40 AM 7 Q. Before we get there, let me just ask them to scroll
11:40 AM 8 through it so the jury will have it all in hard copy. But as
11:40 AM 9 you can see, it's got quite a few pages attached. Did you
11:40 AM 10 review it when it came out?

11:40 AM 11 A. I took a glance at it, but I trusted Tonya, I trusted
11:40 AM 12 LeClairRyan. You know, as I said, they're -- their attorney,
11:40 AM 13 Michael Ruggio, wrote the legal opinion on the process and
11:40 AM 14 handling fee, actually worked for the government and was a
11:40 AM 15 health care attorney for the government. So I had no reason to
11:41 AM 16 doubt his expertise in that situation, as well as I said
11:41 AM 17 LeClairRyan is not a small firm. And -- though Tonya didn't
11:41 AM 18 shop around. We never heard her go, "Hey, there's 10 different
11:41 AM 19 law firms involved, and this is the one we came out with."

11:41 AM 20 Q. Did you have any input into the Exponent study?

11:41 AM 21 A. No, sir.

11:41 AM 22 Q. Did you help them -- give them information about process
11:41 AM 23 and handling or anything like that?

11:41 AM 24 A. No, sir, not to my knowledge. I don't think I ever spoke
11:41 AM 25 with anybody with Exponent. I don't even know if I even heard

1 11:41 AM 1 their name until after all this stuff had came out.

1 11:41 AM 2 Q. So what did they come up with as the cost of doing a
1 11:41 AM 3 specimen process and handling for HDL?

1 11:41 AM 4 A. I believe their fair market value was \$36.

1 11:41 AM 5 Q. 36?

1 11:41 AM 6 A. I believe that's correct.

1 11:41 AM 7 Q. So did HDL raise their process and handling fee --

1 11:41 AM 8 A. No.

1 11:41 AM 9 Q. -- in light of that?

1 11:42 AM 10 A. No, sir. We kept it exactly where it was from the start.
1 11:42 AM 11 There was no reason to raise it.

1 11:42 AM 12 Q. Did you ask them to raise it?

1 11:42 AM 13 A. No, sir.

1 11:42 AM 14 Q. Meanwhile, over on the west coast, how about Singulex?
1 11:42 AM 15 Did they do a time and motion study as well?

1 11:42 AM 16 A. Yes, sir, they did. They actually did do a time and
1 11:42 AM 17 motion study as well because the first agent we met with fully,
1 11:42 AM 18 he said, "You need to go ahead and do this so you have the
1 11:42 AM 19 actual numbers so, if anybody questions you, you've actually
1 11:42 AM 20 got proof -- valid proof in front of you."

1 11:42 AM 21 MR. COOKE: Exhibit 55 is already in; is that right?
1 11:42 AM 22 It is?

1 11:42 AM 23 Okay. Could we go ahead and put that up.

1 11:42 AM 24 BY MR. COOKE:

1 11:42 AM 25 Q. Here's an email from Jeff Anderson. Is that somebody with

1 Singulex?

2 A. Yes, sir, it is.

3 Q. And it says "time and motion study" dated September 20,
4 2012. And did you see that time and motion study?

5 A. I don't know if we ever saw the physical -- actual time
6 and motion study. We was told from Mike, who was the CFO --
7 and I think Philippe was still there at the time -- that, "Hey,
8 listen, we're good on all points. We have a time and study.
9 we're covered."

10 Q. And do you know what the number was that they came up
11 with?

12 A. From these exhibits, I think it was 16 or \$17, I believe,
13 but I might be wrong.

14 Q. And let me show you.

15 MR. COOKE: Do we have 147?

16 (Pause.)

17 BY MR. COOKE:

18 Q. I'll tell you, while they're looking at that, I'm going to
19 show you an exhibit that's been marked 143 and ask you if you
20 ever saw that.

21 A. No, sir, I don't think I physically ever saw this. We was
22 just told it was --

23 Q. Okay.

24 A. It was good.

25 Q. We talked a little bit on Friday about pro formas. And

1 you talked about doing those at -- when you were at Berkeley
2 HeartLab. And would you, just in one minute or less, tell the
3 jury what a pro forma is.

4 A. It's just a -- if you're looking at the lipid clean pro
5 forma, it's just an analysis. It takes into consideration
6 process and handling fees, Level 3, Level 4 follow-up visits,
7 Level 5 follow-up visits.

8 It also coincides with the nurse practitioners and PAs
9 involved in it. It's a model that, actually, Berkeley
10 presented -- I don't know how many hundreds of times. And they
11 had a manual that they walked around with about yea thick
12 presenting it.

13 MR. COOKE: Could we see 1099.

14 BY MR. COOKE:

15 Q. Did you ever hear about pro formas being used at Bluewave?

16 A. Actually, this one right here is one that Burt had sent to
17 an account that I was in for about 10 minutes.

18 Q. Can you talk a little bit about it --

19 A. I'm sorry.

20 Q. -- the speed is okay.

21 A. I'm sorry. I sat back. My bad.

22 Q. Okay. So this is dated September 23, 2010.

23 A. Yes, sir.

24 Q. And Burt Lively, the gentleman that was here last week --

25 A. Correct.

11:46 AM 1 Q. -- is sending this to you regarding Kansas City IM pro
2 forma.

11:46 AM 3 A. Correct.

11:46 AM 4 Q. And what was the purpose for sending that pro forma?

11:46 AM 5 A. I was actually talking to the CEO and the CFO. And the
11:47 AM 6 first five minutes of the conversation is meet, greet,
11:47 AM 7 socialize. I had already told my sales contractor Chad, I
11:47 AM 8 said, "This is a waste of time. This account will never do the
11:47 AM 9 tests. It's a 60-man practice. And we're not even talking to
11:47 AM 10 any physician. So it's a waste, in my opinion, right out of
11:47 AM 11 the gate."

11:47 AM 12 We was talking to them, and I told them I'd worked
11:47 AM 13 for Berkeley before. And they immediately asked why somebody
11:47 AM 14 would do a Berkeley lipid clinic. There was actually a
11:47 AM 15 Berkeley lipid clinic down the street from them, and they had
11:47 AM 16 asked about, "Well, what are they doing?"

11:47 AM 17 I says, "Well, what they're actually doing is what's
11:47 AM 18 called a 'for my heart risk reduction center,'" is what
11:47 AM 19 Berkeley liked to call it and -- which used this model. And so
11:47 AM 20 I told her, I says -- she said, you know, "Can you tell me what
11:47 AM 21 they're doing?" I said sure.

11:47 AM 22 So I walked out and called Burt and told him. And he
11:48 AM 23 started laughing at me on the phone. And I said, "Listen,
11:48 AM 24 they're not going to do the test. Just send them this so they
11:48 AM 25 know what they're doing down the street. That's good enough."

11:48 AM 1 Q. Now, suppose that they were candidates to do the test,
11:48 AM 2 would it have still been all right to send a pro forma, in your
11:48 AM 3 view?

11:48 AM 4 A. It was. Actually, at Berkeley, this was common.
11:48 AM 5 Actually, a lipid clinic pro forma was presented all the time.
11:48 AM 6 If you was a smart sales rep, you would never present it on the
11:48 AM 7 first call. And the reason or rationale behind it is because
11:48 AM 8 you really needed to sell the account on the science behind it.
11:48 AM 9 But I had seen, as I said, David Kaufman, who was the VP of
11:48 AM 10 sales, actually walk into an account of mine and present it.
11:48 AM 11 And the first time I ever saw it. And I was like, "well, what
11:48 AM 12 is this?"

11:48 AM 13 And he says, "Frank is promoting this because we want
11:48 AM 14 a higher valuation in order to sell the company." As I
11:49 AM 15 mentioned Friday, your evaluation on the lab is really 2 to 2.5
11:49 AM 16 times sales. So a company that does a million in sales is
11:49 AM 17 worth 2 1/2 million. If you do what's called a "for my heart
11:49 AM 18 risks reduction center" or a lipid clinic model, which means
11:49 AM 19 you have a recurring analysis in your book of business, you
11:49 AM 20 have a tenfold evaluation, so a million-dollar company in sales
11:49 AM 21 is worth 10 million. So --

11:49 AM 22 Q. Did you ever use a pro forma while you were at BlueWave to
11:49 AM 23 try to persuade a doctor to use your tests or to order tests
11:49 AM 24 for the financial gain of process and handling fees?

11:49 AM 25 A. No, sir. Did not.

11:49AM 1 Q. Let me show you Exhibit 1004. And this relates to a
11:49AM 2 Dr. Netter. You're not copied on this, but are you familiar
11:50AM 3 with what this pro forma was offered for?

11:50AM 4 A. I don't know the specifics. I heard Tony talk about it a
11:50AM 5 little bit. I think Cal was asked about it, but I don't know
11:50AM 6 the specifics pertaining to it.

11:50AM 7 MR. COOKE: Can you scroll down.

11:50AM 8 BY MR. COOKE:

11:50AM 9 Q. Do you see those -- see those numbers there?

11:50AM 10 A. I do.

11:50AM 11 Q. Did you have any information that would -- from your
11:50AM 12 training or anything that had ever been advised to you that
11:50AM 13 said you could not provide that kind of information to a
11:50AM 14 practice?

11:50AM 15 A. No, not on this. This right here is pretty simple
11:50AM 16 business, if you think about it, because they're asking should
11:50AM 17 they have a phlebotomist, what would their process and handling
11:50AM 18 be, be more advantageous to them as far as costs and loss in
11:50AM 19 that model. The thing is is their calculations there are off
11:51AM 20 because the -- if you hired a part-time phlebotomist using,
11:51AM 21 say, using Aerotek, you're at 36 an hour. So the numbers are
11:51AM 22 wrong off of it as well.

11:51AM 23 Q. Okay. Let me show you 1166. This is another one that was
11:51AM 24 discussed earlier regarding MDVIP. And you see that
11:51AM 25 explanation for that? It's from Tonya to Lee Roberts.

1 "There's a doctor in Chapel Hill that is very eager to use HDL.
2 I'm not sure if this is Cal and Tony or Lee and Jerry, so I'm
3 sending this to all of you."

4 what is an MDVIP practice?

5 A. It's basically a concierge physician. What they do is
6 they take a \$2,000 or \$3,000 payment up front for service for
7 the whole year for the patient. It's -- it's reserved for more
8 well-to-do patients.

9 Q. Did you -- do you know whether they became a client?

10 A. I have no idea.

11 Q. Did you find that, from time to time, physician practices
12 would want to have information so that they could decide
13 whether it was better to have a phlebotomist placed in their
14 office or use their own phlebotomist and receive process and
15 handling reimbursement?

16 A. Yeah, I mean, you have a lot of people that ask which one
17 is more cost-effective? Which one am I not going to lose my
18 butt on in that situation? Correct. So --

19 Q. Did you ever present a pro forma in terms of profitability
20 from process and handling fees and telling a physician's
21 practice that they could make a profit off of process and
22 handling fees?

23 A. No. I don't know if there's any physician that really
24 ever made a profit off of process and handling fees. I would
25 venture to sit here and say that I don't think any physician

11:53 AM 1 ever did.

11:53 AM 2 Q. Was it ever intended for physicians to make a profit?

11:53 AM 3 A. No, sir. Again, it is fair market value, and it's defined
11:53 AM 4 as to pay for a fee for service. So --

11:53 AM 5 Q. Is it revenue? Is the process and handling fee a revenue
11:53 AM 6 source for a physician?

11:53 AM 7 A. I think my partner made the best statement ever on that.

11:53 AM 8 He says, you know, anything that comes in, whether it be a
11:53 AM 9 penny or a quarter or a dollar, it's considered revenue. So --

11:53 AM 10 Q. I'm going to show you BW82. This was a -- it's in
11:53 AM 11 evidence. This was shown last week. And it's a sales piece
11:53 AM 12 that Singulex had. Do you remember seeing that?

11:53 AM 13 A. I do. I think you showed it to me last week.

11:53 AM 14 Q. And when did you first see this?

11:53 AM 15 A. Last week.

11:53 AM 16 Q. Okay. All right. I'm going to ask you to comment on
11:53 AM 17 something. And let's kind of scroll through a page at a time.

11:54 AM 18 A. Okay.

11:54 AM 19 MR. COOKE: Keep going. Keep going. Keep going.
11:54 AM 20 Keep going. Keep going. Keep going. Keep going. Keep going.
11:54 AM 21 Keep going. I want you to stop when you get to the thing that
11:54 AM 22 mentions revenue. There you go.

11:54 AM 23 BY MR. COOKE:

11:54 AM 24 Q. Do you see that, "Revenue generation: Individualized risk
11:54 AM 25 assessment generates appropriate testing"?

1 11:54 AM 1 A. Okay.

1 11:54 AM 2 Q. Have you known from time to time that physicians, in
1 11:54 AM 3 speaking to each other, would talk about the business side of
1 11:54 AM 4 their medical practice?

1 11:54 AM 5 A. 100 percent, yes, sir.

1 11:54 AM 6 Q. All right. Now, does that mean that you would then use
1 11:54 AM 7 that to promote process and handling fees as a revenue source?

1 11:54 AM 8 A. No, sir. No, sir.

1 11:54 AM 9 Q. And does this, in fact, talk about P&H as the revenue
1 11:54 AM 10 source?

1 11:55 AM 11 MR. LEVENTIS: Objection, Your Honor. I don't think
1 11:55 AM 12 he's ever seen it.

1 11:55 AM 13 MR. COOKE: Go ahead and scroll down to the next
1 11:55 AM 14 page.

1 11:55 AM 15 THE COURT: Restate the question. If you're asking
1 11:55 AM 16 him whether he -- based on this document or just general
1 11:55 AM 17 proposition, you're --

1 11:55 AM 18 MR. COOKE: I was going to get to the general
1 11:55 AM 19 proposition. I just was really asking him to look at this
1 11:55 AM 20 document as we scroll through it.

1 11:55 AM 21 THE COURT: Overruled.

1 11:55 AM 22 MR. COOKE: Keep going. Keep going. Okay.

1 11:55 AM 23 BY MR. COOKE:

1 11:55 AM 24 Q. Based on --

1 11:55 AM 25 Go back to the previous page, please.

1 Did you see any mention of processing and handling
2 fees as a profit center?

3 A. No, sir.

4 Q. In any of the presentations that you ever attended on
5 behalf of Bluewave, did you ever hear anybody talk about
6 process and handling fees as a profit center for medical
7 practices?

8 A. Never heard the word "profit center" at all from a process
9 and handling fee. So --

10 Q. Did you believe, based upon your training and experience
11 in the industry, that it was somehow illegal to talk about the
12 financial aspects of the physician's practice?

13 A. Did I hear it was illegal?

14 Q. Yes.

15 A. Something pro forma alone presented at Berkeley, you know,
16 by the CEO, by VP of sales and everything else, no, across the
17 board. So --

18 Q. Well, could you say where, in your view based on your
19 training, when you would cross the line from what was
20 acceptable for Bluewave and what was not acceptable to Bluewave
21 as far as talking about money?

22 A. Yeah. I believe if you went into an account and says,
23 "Hey, listen, I'm going to pay you this for this," I think
24 that's illegal in that situation. That's why it was always
25 emphasized to all the sales reps. And if you listen to any of

1 the sales presentations, they all sold on the science, period,
2 right out of the gate, all the way through the process.

3 Q. I'm going to show you now a few documents. And I'm going
4 to ask you to look at them. They're in evidence. And I'm
5 going to ask you to comment on them and then comment on whether
6 you -- when you first saw these.

7 Can we look at 1162, please. who was
8 kmartel@bluewavehealth.com? Is that Kyle Martel?

9 A. That would be Kyle Martel.

10 Q. Okay. You see the last email there is from a practice.
11 And it says, "Kyle, I appreciate your summarizing your offer."

12 Now, take a moment and look at the email that Kyle
13 Martel sent to Kamachie Chinapen.

14 A. Okay.

15 Q. And you don't have to read it out loud, but let's go ahead
16 and bring it up so everybody can see it.

17 BY MR. COOKE:

18 Q. And I think there's another page too. Is there? Yeah.

19 It says, "With regards to business opportunity, I
20 have a processing and handling fee of \$20 that would be paid
21 directly to the practice on each panel sent out for the
22 advanced panel. Judging from the amount of previously ordered
23 NMR Lipoprofile tests, the practice ordered minimally 50 panels
24 a week."

25 Anyway, it goes down to the bottom, "Therefore, a

1 hundred panels a week will result in a revenue stream for the
2 office of \$2,000, 100 times 20 panels a week."

3 when did you first see this?

4 A. In the exhibits when you gave them to us.

5 Q. Let's go back to the beginning and the address block up
6 there. And go to the address block up above. Sorry.

7 Do you see yourself included anywhere there?

8 A. No, sir.

9 Q. Do you see -- see Mr. Dent included there?

10 A. No, sir.

11 Q. Do you see Tonya Mallory included there?

12 A. No, sir.

13 Q. So, in your own words, tell the jury what you -- what --
14 what you thought when you saw this document.

15 A. First of all, I would never condone sending emails like
16 this, number one.

17 Number two is you've got Kyle who was trained at
18 LipoScience. He knows this is something you do not do, period.
19 And the reason being is, he's sitting here trying to say, "Hey,
20 listen, do all these tests and stuff." And I know what he's
21 doing. He's taking his LipoScience panel with one of his
22 existing customers and trying to sell our test on top of it.

23 But this is a no-no-no, because number one, he should
24 have been into the account meeting them face to face, talking
25 about the science of the test and then going over the benefits

1 across the board. So --

2 Q. Do you know whether this practice became a customer?

3 A. Based on the information I had one of my secretaries look
4 up, no, they did not.

5 Q. would you have approved a communication like this --

6 A. No, I would have not in a million years.

7 Q. Did Kyle pass his tests -- compliance tests that you gave?

8 A. He did. He did. I think if he'd done this at
9 LipoScience, I think they would have -- since I knew his
10 regional director was Bobby Watson, who's a friend of mine, I
11 think he would have come unglued.

12 Q. Let me look at exhibit -- I think it's -- 1268 is not in
13 evidence, is it? Go ahead and put 1268 up, then.

14 This is dated September 13, 2011. And right down at
15 the bottom, it says, "Our processing and handling fees are also
16 much better than the other companies as well."

17 when did you first see this email?

18 A. When you showed me the exhibits.

19 Q. Okay. And, again, you're not included on those?

20 A. No, sir.

21 Q. Cal Dent is not included?

22 A. Correct, he's not.

23 Q. Tonya Mallory is not included?

24 A. No, sir.

25 Q. Is anybody else from Bluewave included?

1 A. No, sir.

2 Q. What's your comment on that one?

3 A. Same situation. He's creating basically a marketing piece
4 and sending it to everyone.

5 Q. Let me see 1033. I think we have to start at the bottom
6 of this one.

7 Do you remember seeing this when it came into
8 evidence during the trial? And at the top -- it ends with Kyle
9 saying, "That's not going to work. Let me call them." And you
10 see there, it's --

11 A. I see that.

12 Q. Right below that, it says, "Just as an FYI, Brevard
13 physician requested to delete the following from their panel."

14 A. Okay.

15 Q. And Kyle says, "That's not going to work. Let me call
16 them."

17 A. Okay.

18 Q. Was it consistent with BlueWave's policy to call doctors
19 and try to tell them what tests that they should put on their
20 panel?

21 A. No. I mean, our job was to sell the test and sell the
22 benefits of the test to the physician's office.

23 Could you scroll up to the top.

24 Q. Yes. Would it be permissible to try to persuade a doctor
25 to order tests?

1 12:03 PM A. You mean to sell tests to a physician? Sell the science?

2 A hundred percent, yes.

3 I mean, how are they to get educated if you're not
4 talking to them? I mean, there's too many studies out there, I
5 think, nowadays to even find one to read them all.

6 Q. If you found a doctor was not ordering as many tests as
7 you would like for him to, would it have been permissible to
8 give him clinical information about the tests?

9 A. Of course. Of course, it would.

10 Q. Could you offer him more processing and handling fees?

11 A. No.

12 Q. Let me show you Exhibit 1154. This is a -- an email dated
13 10/18/2011 from a Mr. Coffman.

14 A. Okay.

15 Q. Who is Mr. Coffman?

16 A. He was a Bluewave contractor out of Knoxville, Tennessee.

17 Q. Okay. Did he work under you?

18 A. You mean did he work under Bluewave, the corporation?

19 Q. Yes.

20 A. Yeah, he was an independent contractor.

21 Q. All right. Let's skip down here. In the middle paragraph
22 right there, he says, "I will provide advanced testing to those
23 patients, and they will never receive a bill from me. And your
24 account will make \$200 that you never would have made, \$20
25 handling fee for 10 patients that would never have received at

1 Berkeley and probably generate some additional follow-up visits
2 and maybe some ancillary cardiac workup."

3 A. Okay.

4 Q. When did you first see that?

5 A. When you showed me these exhibits.

6 Q. Okay. And, again, you were not copied on that?

7 A. No, sir.

8 Q. Mr. Dent was not copied on that?

9 A. That's correct.

10 Q. And Ms. Mallory was not copied on that?

11 A. That's correct.

12 Q. Okay. So what's your comment on that presentation?

13 A. Same situation. You got this -- John Coffman came from
14 Eli Lilly, which is one of the most conservative pharmaceutical
15 companies in the world. He would know not to send an email
16 like this. He would know not to solicit business this way,
17 number one.

18 Number two -- number three, just from outside looking
19 in, he's sitting here saying Berkeley did offer a process and
20 handling fee at that time as well. So I'm not sure why he's
21 saying that there in that situation. But still I think he's
22 overreaching and doing everything he can to get in front of the
23 customer.

24 Q. Do you know whether that company ever became a customer?

25 A. To my knowledge, they did not.

1 12:05 PM Q. Let me show you Exhibit 1203. This one is -- this is from
2 Boomer Cornwell who testified here.

3 Do you remember that?

4 A. Yes.

5 Q. Do you know Boomer?

6 A. I do.

7 Q. And this is one that I think he went over in some detail.
8 It was his email dated August 8th, 2012, to Mr. Moreno, I
9 believe you testified was the administrator of a practice.

10 Do you remember seeing this?

11 A. At the exhibits, yes.

12 Q. Okay. Are you copied on it in any way?

13 A. No, sir.

14 Q. And Cal Dent is not copied?

15 A. No, sir.

16 Q. Tonya Mallory is not copied?

17 A. No, sir.

18 Q. Okay. Let's go ahead and scroll down so we can read the
19 whole thing.

20 Do you remember seeing this when Mr. Cornwell
21 testify?

22 And he says, "The key aspect that truly sets us apart
23 from our competitors is our business model. Nobody else can do
24 what we can do. When HDL formed, the owners agreed to fix all
25 of the problems they ran into while at other laboratories."

1 And then you see it's got down there process and
2 handling reimbursements, \$20 for HDL and \$13 for Singulex.

3 A. Uh-huh.

4 Q. So what did you think when you saw that presentation?

5 A. Again, Boomer came from Quest, which they had massive
6 compliance training. He would have known not to send anything
7 like this as well, which is interesting as well in that
8 situation.

9 Q. Would you have approved it if you had seen it?

10 A. No, sir. I would not have approved this at all under any
11 circumstances.

12 Q. Do you know whether this practice ever became a customer?

13 A. To my knowledge, this account did not ever become a
14 customer either.

15 Q. Okay. Does the name Leonard Blasko ring a bell to you?

16 A. It does.

17 Q. He was the first witness, I believe?

18 A. Yes, sir, it does.

19 Q. Do you know if you ever met him before then?

20 A. I can attest I've never met the man at all, never seen the
21 man actually until a video got produced.

22 Q. When did you first learn about Mr. Blasko?

23 A. Ms. Strawn was interviewing me in April or May of 2014,
24 and she said, "I got a BlueWave sales rep -- or a contractor
25 that works for BlueWave on a video." And she said, "would you

1 like to see it?" And I said sure.

2 And she proceeded to show me -- I think it's about
3 10 minutes of the video due to the fact that she had to catch a
4 flight. But as soon as I saw the guy -- I'd never heard of
5 him, never met him, did not know him. But he did say one thing
6 on the video that caught my attention, and that's Charles. And
7 Charles Maimone is a contractor with BlueWave out of
8 Pennsylvania, and that caught my attention.

9 Q. And what was your observation when you -- did Ms. Strawn
10 show you the video?

11 A. She showed me about 10 minutes of it, maybe 15. I know
12 she was in a hurry to catch a flight. I never saw the full
13 video until, I guess, here. I don't know if I ever saw it
14 completely.

15 Q. Did she show you the part where he kind of leaned into the
16 doctor and said there's a financial component to this?

17 A. She did.

18 Q. Well, did she show you that when you were with her?

19 A. She did. She showed me that snippet right there.

20 Q. What did you feel and think when you saw that?

21 A. You don't want to know what I thought.

22 Q. All right.

23 A. So -- because I was not a happy camper.

24 Q. What did you do afterwards?

25 A. We walked out of the government building. Mark White was

1 standing to my left. And I grabbed my cell phone, and I called
2 Charles Maimone. And I said some words to him that I cannot
3 repeat in this courtroom. I was that mad. And if I could have
4 reached through the phone and grabbed him by the throat, I
5 probably would have.

6 I told him to fire him immediately. There is no
7 reason this should ever be done. I did not know him. He's
8 never been trained. I don't know anything about him. I said
9 I'd never heard anything about him.

10 And, you know, first of all, I guess he's a helper,
11 and that's what Charles had said. And I said, "You know our
12 rules. Helpers are not supposed to sell the test, period."
13 And I says, "Also you need to inform us because we're supposed
14 to train these people so they're not out there like a chicken
15 with their head chopped off." And that's exactly what he was
16 doing.

17 Q. Did you ever find out whether that doctor himself ever
18 became a customer of HDL or Singulex?

19 A. To my knowledge, he did not.

20 Q. Was that the -- you said, on Friday, the second call you
21 made after that meeting was to call somebody and ask them about
22 billing TRICARE; right?

23 A. That is correct. Actually, I had kind of a list after
24 that meeting because I was kind of blindsided. The Blasko
25 video, it felt like somebody hit me with a 2-by-4. That's why

1 I never had heard his name ever mentioned until that point.

2 And so that's when, as I said, she had said something
3 about billing Medicare. And I had stated it was illegal, and
4 then she said -- she grabbed a form and says, "well, it's
5 TRICARE."

6 Q. The reason I brought it up is because you might have left
7 us curious when you said on Friday that that was your second
8 call but the Blasko call was your first call.

9 A. It was my first call, and it was not a pleasant call. I
10 don't recall being that mad in a long time.

11 Q. I'm going to show you an email that's been marked as
12 Plaintiffs' Exhibit 1035.

13 MR. COOKE: May I approach?

14 THE COURT: You may, sir.

15 MR. LEVENTIS: Your Honor, while he's showing the
16 witness this one, Plaintiffs' Exhibit 1154, we don't have that
17 one as evidence. We don't have an objection.

18 THE COURT: Hold on just a second.

19 Miss Eunice, is 1154 in?

20 THE DEPUTY CLERK: No, it's not.

21 THE COURT: Would you like to offer 1154?

22 MR. COOKE: Yes.

23 THE COURT: Is there objection?

24 MR. LEVENTIS: No, Your Honor.

25 MR. ASHMORE: No objection.

1 THE COURT: Very good. Plaintiffs' 1154 admitted
2 without objection.

3 MR. COOKE: All right. Could we go ahead and bring
4 that up then.

5 THE COURT: No, that's the one we just did.

6 MR. COOKE: Oh, that's the one?

7 THE COURT: That's the one you previously called for.

8 MR. COOKE: I'm a step behind.

9 BY MR. COOKE:

10 Q. All right. Can I have that back.

11 A. Yes, sir, you may.

12 Q. Do you recognize these documents?

13 A. The only time I saw them is when you gave me the exhibits,
14 and actually the exhibit I received didn't have all that
15 information as well.

16 MR. COOKE: I'd like to offer this as an exhibit.
17 This is 1035.

18 MR. LEVENTIS: No objection, Your Honor.

19 MR. ASHMORE: No objection.

20 THE COURT: Plaintiffs' 1035 admitted without
21 objection.

22 BY MR. COOKE:

23 Q. And I think you said you've seen this without the --
24 without the attachments, but --

25 A. I saw the first part here where the 1035 is on it.

1 12:13 PM Q. Okay. And there's a -- there's a -- an email on the one
2 that's actually in evidence. Now, it's a from Jeff Steadman.

3 who is Jeff Steadman?

4 A. He's a contractor in Idaho.

5 Q. And it was dated 12/4/2012, and he was making a copy to
6 Julie Harding.

7 who is Julie Harding?

8 A. She's actually one of our contractors in Seattle. She's
9 actually his partner.

10 Q. And it says, "Subject: Blackfoot Medical proposal." He
11 says, "I made a few changes to your original. Just thought I
12 would share. I was presenting this today to all 12 providers."

13 And attached to it is this Blackfoot Medical
14 proposal.

15 when did you first see this?

16 A. When you presented the exhibits.

17 MR. LEVENTIS: I'm sorry to interrupt. The one on
18 the screen is not the correct exhibit. We can pull up 1035 if
19 we need to.

20 MR. COOKE: Yeah. Can we do that.

21 MR. LEVENTIS: Do you mind pulling up 1035, Peter.

22 MR. COOKE: This is the one you substituted --

23 MR. LEVENTIS: During discovery, yeah.

24 MR. COOKE: Thank you.

25 MR. LEVENTIS: I apologize for the interruption.

1 THE COURT: Okay. So we're going to -- if you're
2 going to offer it into evidence and give it to Mr. Ravenel, you
3 need to get the correct one.

4 MR. COOKE: Can we get the correct -- oh, this is the
5 correct one?

6 THE COURT: Okay.

7 MR. COOKE: I've got it.

8 THE COURT: Very good.

9 MR. COOKE: Go ahead and scroll forward to the
10 Blackfoot Medical thing.

11 BY MR. COOKE:

12 Q. All right. Again, when did you first see this?

13 A. When you produced the exhibits.

14 Q. And you see right there in the middle it says, "P&H missed
15 potential: \$145,000 per year P&H reimbursement."

16 what were your thoughts on that when you saw that
17 presentation?

18 A. Jeff Steadman had come from Pfizer and had been there for
19 14 years. He actually knew that doing anything, anything
20 pertaining to a homemade detail piece or anything like that was
21 bad, beyond bad. So that's the easiest way to describe that.

22 Q. 150 specimens per week, where would that put this
23 Blackfoot Medical on your array of producing practices?

24 A. It would be the number one test in the world -- number one
25 company in the world.

1 12:15 PM Q. You didn't have any that were ordering more than 150 a
2 week?

3 12:15 PM A. No, sir. You got to realize that, if you looked at
4 accounts, a big account was 20 tests a week, just so you're
5 aware. And I think I mentioned they only did about 15 percent
6 of their patients. So -- just to give you an idea.

7 12:16 PM Q. would you have approved anything like this if it had been
8 submitted to you?

9 12:16 PM A. Not in a trillion years, no, sir.

10 12:16 PM Q. Did you have a rule at BlueWave about creating -- sales
11 representatives creating their own sales pieces?

12 12:16 PM A. Yes, sir. They knew not to do that.

13 12:16 PM Q. why not?

14 12:16 PM A. Because, again, they got something here they're sending
15 out without approval across the board. we don't know, one, how
16 HDL will handle that or how Singulex will respond to it. And
17 they don't really know -- well, they knew how Cal and myself
18 would respond to it, but that's my perspective.

19 12:16 PM Q. Did Blackfoot Medical become a customer?

20 12:16 PM A. No, they did not.

21 12:16 PM Q. And I'd like to approach and show you Exhibit 1158.

22 12:17 PM A. Okay.

23 12:17 PM MR. COOKE: I would offer this as an exhibit.

24 12:17 PM MR. LEVENTIS: No objection, Your Honor.

25 12:17 PM MR. ASHMORE: No objection.

1 THE COURT: Plaintiff 1158 admitted without
2 objection.

3 BY MR. COOKE:

4 Q. And this is an email from Julie Harding to Jeff Steadman,
5 "Cheats and proposal, cheats.docx, primary care."

6 "Hey, Jeff. Attached are the cheats that were shared
7 with me as well as the proposal."

8 And if you could go to the last page.

9 This is a similar thing for Primary Care Northwest
10 proposal. "Missed potential: \$170,000 to 175,000 per year."
11 And that's based on 200 per week.

12 And where would that have placed this practice if
13 they had become a customer and done that?

14 A. Biggest in the country.

15 Q. Did they become a customer?

16 A. No, sir.

17 Q. would you have approved this sales presentation?

18 A. Again, not in a million years.

19 Q. Did you ever have any idea that they were doing anything
20 like that?

21 A. I had no idea, no.

22 Q. From time to time, did people in the field have questions
23 raised about process and handling fees?

24 A. Yes, sir, they did.

25 Q. Did it surprise you that people would have questions about

1 processing and handling fees?

2 A. No, sir, not since I've been in the industry for a long
3 time. So 2002, 2001, whenever I started there with Berkeley, I
4 got asked questions in the first six months in the field. And
5 the reps had trained me and told me that they got asked
6 questions that typically was referred back to Rob Lewis, who
7 was the chief compliance officer at Berkeley at the time.

8 And then when he stepped down and retired, it was
9 Michael McNulty and referred to me as well and stuff. But
10 the longer this went on, the less questions you were ever asked
11 because it became such a mainstream thing that not many people
12 would ask a question about it.

13 Q. I want to show you a few that the jury has already seen.
14 Let's start with 1194.

15 Go ahead and scroll down to the bottom so we can see
16 where this came from.

17 Do you remember seeing this come up in evidence?

18 A. I saw the exhibit. I did.

19 Q. It says I would not -- "I am not sure why the reps would
20 want the doctor to send the samples to LipoScience when we
21 carry the same test and can provide the full LipoScience report
22 to any doctor that wants, as we do with Fillingane."

23 And then Steve Norris -- who is Steve Norris?

24 A. I think he was one of the client service people at HDL.

25 Q. It says, "I am pretty sure it was to receive both P&H

1 fees."

2 Is that what you were referring to earlier about
3 somebody could order directly -- they could order LipoScience
4 through HDL; correct?

5 A. That's correct.

6 Q. Or they could opt to order it separately from LipoScience?

7 A. That is correct.

8 MR. COOKE: Go ahead and scoot down.

9 BY MR. COOKE:

10 Q. Tonya says, "I understand but was politely asking Cal and
11 Brad to fix it."

12 And go ahead and scroll all the way down.

13 And Steve says, "Understood."

14 Do you remember, as you sit here, what was done about
15 that, if anything?

16 A. I don't remember the specifics that pertain to this. I
17 knew we had an issue out of the gate with all the LipoScience
18 reps, that they loved the LipoScience reports, the physicians
19 did, and they didn't want to change from that. So they was
20 ordering our tests with all the other tests on it, and then
21 they'd order the LipoScience panel separately. That actually
22 went away pretty quickly.

23 Then what had transitioned was LipoScience. Since we
24 sold their test, they had -- the sales reps actually stopped
25 getting paid commissions. So since I contracted with

1 LipoScience and we can go ahead and sell the test here, the
2 LipoScience rep got paid a commission. As I mentioned before,
3 they was making so much money. All of a sudden, the management
4 over here with LipoScience says, if Bluewave sells it, you're
5 not getting paid anymore. So I knew that became an issue.

6 Q. Okay. Do you remember an attorney Lester Perling?

7 A. Through all the exhibits and stuff and -- I think I was in
8 on one of the emails with him, yes, sir.

9 Q. I'm going to show you a couple. One is 1266.

10 Go ahead and scroll down to the bottom of that.

11 It says -- is that the only page there? Okay.

12 There's an email from Lester Perling to Dawn, it
13 looks like, at a practice. And he says -- talking about "the
14 proposed relationship is blatantly illegal, as blatantly
15 illegal as anything that I have seen in a long time. It would
16 be a federal violation of the federal and state kickback laws,
17 a Stark Law problem if Dr. Reddy were to refer Medicare
18 patients, and could form the basis for liability under the
19 False Claims Act. It is absurd."

20 Do you see that?

21 A. Uh-huh.

22 Q. And that was his comment to his client from December 11,
23 2010.

24 And scroll forward.

25 And it says -- it's forwarded to Tre Everett.

1 Do you know who that is?

2 A. No, sir.

3 Q. It says, "Tre, please see below for comments from our
4 health care attorney regarding HDL contract. Please forward
5 this to HDL's legal department for review to see what they can
6 do to work this out. Thanks, Dawn."

7 And it goes up, keeps going up. And keep going.

8 And Kyle sends it to you. It says, "Brad, please
9 forward on to Tonya for her review. I've spoken with Cal about
10 this already, and we definitely have to address this very soon
11 as they have a hefty amount of specimens that are ready to ship
12 today."

13 So Kyle wants the business; right?

14 A. He does.

15 Q. And could they have ordered without receiving P&H fees?

16 A. Yes.

17 Q. Do you happen to know whether you could have provided a
18 phlebotomist to that practice?

19 A. I think at the time in the state of Florida, you could put
20 a phlebotomist in a practice, correct.

21 Q. Did they change the law on that?

22 A. I think that changed two years later after this, I
23 believe. So --

24 Q. Okay. I want to flash forward now to BW68.

25 Did you refer that to Tonya and to the attorneys at

1 HDL?

2 A. We did.

3 Q. Did you later find out that they did have a dialogue with
4 Mr. Perling?

5 A. We did, and he said it was fine. He said he had been
6 working with Quest. So you can see Mr. Perling didn't back
7 down on his comments that it was illegal and said he only wrote
8 that because he had been so entwined in these discussions with
9 the State of Florida and Quest. So I would assume he was
10 representing Quest based on that email or that statement as
11 well.

12 Q. Okay.

13 A. And so from that standpoint.

14 Q. I want to address this whole thing here.

15 Scroll up enough so we can see the date.

16 This is December 16, 2010, Tonya writing to Kyle,
17 "Kyle, I wanted to give you an update on discussions that our
18 attorney has had with Dr. Reddy's attorney, Lester Perling.
19 Mr. Perling's email was strange, and at first we all believed
20 he didn't know what he was talking about. However our attorney
21 quizzed him and has determined that his credentials are quite
22 good and he does know health care law. Mr. Lester is actually
23 involved in some of the changes that are going to occur in the
24 state of Florida and the state's interpretation" -- well, I'll
25 just keep going -- of inducement laws."

1 THE COURT: Hold on just a second, Mr. Cooke.

2 MR. COOKE: All right.

3 THE DEPUTY CLERK: They claimed they fixed it, but I
4 got to report that it's still not fixed.

5 THE COURT: Ladies and gentlemen, I've told you, if
6 technology can go wrong during a trial, it will do that.

7 why don't we -- I think we're good now. Maybe
8 some in the audience won't have as much light, but we'll fix it
9 at lunch. why don't we continue.

10 All right. There we go. Please continue.

11 MR. COOKE: Your Honor, I'm going to keep going as
12 long as --

13 THE COURT: Let's go for another 30 minutes or so if
14 we can.

15 BY MR. COOKE:

16 Q. "However, our attorney quizzed him, and Mr. Lester is
17 actually involved in things that happened in Florida.

18 Mr. Perling has said that Quest has been very active in the
19 state and has convinced the State of Florida to change their
20 opinion of the inducement laws. He told our attorney that, in
21 the future, Florida will not allow any P&H fees to be paid to
22 doctors and they will also not allow a lab like HDL to put a
23 phlebotomist in the physician practice. Florida's
24 interpretation is that these will be viewed as inducement.

25 "Mr. Perling did back down on his comments that it

1 was illegal, et cetera, and said he only wrote that because he
2 has been so entwined in these discussions with the State of
3 Florida."

4 And then she says -- and I'm not going to get you to
5 read the whole thing -- "I have asked our attorneys to go back
6 and research what Mr. Perling has told them and to come up with
7 a solution. This has not gone into law now, but Mr. Perling
8 said they do expect that it will be next year" and so forth.

9 Just flip forward so you can see there's another page
10 to this.

11 And she goes on and explains what was going on, and
12 then she ultimately forwards that -- that's forwarded to you.

13 So did you -- what did you believe was happening as a
14 result of that encounter with Mr. Perling?

15 A. What we discussed initially. We forwarded it straight to
16 Tonya, who turned it over to LeClairRyan. Then I read the
17 email from Tonya back -- I guess it was Tonya back -- that
18 Lester Perling said everything was good.

19 Q. And just so we can kind of move along here, did you ever
20 hear from a Cristy Kaibigan? Do you remember seeing that name?

21 A. I don't know if I heard that name. I saw it in this case,
22 but I can't remember off the top of my head. I'd have to see
23 the exhibit.

24 Q. 1191, and then I'll do M6 after that.

25 All right. Do you remember seeing this exhibit

1 during the trial, and it was Cristy Kaibigan who, again, raises
2 questions and looks like Kyle Martel forwards that to Tonya?

3 A. Yep.

4 Q. And do you remember that?

5 A. Yes, sir, I see it now.

6 Q. And then let's look at M6, Mallory 6.

7 Does -- do you see that reference to Mr. Hurd up
8 there?

9 A. I do.

10 Q. So based on this, does it appear that Ms. Mallory did turn
11 this over to Mr. Hurd?

12 A. I do.

13 Q. And who is Mr. Hurd?

14 A. I believe he's an attorney with HDL -- with LeClairRyan.
15 Excuse me. I'm sorry.

16 Q. LeClairRyan? All right.

17 And so at some point, did it seem to become important
18 to get a firm written legal opinion on the appropriateness of
19 paying process and handling fees?

20 A. What do you mean, Tonya's external time and motion study?

21 Q. Yes.

22 A. Yes, sir.

23 Q. Okay. And did she obtain an opinion letter from
24 LeClairRyan?

25 A. She did.

5 : 3 2 P M 1 Q. Could we have 1253? And did you see this letter dated
5 : 3 2 P M 2 April 27, 2012?

5 : 3 2 P M 3 A. Yes, I did.

5 : 3 2 P M 4 Q. And was that -- of what importance, if any, was that
5 : 3 2 P M 5 letter to you?

5 : 3 2 P M 6 A. That actually told me she had an external time and motion
5 : 3 3 P M 7 study that validated everything we told her to do, that
5 : 3 3 P M 8 situation on getting an external time and motion study. To me
5 : 3 3 P M 9 it actually gave credence to everything that had been going on
5 : 3 3 P M 10 as well.

5 : 3 3 P M 11 Q. We're going to come back to this one in a little while,
5 : 3 3 P M 12 but let's go to the very bottom, last paragraph of the letter.
5 : 3 4 P M 13 And he says, "Based on our recent analysis of the report
5 : 3 4 P M 14 prepared by Exponent of HDL's staff and resources involved, and
5 : 3 4 P M 15 that HDL has defined this as a typical site, a fair market
5 : 3 4 P M 16 value of up to, but not to exceed \$36.03 per specimen." Is
5 : 3 4 P M 17 that consistent with what you remember?

5 : 3 4 P M 18 A. 36 bucks, yeah.

5 : 3 4 P M 19 Q. "For processing and handling tasks is appropriate and
5 : 3 4 P M 20 justifiable. HDL's current agreements with physicians in this
5 : 3 7 P M 21 regard are well below that amount. Based on this careful study
5 : 3 7 P M 22 this arm's-length fixed-in-advance fair market value fee will
5 : 3 8 P M 23 fall into the safe harbor exceptions under the Anti-Kickback
5 : 3 8 P M 24 Statute and civil False Claims Act to alleviate any issue in
5 : 3 8 P M 25 that regard. The safe harbor requires that the aggregate

5 : 3 8 P M 1 compensation paid for the services are set in advance and
5 : 3 8 P M 2 consistent with fair market value and based on Exponent's
5 : 3 8 P M 3 detailed review and our analysis of applicable laws, HDL is
5 : 3 8 P M 4 acting within applicable statutory laws to pay this fair market
5 : 3 8 P M 5 fee for processing and handling services. If you have any
5 : 3 9 P M 6 questions please do not hesitate to contact me. Thank you.
5 : 3 9 P M 7 Michael Ruggio."

5 : 3 9 P M 8 who is Michael Ruggio?

5 : 3 9 P M 9 A. Michael Ruggio is a -- an attorney for LeClairRyan who was
5 : 3 9 P M 10 a senior health care Justice Department attorney beforehand,
5 : 4 0 P M 11 and he's the one signed off on this, so it gave even more
5 : 4 0 P M 12 credence in that situation to us.

5 : 4 0 P M 13 Q. Did you from time to time provide that letter or an
5 : 4 0 P M 14 explanation of that letter to people if they raised the
5 : 4 1 P M 15 question about process and handling fees?

5 : 4 1 P M 16 A. I've done that a few times. I can't say more than five.

5 : 4 1 P M 17 Q. Will you pull out for a moment Exhibit 1244? And we've
5 : 4 1 P M 18 seen this in evidence. This is a memorandum from the general
5 : 4 1 P M 19 counsel, which we know to be Mr. Kung at HDL dated August 30,
5 : 4 1 P M 20 2012. And just scroll through it so the jury will recognize
5 : 4 1 P M 21 it. Go to -- scroll through to the end. When did you first
5 : 4 1 P M 22 see this memorandum, if ever?

5 : 4 1 P M 23 A. Exhibits -- I think it was actually -- we're in January
5 : 4 2 P M 24 now. It was December, last month.

5 : 4 2 P M 25 Q. December when?

5 : 4 2 P M 1 A. Last month.

5 : 4 2 P M 2 Q. So did you ever see this back in -- see this was dated in
5 : 4 2 P M 3 2012. Did you ever see it in 2012, 2013, '14?

5 : 4 2 P M 4 A. No, sir.

5 : 4 2 P M 5 Q. '15?

5 : 4 2 P M 6 A. No, sir.

5 : 4 2 P M 7 Q. For how long did you continue to rely on the LeClairRyan
5 : 4 2 P M 8 letter?

5 : 4 2 P M 9 A. We relied on it up until the Summit meeting in June 2013
5 : 4 2 P M 10 when Ropes & Gray said, "Please do not distribute it anymore,
5 : 4 2 P M 11 because it will violate attorney-client privilege," and so it
5 : 4 2 P M 12 was kind of like, "We've already used it. People have got it
5 : 4 2 P M 13 in the field," so -- but we listened and obeyed.

5 : 4 2 P M 14 Q. We'll come back to that. Audits. We established earlier
5 : 4 2 P M 15 that under your contract with Singulex, they were supposed to
5 : 4 3 P M 16 have you audited every year. Did they do that?

5 : 4 3 P M 17 A. Yeah, actually the first one I think was either end of
5 : 4 3 P M 18 2011 or 2012, so I think they had about year lag, because they
5 : 4 3 P M 19 were growing so fast. They were sort of like us, and they were
5 : 4 4 P M 20 sort of hiring their own sales representatives and a lot of
5 : 4 4 P M 21 geography as well.

5 : 4 4 P M 22 Q. Let's look at the BW 142. Who is Navigant?

5 : 4 6 P M 23 A. Navigant is a billion-plus dollar firm that represents
5 : 4 7 P M 24 health care firms. They specialize in anti-kickback. They are
5 : 4 7 P M 25 a heavy hitter. They'll come in and do an audit, an analysis

5 : 4 7 P M 1 of your practices, what you're doing wrong, things like that.

5 : 4 7 P M 2 Q. And I believe we looked earlier at the Singulex contract,
5 : 4 7 P M 3 and it had a provision in there that provided for --

5 : 4 7 P M 4 A. Yes, sir.

5 : 4 7 P M 5 Q. -- an anti-kickback consulting firm to do an audit every
5 : 4 7 P M 6 year?

5 : 4 7 P M 7 A. That is correct.

5 : 4 7 P M 8 Q. And did they do one? This one is dated September 2012.
5 : 4 7 P M 9 was that report shown to you?

5 : 4 7 P M 10 A. Yes, sir. It looks like it was before. It says conducted
5 : 4 7 P M 11 by, so it had to be before.

5 : 4 7 P M 12 Q. Okay. Did you go over that report with anybody from
5 : 4 7 P M 13 Singulex?

5 : 4 7 P M 14 A. Actually we did. At the RMC meeting we discussed it.

5 : 4 7 P M 15 Q. Let's scroll to page 3 of that report.

5 : 4 7 P M 16 A. I actually also believe our attorney signed off on it as
5 : 4 8 P M 17 well.

5 : 4 8 P M 18 Q. Okay. See the "Project Scope" up there, if we could
5 : 4 8 P M 19 highlight that. "Navigant Consulting served as Singulex's
5 : 4 8 P M 20 independent third party auditor to perform a compliance audit
5 : 4 8 P M 21 of BlueWave sales practices with an emphasis on training,
5 : 4 8 P M 22 materials, client interaction, anti-kickback, Stark laws, HIPAA
5 : 4 8 P M 23 and other relevant Federal and State regulatory compliance."
5 : 4 9 P M 24 Do you know whether they were provided with copies of your
5 : 5 0 P M 25 contract?

5 : 5 0 P M 1 A. They did. They had a copy of our Singulex contract. I
5 : 5 0 P M 2 think they actually had a copy of our HDL contract with
5 : 5 0 P M 3 redacted numbers on the actual physical numbers.

5 : 5 0 P M 4 Q. Did they have copies of the -- of the process and handling
5 : 5 0 P M 5 fee agreements?

5 : 5 0 P M 6 A. From Singulex they did. I do not know if we provided them
5 : 5 0 P M 7 from HDL.

5 : 5 0 P M 8 Q. Go to page 5, please. And I don't know whether it was a
5 : 5 0 P M 9 coincidence or not, but kind of like the HDL reports, they
5 : 5 0 P M 10 broke things down into red, green or yellow. Do you remember
5 : 5 0 P M 11 that?

5 : 5 0 P M 12 A. Yes, sir, I do.

5 : 5 0 P M 13 Q. And let's go down to page 6. And the overall compliance
5 : 5 1 P M 14 rating was that improvements were needed. Did you get any red
5 : 5 1 P M 15 flags from them?

5 : 5 1 P M 16 A. I don't believe so.

5 : 5 1 P M 17 Q. Okay.

5 : 5 1 P M 18 A. I know Singulex was very happy at the RMC meeting, and we
5 : 5 1 P M 19 were very happy with it.

5 : 5 1 P M 20 Q. Let's scroll down to the next page. This is your -- your
5 : 5 1 P M 21 grades up there. And oversight, A, IN, IN, A, IN, IN, A. Were
5 : 5 1 P M 22 there any failures at all?

5 : 5 1 P M 23 A. No, sir.

5 : 5 1 P M 24 Q. Did they make any comment about the fact that you were
5 : 5 2 P M 25 receiving commissions or that you were selling as an

5 : 5 2 P M 1 independent contractor receiving commissions?

5 : 5 3 P M 2 A. No.

5 : 5 3 P M 3 Q. Did they make any comment on the fact that you were paying
5 : 5 3 P M 4 commissions to your independent contractors?

5 : 5 3 P M 5 A. No, sir, they did not.

5 : 5 3 P M 6 Q. Did they ever say that that could be, possibly, may be a
5 : 5 3 P M 7 violation of the Anti-Kickback Statute?

5 : 5 3 P M 8 A. No, sir, they did not.

5 : 5 3 P M 9 Q. What about the payment of process and handling fees?

5 : 5 3 P M 10 A. No complaints mentioned about that there as well.

5 : 5 5 P M 11 Q. Did they -- and were they aware of how much -- of -- that
5 : 5 5 P M 12 Singulex was paying in processing and handling fees?

5 : 5 5 P M 13 A. They should have been aware, and the reason I say that is
5 : 5 5 P M 14 because my understanding was Singulex gave them all the
5 : 5 5 P M 15 documents as well. We produced all the documents as well, so
5 : 5 5 P M 16 they would have seen a Singulex P&H from us as well.

5 : 5 5 P M 17 Q. Now, was it possible for them to ride along with every
5 : 5 5 P M 18 single contractor to see how they did their sales
5 : 5 5 P M 19 presentations?

5 : 5 5 P M 20 A. No, sir. We had about -- I think at the time we had 15 or
5 : 5 5 P M 21 16 sales reps nationwide for Singulex. So I think they rode
5 : 5 5 P M 22 with two and did calls with three, and those are three- or
5 : 5 5 P M 23 four-hour interviews with us, which is five of us total, so if
5 : 5 5 P M 24 you do the math, what's that 30 percent, 40 percent? So --

5 : 5 5 P M 25 Q. Go to the next page, please. Just go ahead and scan

5 : 5 7 P M 1 through those. Jury will have the whole thing. Training was
5 : 5 7 P M 2 given a green?

5 : 5 7 P M 3 A. Yes, it was.

5 : 5 7 P M 4 Q. Did they review your training materials?

5 : 5 7 P M 5 A. They did, and they also knew already -- most of the people
5 : 5 7 P M 6 we had our interviews with them, they had asked who we were
5 : 5 7 P M 7 hiring, what type of people. We shared all that information
5 : 5 8 P M 8 with them, so that was something that was like okay. That's
5 : 5 8 P M 9 great. You got all these people that's been in the industry
5 : 5 8 P M 10 for a long time, so they had good knowledge.

5 : 5 8 P M 11 Q. They noted that you didn't have a no retaliation policy?

5 : 5 8 P M 12 A. That's right.

5 : 5 8 P M 13 Q. Did you think you needed a no retaliation policy?

5 : 5 8 P M 14 A. We actually called Gene on that, and Gene says, "You've
5 : 5 8 P M 15 lost your mind," primarily because we were independent
5 : 5 8 P M 16 contractors, so if anybody had a problem, they would call Cal
5 : 5 8 P M 17 or me in that situation.

5 : 5 8 P M 18 Q. Okay. Go ahead and scroll down. Keep going. Auditing
5 : 5 8 P M 19 and monitoring. Monitoring was a yellow. They made a comment
5 : 5 8 P M 20 about your expense reports. Independent contractors and I
5 : 5 8 P M 21 believe you commented earlier about your expectation of getting
5 : 5 8 P M 22 expense reports from your contractors; correct?

5 : 5 8 P M 23 A. That's correct. Could not do that. That violated the
5 : 5 8 P M 24 independent contractor sales representative relationship --

5 : 5 8 P M 25 Q. Okay.

5 : 5 8 P M 1 A. -- according to the IRS guidelines.

5 : 5 9 P M 2 Q. And you didn't have a disciplinary guideline. You had an
5 : 5 9 P M 3 investigation policy, however, and you got a green for that?

5 : 5 9 P M 4 A. We did.

5 : 5 9 P M 5 Q. Go ahead to the next page. All right. And we'll talk
6 : 0 0 P M 6 about business risk, compliance risk, and then recommendations.
6 : 0 0 P M 7 And anywhere at all did they recommend that you consider using
6 : 0 0 P M 8 employees rather than independent contractors?

6 : 0 0 P M 9 A. No, sir.

6 : 0 0 P M 10 Q. Did they ever say anything about your policy of no-balance
6 : 0 0 P M 11 billing?

6 : 0 0 P M 12 A. No, sir.

6 : 0 0 P M 13 Q. Did they say anything at all about processing and handling
6 : 0 0 P M 14 fees?

6 : 0 0 P M 15 A. No. AS I said at the RMC, Philippe and them were
6 : 0 0 P M 16 extremely excited that everything was good. He said, "This
6 : 0 1 P M 17 helps us pertaining to our longevity with the company, because
6 : 0 1 P M 18 in the future we're going to shoot for an IPO, or we're going
6 : 0 1 P M 19 to" -- well, they wanted an IPO. They didn't want to sell the
6 : 0 1 P M 20 company, but still --

6 : 0 1 P M 21 Q. Were you also audited in 2013?

6 : 0 1 P M 22 A. We were. We were.

6 : 0 1 P M 23 Q. What company did that?

6 : 0 1 P M 24 A. Collaborate, another major firm as well regarding
6 : 0 1 P M 25 anti-kickback, Stark violations, things of that situation as

6 : 0 2 P M 1 well.

6 : 0 2 P M 2 Q. What, if any, recommendations for change were made as a
6 : 0 2 P M 3 result of that --

6 : 0 2 P M 4 A. We actually never saw a physical copy of that report, I
6 : 0 2 P M 5 believe. What happened was at the RMC meetings, which was the
6 : 0 2 P M 6 regional management conference meetings, they said, "Hey,
6 : 0 2 P M 7 listen. Everything is great. Y'all are doing good. Don't
6 : 0 2 P M 8 worry about anything, so we're fine."

6 : 0 2 P M 9 Q. And what meeting was that?

6 : 0 2 P M 10 A. The RMC meetings. The regional management committee
6 : 0 3 P M 11 meetings, I believe, so -- so many analogies nowadays,
6 : 0 3 P M 12 abbreviations get all confusing.

6 : 0 3 P M 13 Q. Were you also audited one time on behalf of HDL?

6 : 0 3 P M 14 A. We were. We saw that, and Tonya had spoken, and we're not
6 : 0 3 P M 15 really privy to that, but it was not that she had done
6 : 0 3 P M 16 something like that, because that's what gave us even more
6 : 0 3 P M 17 credence to everything. You got to realize, we weren't being
6 : 0 3 P M 18 told anybody was doing anything wrong.

6 : 0 3 P M 19 Q. Let's look at Exhibit 159. And is this a report done by a
6 : 0 4 P M 20 company called the Saranac Group?

6 : 0 4 P M 21 A. Yes, sir.

6 : 0 4 P M 22 Q. Who is the Saranac Group?

6 : 0 4 P M 23 A. To my knowledge it's an independent company that
6 : 0 4 P M 24 specializes in this that HDL hired.

6 : 0 4 P M 25 Q. By the time this --

6 : 0 4 P M 1 THE REPORTER: I'm sorry, what was the end of that?

6 : 0 5 P M 2 A. It's an independent company that HDL hired. Sorry.

6 : 0 5 P M 3 Q. And by the time this company was hired, had HDL and
6 : 0 5 P M 4 BlueWave already received their subpoenas from the Justice
6 : 0 5 P M 5 Department?

6 : 0 5 P M 6 A. Yeah, we received our subpoena January 25th, 2013,
6 : 0 5 P M 7 somewhere in there, for documentation retention.

6 : 0 6 P M 8 Q. And do you know whether that's why they had this audit
6 : 0 6 P M 9 done?

6 : 0 6 P M 10 A. You would have to actually ask Tonya why she had the audit
6 : 0 6 P M 11 done, so I would assume the audit was actually done before that
6 : 0 6 P M 12 to be honest with you, just to publish results.

6 : 0 6 P M 13 Q. Can we flip forward to the table of contents here? And
6 : 0 6 P M 14 scroll down a little bit there. See down at the very bottom,
6 : 0 6 P M 15 they have a section beginning page 17 entitled "The
6 : 0 6 P M 16 Relationship with BlueWave"?

6 : 0 6 P M 17 A. I do.

6 : 0 6 P M 18 Q. Did you review that finding?

6 : 0 6 P M 19 A. I don't believe I reviewed the finding. I don't know if I
6 : 0 6 P M 20 physically had a copy of it to my knowledge.

6 : 0 6 P M 21 Q. Do you know whether any changes were required or
6 : 0 6 P M 22 recommended as a result of the audit?

6 : 0 6 P M 23 A. Not to my knowledge. I never got told anything that was
6 : 0 7 P M 24 bad. Tonya was pretty good. If somebody was doing something
6 : 0 7 P M 25 wrong or not proper, she would even say something to us, and

6 : 0 7 P M 1 that didn't happen.

6 : 0 7 P M 2 Q. As a result of the audit, were you informed that there was
6 : 0 7 P M 3 any problem with the fact that you were an independent
6 : 0 7 P M 4 contractor and receiving commissions?

6 : 0 7 P M 5 A. No, sir. As I said, the only time the independent
6 : 0 7 P M 6 contractor became an issue was November 2014 right at the end
6 : 0 7 P M 7 of our contract when HDL really couldn't cut us a check, and
6 : 0 7 P M 8 that's when it became a big issue.

6 : 0 7 P M 9 Q. As a result of that audit, were you informed in any way
6 : 0 7 P M 10 that there was potential problem with waivers of copays and
6 : 0 8 P M 11 deductibles for TRICARE?

6 : 0 8 P M 12 A. At this point, no, sir. No, sir.

6 : 0 8 P M 13 Q. Did they mention TRICARE at all?

6 : 0 8 P M 14 A. No, sir.

6 : 0 8 P M 15 Q. And did the audit reveal any issues potentially about the
6 : 0 8 P M 16 payment of processing and handling fees?

6 : 0 8 P M 17 A. No, sir. Again, not heard a word about it.

6 : 0 8 P M 18 Q. I want to change the subject now and talk about Emily
6 : 0 8 P M 19 Barron.

6 : 0 8 P M 20 A. Okay.

6 : 0 8 P M 21 Q. We've seen a number of exhibits.

6 : 0 8 P M 22 A. Yes, sir.

6 : 0 8 P M 23 Q. Let's look at BW 64. And this is an exhibit that's
6 : 0 9 P M 24 already in evidence, but -- and I'm jumping ahead a little bit
6 : 0 9 P M 25 towards the end of the Emily Barron story, but you see here on

6 : 0 9 P M 1 September 17, 2013, Tonya writes to you, and she says, "See
6 : 0 9 P M 2 note from Emily's attorney below. We have confirmed that they
6 : 0 9 P M 3 are not waiting for anything from HDL. Her attorney
6 : 0 9 P M 4 communicated to Derek yesterday," and that's Derek Kung?

6 : 0 9 P M 5 A. I would assume, yes.

6 : 0 9 P M 6 Q. "And again today that he has issues with the BW contract
6 : 0 9 P M 7 and needs to speak to Gene. He told Derek that there's nothing
6 : 0 9 P M 8 more they need from us."

6 : 0 9 P M 9 would you tell the jury in your own words what led to
6 : 0 9 P M 10 that point where Mr. Dickerson was being referred to Mr. Kung
6 : 1 0 P M 11 at HDL?

6 : 1 0 P M 12 A. Sure. What had happened was we started getting calls that
6 : 1 0 P M 13 Emily was not working. She actually wasn't leaving her house.
6 : 1 0 P M 14 This is from her account, made a statement that she had a
6 : 1 1 P M 15 phobia of driving. I'm not sure what that means, but we've got
6 : 1 1 P M 16 numerous calls from client services. I actually reached out to
6 : 1 1 P M 17 one of the reps down there, and they confirmed as well. Kyle
6 : 1 1 P M 18 as well as Kevin had said something about it. And so we
6 : 1 1 P M 19 actually said -- they wanted a severe -- to sever the
6 : 1 1 P M 20 partnership -- sever, not severe. Sever the partnership, and
6 : 1 1 P M 21 so which means they would not be sharing the geography of
6 : 1 1 P M 22 Florida anymore. So we asked them to amicably separate it, and
6 : 1 1 P M 23 they could not come to an agreement, which in turn Cal and
6 : 1 1 P M 24 myself flew down, met with them, and we got an agreement
6 : 1 1 P M 25 between all parties. And, of course, everybody -- and this is

6 : 1 1 P M 1 like in a mediation, everybody is not happy. And so we felt
6 : 1 1 P M 2 like everything was good.

6 : 1 1 P M 3 And then that's when all this stuff started
6 : 1 2 P M 4 transpiring. And Emily was not signing the contract, which
6 : 1 2 P M 5 truth be known, she had attorneys involved and all this other
6 : 1 2 P M 6 stuff, which was actually a brilliant strategy on her part,
6 : 1 2 P M 7 because what happened was is the way the new geography was cut,
6 : 1 2 P M 8 she was set to make about 80 something thousand a year -- or
6 : 1 2 P M 9 not a year, but a quarter on her sales. By dragging it four
6 : 1 2 P M 10 months I think she drug it, she actually ended up getting paid
6 : 1 2 P M 11 the commission for the whole geography, which was 330 something
6 : 1 2 P M 12 thousand dollars. And so --

6 : 1 2 P M 13 Q. Did you and Cal go and meet with her and her partners to
6 : 1 4 P M 14 try to resolve things?

6 : 1 4 P M 15 A. We did. That's what I said. We actually came to an
6 : 1 4 P M 16 agreement. Everybody was happy. Everybody was good. Well, as
6 : 1 4 P M 17 happy as you could be in a mediation. I mean, Kyle was really
6 : 1 4 P M 18 upset. Emily was not as happy. She was happier. Kevin was
6 : 1 4 P M 19 fine either way, and so we felt like everybody was good to go.
6 : 1 4 P M 20 Everybody walked away. Well, okay. We're good. Let's move
6 : 1 4 P M 21 forward, and that's it.

6 : 1 4 P M 22 Q. Kevin. That's Kevin Carrier --

6 : 1 4 P M 23 A. That's correct.

6 : 1 4 P M 24 Q. -- who was here last week?

6 : 1 4 P M 25 A. That's correct.

6 : 1 5 P M 1 Q. So what happened? We saw -- in evidence we saw her
6 : 1 5 P M 2 lawyer, Mr. Dickerson, writing to Gene Sellers and writing to
6 : 1 5 P M 3 Arnold and Dowd saying that this whole thing is illegal, this
6 : 1 5 P M 4 whole business model is illegal.

6 : 1 5 P M 5 A. Uh-huh.

6 : 1 5 P M 6 Q. How did that impress you?

6 : 1 5 P M 7 A. John Galese told me point blank, "You're fixing to get
6 : 1 5 P M 8 sued, so brace for impact." So we knew Gene was communicating
6 : 1 6 P M 9 with John Galese at Galese & Ingram, and we was told, "Hey,
6 : 1 6 P M 10 you're going to get sued," and so we was letting attorneys deal
6 : 1 6 P M 11 with everything in that situation.

6 : 1 6 P M 12 Q. And could we look at Exhibit 387, BW 387? And is this a
6 : 1 7 P M 13 letter from Mr. Ingram -- Mr. Galese, I'm sorry, dated October
6 : 1 7 P M 14 31, 2013?

6 : 1 7 P M 15 A. Yes, it is.

6 : 1 7 P M 16 Q. And go ahead and scroll down. And he says, "It is now and
6 : 1 7 P M 17 has always been my client's position that its operation is
6 : 1 7 P M 18 wholly within applicable and controlling governmental rules,
6 : 1 7 P M 19 and any suggestion by you or your clients to the contrary is
6 : 1 7 P M 20 incorrect and unfortunate. Also we believe that there is no
6 : 1 7 P M 21 basis for your claim that my client breached any agreement that
6 : 1 7 P M 22 it had with Ocean Diagnostics and Consultants." Had she
6 : 1 7 P M 23 claimed that you had breached her contract by terminating her?

6 : 1 7 P M 24 A. I think he was trying to say that we had breached her
6 : 1 8 P M 25 contract by terminating her.

6 : 1 8 P M 1 Q. And was that the problem that she said she had with your
6 : 1 8 P M 2 contract?

6 : 1 8 P M 3 A. Yeah, I -- my impression was that she drug her feet,
6 : 1 8 P M 4 because since we was honoring the contract, we had to pay her
6 : 1 8 P M 5 quarterly commissions based on the whole contract, which means
6 : 1 8 P M 6 she received almost \$300,000 more than what she would have
6 : 1 8 P M 7 received if she had signed the contract.

6 : 1 8 P M 8 Q. All right. And go ahead and scroll down to the next page.
6 : 1 9 P M 9 And do you see here that they did arrive at a -- a resolution
6 : 1 9 P M 10 where she was paid a commission check; is that correct?

6 : 1 9 P M 11 A. That is correct. It was not a settlement check. I think
6 : 1 9 P M 12 Dickerson kept saying a settlement check. It was not. It was
6 : 1 9 P M 13 actually the commission check that was due based on the
6 : 2 0 P M 14 contract as the old existing contract, not the new one that she
6 : 2 0 P M 15 was supposed to sign.

6 : 2 0 P M 16 Q. Did you ever take the position that, "well, we're not
6 : 2 0 P M 17 going to pay you because the contract is illegal." Did you
6 : 2 0 P M 18 ever take that position at all?

6 : 2 0 P M 19 A. No, sir.

6 : 2 0 P M 20 Q. Did you believe the contract was illegal?

6 : 2 0 P M 21 A. No, sir, not under no circumstances.

6 : 2 0 P M 22 Q. Did HDL later in 2015 take that position with you, that,
6 : 2 0 P M 23 "Because the government says our contract is illegal, we're not
6 : 2 0 P M 24 paying you any more"?

6 : 2 0 P M 25 A. That's -- that's exactly when HDL took that position that

6 : 2 0 P M 1 our contract was illegal. What's interesting about that is
6 : 2 0 P M 2 they agreed to purchased Bluewave and buy us out a month
6 : 2 0 P M 3 before.

6 : 2 0 P M 4 Q. As of this time, I believe you've established that you had
6 : 2 1 P M 5 received the subpoena from the Justice Department, but as of
6 : 2 1 P M 6 the time that you resolved this matter with Ms. Barron, had
6 : 2 1 P M 7 anybody from the government told you that your -- that they
6 : 2 2 P M 8 thought your contract was illegal?

6 : 2 2 P M 9 A. Never heard the word "illegal" about my contract. As I
6 : 2 2 P M 10 said, near the end of 2014 and we got our lawyers involved and
6 : 2 3 P M 11 then, as I said, some people used it as a negotiating tactic.

6 : 2 3 P M 12 Q. I'm going to turn now that the investigation that you
6 : 2 3 P M 13 became a part of with the Department of Justice.

6 : 2 3 P M 14 A. Okay.

6 : 2 3 P M 15 Q. And turn your attention to January 2013.

6 : 2 3 P M 16 A. Okay.

6 : 2 3 P M 17 Q. That's when you received your subpoena?

6 : 2 3 P M 18 A. Yes, sir.

6 : 2 3 P M 19 Q. So tell the jury what happened then.

6 : 2 3 P M 20 A. We got the subpoena from the government that day. Looked
6 : 2 3 P M 21 at it like, "Okay. I'm not sure what that means." So called
6 : 2 3 P M 22 John Galese -- or excuse me, called Gene Sellers. Gene Sellers
6 : 2 3 P M 23 called John. They said, "Let's get back in touch with you."
6 : 2 3 P M 24 And they said, "The first thing we need to do is have a
6 : 2 3 P M 25 conference call involving our contractors and tell them to

6 : 2 3 P M 1 retain documents," which I know John Galese was on the
6 : 2 3 P M 2 conference call, which we discussed with all the independent
6 : 2 3 P M 3 contractors. Then he says, "Hey, listen. This is over our
6 : 2 3 P M 4 scope, over our head." So that's when they recommended another
6 : 2 4 P M 5 set of attorneys, and that's when Mark White, Augusta Dowd and
6 : 2 4 P M 6 Flippo and that big firm in Birmingham came into play.

6 : 2 4 P M 7 Q. That's White Arnold & Dowd?

6 : 2 4 P M 8 A. That is correct.

6 : 2 4 P M 9 Q. Did it include Mark White?

6 : 2 4 P M 10 A. Yes, sir.

6 : 2 4 P M 11 Q. Main partner, and Ms. Flippo was the lawyer who testified
6 : 2 4 P M 12 here last -- a week ago?

6 : 2 4 P M 13 A. That's correct. The majority of the time was in
6 : 2 4 P M 14 conversations with Mr. Mark White, excuse me. Linda was always
6 : 2 4 P M 15 off to the side and taking notes or different things.

6 : 2 4 P M 16 Q. Did -- did you remember the -- what we called the Summit
6 : 2 4 P M 17 conference meeting that took place in June?

6 : 2 4 P M 18 A. I do. I do remember the Summit conference, so --

6 : 2 4 P M 19 Q. Did your attorneys start talking to the attorneys for HDL?

6 : 2 4 P M 20 A. Actually it's interesting. I don't actually remember our
6 : 2 4 P M 21 attorneys outside of Gene speaking at all at the Summit
6 : 2 4 P M 22 meeting. My recollection of the Summit meeting was what are
6 : 2 4 P M 23 you doing here? Because they said they'd notified us. But you
6 : 2 4 P M 24 know when you're fixing to pay 13,000, \$14,000 for an
6 : 2 5 P M 25 attorney's fees for a day, and you're sitting here going, "why

6 : 2 5 P M 1 are you here?" Because we had "strategy" written down on our
6 : 2 5 P M 2 calendar, so I had no idea what the meeting was actually
6 : 2 5 P M 3 pertaining to at that time. So immediately the meeting was
6 : 2 5 P M 4 quiet, and then I think Brien O'Connor, Ropes & Gray lead guy,
6 : 2 5 P M 5 started to speak.

6 : 2 5 P M 6 Q. Had you heard of Ropes & Gray before that meeting?

6 : 2 5 P M 7 A. I had. I heard that they represent Harvard University.
6 : 2 5 P M 8 They're one of the biggest in the country. I knew they were a
6 : 2 5 P M 9 thousand-man-plus law firm. We knew they were heavy, heavy
6 : 2 5 P M 10 hitters, because Tonya had said, "Hey, listen, they're some of
6 : 2 6 P M 11 the biggest in the country."

6 : 2 7 P M 12 Q. Who -- who hired them?

6 : 2 7 P M 13 A. HDL.

6 : 2 7 P M 14 Q. Did they represent Bluewave?

6 : 2 7 P M 15 A. No, sir, they did not.

6 : 2 7 P M 16 Q. Did they -- did they talk to your lawyers at White Arnold
6 : 2 7 P M 17 & Dowd from time to time?

6 : 2 7 P M 18 A. My impression is yes, they talked to them a bunch.

6 : 2 7 P M 19 Q. So without me leading you, tell us what happened at the
6 : 2 7 P M 20 meeting. Once you got there, who all was there and what
6 : 2 8 P M 21 happened?

6 : 2 8 P M 22 A. Well, walked into the conference room, and Ropes & Gray
6 : 2 8 P M 23 was on one side of the table. Tonya over here in the corner.
6 : 2 8 P M 24 Cal and myself, Gene Sellers was between us. We had Nick Pace,
6 : 2 8 P M 25 in-house counsel lining the wall, and Brien got up and started

6 : 2 8 P M 1 speaking about the discussions with the government, and so he
6 : 2 8 P M 2 talked about that for a while, and then I think the big
6 : 2 8 P M 3 thing -- statement he said, he says, "I've told the government,
6 : 2 8 P M 4 and we're going to be on the forefront. We're going to start
6 : 2 9 P M 5 moving away from the processing and handling fee." And that's
6 : 2 9 P M 6 when my business partner Cal said, "Wait a minute." That's
6 : 2 9 P M 7 when Tonya stated, "I never said that. I said we'll go away
6 : 2 9 P M 8 from it if everybody is in the same boat."

6 : 2 9 P M 9 So that's when Ropes & Gray, Brien started
6 : 2 9 P M 10 asking questions. He said, "Okay. Can somebody walk me
6 : 2 9 P M 11 through the processing and handling fee? Who -- who out there
6 : 2 9 P M 12 offers this?" And then it became an educational session.
6 : 2 9 P M 13 That's when Cal, my business partner, started talking about all
6 : 2 9 P M 14 the companies offering the processing and handling fees, and
6 : 2 9 P M 15 that's when you saw the homework assignment from Linda Flippo
6 : 2 9 P M 16 was, "Can you get their legal documents?" Well, I got all the
6 : 2 9 P M 17 process and handling fee documents; could not get the legal
6 : 2 9 P M 18 documents. I actually called the Cleveland rep, Atherotech,
6 : 3 0 P M 19 Boston, LipoScience. I got all their processing and handling
6 : 3 0 P M 20 fee documents faxed in, and so it became an information
6 : 3 0 P M 21 gathering session. "So wait a minute." You could see Brien
6 : 3 0 P M 22 going, "You mean all these companies are offering this?" And
6 : 3 0 P M 23 we said, "Yes, they are." And he said, "Okay. Let's -- let's
6 : 3 0 P M 24 table some of this discussion, and let's go back to the table
6 : 3 0 P M 25 about it and see where we are."

6 : 3 0 P M 1 Q. Prior to that day, had you guys ever been told that HDL
6 : 3 0 P M 2 was moving away from process and handling fees?

6 : 3 0 P M 3 A. Never have heard that mentioned one time.

6 : 3 0 P M 4 Q. You ever heard of a Project Twilight?

6 : 3 0 P M 5 A. I had not heard of it until this case. In the exhibits I
6 : 3 1 P M 6 think I saw it.

6 : 3 1 P M 7 Q. Why was it -- why was it significant to you that -- that
6 : 3 1 P M 8 if you -- if HDL quit paying process and handling fees, that
6 : 3 1 P M 9 everybody else should have to quit also?

6 : 3 1 P M 10 A. Well --

6 : 3 1 P M 11 Q. If they're not a sales incentive, why would it make any
6 : 3 1 P M 12 difference to you?

6 : 3 1 P M 13 A. Okay. That's a good question. Okay. I'll look at it
6 : 3 1 P M 14 from a competitive sales point. Let's look at it that way. If
6 : 3 4 P M 15 all of a sudden HDL dropped the process and handling fee today,
6 : 3 4 P M 16 if I was a competitive sales rep, I would walk into the account
6 : 3 4 P M 17 and say, "They're doing lot of other things wrong; blah, blah,
6 : 3 4 P M 18 blah. You're probably going to get drug through the mud on
6 : 3 4 P M 19 this." You want to in essence destroy the company right there
6 : 3 4 P M 20 and then. You may even walk in and say, "They're going
6 : 3 4 P M 21 financially under. They can't make ends meet." You'll start
6 : 3 4 P M 22 pitching those things. So, in essence, you're going to attack
6 : 3 4 P M 23 those accounts.

6 : 3 4 P M 24 Now, LabCorp and Quest is going to come into all
6 : 3 4 P M 25 those accounts and say, "The government is after them. They're

6 : 3 4 P M 1 going to go to prison; blah, blah, blah. Doctor, I'll bet
6 : 3 4 P M 2 you're going to be one of them."

6 : 3 4 P M 3 So immediately you can completely change a whole
6 : 3 4 P M 4 market real quick just from a sales tactic in that situation.
6 : 3 4 P M 5 You saw sales tactics from Berkeley where they got a lawyer
6 : 3 5 P M 6 saying, "You can't offer no-balance billing," when, in essence,
6 : 3 5 P M 7 that's what they had been doing. And that right there was used
6 : 3 5 P M 8 to sway -- we lost accounts off of that.

6 : 3 5 P M 9 And so if you took something like this and threw
6 : 3 5 P M 10 it out there and said, "HDL's got to stop. Everybody else is
6 : 3 7 P M 11 going to keep running with it," what's going to happen is your
6 : 3 7 P M 12 competitors are going to use that to their full advantage to, I
6 : 3 7 P M 13 mean, hammer you through the floor.

6 : 3 7 P M 14 And also at the same time you've got to have a
6 : 3 7 P M 15 system in place. If you immediately stop it, you got to have a
6 : 3 7 P M 16 system in place. How are we going to protect our interests?
6 : 3 7 P M 17 How are we going to get the blood to the lab? What are we
6 : 3 7 P M 18 going to do? You're looking at the average time on hiring a
6 : 3 7 P M 19 phlebotomist and putting them in practice live probably two
6 : 3 7 P M 20 months, maybe two and a half months. That's if you're lucky if
6 : 3 7 P M 21 the physician has somebody that they would recommend that could
6 : 3 7 P M 22 draw the blood. Otherwise you're going to have to either hire
6 : 3 7 P M 23 a part-time company to hire a part-time phlebotomist to try to
6 : 3 7 P M 24 put them in pretty quick. Then you run into a lot more issues.
6 : 3 7 P M 25 You got to make sure the phlebotomist gels with the practice.

1 There's got to be steps in place. You just can't slam on the
2 brakes in that day.

3 Now, I'm sure if they said, "Hey, this is 100%
4 illegal, and you got to stop today. If not, we're going to be
5 a problem," I'm sure everybody was -- "All right, let's
6 completely drop it. Let's go into panic mode. Let's figure
7 out how we're going to get the blood here." So we would have
8 probably said, "How much money needs to be designated to find
9 phlebotomists?" Or we would have gone down another path, I
10 think.

11 Q. Did anybody at that meeting tell you that paying
12 processing and handling fees is illegal and you needed to stop
13 it?

14 A. No.

15 Q. You're breaking the law?

16 A. That never was said at all.

17 Q. Did anybody ever tell you waiving co-pays or deductibles
18 to TRICARE was illegal and we need to stop doing that?

19 A. That was not even discussed, nothing about --

20 Q. When did that first come up?

21 A. Ms. Strawn, when she brought it to my attention, she said
22 it to me, that was the first time I'd ever heard of that my
23 entire life. As I said, my second phone call that day was Cal,
24 Tonya, Gary Tom, then the Boston reps to ask, "Hey, is there
25 something going on here we don't know about?" And that's how

6 : 4 2 P M 1 that was --

6 : 4 2 P M 2 Q. Did anybody in that meeting say that you had to stop
6 : 4 2 P M 3 receiving commissions as independent contractors?

6 : 4 2 P M 4 A. Commissions have never been discussed at all.

6 : 4 2 P M 5 Q. And what about paying commissions to your sales reps?

6 : 4 2 P M 6 A. No, sir, never.

6 : 4 2 P M 7 Q. What about the lawyers at White Arnold & Dowd? Did they
6 : 4 2 P M 8 ever tell you that you're breaking the law and you need to stop
6 : 4 2 P M 9 doing it?

6 : 4 2 P M 10 A. Never said that at all under any circumstances. All Mark
6 : 4 2 P M 11 White kept saying throughout most of our meetings was, "Hey,
6 : 4 2 P M 12 listen. Let the big dogs handle this. They'll take care of
6 : 4 2 P M 13 everything. Everything is going to be fine."

6 : 4 2 P M 14 Q. By -- what did you -- what did you interpret that to mean?

6 : 4 2 P M 15 A. HDL's working with -- HDL had taken the lead with
6 : 4 3 P M 16 Ropes & Gray meeting with the government, so they were going to
6 : 4 3 P M 17 make some sort of negotiation or mediation or settlement or
6 : 4 3 P M 18 whatever.

6 : 4 4 P M 19 Q. If -- if the result of that had been for the government to
6 : 4 4 P M 20 say, "You can't pay process and handling fees," or, "You can't
6 : 4 4 P M 21 pay that much process and handling fees," would you have
6 : 4 4 P M 22 complied with that?

6 : 4 4 P M 23 A. Oh, no question. No question.

6 : 4 4 P M 24 Q. What was said about the LeClairRyan letter at that
6 : 4 4 P M 25 meeting?

6 : 4 4 P M 1 A. Actually the exact words about the LeClairRyan letter was
6 : 4 5 P M 2 they asked us how often it was used. I know Cal said -- I
6 : 4 5 P M 3 don't know if he even used it. Linda said that I said I never
6 : 4 5 P M 4 have used it. I know I've used it two or three times. That's
6 : 4 5 P M 5 why I said less than five total. I knew our sales reps had it,
6 : 4 5 P M 6 because we did send it to them. So at that meeting they said,
6 : 4 5 P M 7 "well, listen. We got to stop using that letter right now."
6 : 4 5 P M 8 They said, "The reason behind this, attorney-client privilege."
6 : 4 5 P M 9 And we was like, "Okay. No problem."

6 : 4 5 P M 10 Q. Do you remember anybody telling you that the letter was
6 : 4 6 P M 11 wrong?

6 : 4 6 P M 12 A. I don't remember anybody saying Ruggio's opinion was
6 : 4 6 P M 13 wrong, so --

6 : 4 6 P M 14 Q. Did you understand then what is required to comply with
6 : 4 6 P M 15 the safe harbor in the Anti-Kickback Statute?

6 : 4 6 P M 16 A. Repeat the question again.

6 : 4 6 P M 17 Q. At that time did you understand what was required in order
6 : 4 6 P M 18 to comply with the safe harbor of the Anti-Kickback Statute?

6 : 4 8 P M 19 A. I'd heard the safe harbor mentioned numerous times, but I
6 : 4 8 P M 20 don't -- I don't know if I knew what that per se was -- what it
6 : 4 8 P M 21 meant. Does that make sense?

6 : 4 8 P M 22 Q. Yeah.

6 : 4 8 P M 23 A. And what I mean by that is I had been told from Gene and
6 : 4 8 P M 24 Mark White, "Hey, if we're out of safe harbor, that doesn't
6 : 4 8 P M 25 mean it's illegal at all," so --

6 : 4 8 P M 1 Q. what would have to happen if you were out of the safe
6 : 4 8 P M 2 harbor?

6 : 4 8 P M 3 A. I think based on what I've read since then, you've got to
6 : 4 8 P M 4 set a fixed amount period. Is that what you mean?

6 : 4 8 P M 5 Q. well, no. I think what we're really curious about is what
6 : 4 8 P M 6 did you think at that time? what did you believe was necessary
6 : 4 8 P M 7 in order to comply with the Anti-Kickback Statute?

6 : 4 8 P M 8 A. I felt like we was complying with it at that time. I
6 : 4 8 P M 9 don't remember at any point somebody saying, "Hey, we're not
6 : 4 8 P M 10 complying with the Anti-Kickback Statute," at that moment in
6 : 4 8 P M 11 time. So I guess I'm confused with your statement.

6 : 4 9 P M 12 Q. No, I think you've answered the question.

6 : 4 9 P M 13 A. So, I mean, because I actually -- as I said, yeah, nobody
6 : 4 9 P M 14 ever said "stop". I mean, that's a big factor. Nobody ever
6 : 4 9 P M 15 said, "Hey, this is illegal." You know, those were --

6 : 4 9 P M 16 Q. After that meeting did your lawyers continue to talk to
6 : 4 9 P M 17 the Ropes & Gray lawyers who talked to the Justice Department
6 : 4 9 P M 18 lawyers?

6 : 4 9 P M 19 A. Yeah, my understanding, Ropes & Gray had the lead with the
6 : 4 9 P M 20 government, and our attorneys would traverse back and forth.
6 : 4 9 P M 21 I'm not even going to say routinely. I'm going to say every
6 : 4 9 P M 22 now and then.

6 : 4 9 P M 23 MR. COOKE: Your Honor, I could keep going, or I
6 : 4 9 P M 24 could --

6 : 5 3 P M 25 THE COURT: No, I think this is good time to take a

6 : 5 3 P M 1 break. Let's take our lunch break. Be back in about an hour.

6 : 5 3 P M 2 (Whereupon the jury was excused from the courtroom.)

6 : 5 4 P M 3 **THE COURT:** You may be seated. Mr. Cooke, you have
6 : 5 4 P M 4 the benefit of the last hour and a half having passed. Do you
6 : 5 4 P M 5 have any estimate now how much longer you've --

6 : 5 4 P M 6 **MR. COOKE:** Duly reminded that I was wrong the last
6 : 5 4 P M 7 time. I still think that I'm probably within half an hour.

6 : 5 4 P M 8 **THE COURT:** Whatever. I just need to project in
6 : 5 4 P M 9 terms of our tasks today. Very good. Let's break for lunch.

6 : 5 4 P M 10 (Recess.)

2 : 2 9 P M 11 **THE COURT:** Any matters we need to address before we
2 : 2 9 P M 12 bring in the jury?

2 : 2 9 P M 13 **MR. LEVENTIS:** No. Thank you, Your Honor.

2 : 2 9 P M 14 **MR. COOKE:** Just one thing. I anticipate in
2 : 2 9 P M 15 cross-examination, we brought up on Friday that we objected to
2 : 2 9 P M 16 the government using exhibits that had not been previously
2 : 2 9 P M 17 identified pursuant to pretrial order. And I believe that was
2 : 2 9 P M 18 overruled. Could we just have a continuing objection?

2 : 2 9 P M 19 **THE COURT:** You have a continuing objection.

2 : 2 9 P M 20 **MR. COOKE:** Thank you.

2 : 2 9 P M 21 **THE COURT:** Bring in the jury, please.

2 : 3 0 P M 22 (Whereupon the jury entered the courtroom.)

2 : 3 0 P M 23 **THE COURT:** Please be seated. Okay. Mr. Cooke,
2 : 3 1 P M 24 continue your direct examination, sir.

2 : 3 1 P M 25 **MR. COOKE:** Thank you, Your Honor.

2 : 3 1 P M 1 BY MR. COOKE:

2 : 3 1 P M 2 Q. I believe, when we left off, we had brought you up through
2 : 3 1 P M 3 the summer of 2013. You had talked about the conference that
2 : 3 1 P M 4 took place up in Richmond in June of 2013, and then we talked
2 : 3 1 P M 5 about what your expectations were going forward.

2 : 3 1 P M 6 Do you remember all of that?

2 : 3 1 P M 7 A. I do.

2 : 3 1 P M 8 Q. And you testified earlier that, at some point that year,
2 : 3 1 P M 9 you decided to have your compliance tests looked at by another
2 : 3 1 P M 10 attorney who was not associated with anybody; is that right?

2 : 3 1 P M 11 A. That is correct.

2 : 3 1 P M 12 Q. And why did you decide to do that?

2 : 3 1 P M 13 A. Cal and I discussed it and said everything we've done,
2 : 3 1 P M 14 we've had an attorney at least touch it. So from our
2 : 3 1 P M 15 standpoint it's, hey, we got the legal test here. Let's go
2 : 3 2 P M 16 ahead and send it to somebody and get them to check it, make
2 : 3 2 P M 17 sure their answers coincide with ours.

2 : 3 2 P M 18 Q. So what did you do?

2 : 3 2 P M 19 A. Actually, I reached out to Brett King. I said, "Hey,
2 : 3 2 P M 20 Brett, we got a legal test here. Do you think you can take a
2 : 3 2 P M 21 look at this or you can get somebody to take a look at it?"

2 : 3 2 P M 22 Q. Who is Brett King?

2 : 3 2 P M 23 A. Brett King is a legal attorney of mine -- friend of mine.
2 : 3 2 P M 24 He does a lot of different things for us. So he said, "Brett,
2 : 3 2 P M 25 I probably know somebody from my class." And next thing, I

2 : 3 2 P M 1 sent it to him. And that's when he reached out to Ms. Lauren
2 : 3 2 P M 2 DeMoss.

2 : 3 2 P M 3 Q. And, last week, it was brought out that there was a test.
2 : 3 2 P M 4 Do you remember the test that was shown?

2 : 3 2 P M 5 Could we have 7017.

2 : 3 2 P M 6 And this is Mr. Lively's test taken on January 10th
2 : 3 2 P M 7 of 2013. Do you recall that?

2 : 3 2 P M 8 A. Yes, sir, I do.

2 : 3 2 P M 9 MR. COOKE: And then scroll down to the question
2 : 3 3 P M 10 about process and handling fees. Keep going. Is there another
2 : 3 3 P M 11 page or is that it? That's it? Let's see. There's a question
2 : 3 3 P M 12 on there that -- "can you send a physician on a cruise? No.
2 : 3 3 P M 13 Perform unnecessary tests? No."

2 : 3 3 P M 14 BY MR. COOKE:

2 : 3 3 P M 15 Q. I'll tell you what. Let's just go straight to
2 : 3 3 P M 16 Ms. DeMoss's message. It's Exhibit 1002. And there's several
2 : 3 3 P M 17 questions, have to go all the way down to the -- near the
2 : 3 3 P M 18 bottom of the exhibit, all the way down. First of all, do you
2 : 3 4 P M 19 recall, was this email sent to you?

2 : 3 4 P M 20 A. I think it was Lauren sent it to Brett, Brett sent it to
2 : 3 4 P M 21 me. I believe that's right.

2 : 3 4 P M 22 Q. Let's scroll all the way up to the top just for a second.

2 : 3 4 P M 23 All right. This particular version of it is shown to
2 : 3 4 P M 24 have gone from Lauren DeMoss to Brett King. But you think you
2 : 3 4 P M 25 got it at some point?

2 : 3 4 P M 1 A. I did. Actually, if you look at the top, it says
2 forwarded from Brett.

2 : 3 4 P M 3 Q. Okay. Go all the way down, all the way down to the bottom
4 until we get to the test.

2 : 3 4 P M 5 Let's go to Question Number 26.

2 : 3 5 P M 6 A. Okay.

2 : 3 5 P M 7 Q. "Can HDL place a phlebotomist in a practice and the
8 practice still receive the P&H fee?"

2 : 3 5 P M 9 And the answer that she provided was "These two
10 issues are not connected. The provision of a phlebotomist is
11 allowed in certain circumstances. See Question Number 6 above.
12 However, the P&H fee appears to be prohibited. See Question 17
13 above."

2 : 3 5 P M 14 Let's go to Question 6 first.

2 : 3 5 P M 15 "Can you supply your physician with a phlebotomist?"

2 : 3 5 P M 16 "The OIG has issued a special fraud alert on this
17 issue, and so long as state law does not prohibit it, there are
18 limited circumstances when a phlebotomist who collects
19 specimens from patients for testing by the outside laboratory
20 can be supplied to a physician's office. The phlebotomist
21 should not perform clerical or medical functions not directly
22 related to the collection or processing of laboratory
23 specimens."

2 : 3 6 P M 24 Is that consistent with what you had understood?

2 : 3 6 P M 25 A. Yes, sir.

2 : 3 6 P M 1 Q. All right. So let's now go to paragraph 17.

2 : 3 6 P M 2 "How much is the P&H fee? Can you pay any amount?"

2 : 3 6 P M 3 "The P&H fee is intended to represent a fair market
2 : 3 6 P M 4 value fee to compensate the physician for handling and
2 : 3 6 P M 5 processing of the laboratory specimens collected at the
2 : 3 6 P M 6 physician's office that are sent to the lab."

2 : 3 6 P M 7 And then you remember this part being read.

2 : 3 6 P M 8 "Medicare generally considers the expenses of handling of
2 : 3 6 P M 9 specimens to be in its calculation of the bundled payment.

2 : 3 6 P M 10 Many private payers take the same approach. When a physician
2 : 3 6 P M 11 accepts a handling fee from a lab, this may not only be a
2 : 3 6 P M 12 double payment, but the government may view the fee as intended
2 : 3 6 P M 13 to induce the physician to refer to the laboratory."

2 : 3 7 P M 14 Do you remember getting that advice from her?

2 : 3 7 P M 15 A. Yes.

2 : 3 7 P M 16 Q. All right. So what did you do with that advice?

2 : 3 7 P M 17 A. Cal and I talked about the test afterwards. I think I
2 : 3 7 P M 18 sent him a copy, but I'm still not quite sure if we did or not.
2 : 3 7 P M 19 But this is actually exactly the way we've answered this
2 : 3 7 P M 20 question. The P&H fee is intended to represent the fair market
2 : 3 7 P M 21 value. Answer to the question was \$17 for HDL in this
2 : 3 7 P M 22 situation.

2 : 3 7 P M 23 The Medicare part down here, as you look at it, it
2 : 3 7 P M 24 says the same thing. "But government may view the fee as
2 : 3 7 P M 25 intended to induce the physician to refer to the laboratory."

2 : 3 7 P M 1 May. We've heard the word "may" I don't know how many times
2 : 3 7 P M 2 now.

2 : 3 7 P M 3 So, from our perspective, we were 100 percent in
2 : 3 7 P M 4 where we was supposed to be. In addition to that, we already
2 : 3 7 P M 5 had the LeClairRyan opinion letter, so we knew that. We knew
2 : 3 7 P M 6 all the other people out there in the industry that had legal
2 : 3 7 P M 7 opinions as well pertaining to the process and handling fee.
2 : 3 8 P M 8 So we -- just was not much different answer than we'd already
2 : 3 8 P M 9 been answering.

2 : 3 8 P M 10 Q. All right. So let's go back to the very top and make sure
2 : 3 8 P M 11 we remember the date of this communication.

2 : 3 8 P M 12 All the way to the very top of the email.

2 : 3 8 P M 13 And right down here, it was sent from Lauren DeMoss
2 : 3 8 P M 14 on November 14, 2013.

2 : 3 8 P M 15 A. Correct.

2 : 3 8 P M 16 Q. Do you remember what was going on with HDL and
2 : 3 8 P M 17 Ropes & Gray around that time?

2 : 3 8 P M 18 A. Actually, they were in discussions with the Department of
2 : 3 8 P M 19 Justice --

2 : 3 8 P M 20 Q. Okay.

2 : 3 8 P M 21 A. -- and -- pertaining to all of this.

2 : 3 8 P M 22 Q. And what was going on with regard to process and handling
2 : 3 8 P M 23 fees? Do you remember?

2 : 3 8 P M 24 A. Actually, this is what they were discussing right then at
2 : 3 8 P M 25 that time.

2 : 3 8 P M 1 Q. All right. Let me show you Mallory Exhibit 29. This is
2 : 3 9 P M 2 an email from Tonya Mallory dated Friday, October 25th, 2013.
2 : 3 9 P M 3 And it's to Cal Dent and Brad Johnson with copies to Derek Kung
2 : 3 9 P M 4 and Kathy Johnson.

2 : 3 9 P M 5 who was Kathy Johnson?

2 : 3 9 P M 6 A. Chief compliance officer at HDL.

2 : 3 9 P M 7 Q. And Derek Kung was?

2 : 3 9 P M 8 A. I think chief in-house counsel for HDL.

2 : 3 9 P M 9 Q. Okay. So Tonya says here, "Cal and Brad, we have modified
2 : 3 9 P M 10 the P&H agreement to strengthen compliance documentation. Some
2 : 3 9 P M 11 of the changes are simply rewording what we have already
2 : 3 9 P M 12 written, and others are truly adding to our compliance efforts.
2 : 3 9 P M 13 Since we need to add to the documents for our compliance
2 : 3 9 P M 14 efforts, I have let the insignificant changes go. Can you
2 : 3 9 P M 15 please review the attached documents from the physician
2 : 3 9 P M 16 perspective and let me know if there is anything that you can
2 : 4 0 P M 17 see that would be problems from their perspective? I cannot
2 : 4 0 P M 18 see anything that I think will be alarming, but I would
2 : 4 0 P M 19 appreciate a second set of eyes.

2 : 4 0 P M 20 "Once you approve, this will be the new agreement
2 : 4 0 P M 21 going forward. We will pick a future date, but we will not go
2 : 4 0 P M 22 back and change all those that exist. Thanks also for all your
2 : 4 0 P M 23 support on getting the BW team to get this -- to get us their
2 : 4 0 P M 24 P&H documentation faster. It seems to be coming in a lot
2 : 4 0 P M 25 faster now."

2 : 4 0 P M 1 Do you remember what the significant changes to the
2 : 4 0 P M 2 process and handling agreement were that were being
2 : 4 0 P M 3 implemented?

2 : 4 0 P M 4 A. Yeah. I think the biggest changes from this, based on
2 : 4 0 P M 5 everything we discussed, was HDL had taken on that process and
2 : 4 0 P M 6 handling fee. So that means we go into an account, we would
2 : 4 0 P M 7 sell an account across the board. And then, if process and
2 : 4 0 P M 8 handling fee was going to be, I guess, offered to that account,
2 : 4 0 P M 9 HDL -- we would call HDL, and HDL would handle all the
2 : 4 0 P M 10 paperwork and everything else, and then send it back to HDL, so
2 : 4 1 P M 11 we never touched it.

2 : 4 1 P M 12 Q. And do you know whether Ropes & Gray had participated in
2 : 4 1 P M 13 that revision of the agreement?

2 : 4 1 P M 14 A. Yes, sir.

2 : 4 1 P M 15 MR. COOKE: Your Honor, may I approach --

2 : 4 1 P M 16 THE COURT: You may.

2 : 4 1 P M 17 MR. COOKE: -- with BW480?

2 : 4 1 P M 18 THE WITNESS: Okay.

2 : 4 1 P M 19 BY MR. COOKE:

2 : 4 1 P M 20 Q. Do you remember ever seeing that email?

2 : 4 1 P M 21 A. Yes, sir, I do.

2 : 4 1 P M 22 MR. COOKE: Your Honor, I would offer this as
2 : 4 1 P M 23 Exhibit BW480. I believe there's no objection.

2 : 4 1 P M 24 MR. LEVENTIS: No objection, Your Honor.

2 : 4 1 P M 25 MR. ASHMORE: No objection.

2 : 4 1 P M 1 THE COURT: BlueWave 480 admitted without objection.

2 : 4 1 P M 2 BY MR. COOKE:

2 : 4 1 P M 3 Q. So this is dated November 26th, 2013, which is actually
2 : 4 1 P M 4 after the email from Lauren DeMoss; is that right?

2 : 4 1 P M 5 A. Correct.

2 : 4 1 P M 6 Q. And it says "All." It's from Kathy Johnson to a bunch of
2 : 4 2 P M 7 people, including yourself. "We are going forward tomorrow
2 : 4 2 P M 8 with a BW sales call at 4 p.m. EST to roll out HDL's new P&H
2 : 4 2 P M 9 agreement which is attached. Cal would like me to review the
2 : 4 2 P M 10 new P&H agreement with the sales rep line by line and then open
2 : 4 2 P M 11 the call to questions. Cal will address any sales questions
2 : 4 2 P M 12 that arise. We will jointly emphasize that selling our
2 : 4 2 P M 13 products based on the P&H fees rather than on science of the
2 : 4 2 P M 14 testing is strictly prohibited. Joe and Tabitha will be on
2 : 4 2 P M 15 this call to field any questions about sales support's roll in
2 : 4 2 P M 16 the process. Doug will be on the call to field any legal
2 : 4 2 P M 17 questions, if any, that arise regarding the P&H agreement
2 : 4 2 P M 18 revisions. Below is the dial-in number for all participants."

2 : 4 2 P M 19 Do you remember that call?

2 : 4 2 P M 20 A. I do.

2 : 4 2 P M 21 Q. Did it take place?

2 : 4 2 P M 22 A. It did.

2 : 4 2 P M 23 Q. What happened during the call?

2 : 4 2 P M 24 A. Kathy went line by line through the new process and
2 : 4 3 P M 25 handling fee agreement. And I actually thought it was very

2 : 4 3 P M 1 advantageous for us because it was something we'd been kind of
2 : 4 3 P M 2 pushing for that HDL take over, we'd not have to even look at
2 : 4 3 P M 3 them.

2 : 4 3 P M 4 Q. Meanwhile, did your lawyers continue to have dialogue with
2 : 4 3 P M 5 the Justice Department lawyers?

2 : 4 3 P M 6 A. One more time. I'm sorry.

2 : 4 3 P M 7 Q. Did your lawyers, the White Arnold & Dowd lawyers, did
2 : 4 3 P M 8 they continue to have discussions with the Justice Department
2 : 4 3 P M 9 lawyers while this was going on?

2 : 4 3 P M 10 A. I believe they did. I know they were -- Ropes & Gray were
2 : 4 3 P M 11 the lead and our attorneys were doing more conversations with
2 : 4 3 P M 12 the Ropes & Gray, to my knowledge.

2 : 4 3 P M 13 MR. COOKE: Could we have Exhibit 1497, please.

2 : 4 3 P M 14 BY MR. COOKE:

2 : 4 3 P M 15 Q. Do you see this? This was an email dated March 19, 2014,
2 : 4 4 P M 16 from Linda Flipppo. That was one of your lawyers at White
2 : 4 4 P M 17 Arnold & Dowd?

2 : 4 4 P M 18 A. Correct.

2 : 4 4 P M 19 Q. To you and to Cal Dent and to Gene Sellers and John
2 : 4 4 P M 20 Galese. Those were your other attorneys?

2 : 4 4 P M 21 A. That's correct.

2 : 4 4 P M 22 Q. And it's regarding letter from DOJ. It says, "Gentlemen:
2 : 4 4 P M 23 Please find a letter that we received from Elizabeth Strawn, an
2 : 4 4 P M 24 attorney in the civil trials division of the Department of
2 : 4 4 P M 25 Justice in Washington. Elizabeth, along with James Leventis of

2 : 4 4 P M 1 the South Carolina -- out of South Carolina, have been the lead
2 : 4 4 P M 2 DOJ counsel on this investigation" -- and there's a redacted
2 : 4 4 P M 3 part. It says, "I am also attaching the OIG advisory opinion
2 : 4 4 P M 4 referenced in the letter. Please let me know if you're
2 : 4 4 P M 5 available for a brief conference call on Monday morning."

2 : 4 4 P M 6 Then scroll down, please, to the attached letter.

2 : 4 4 P M 7 And you see that attached is a letter dated March
2 : 4 5 P M 8 18th, 2014, from Mark White -- I mean, from -- I'm sorry --
2 : 4 5 P M 9 from Elizabeth Strawn to Mark White. Did you receive that
2 : 4 5 P M 10 letter?

2 : 4 5 P M 11 A. We did. I think we was copied on this.

2 : 4 5 P M 12 Q. And do you see the last sentence in the first paragraph
2 : 4 5 P M 13 there? It says, "The purpose of this letter is to give you a
2 : 4 5 P M 14 sense of the direction of the investigation. This is not an
2 : 4 5 P M 15 attempt to provide a full discussion of the issue or the
2 : 4 5 P M 16 allegations or the investigation to date."

2 : 4 5 P M 17 Now, as of this date, had you been interviewed yet by
2 : 4 5 P M 18 the Justice Department?

2 : 4 5 P M 19 A. I had not.

2 : 4 5 P M 20 Q. What, if anything, did you believe as to the status of the
2 : 4 5 P M 21 investigation that was going on?

2 : 4 5 P M 22 A. Well, Mark White had already told us we were not a target.
2 : 4 5 P M 23 And he had also said, "Hey, the big dogs are going to handle
2 : 4 5 P M 24 this and fight this out." So he also had stated that not until
2 : 4 5 P M 25 they released anything saying we did anything wrong were we

2 : 4 6 P M 1 going to get to talk to Ms. Strawn.

2 : 4 6 P M 2 Q. Up to this point, had anybody told you to stop talking
2 : 4 6 P M 3 about process and handling fees?

2 : 4 6 P M 4 A. No, sir.

2 : 4 6 P M 5 Q. It says, "Based on our investigation to date, it appears
2 : 4 6 P M 6 to us that the laboratory's payments to referring providers
2 : 4 6 P M 7 raise an inference that one purpose of these payments -- those
2 : 4 6 P M 8 payments was to induce referrals. Those payments exceeded the
2 : 4 6 P M 9 amount Medicare pays for blood specimen collection and
2 : 4 6 P M 10 processing services, providing an obvious financial benefit to
2 : 4 6 P M 11 the referring providers, particularly when viewed in the
2 : 4 6 P M 12 aggregate. This raises an inference that one purpose of the
2 : 4 6 P M 13 payments is to induce referrals. By making the payments, the
2 : 4 6 P M 14 laboratories are essentially sharing a portion of the clinical
2 : 4 6 P M 15 laboratory fee, providing an incentive for the referring
2 : 4 6 P M 16 physician to order more tests and increasing the risk of
2 : 4 7 P M 17 overutilization."

2 : 4 7 P M 18 Do you remember receiving that information?

2 : 4 7 P M 19 A. Yes, sir, I saw -- received this letter.

2 : 4 7 P M 20 Q. Had you ever heard before that that -- that the processing
2 : 4 7 P M 21 and handling fees exceed the amount Medicare pays for blood
2 : 4 7 P M 22 specimen collection and processing services?

2 : 4 7 P M 23 A. I don't remember anybody ever saying that it exceeds fair
2 : 4 7 P M 24 market value if that's what you're asking.

2 : 4 7 P M 25 Q. Was there any mention in this letter of the independent

2 : 4 7 P M 1 contractor commission arrangement?

2 : 4 7 P M 2 A. No, sir.

2 : 4 7 P M 3 MR. COOKE: Scroll down to the next page, please.

2 : 4 7 P M 4 I'm sorry. Go back to the bottom of the previous page.

2 : 4 7 P M 5 BY MR. COOKE:

2 : 4 7 P M 6 Q. Do you see there where she says that they're continuing to
2 : 4 7 P M 7 -- "we're continuing to investigate the facts surrounding the
2 : 4 7 P M 8 payment of these fees, including BlueWave's conduct and
2 : 4 7 P M 9 representations to providers regarding these fees"?

2 : 4 8 P M 10 So, based on that, did you believe that the
2 : 4 8 P M 11 investigation was continuing?

2 : 4 8 P M 12 A. Yes, sir.

2 : 4 8 P M 13 Q. Let's -- now, in view of what Ms. Strawn was telling your
2 : 4 8 P M 14 lawyer that day, I wanted to go back and review a little bit
2 : 4 8 P M 15 the advice which you had gotten on those very subject matters
2 : 4 8 P M 16 that she referred to there. So let's begin with Exhibit 493.

2 : 4 8 P M 17 This, as you may remember, is the July 28th, 2005,
2 : 4 8 P M 18 report -- opinion from Ropes & Gray, same law firm, to who?
2 : 4 8 P M 19 who was this made to?

2 : 4 8 P M 20 A. This was Berkeley HeartLab. That's the CFO for -- Andy
2 : 4 8 P M 21 Ambrose and CEO Frank Ruderman.

2 : 4 8 P M 22 Q. And this is an opinion that I believe you testified last
2 : 4 8 P M 23 week you saw while you were there?

2 : 4 8 P M 24 A. I did.

2 : 4 8 P M 25 MR. COOKE: And go ahead and scroll down to the

2 : 4 9 P M 1 part -- keep going.

2 : 4 9 P M 2 BY MR. COOKE:

2 : 4 9 P M 3 Q. Okay. Do you see the part that begins "fair market
2 : 4 9 P M 4 payment for services that are directly related to lab functions
2 : 4 9 P M 5 and are not separately reimbursed by third-party payers is
2 : 4 9 P M 6 consistent with the federal anti-kickback and Stark Laws,
2 : 4 9 P M 7 provided, of course, that the payment arrangement is consistent
2 : 4 9 P M 8 with fair market, is not an inducement for test referrals, and
2 : 4 9 P M 9 meets the other technical criteria of Stark too."

2 : 4 9 P M 10 Do you remember reading that?

2 : 4 9 P M 11 A. Yes, sir. It sounded like the training.

2 : 4 9 P M 12 Q. And then let's go to Mallory 42. This was the -- what we
2 : 5 0 P M 13 call the Root opinion.

2 : 5 0 P M 14 Go ahead and scroll down there. And blow that page
2 : 5 0 P M 15 up a little bit, if you could.

2 : 5 0 P M 16 And you see the reference there to the advisory
2 : 5 0 P M 17 opinion that had been issued. And that advisory opinion, "the
2 : 5 0 P M 18 OIG states that if the laboratory pays a referring physician
2 : 5 0 P M 19 more than the Medicare reimbursement amount of \$3 for specimen
2 : 5 0 P M 20 collection, the payment could be considered a violation of the
2 : 5 0 P M 21 federal Anti-Kickback Statute."

2 : 5 0 P M 22 Do you see that?

2 : 5 0 P M 23 A. Yes, sir, I do.

2 : 5 0 P M 24 Q. And do you remember what the attorneys advised Berkeley
2 : 5 0 P M 25 HeartLab to do to avoid paying more than the \$3 draw fee?

2 : 5 0 P M 1 A. The time and motion study.

2 : 5 0 P M 2 Q. And, in addition to that, did they break out process and
2 : 5 0 P M 3 handling separate from the draw fee?

2 : 5 1 P M 4 A. They actually had process and handling fee separate and
2 : 5 1 P M 5 the draw fee separate from the beginning.

2 : 5 1 P M 6 Q. Do you see the part that begins -- let's see. Okay.

2 : 5 1 P M 7 "In response to that advisory opinion, BHL revised
2 : 5 1 P M 8 its practice of compensating the physicians from the
2 : 5 1 P M 9 collection, processing, and handling of specimens. First, BHL
2 : 5 1 P M 10 conducted a time and motion study, along with a fair market
2 : 5 1 P M 11 value compensation analysis, to determine the cost of
2 : 5 1 P M 12 performing the unique and labor-intensive specimen processing
2 : 5 1 P M 13 and handling associated with BHL's testing."

2 : 5 1 P M 14 Do you remember that?

2 : 5 1 P M 15 A. Yes, I do.

2 : 5 1 P M 16 Q. Do you remember how Berkeley HeartLab revised its
2 : 5 1 P M 17 arrangements with ordering physicians? Do you see the
2 : 5 1 P M 18 highlighted part there?

2 : 5 1 P M 19 "BHL then revised its arrangements with ordering
2 : 5 2 P M 20 physician for the collection, processing, and handling of
2 : 5 2 P M 21 specimens. Instead of paying one sum for these services, BHL
2 : 5 2 P M 22 began compensating the physician practices \$3 for the
2 : 5 2 P M 23 venipuncture and collection and \$7 for the processing and
2 : 5 2 P M 24 handling."

2 : 5 2 P M 25 Do you remember that?

2 : 5 2 P M 1 A. That is correct.

2 : 5 2 P M 2 Q. And did you follow that same practice -- or did HDL and
2 : 5 2 P M 3 Singulex follow that same practice once you began marketing for
2 : 5 2 P M 4 them through BlueWave?

2 : 5 2 P M 5 A. That is correct.

2 : 5 2 P M 6 Q. Go to page 3. You see the part that begins, "In addition,
2 : 5 2 P M 7 BHL requires any physician practice that enters into an
2 : 5 2 P M 8 arrangement for the performance of specimen collection,
2 : 5 2 P M 9 processing, and handling to agree not to bill Medicare for
2 : 5 2 P M 10 specimen collection paid for by BHL. This aspect of the
2 : 5 3 P M 11 arrangement removes the danger of violating the civil False
2 : 5 3 P M 12 Claims Act contemplated in the OIG's advisory opinion."

2 : 5 3 P M 13 Did you follow that advice with HDL and Singulex when
2 : 5 3 P M 14 you were with Bluewave?

2 : 5 3 P M 15 A. Yes, sir. It was actually in the process and handling
2 : 5 3 P M 16 fee.

2 : 5 3 P M 17 Q. Beg your pardon?

2 : 5 3 P M 18 A. It was actually in the process and handling fee letter
2 : 5 3 P M 19 agreement.

2 : 5 3 P M 20 MR. COOKE: Let's look at Exhibit 1136. I'm sorry.
2 : 5 3 P M 21 Let's skip that. Let's -- no, let's do that. 1136.

2 : 5 3 P M 22 BY MR. COOKE:

2 : 5 3 P M 23 Q. That's the May 1, 2010, HDL position statement.

2 : 5 3 P M 24 And let's go to the next page, please, Item Number 3.
2 : 5 3 P M 25 "Physician will not bill, receive, nor collect any

2 : 5 3 P M 1 reimbursement from any third-party payer, including commercial
2 : 5 4 P M 2 insurers and governmental programs such as Medicare and
2 : 5 4 P M 3 Medicaid for any processing and handling services or collection
2 : 5 4 P M 4 services for which the physician receives any fees from HDL."

2 : 5 4 P M 5 And was that, in fact, included not only in the HDL
2 : 5 4 P M 6 processing and handling agreement, but also the Singulex?

2 : 5 4 P M 7 A. Yes, sir, I think it's verbatim in both -- actually, all
2 : 5 4 P M 8 three.

2 : 5 4 P M 9 MR. COOKE: And now let's go to 1253.

2 : 5 4 P M 10 BY MR. COOKE:

2 : 5 4 P M 11 Q. And this is the LeClairRyan letter of April 27, 2012.

2 : 5 4 P M 12 Let's scroll down, please. Can you find the section
2 : 5 4 P M 13 that begins "in accord with the safe harbor provisions of the
2 : 5 4 P M 14 AKS" -- might be the next page. Let's just go with this.

2 : 5 5 P M 15 "Based on our recent analysis of the report prepared
2 : 5 5 P M 16 by Exponent of HDL's staff and resources involved and that HDL
2 : 5 5 P M 17 has defined this as a typical site, a fair market value of up
2 : 5 5 P M 18 to but not to exceed \$36.03 per specimen has -- for processing
2 : 5 5 P M 19 and handling tasks is appropriate and justifiable."

2 : 5 5 P M 20 And go to the bottom. "The safe harbor requires that
2 : 5 5 P M 21 the aggregate compensation paid for the services are set in
2 : 5 5 P M 22 advance and consistent with fair market value, and based on
2 : 5 5 P M 23 Exponent's detailed review and our analysis of the applicable
2 : 5 5 P M 24 laws, HDL is acting within applicable statutory laws to pay
2 : 5 5 P M 25 this fair market fee for processing and handling services."

2 : 5 5 P M 1 Is that correct?

2 : 5 5 P M 2 A. Yes, sir.

2 : 5 5 P M 3 Q. So based on the advice that you had been given and the
2 : 5 5 P M 4 time and motion studies that have been done and the other work
2 : 5 6 P M 5 that has been done, did you -- what, if anything, did you
2 : 5 6 P M 6 believe the government would ultimately conclude when it
2 : 5 6 P M 7 finished its investigation?

2 : 5 6 P M 8 A. What I thought the government would conclude at the end of
2 : 5 6 P M 9 their investigation is set a number and say "this is it,
2 : 5 6 P M 10 period. You cannot go above this number."

2 : 5 6 P M 11 So, from my standpoint, it was going to be this is
2 : 5 6 P M 12 fair market value for everybody across the board.

2 : 5 6 P M 13 Q. I'm sorry. Say that again.

2 : 5 6 P M 14 A. I felt like, when they concluded their investigation, they
2 : 5 6 P M 15 would set up a number and say that's it across the board.

2 : 5 6 P M 16 Q. You mean, like, a dollar amount for processing and
2 : 5 6 P M 17 handling?

2 : 5 6 P M 18 A. That is correct, yes, sir.

2 : 5 6 P M 19 MR. COOKE: Can we have Exhibit 508, please.

2 : 5 6 P M 20 BY MR. COOKE:

2 : 5 6 P M 21 Q. This is the special fraud alert that was issued on June
2 : 5 6 P M 22 5th, 2014. Do you remember having that sent to you?

2 : 5 7 P M 23 A. I do.

2 : 5 7 P M 24 Q. I'm not going to ask you to read the whole thing, but do
2 : 5 7 P M 25 you see the part here that says "the Anti-Kickback Statute is

2 : 5 7 P M 1 implicated when a clinical laboratory pays a physician for
2 : 5 7 P M 2 services. Whether an actual violation of the statute occurs
2 : 5 7 P M 3 depends on the intent of the parties. The Anti-Kickback
2 : 5 7 P M 4 Statute prohibits the knowing and willful payment of such
2 : 5 7 P M 5 amounts if even one purpose of the payment is to induce or
2 : 5 7 P M 6 reward referrals of federal health care program business. This
7 is true regardless of whether the payment is fair market value
8 for services rendered. The probability that a payment is for
9 an illegitimate purpose is increased, however, if a payment
10 exceeds fair market value or if it is for a service for which
11 the physician is paid by a third party, including Medicare."

2 : 5 7 P M 12 was one purpose of paying process and handling fees
2 : 5 8 P M 13 to induce referrals -- to reward referrals of Medicare
2 : 5 8 P M 14 patients?

2 : 5 8 P M 15 A. No.

2 : 5 8 P M 16 MR. COOKE: Go to the next page, please. Actually,
2 : 5 8 P M 17 let's see. Now, let's go to the bottom. Down here.

2 : 5 8 P M 18 BY MR. COOKE:

2 : 5 8 P M 19 Q. It says "characteristics -- characteristics of a specimen
2 : 5 8 P M 20 processing arrangement that may be evidence of such unlawful
2 : 5 8 P M 21 purpose include, but are not limited to, the following."

2 : 5 8 P M 22 And then I'm going to look at each of these bullet
2 : 5 8 P M 23 points and just want you to say very briefly whether you
2 : 5 8 P M 24 believe that the HDL or the Singulex process and handling fees
2 : 5 8 P M 25 met that definition.

2 : 5 8 P M 1 So "payment exceeds fair market value for services
2 : 5 8 P M 2 actually rendered by the party receiving the payment."

2 : 5 8 P M 3 Did you believe that to be the case?

2 : 5 8 P M 4 A. No, I did not believe they exceeded fair market value at
2 : 5 9 P M 5 any level.

2 : 5 9 P M 6 Q. "Payment is for services for which payment is also made by
2 : 5 9 P M 7 a third party, such as Medicare."

2 : 5 9 P M 8 Did you believe that that was the case?

2 : 5 9 P M 9 A. My opinion was -- is that, yes, Medicare could not bill if
2 : 5 9 P M 10 we paid them the -- billing the services is a double pay.

2 : 5 9 P M 11 Q. Okay. So on that provision of the process and handling
2 : 5 9 P M 12 agreement?

2 : 5 9 P M 13 A. Yes.

2 : 5 9 P M 14 Q. Okay. "Payment is made directly to the ordering physician
2 : 5 9 P M 15 rather than to the ordering physician's group practice, which
2 : 5 9 P M 16 may bear the cost of collecting and processing the specimen."

2 : 5 9 P M 17 Did you determine if Bluewave or any of its sales
2 : 5 9 P M 18 representatives determined how the P&H fee was to be paid or
2 : 5 9 P M 19 where it was to be sent?

3 : 0 0 P M 20 A. I'm confused on your question.

3 : 0 0 P M 21 Q. One of the bullet points there, one of the -- one of the
3 : 0 0 P M 22 indicia is that "payment is made directly to the ordering
3 : 0 0 P M 23 physician rather than to the ordering physician's group
3 : 0 0 P M 24 practice which may bear the cost of collecting and processing
3 : 0 0 P M 25 the specimen."

3 : 0 0 P M 1 A. It's supposed to be made to the group practice.

3 : 0 0 P M 2 Is that what you're asking?

3 : 0 0 P M 3 Q. well, my question is, did Bluewave have anything to do --

3 : 0 0 P M 4 A. No.

3 : 0 0 P M 5 Q. -- with who it was actually paid to?

3 : 0 0 P M 6 A. No, sir.

3 : 0 0 P M 7 Q. Then "payment is made on a per-specimen basis for more
3 : 0 0 P M 8 than one specimen collected during a single patient encounter
3 : 0 0 P M 9 or on a per-test, per-patient, or other basis that takes into
3 : 0 0 P M 10 account the volume of value of referrals."

3 : 0 0 P M 11 Had you ever been aware that that was the way that
3 : 0 0 P M 12 P&H fees were paid?

3 : 0 0 P M 13 Do you understand what that means?

3 : 0 0 P M 14 A. I'm confused on your question. Payments made on a
3 : 0 0 P M 15 per-specimen basis, more than one specimen collected during a
3 : 0 0 P M 16 single patient encounter. So a process and handling fee was
3 : 0 1 P M 17 paid.

3 : 0 1 P M 18 Q. well, could that be, for example, if they -- if they
3 : 0 1 P M 19 billed -- if they did testing for Singulex at the same time
3 : 0 1 P M 20 that they did testing for HDL?

3 : 0 1 P M 21 A. You mean bill both the --

3 : 0 1 P M 22 Q. Yeah.

3 : 0 1 P M 23 A. -- the venipuncture both times?

3 : 0 1 P M 24 Q. Yeah.

3 : 0 1 P M 25 A. No, they do not do that.

3 : 0 1 P M 1 Q. Did you ever encourage people to do that?

3 : 0 1 P M 2 A. No.

3 : 0 1 P M 3 Q. And then "payment is offered on the condition that the
3 : 0 1 P M 4 physician order either a specified volume or type of tests or
3 : 0 1 P M 5 test panel, especially if the panel includes duplicative tests;
3 : 0 1 P M 6 e.g., two or more tests performed using different methodologies
3 : 0 1 P M 7 that are intended to provide the same clinical information or
3 : 0 1 P M 8 tests that otherwise are not reasonable and necessary or
3 : 0 1 P M 9 reimbursable."

3 : 0 1 P M 10 Did you believe that that was going on?

3 : 0 1 P M 11 A. No, that was not going on at all.

3 : 0 1 P M 12 Q. And then "payment is made to the physician or the
3 : 0 1 P M 13 physician's group practice despite the fact that the specimen
3 : 0 2 P M 14 processing was actually being performed by a phlebotomist
3 : 0 2 P M 15 placed in the physician's office by a laboratory or a third
3 : 0 2 P M 16 party."

3 : 0 2 P M 17 what was your policy about whether a physician's
3 : 0 2 P M 18 practice could both have a phlebotomist provided and receive
3 : 0 2 P M 19 P&H fees?

3 : 0 2 P M 20 A. You could not do that.

3 : 0 2 P M 21 Q. So did you feel, based on reviewing that special fraud
3 : 0 2 P M 22 alert, that the processing and handling fees that were being
3 : 0 2 P M 23 paid by HDL or Singulex violated those provisions?

3 : 0 2 P M 24 A. I don't feel like they violated those provisions, no.

3 : 0 2 P M 25 Q. So based on that, what did you decide to do?

3 : 0 2 P M 1 A. When we heard this, we had our conference call. We was on
3 : 0 2 P M 2 a conference call with Ropes & Gray. Tonya and Mark White was
3 : 0 2 P M 3 on there as well.

3 : 0 2 P M 4 We took this as a shot across the bow; you either
3 : 0 2 P M 5 stop doing it or you're going to get hammered. Ropes & Gray
3 : 0 3 P M 6 was super beyond excited. They said now the government has
3 : 0 3 P M 7 defined "process and handling fee" specifically, so we're good
3 : 0 3 P M 8 across the board.

3 : 0 3 P M 9 Q. Let me stop you because you said that really fast.

3 : 0 3 P M 10 What was it -- what was it about the special fraud
3 : 0 3 P M 11 alert that gave anybody any reason for encouragement?

3 : 0 3 P M 12 A. Because it now had completely defined "process and
3 : 0 3 P M 13 handling fee." And what happened was Ropes & Gray was ecstatic
3 : 0 3 P M 14 on the phone. They were beyond excited that now it's been
3 : 0 3 P M 15 100 percent defined. So we know now it's just got to assign a
3 : 0 3 P M 16 value to it.

3 : 0 3 P M 17 When we had the discussion on the conference call, we
3 : 0 3 P M 18 said wait a minute. That's when Mark White, our attorney,
3 : 0 3 P M 19 jumped in and says, "Hey, Bluewave will not sell any tests
3 : 0 3 P M 20 where a processing and handling fee is offered."

3 : 0 3 P M 21 Then I said on the phone, "Hey, y'all need to have a
3 : 0 3 P M 22 conference call with Elizabeth Strawn to confirm this" because
3 : 0 4 P M 23 I'd already called Boston. They said they were going to
3 : 0 4 P M 24 continue paying process and handling fee.

3 : 0 4 P M 25 Q. Boston HeartLab?

3 : 0 4 P M 1 A. Boston HeartLab. I had already reached out to Atherotech,
3 : 0 4 P M 2 and they said the same.

3 : 0 4 P M 3 And so -- and so that's when we had the conference
3 : 0 4 P M 4 call with Ms. Strawn. And I think she made the statement, "How
3 : 0 4 P M 5 can anybody interpret that you can still pay process and
3 : 0 4 P M 6 handling fees from this?"

3 : 0 4 P M 7 So what was interesting after reading all this stuff,
3 : 0 4 P M 8 when we read the deposition of the CEO of Boston, she had
3 : 0 4 P M 9 actually said the exact same thing. "This is great news; we
3 : 0 4 P M 10 can continue paying it." And that was in her deposition in the
3 : 0 4 P M 11 exhibits.

3 : 0 4 P M 12 Q. So did you ask that a call be made to Ms. Strawn to get
3 : 0 4 P M 13 clarification?

3 : 0 4 P M 14 A. We asked them to call her. Verbatim, for sure, yes.

3 : 0 4 P M 15 MR. COOKE: Could we see Exhibit 123.

3 : 0 4 P M 16 BY MR. COOKE:

3 : 0 4 P M 17 Q. Now, let me clarify. From the date that that special
3 : 0 5 P M 18 fraud alert came out, June 25th, did BlueWave ever sell tests
3 : 0 5 P M 19 again that had a process and handling fee associated with them?

3 : 0 5 P M 20 A. No, sir, we did not.

3 : 0 5 P M 21 Q. From that day forward?

3 : 0 5 P M 22 A. That's correct. We actually -- we had already reached out
3 : 0 5 P M 23 to Guido, who was the CEO of Singulex at the time. He had
3 : 0 5 P M 24 actually made the decision we're going to drop process and
3 : 0 5 P M 25 handling fees, we're going to pay it through the end of the

3 : 0 5 P M 1 month.

3 : 0 5 P M 2 Our statement was you need to drop it today. Don't
3 : 0 5 P M 3 take a risk in that situation.

3 : 0 5 P M 4 Q. All right. And so did you get an email from Linda Flipppo
3 : 0 5 P M 5 on or about -- well, exactly June 30th -- I'm sorry -- from
3 : 0 5 P M 6 Tonya Mallory at 7:27 p.m. on June 30th?

3 : 0 5 P M 7 A. It looks like we did.

3 : 0 5 P M 8 Q. Okay. And can you read slowly what she said. Read it out
3 : 0 6 P M 9 loud.

3 : 0 6 P M 10 A. Sure. "Cal and Brad, Laura and Brien from Ropes & Gray
3 : 0 6 P M 11 had a chance to speak with Elizabeth Strawn. Elizabeth
3 : 0 6 P M 12 confirmed that this advisory was written by the OIG person
3 : 0 6 P M 13 working on our case and has been present in the room when our
3 : 0 6 P M 14 attorneys met with them. The OIG person is a female, but I
3 : 0 6 P M 15 forgot her name.

3 : 0 6 P M 16 "Laura and Brien said they spoke to Elizabeth for
3 : 0 6 P M 17 about 20 minutes. Elizabeth told Ropes & Gray that they have
3 : 0 6 P M 18 never had a situation like this in the past where an advisory
3 : 0 6 P M 19 was written in the middle of an investigation and admitted that
3 : 0 6 P M 20 these are typically written when there are areas that are vague
3 : 0 6 P M 21 or not spoken that need to be clarified.

3 : 0 6 P M 22 "Elizabeth clarified that the intention of this
3 : 0 6 P M 23 advisory was to state that there is no possible scenario in
3 : 0 6 P M 24 which process and handling fee payments were okay and to stop
3 : 0 6 P M 25 the practice in the market. Ropes & Gray explained that there

3 : 0 6 P M 1 are many in the market that believes that it" --

3 : 0 6 P M 2 Q. Go to the next page.

3 : 0 7 P M 3 A. -- that it blesses the use of process and handling fee and
3 : 0 7 P M 4 will continue to use them. Elizabeth repeated several times
3 : 0 7 P M 5 that the intention was to make it clear there was no possible
3 : 0 7 P M 6 scenario in which P&H was okay. She was interested to hear
3 : 0 7 P M 7 more about those companies that will continue the practice.

3 : 0 7 P M 8 "This concludes that we have -- that we have to move
3 : 0 7 P M 9 forward with discontinuing. We would like to get the letters
3 : 0 7 P M 10 out tomorrow to get ahead of LabCorp talking to our practices."

3 : 0 7 P M 11 Q. "To get ahead of LabCorp talking to our practices"? What
3 : 0 7 P M 12 was the concern about LabCorp talking to your practices?

3 : 0 7 P M 13 A. As I mentioned earlier, they were going to run straight to
3 : 0 7 P M 14 our practices and say "aha." So we knew they were going to
3 : 0 7 P M 15 focus on actually anybody that offered process and handling fee
3 : 0 7 P M 16 and try to immediately switch over the business that day. And
3 : 0 7 P M 17 because they do have so many phlebotomists on staff, they could
3 : 0 7 P M 18 throw them in there immediately, whereas, if we're in a
3 : 0 8 P M 19 situation, it's going to take us months to do that.

3 : 0 8 P M 20 Q. Mr. Johnson, was there ever a time when you resolved that
3 : 0 8 P M 21 you were going to defy the Anti-Kickback Statute or any other
3 : 0 8 P M 22 law and skirt the law in some way?

3 : 0 8 P M 23 A. I'm sorry. Would you repeat the question.

3 : 0 8 P M 24 Q. Was there ever a time when you decided that Bluewave or
3 : 0 8 P M 25 that yourself was going to either defy the law or try to skirt

3 : 0 8 P M 1 the law in some way?

3 : 0 8 P M 2 A. No, sir.

3 : 0 8 P M 3 Q. Did you ever do anything that, even in hindsight, you
3 : 0 8 P M 4 believe may have encouraged any of your contractors or anybody
3 : 0 8 P M 5 else working with you to disobey or to skirt the law?

3 : 0 8 P M 6 A. No, sir.

3 : 0 8 P M 7 Q. What were you waiting for? What did you want to get from
3 : 0 8 P M 8 the government to decide how to move forward with regard to
3 : 0 9 P M 9 your business model?

3 : 0 9 P M 10 A. One more time with your question.

3 : 0 9 P M 11 Q. What were you -- what, if anything, were you waiting for
3 : 0 9 P M 12 before you would decide how to move forward with your business
3 : 0 9 P M 13 model?

3 : 0 9 P M 14 A. What were we waiting for from the government?

3 : 0 9 P M 15 Q. Yes.

3 : 0 9 P M 16 A. I think clarification. And when they came out with this,
3 : 0 9 P M 17 that was clarification to stop now. I think I even said it in
3 : 0 9 P M 18 my deposition with the government. I says, "Hey, listen. Just
3 : 0 9 P M 19 tell us to stop. Just say stop now." We would have stopped.

3 : 0 9 P M 20 There was -- that was never given to anybody. They
3 : 0 9 P M 21 would never say those words. I don't know why, but, if
3 : 0 9 P M 22 somebody would have just said, "Hey, stop," I think I would
3 : 0 9 P M 23 have said "Okay. Done. No problem whatsoever."

3 : 0 9 P M 24 And that's why, if you look across the board when you
3 : 0 9 P M 25 look at a lot of this stuff, even Linda Flippo stated in the

3 : 0 9 P M 1 summit meeting there was confusion. And there was confusion.
3 : 0 9 P M 2 So nobody still had concrete information, stop. You know, it
3 : 1 0 P M 3 was like we don't know, we're not sure, maybe, possibly.
3 : 1 0 P M 4 That's it. And that's all that's ever been discussed.

3 : 1 0 P M 5 Q. But why would you even take a chance? why don't you, in
3 : 1 0 P M 6 your line of work, want to push the envelope for getting just
3 : 1 0 P M 7 as close to the line as you can get?

3 : 1 0 P M 8 A. well, I mean, I don't think we was pushing the line. I
3 : 1 0 P M 9 don't believe we were skating the line. There was so many
3 : 1 0 P M 10 legal opinions out there pertaining to this, number one.

3 : 1 0 P M 11 Number two, at the same time, you had so many
3 : 1 0 P M 12 companies offering it. In the scope of this investigation,
3 : 1 0 P M 13 there was more companies coming out offering processing and
3 : 1 0 P M 14 handling fees than there were before the investigation began,
3 : 1 0 P M 15 which is even more interesting when you start looking at it.

3 : 1 0 P M 16 So it's -- you know, you're sort of sitting here
3 : 1 0 P M 17 looking -- you know, as I said, I think you gave the analogy of
3 : 1 0 P M 18 driving down the road. And now all of a sudden, the speed
3 : 1 0 P M 19 limit is 35. Before you'd been doing 50. And now all of a
3 : 1 1 P M 20 sudden you're now stopped. I mean, there's a little confusion
3 : 1 1 P M 21 there.

3 : 1 1 P M 22 Q. Did this special fraud alert or the interview with
3 : 1 1 P M 23 Ms. Strawn reveal that the government also considered it to be
3 : 1 1 P M 24 illegal to have an independent contractor commission
3 : 1 1 P M 25 arrangement for sales?

3 : 1 1 P M 1 A. No, sir. That's never been discussed at all.

3 : 1 1 P M 2 Q. And then what about the waiver of the copay for TRICARE?

3 : 1 1 P M 3 A. Again, no, sir. As I said, the first time we ever heard
3 : 1 1 P M 4 anything about it was in my meeting with her.

3 : 1 1 P M 5 MR. COOKE: That's all. Thank you.

3 : 1 1 P M 6 THE COURT: Cross-examination?

3 : 1 1 P M 7 MR. LEVENTIS: Thank you.

3 : 1 1 P M 8 CROSS-EXAMINATION

3 : 1 1 P M 9 BY MR. LEVENTIS:

3 : 1 1 P M 10 Q. All right. Good afternoon. I was beginning to wonder if
3 : 1 1 P M 11 I was going to get up here or not. Let's get started. Good
3 : 1 1 P M 12 afternoon, Mr. Johnson.

3 : 1 1 P M 13 So you testified on Friday that BlueWave sales rep
3 : 1 1 P M 14 Richard Yunger was a good friend of yours.

3 : 1 1 P M 15 He was one of the original BlueWave sales reps; is
3 : 1 2 P M 16 that right?

3 : 1 2 P M 17 A. He was one of the initial five, correct.

3 : 1 2 P M 18 Q. And back in June of 2010, you and Mr. Yunger recruited a
3 : 1 2 P M 19 Dr. Jonathan Fialkow.

3 : 1 2 P M 20 Do you remember Dr. Fialkow in Florida?

3 : 1 2 P M 21 A. I remember Richard talking about Dr. Fialkow.

3 : 1 2 P M 22 Q. He's a doctor in Miami, Florida; and you and Richard were
3 : 1 2 P M 23 trying to get him to start ordering HDL tests, weren't you?

3 : 1 2 P M 24 A. Richard was trying to sell him tests, correct.

3 : 1 2 P M 25 Q. And in 2010, Dr. Fialkow was ordering tests from Berkeley

3 : 1 2 P M 1 HeartLab, and you and Richard were trying to get this doctor to
3 : 1 2 P M 2 switch to HDL; correct?

3 : 1 2 P M 3 A. Richard was trying to get the account to switch to HDL. I
3 : 1 2 P M 4 think the lead had came from Russ Warnick with HDL. So I don't
3 : 1 2 P M 5 personally know Dr. Fialkow. I know Richard had went down two
3 : 1 2 P M 6 or three times to call on him.

3 : 1 2 P M 7 Q. Okay. We heard last week sometime from a Dr. Hollins and
3 : 1 2 P M 8 a Dr. Alam. We talked about a medical advisory board where you
3 : 1 2 P M 9 can earn up to \$2,500 every time you get together.

3 : 1 3 P M 10 Do you remember that testimony?

3 : 1 3 P M 11 A. I do.

3 : 1 3 P M 12 Q. And so you talked to Dr. Fialkow about the medical
3 : 1 3 P M 13 advisory board, didn't you?

3 : 1 3 P M 14 A. No, I did not.

3 : 1 3 P M 15 Q. And Richard said that he was confident that, if you could
3 : 1 3 P M 16 get Fialkow on the medical advisory board, he would switch to
3 : 1 3 P M 17 HDL, didn't he?

3 : 1 3 P M 18 A. I think Richard stated something in one of the exhibits or
3 : 1 3 P M 19 an email.

3 : 1 3 P M 20 Q. Richard actually told you that this doctor actually looked
3 : 1 3 P M 21 at the medical advisory board opportunity as a reason to select
3 : 1 3 P M 22 HDL over Berkeley, didn't he.

3 : 1 3 P M 23 A. I don't think he ever switched to HDL, and I don't think
3 : 1 3 P M 24 we ever put him on the advisory board under any circumstances.
3 : 1 3 P M 25 I know my recommendation was for him not to be on the advisory

3 : 1 3 P M 1 board.

3 : 1 3 P M 2 Q. You recommended for him not to be on the advisory board?

3 : 1 3 P M 3 A. Not to be on the advisory board. I knew Richard --

3 : 1 3 P M 4 MR. LEVENTIS: Your Honor, may I approach?

3 : 1 3 P M 5 THE COURT: You may.

3 : 1 3 P M 6 BY MR. LEVENTIS:

3 : 1 3 P M 7 Q. This is Government's Exhibit 7018. It's not yet in
3 : 1 3 P M 8 evidence. If you could take a look at that for me.

3 : 1 3 P M 9 This appears to be an email exchange at the top here
3 : 1 4 P M 10 between you and Tonya Mallory and Cal Dent; is that correct?

3 : 1 4 P M 11 A. Hold on a second. I'm reading the email.

3 : 1 4 P M 12 Q. Sure.

3 : 1 4 P M 13 A. Yes, it's from Tonya to myself and Cal.

3 : 1 4 P M 14 MR. LEVENTIS: Okay. Your Honor, the government
3 : 1 4 P M 15 would move into evidence Plaintiffs' Exhibit 7018.

3 : 1 4 P M 16 THE COURT: Mr. Cooke?

3 : 1 4 P M 17 MR. COOKE: Standing objection.

3 : 1 4 P M 18 THE COURT: Very good.

3 : 1 4 P M 19 MR. ASHMORE: No objection, Your Honor.

3 : 1 4 P M 20 THE COURT: Very good. Government's 7018 admitted
3 : 1 4 P M 21 over Bluewave objections.

3 : 1 4 P M 22 MR. LEVENTIS: Okay. Let's go -- we'll go to page 6,
3 : 1 4 P M 23 if you would, Peter.

3 : 1 4 P M 24 BY MR. LEVENTIS:

3 : 1 4 P M 25 Q. We'll start back here where we're talking about

3 : 1 5 P M 1 Dr. Fialkow. There's a Jeffrey Kaplan, CEO of Heartwell LLP.

3 : 1 5 P M 2 Is that Dr. Fialkow's practice?

3 : 1 5 P M 3 A. Are the pages supposed to be cross-numbered?

3 : 1 5 P M 4 Q. I'm sorry?

3 : 1 5 P M 5 A. I got 6 as the last page, 7 as the page before it.

3 : 1 5 P M 6 Q. That one may be stapled in the wrong order. If you just
3 : 1 5 P M 7 want to pull it up, yeah, there should be 7 total pages.

3 : 1 5 P M 8 A. Okay. So I'm looking at page 6?

3 : 1 5 P M 9 Q. Yes, sir. It says, quoting Jeff Kaplan, "Do we invoice
3 : 1 5 P M 10 you or do you keep track?"

3 : 1 5 P M 11 Peter, which page are you on now? Let's see. The
3 : 1 5 P M 12 one right before it there, Peter. Yep, there we go. Oh,
3 : 1 5 P M 13 that's page 7. Looks like this one has got the wrong page
3 : 1 5 P M 14 numbers, too.

3 : 1 5 P M 15 Keep going down. It looks like 6 got there on the
3 : 1 5 P M 16 end. I apologize. Keep going down Peter. That looks like
3 : 1 6 P M 17 that one is page 6. Keep going down. Yeah, this is -- I
3 : 1 6 P M 18 apologize.

3 : 1 6 P M 19 This one is out of order, too, Mr. Johnson. So this
3 : 1 6 P M 20 is page 6.

3 : 1 6 P M 21 It says, "Do we invoice you or do you keep track?
3 : 1 6 P M 22 FYI, as of 1 p.m. today, he had ordered 14 tests for HDL. I'm
3 : 1 6 P M 23 keeping my fingers crossed." And he says, "What are the steps
3 : 1 6 P M 24 for getting him on the advisory board?"

3 : 1 6 P M 25 So after only 14 tests, I'm looking to get on the

3 : 1 6 P M 1 advisory board?

3 : 1 6 P M 2 A. No, sir. Dr. Fialkow was a lead generator for Russ
3 : 1 6 P M 3 warnick. Dr. Fialkow was -- what had been communicated to me
3 : 1 6 P M 4 was considered to be an expert thought leader in the South --
3 : 1 6 P M 5 South state of Florida.

3 : 1 6 P M 6 And so I know Richard had been trying to sell to him
3 : 1 6 P M 7 the whole time. Dr. Fialkow kept asking to be on the medical
3 : 1 6 P M 8 advisory board. To my knowledge, he never was on the medical
3 : 1 6 P M 9 advisory board.

3 : 1 6 P M 10 MR. LEVENTIS: Okay. Let's go to page 5, Peter.

3 : 1 6 P M 11 BY MR. LEVENTIS:

3 : 1 6 P M 12 Q. Mr. Johnson, we're going to go to page 5, if we can get it
3 : 1 7 P M 13 up on the screen here. There we go. Let's go down kind of
3 : 1 7 P M 14 middle of the page. It's an email from Jeff Kaplan to Richard
3 : 1 7 P M 15 Yunger on Friday, June 18th, 2010. It's to -- from Jeff to
3 : 1 7 P M 16 Richard Yunger and Tonya Mallory.

3 : 1 7 P M 17 It says, "Dr. Fialkow has started receiving results
3 : 1 7 P M 18 from HDL. I believe during one week last month he sent all
3 : 1 7 P M 19 specimens to HDL to see how you compare to Berkeley. Can we
3 : 1 7 P M 20 arrange a call in approximately two weeks to discuss results
3 : 1 7 P M 21 and impressions? Any update on the advisory board?"

3 : 1 7 P M 22 Do you see that?

3 : 1 7 P M 23 A. I do.

3 : 1 7 P M 24 Q. Okay. Now let's go to page 4. Towards the middle of the
3 : 1 7 P M 25 page here, do you see original message from Russ Warnick to

3 : 1 7 P M 1 Tonya Mallory, Richard Yunger, Joe McConnell?

3 : 1 7 P M 2 "Rich, do you think it's time to approach Fialkow
3 : 1 7 P M 3 about joining the medical advisory board?"

3 : 1 8 P M 4 And just above that, Richard says, "Probably. Not
3 : 1 8 P M 5 real high volume so far. He and Jeff have been asking and
3 : 1 8 P M 6 likely will expect for him to be added. I do think he will
3 : 1 8 P M 7 provide us with many leads in the area, though."

3 : 1 8 P M 8 I think that gets to what you were talking about
3 : 1 8 P M 9 there, Mr. Johnson; is that right?

3 : 1 8 P M 10 A. Yeah. Hold on one second. Who's Jeff?

3 : 1 8 P M 11 Q. That appears to be the COO of Dr. Fialkow's practice.

3 : 1 8 P M 12 We'll turn to page 3. Mr. Warnick replies, "Rich" --
3 : 1 8 P M 13 you see this is Russ Warnick, Monday, June 21, 2010, to
3 : 1 8 P M 14 Mr. Yunger and Tonya Mallory.

3 : 1 8 P M 15 "Rich, do you think appropriate to ask Brad for
3 : 1 8 P M 16 recommendation, i.e., how he fits in the overall strategy and
3 : 1 8 P M 17 how much will he help us build volume in the Miami area?

3 : 1 8 P M 18 "Tonya, what do you think about adding Fialkow to the
3 : 1 8 P M 19 medical advisory board?"

3 : 1 8 P M 20 Let's go to above there and see what Mr. Yunger
3 : 1 8 P M 21 replies back.

3 : 1 9 P M 22 A. What page are we on? 2?

3 : 1 9 P M 23 Q. No, sir. We're on page 3. It's on the screen as well if
3 : 1 9 P M 24 it's easier.

3 : 1 9 P M 25 A. I'm just trying to read it.

3 : 1 9 P M 1 Q. Okay. We've got from Mr. Yunger to Russ Warnick.

3 : 1 9 P M 2 Mr. Yunger is a Bluewave rep, says, "I'm confident that if we
3 : 1 9 P M 3 don't add him" -- being Dr. Fialkow -- "as a medical advisory
3 : 1 9 P M 4 board, we will lose whatever business we get from him. He
3 : 1 9 P M 5 looked at this opportunity as a reason to select HDL over
3 : 1 9 P M 6 Berkeley.

3 : 1 9 P M 7 "Brad" -- I presume, that's you, Mr. Johnson --
3 : 1 9 P M 8 "won't be impressed with the volume, but it could go higher if
3 : 1 9 P M 9 he gets the rest of the docs in his practice on board."

3 : 1 9 P M 10 Do you see that?

3 : 1 9 P M 11 A. I do.

3 : 1 9 P M 12 Q. Now let's go to page 2. Tonya Mallory chimes in and she
3 : 1 9 P M 13 says, "Brad, this is your call." And she sends that email to
3 : 1 9 P M 14 you.

3 : 1 9 P M 15 And then you respond to Ms. Mallory, "We'll get back
3 : 2 0 P M 16 with you. Want to talk to the NMR rep in Miami first."

3 : 2 0 P M 17 A. Okay.

3 : 2 0 P M 18 Q. So Ms. Mallory left it up to you to decide about
3 : 2 0 P M 19 Dr. Fialkow, didn't she?

3 : 2 0 P M 20 A. As far as being on the medical advisory board?

3 : 2 0 P M 21 Q. Correct.

3 : 2 0 P M 22 A. Well, I mean, he was a friend of Russ's, and Russ was
3 : 2 0 P M 23 pushing for it. And as I said, I'm pretty sure I turned it
3 : 2 0 P M 24 down a hundred percent. I didn't want him on the advisory
3 : 2 0 P M 25 board. Richard had called on him four different times, and --

3 : 2 0 P M 1 Q. You wouldn't want somebody on the advisory board that only
3 : 2 0 P M 2 wants to be on the advisory board because that's the only
3 : 2 0 P M 3 reason he'll order HDL, isn't it?

3 : 2 0 P M 4 A. I'm sorry?

3 : 2 0 P M 5 Q. You wouldn't want him on the advisory board if the only
3 : 2 0 P M 6 reason he wanted on is to choose HDL over Berkeley; is that
3 : 2 0 P M 7 right?

3 : 2 0 P M 8 A. I wouldn't want him on the board if he was not going to be
3 : 2 0 P M 9 an ordering provider, one. Two, I wouldn't want him on the
3 : 2 0 P M 10 advisory board if he's not going to be a thought leader in the
3 : 2 0 P M 11 community and people don't respect him, truth be known, I don't
3 : 2 1 P M 12 want him in that situation.

3 : 2 1 P M 13 Q. All right.

3 : 2 1 P M 14 A. As I said, this is a lead from Russ Warnick, who is
3 : 2 1 P M 15 wanting him -- I think we ended up dropping him all together.

3 : 2 1 P M 16 Q. All right. Let's move to the Plavix test. We've talked
3 : 2 1 P M 17 about that, the CYP2C19 test.

3 : 2 1 P M 18 A. Yes, sir.

3 : 2 1 P M 19 Q. We've heard Dr. Trost talk about it. We've heard plenty
3 : 2 1 P M 20 of people discuss it.

3 : 2 1 P M 21 You recall this test being on the HDL panel; right?

3 : 2 1 P M 22 A. It was on the panel.

3 : 2 1 P M 23 Q. And you and BlueWave pushed sales reps to get doctors to
3 : 2 1 P M 24 order the Plavix test on all of their patients, didn't you?

3 : 2 1 P M 25 A. We sold the -- 2CPY -- CYP2C19 test. We did sell the

3 : 2 1 P M 1 test, correct. It helped that insurance companies had
3 : 2 1 P M 2 fax-blasted all of the cardiology practices and all the big
3 : 2 1 P M 3 Plavix users across the board in order to use the test. That
3 : 2 1 P M 4 was actually one of the biggest advantages about selling the
3 : 2 1 P M 5 test, because we already had somebody out there trying to sell
3 : 2 1 P M 6 it.

3 : 2 1 P M 7 And what I mean by that is, since Plavix costs
3 : 2 2 P M 8 \$300-plus a month, it was one of those things that insurance
3 : 2 2 P M 9 companies had fax-blasted and wanted the physicians to start
3 : 2 2 P M 10 ordering the test.

3 : 2 2 P M 11 Q. Mr. Johnson, you told your friend Burt Lively, who we had
3 : 2 2 P M 12 here last week, you told him to get doctors to put
3 : 2 2 P M 13 prescriptions on Plavix for his doctors, didn't you?

3 : 2 2 P M 14 A. I told him to sell the test and, if they wanted to order a
3 : 2 2 P M 15 test or get a prescription written for it. Yes, that's right.

3 : 2 2 P M 16 Q. I'm going to show you government's Exhibit 7022.

3 : 2 2 P M 17 May I approach, Your Honor?

3 : 2 2 P M 18 THE COURT: You may.

3 : 2 2 P M 19 MR. LEVENTIS: Thank you.

3 : 2 2 P M 20 BY MR. LEVENTIS:

3 : 2 2 P M 21 Q. Take a look at this one. Mr. Johnson, this appears to be
3 : 2 3 P M 22 an email exchange between you and Burt Lively in July of 2010;
3 : 2 3 P M 23 doesn't it?

3 : 2 3 P M 24 A. Yes, sir.

3 : 2 3 P M 25 MR. LEVENTIS: Your Honor, we would move into

3 : 2 3 P M 1 evidence Government's Exhibit 7022?

3 : 2 3 P M 2 THE COURT: Is there an objection?

3 : 2 3 P M 3 MR. COOKE: Standing objection.

3 : 2 3 P M 4 MR. ASHMORE: No objection.

3 : 2 3 P M 5 THE COURT: Very good. Plaintiffs' Exhibit 7022
3 : 2 3 P M 6 admitted over objection of BlueWave.

3 : 2 3 P M 7 MR. LEVENTIS: Thank you, Your Honor.

3 : 2 3 P M 8 BY MR. LEVENTIS:

3 : 2 3 P M 9 Q. Let's look at your email to Mr. Lively on July 15th, 2010.
3 : 2 3 P M 10 It's right in the middle there.

3 : 2 3 P M 11 A. Okay.

3 : 2 3 P M 12 Q. You emailed to Mr. Lively, "Get some scripts on Plavix
3 : 2 3 P M 13 from your docs. You got to come on. You are behind on
3 : 2 3 P M 14 Singulex and Plavix add-ons."

3 : 2 3 P M 15 what are add-ons?

3 : 2 3 P M 16 A. Add-ons -- when a new test comes out -- and this is
3 : 2 3 P M 17 originated from Berkeley. When a new test comes out, if a
3 : 2 3 P M 18 physician wants the test -- a perfect example is Bruce Trippe
3 : 2 3 P M 19 here, endocrinologist in Montgomery, Alabama.

3 : 2 4 P M 20 when the test came out, I said, "Hey, we have the
3 : 2 4 P M 21 CN2Y219 test."

3 : 2 4 P M 22 He said, "I want it, Brad."

3 : 2 4 P M 23 And I said, "You have the option of running it on
3 : 2 4 P M 24 your previous patients."

3 : 2 4 P M 25 He said, "Run it. Rock and roll with it."

3 : 2 4 P M 1 And so our focus was selling the test. If the
3 : 2 4 P M 2 physicians wanted it, that's the way we proceeded. At
3 : 2 4 P M 3 Berkeley, it was the Plavix test which is the -- not Plavix
3 : 2 4 P M 4 test -- Lp-PLA2 test. Sorry. That test came out, and it was
3 : 2 4 P M 5 actually encouraged in order to do it the same way.

3 : 2 4 P M 6 Q. So I believe you testified earlier that we have an email
3 : 2 4 P M 7 where you said for reps to get Plavix on the doctor's forms.

3 : 2 4 P M 8 And I think your testimony was it was just to get it
3 : 2 4 P M 9 on the form, not to get them to order it; is that right?

3 : 2 4 P M 10 A. It was twofold. One, to get it on the form and, two, to
3 : 2 4 P M 11 start selling the test.

3 : 2 4 P M 12 Q. Okay.

3 : 2 4 P M 13 A. It's just like a menu. If you go to a local restaurant
3 : 2 5 P M 14 here and they're wanting to sell the salmon that day, it's the
3 : 2 5 P M 15 same analogy.

3 : 2 5 P M 16 Q. And the selling of the test is what Burt's getting at.
3 : 2 5 P M 17 That's what he understood; right?

3 : 2 5 P M 18 He responds to you, "You can hammer me on anything
3 : 2 5 P M 19 except Plavix adds." He says, "Trippe 700, Pitman 400, Bullock
3 : 2 5 P M 20 200."

3 : 2 5 P M 21 A. Yeah.

3 : 2 5 P M 22 Q. "I got the orders."

3 : 2 5 P M 23 So he understood what you were telling him to do is
3 : 2 5 P M 24 go get Plavix ordered on all these patients, weren't you?

3 : 2 5 P M 25 A. He was going to sell the test.

3 : 2 5 P M 1 Q. And he sold them, didn't he?

3 : 2 5 P M 2 A. Oh, he always did. He did a good job.

3 : 2 5 P M 3 Q. Okay. You even had doctors you convinced to order the
3 : 2 5 P M 4 Plavix tests on stored frozen blood; didn't you?

3 : 2 5 P M 5 A. Actually, when they wrote a prescription and if they
3 : 2 5 P M 6 wanted it run for previous patients, it was sent to HDL. I
3 : 2 5 P M 7 don't know what blood it was run on, off the top of my head.

3 : 2 6 P M 8 Q. Okay. Here, let's take a look at an email.

3 : 2 6 P M 9 A. Okay.

3 : 2 6 P M 10 Q. This is Government's Exhibit 1092.

3 : 2 6 P M 11 MR. LEVENTIS: May I approach, Your Honor?

3 : 2 6 P M 12 THE COURT: Yes.

3 : 2 6 P M 13 MR. LEVENTIS: Thank you.

3 : 2 6 P M 14 BY MR. LEVENTIS:

3 : 2 6 P M 15 Q. Take a look at that one.

3 : 2 6 P M 16 All right. Mr. Johnson, this appears to be an email
3 : 2 6 P M 17 exchange between you and Tonya Mallory in July of 2010; is that
3 : 2 6 P M 18 right?

3 : 2 6 P M 19 A. Okay. Yes, sir.

3 : 2 6 P M 20 MR. LEVENTIS: Okay. We would move to admit
3 : 2 6 P M 21 Government's Exhibit 1092 into evidence.

3 : 2 6 P M 22 THE COURT: Any objection?

3 : 2 6 P M 23 MR. COOKE: No objection.

3 : 2 6 P M 24 MR. ASHMORE: No objection.

3 : 2 6 P M 25 THE COURT: Very good. Plaintiffs' Exhibit 1092

3 : 2 6 P M 1 admitted without objection.

3 : 2 6 P M 2 MR. LEVENTIS: Peter, if we could go to page 3.

3 : 2 6 P M 3 BY MR. LEVENTIS:

3 : 2 6 P M 4 Q. Mr. Johnson, we'll start at the end with -- where the
3 : 2 6 P M 5 email string starts. We've got an email from Steve Norris. We
6 heard about him earlier. He's an HDL employee.

3 : 2 7 P M 7 A. Yeah.

3 : 2 7 P M 8 Q. He's emailing some other HDL employees on July 6th of
3 : 2 7 P M 9 2010. It says, "Terry, I believe this is the first big reorder
3 : 2 7 P M 10 for a genetic test. Dr. Trippe would like us to run the
3 : 2 7 P M 11 CYP2C19 test on all of his existing samples."

3 : 2 7 P M 12 Do you see that?

3 : 2 7 P M 13 A. I do.

3 : 2 7 P M 14 Q. Then right above that --

3 : 2 7 P M 15 A. wait a minute. Hold on.

3 : 2 7 P M 16 Q. -- Tonya sends this message to you. And she says "Brad,
3 : 2 7 P M 17 can you confirm that Dr. Trippe wants us to go back and measure
3 : 2 7 P M 18 the Plavix test on all samples we have in frozen storage?"

3 : 2 7 P M 19 Do you see that?

3 : 2 7 P M 20 A. I see that.

3 : 2 7 P M 21 Q. So these aren't new samples being taken.

3 : 2 7 P M 22 These are ones that HDL has held from patients and
3 : 2 7 P M 23 kept in the freezer; is that right?

3 : 2 7 P M 24 A. That's correct.

3 : 2 7 P M 25 Q. "Also, has he said how he wants to receive the results?

3 : 2 7 P M 1 Does he want a single report per patient, which would be many
3 : 2 7 P M 2 pages? Or does he want a list of patients by genotype, which
3 : 2 7 P M 3 would only be about three pages but more difficult for his
3 : 2 8 P M 4 files?"

3 : 2 8 P M 5 Do you see that?

3 : 2 8 P M 6 A. I do.

3 : 2 8 P M 7 Q. And your response -- if we can turn to page 2,
3 : 2 8 P M 8 Mr. Johnson, you told Ms. Mallory on July 6th, "all patients";
3 : 2 8 P M 9 right?

3 : 2 8 P M 10 A. Uh-huh.

3 : 2 8 P M 11 Q. "And what's easiest for us."

3 : 2 8 P M 12 A. Okay.

3 : 2 8 P M 13 Q. Is that right?

3 : 2 8 P M 14 A. Uh-huh.

3 : 2 8 P M 15 Q. I don't see anything about easiest for the patient in
3 : 2 8 P M 16 there. Easiest for us?

3 : 2 8 P M 17 A. Well, I mean, if the physicians ask to run the test on the
3 : 2 8 P M 18 patients, and he wants the report back and he stated what's the
3 : 2 8 P M 19 easiest, so, long story short, he's going to get the report and
3 : 2 8 P M 20 then contact his patients and go over the results. So, I mean,
3 : 2 8 P M 21 again, this is a physician requesting these tests to be run on
3 : 2 8 P M 22 his patients. And I guess I'm confused on where you're going,
3 : 2 8 P M 23 but go ahead.

3 : 2 8 P M 24 Q. Okay. Thank you. Let's move along.

3 : 2 8 P M 25 we've talked about the pro forma that you and Burt

3 : 2 8 P M 1 Lively put together to Lori Mallory at Kansas City Internal
3 : 2 9 P M 2 Medicine?

3 : 2 9 P M 3 A. Yes.

3 : 2 9 P M 4 Q. We -- I think we overlooked a couple of things I'd like to
3 : 2 9 P M 5 make sure we point out. This is Exhibit 1612.

3 : 2 9 P M 6 A. Okay.

3 : 2 9 P M 7 MR. LEVENTIS: Can you pull that one up, please.
3 : 2 9 P M 8 Thank you.

3 : 2 9 P M 9 BY MR. LEVENTIS:

3 : 2 9 P M 10 Q. You testified Friday that -- and I believe again today,
3 : 2 9 P M 11 about how you used a similar form at Berkeley HeartLab;
3 : 2 9 P M 12 correct? And you continued to use these at Bluewave. This
3 : 2 9 P M 13 example here is from Bluewave; right?

3 : 2 9 P M 14 A. Yes, sir, this one was used at Bluewave.

3 : 2 9 P M 15 Q. And at Bluewave, you used those pro formas as a financial
3 : 2 9 P M 16 incentive for doctors, didn't you?

3 : 2 9 P M 17 A. No, sir. This was the only time that I ever utilized this
3 : 2 9 P M 18 thing or told Burt to send it to them. And it was because of
3 : 2 9 P M 19 the fact we were trained, done it at Berkeley hundreds of
3 : 2 9 P M 20 times. And, at the same time, all Burt did is plug in the
3 : 2 9 P M 21 numbers to the account.

3 : 2 9 P M 22 And at the same time, in addition to that, they were
3 : 2 9 P M 23 wanting their information on why the clinic down the street was
3 : 3 0 P M 24 a Berkeley clinic or a "for my heart risk reduction center,"
3 : 3 0 P M 25 however Frank wanted to word it then.

3 : 3 0 P M 1 Q. I understand you want to talk about what everybody else is
3 : 3 0 P M 2 doing, but I want to talk about what Bluewave is doing. Okay?

3 : 3 0 P M 3 A. Sure.

3 : 3 0 P M 4 Q. So in this email that is a Bluewave email, we looked
3 : 3 0 P M 5 through here, and you, or Mr. Lively at your request, is saying
3 : 3 0 P M 6 your process and handling fee based on 200 specimens per week
3 : 3 0 P M 7 would be \$4,000 a week?

3 : 3 0 P M 8 A. Okay.

3 : 3 0 P M 9 Q. Is that not talking about financial incentive?

3 : 3 0 P M 10 A. Well, he's stating that the process and handling fees
3 : 3 0 P M 11 would be \$4,000 a week.

3 : 3 0 P M 12 Q. Exactly.

3 : 3 0 P M 13 A. But he also didn't state in there you would need right at
3 : 3 0 P M 14 seven phlebotomists to offer -- or do 200 specimens a week.

3 : 3 0 P M 15 Q. Right, because, lower down, he says, "Then, with the
3 : 3 0 P M 16 additional revenue, the weekly follow-up totals for these
3 : 3 0 P M 17 follow-up visits would be another \$16,200." And he calls it
3 : 3 0 P M 18 "lipid clinic revenue."

3 : 3 0 P M 19 And then, below that, he says that that "would
3 : 3 0 P M 20 provide your practice a net revenue of \$547,600, over half a
3 : 3 1 P M 21 million dollars."

3 : 3 1 P M 22 A. Uh-huh.

3 : 3 1 P M 23 Q. And you're telling us that's not a financial incentive?

3 : 3 1 P M 24 A. Long story short, this is what we did at Berkeley across
3 : 3 1 P M 25 the board. In addition to that, the lipid clinic revenue is

3 : 3 1 P M 1 based on follow-up visits. If you get more information on a
3 : 3 1 P M 2 patient, you're going to have to do the follow-up.

3 : 3 1 P M 3 Q. Right. And that's what you're telling them. You order
3 : 3 1 P M 4 our test, you get follow-ups, and look at the other money you
3 : 3 1 P M 5 can make on the follow-ups. And that's how you get to over
3 : 3 1 P M 6 half a million dollars, isn't it?

3 : 3 1 P M 7 A. Go ahead.

3 : 3 1 P M 8 Q. Okay. Let's look at the chart, then.

3 : 3 1 P M 9 A. Okay.

3 : 3 1 P M 10 Q. The attachment. Now, over here on the left, it
3 : 3 1 P M 11 specifically says "lab revenue." And it says 200 HDL tests
3 : 3 1 P M 12 times \$20 equals \$4,000; right?

3 : 3 1 P M 13 A. Uh-huh. Yes, sir.

3 : 3 1 P M 14 Q. Okay. And then, below that, it nets out at \$547,000 --

3 : 3 2 P M 15 A. Okay.

3 : 3 2 P M 16 Q. -- in net revenue?

3 : 3 2 P M 17 A. Okay.

3 : 3 2 P M 18 Q. Okay. Just wanted to clarify that. Let's move on.

3 : 3 2 P M 19 And I guess, as part of this, we've seen there are
3 : 3 2 P M 20 email exchanges that's not just between you and Cal Dent, but
3 : 3 2 P M 21 you include Tonya Mallory in these discussions too; right?

3 : 3 2 P M 22 A. I'm not sure what you're talking about.

3 : 3 2 P M 23 Q. Well, you testified in your deposition, for example, that
3 : 3 2 P M 24 it was all three of you that agreed on the process and handling
3 : 3 2 P M 25 amount; right? Do you remember that testimony?

3 : 3 2 P M 1 A. Actually, Russ Warnick, Tonya, myself, and Cal, as well as
3 : 3 2 P M 2 Joe McConnell, which -- we had thrown out a number and said,
3 : 3 2 P M 3 hey, we thought this was fair market value. We asked Tonya to
3 : 3 2 P M 4 do a study on it. And she can confirm because she had done one
3 : 3 2 P M 5 at Berkeley already, and we told her to be sure to do an
3 : 3 2 P M 6 external time and motion study to confirm that as well. And
3 : 3 2 P M 7 she did.

3 : 3 2 P M 8 Q. It's interesting you bring up the other HDL folks --

3 : 3 2 P M 9 A. Okay.

3 : 3 2 P M 10 Q. -- because, in 2012, do you remember the HDL board of
3 : 3 2 P M 11 directors deciding that if something were to happen to Tonya
3 : 3 3 P M 12 Mallory, you would be the one to take over CEO?

3 : 3 3 P M 13 A. I do. I got actually asked -- they had asked would I be
3 : 3 3 P M 14 interested in coming on board before the subpoena. In addition
3 : 3 3 P M 15 to that, I was asked if something had happened to Tonya, Russ,
3 : 3 3 P M 16 and Joe. And even Tonya had stated, would you be interested in
3 : 3 3 P M 17 coming in and running HDL?

3 : 3 3 P M 18 And I says -- I said I'd have to discuss that with my
3 : 3 3 P M 19 wife, number one. Number two is I don't know how that
3 : 3 3 P M 20 relationship would work with having Bluewave.

3 : 3 3 P M 21 Q. In that board of directors meeting, you said you would
3 : 3 3 P M 22 help Joe, Russ, and Dennis if something happens and you all
3 : 3 3 P M 23 would be there together?

3 : 3 3 P M 24 A. Yeah. I think Dennis would be added as a board member at
3 : 3 3 P M 25 that time.

3 : 3 3 P M 1 Q. Okay. Let's talk about the targeting. That's been a
3 : 3 3 P M 2 topic we've discussed here?

3 : 3 3 P M 3 A. Please.

3 : 3 3 P M 4 Q. And we've heard plenty of discussion, actually, on Friday.
3 : 3 3 P M 5 You talked about money hungry, and you said, "I put that down."

3 : 3 3 P M 6 A. I did.

3 : 3 3 P M 7 Q. You said, "I did. I'm not going to lie. Likes money or
3 : 3 4 P M 8 at least the thought of making money."

3 : 3 4 P M 9 "All right. Let's address that. Big word. Go
3 : 3 4 P M 10 through on this one."

3 : 3 4 P M 11 "One, you have to realize these guys are more cutting
3 : 3 4 P M 12 edge. These guys do make the majority of the money. They're
3 : 3 4 P M 13 physicians that do the best out there. They're the ones that
3 : 3 4 P M 14 also have the nuclear machines. They're the ones that have the
3 : 3 4 P M 15 DEXA machines. They're the ones that see the most patients.
3 : 3 4 P M 16 If you look, they're also the ones like Dr. Alam was talking."

3 : 3 4 P M 17 So do you recall being deposed in 2011 when Berkeley
3 : 3 4 P M 18 sued BlueWave and HDL?

3 : 3 4 P M 19 A. Do I remember talking --

3 : 3 4 P M 20 Q. Do you remember being deposed?

3 : 3 4 P M 21 A. I do.

3 : 3 4 P M 22 Q. And they asked you about that same money-hungry criteria
3 : 3 4 P M 23 back then?

3 : 3 4 P M 24 A. Uh-huh.

3 : 3 4 P M 25 Q. And back in 2011 said that money hungry meant that the

3 : 3 4 P M 1 doctors need more revenue for their practice. Do you remember
3 : 3 4 P M 2 that?

3 : 3 4 P M 3 A. I do not remember that. I need to see that.

3 : 3 4 P M 4 Q. And you continued to use that same money-hungry criteria
3 : 3 4 P M 5 while you were at BlueWave?

3 : 3 5 P M 6 THE COURT: Mr. Leventis, he asked if he could see
3 : 3 5 P M 7 that.

3 : 3 5 P M 8 MR. LEVENTIS: Oh, I didn't hear that.

3 : 3 5 P M 9 THE COURT: If you could show him his testimony.

3 : 3 5 P M 10 MR. LEVENTIS: I'll need to get a clean --

3 : 3 5 P M 11 THE COURT: Please.

3 : 3 5 P M 12 MR. LEVENTIS: May I approach, Your Honor?

3 : 3 5 P M 13 THE COURT: You may.

3 : 3 5 P M 14 BY MR. LEVENTIS:

3 : 3 5 P M 15 Q. I do apologize. This has highlighting on it, Mr. Johnson.
3 : 3 5 P M 16 That will show you where I'm talking about.

3 : 3 6 P M 17 A. I didn't say "needs more revenue for the practice." The
3 : 3 6 P M 18 question was -- asked that, and I said "uh-huh."

3 : 3 6 P M 19 Q. Why don't you read it out loud.

3 : 3 6 P M 20 A. Sure.

3 : 3 6 P M 21 Q. Sure. Start at line 8 on page 17.

3 : 3 6 P M 22 A. There are about eight qualities?

3 : 3 6 P M 23 Q. Yeah. What qualities, if any, do you look for in a
3 : 3 6 P M 24 potential target for business you want to try to develop?

3 : 3 6 P M 25 A. Okay. Okay.

3 : 3 6 P M 1 "Can you list them?"

3 : 3 6 P M 2 "Number 1 is the physician actually needs to think
3 : 3 6 P M 3 he's smarter than the average physician.

3 : 3 6 P M 4 "Number 2, he needs to be an early adopter and
3 : 3 6 P M 5 innovator, cutting edge, jumps on new things first, whether it
3 : 3 6 P M 6 be nuclear testing or" -- I don't know what that means.

3 : 3 6 P M 7 "Number 3, has the ability to draw their own blood or
3 : 3 6 P M 8 have the ability to -- actually, have the ability to draw blood
3 : 3 6 P M 9 or have their own lab.

3 : 3 6 P M 10 "Number 4" -- she's typing this, and I'm going too
3 : 3 6 P M 11 fast.

3 : 3 6 P M 12 **THE COURT:** Yes, I'm going to ask you to slow down.

3 : 3 6 P M 13 **THE WITNESS:** Sorry. It even says that here.

3 : 3 7 P M 14 **THE COURT:** You at least something --

3 : 3 7 P M 15 **THE WITNESS:** That's why I was sitting here looking.

3 : 3 7 P M 16 So Number 3 was "draw your own blood or have a
3 : 3 7 P M 17 lab."

3 : 3 7 P M 18 "Number 4, money hungry."

3 : 3 7 P M 19 "What do you mean by that?"

3 : 3 7 P M 20 "Money hungry, starving."

3 : 3 7 P M 21 "Needs more revenue for the practice?"

3 : 3 7 P M 22 "Uh-huh. Number five, small man groups, four or
3 : 3 7 P M 23 less."

3 : 3 7 P M 24 **THE COURT:** I believe that's answered the question.

3 : 3 7 P M 25 **THE WITNESS:** Uh-huh.

3 : 3 7 P M 1 MR. LEVENTIS: Yes.

3 : 3 7 P M 2 BY MR. LEVENTIS:

3 : 3 7 P M 3 Q. Did you catch that part, Mr. Johnson?

3 : 3 7 P M 4 A. I said "needs" --

3 : 3 7 P M 5 Q. She asked you, "Needs more revenue for their practice?"

3 : 3 7 P M 6 And you say "uh-huh."

3 : 3 7 P M 7 A. Uh-huh. Well, I mean, they're business physicians. And,
3 : 3 7 P M 8 I mean, so -- they're more cutting edge across the board.

3 : 3 7 P M 9 These are best tests. These are more cutting edge. If I give
3 : 3 7 P M 10 you more information, are you going to find more things? Yes,
3 : 3 7 P M 11 you are.

3 : 3 7 P M 12 I mean, that's -- that's just given -- simple,
3 : 3 7 P M 13 because you take a lipid panel of four tests and then you take
3 : 3 8 P M 14 one of our panels and show a lot of information on it, it's --
3 : 3 8 P M 15 you're going to find information you didn't see. One of the
3 : 3 8 P M 16 biggest catches with selling the test was always your best
3 : 3 8 P M 17 friend, six months ago, that you patted on the back and said
3 : 3 8 P M 18 "hey, you're doing good," when you checked him, this time
3 : 3 8 P M 19 you're going to see something different. You're going to have
3 : 3 8 P M 20 to treat him different. So -- but still --

3 : 3 8 P M 21 THE COURT: You can continue.

3 : 3 8 P M 22 MR. LEVENTIS: Okay. Thank you, Your Honor.

3 : 3 8 P M 23 BY MR. LEVENTIS:

3 : 3 8 P M 24 Q. Again, under your direction, you had Sandra Tankersley.
3 : 3 8 P M 25 we've talked about her. She's the receptionist, I believe you

3 : 3 8 P M 1 described her as?

3 : 3 8 P M 2 A. She was one, yes.

3 : 3 8 P M 3 Q. Okay. And you had her, in May of 2012, email the
3 : 3 8 P M 4 physician criteria list around that has this money hungry
3 : 3 8 P M 5 section in it. You had her email this around to a number of
3 : 3 8 P M 6 different sales reps.

3 : 3 8 P M 7 This is already in evidence. It's Exhibit 1260.
3 : 3 8 P M 8 Let's pull that one up. Here's the header for it. From Sandra
3 : 3 8 P M 9 Tankersley, May 3rd, 2012. The attachment is the physician
3 : 3 8 P M 10 criteria list. And this is sent to a number of different sales
3 : 3 9 P M 11 reps. We heard from Kevin Carrier. He testified here. We've
3 : 3 9 P M 12 heard you describe Julie Harding. She was out in Washington?

3 : 3 9 P M 13 A. Uh-huh.

3 : 3 9 P M 14 Q. Shane Marquess, we've heard about.

3 : 3 9 P M 15 So let's turn to the attachment. I believe it's
3 : 3 9 P M 16 page 3. There we go.

3 : 3 9 P M 17 There is the physician criteria list. Number 6,
3 : 3 9 P M 18 there's money hungry.

3 : 3 9 P M 19 A. Okay.

3 : 3 9 P M 20 Q. Okay. And, in fact, you know, you talked about Julie
3 : 3 9 P M 21 Harding earlier. You went out and you trained her, didn't you?
3 : 3 9 P M 22 You visited her in Washington?

3 : 3 9 P M 23 A. I did.

3 : 3 9 P M 24 Q. And you sat down with her and you actually helped her put
3 : 3 9 P M 25 together this Primary Care Northwest proposal, didn't you?

3 : 3 9 P M 1 A. No, sir, I did not.

3 : 3 9 P M 2 Q. Okay.

3 : 3 9 P M 3 Let's pull up that proposal. It's Exhibit 1158.

3 : 3 9 P M 4 1158? The defendants put it in earlier today. There we go.

3 : 3 9 P M 5 So, first, let's check the header here. This is in
3 : 3 9 P M 6 2012, so going forward in time. It's still being used here in
3 : 3 9 P M 7 2012. Julie Harding. She sent it to Jeff -- what we're about
3 : 4 0 P M 8 to look at is Jeff Steadman. He's also a BlueWave sales rep.

3 : 4 0 P M 9 "Hi, Jeff. Attached are the cheats that were shared
3 : 4 0 P M 10 with me as well as the proposal. The proposal was based on 40
3 : 4 0 P M 11 lipid panels per day."

3 : 4 0 P M 12 Let's turn to the attachment, page 3. This looks
3 : 4 0 P M 13 eerily like some of the other pro formas that we've seen.
3 : 4 0 P M 14 You're saying you didn't have a hand in putting this together,
3 : 4 0 P M 15 Mr. Johnson?

3 : 4 0 P M 16 A. No, sir, I did not. Actually, Jeff and Jennifer -- it was
3 : 4 0 P M 17 Julie. Excuse me. Jeff and Julie were actually partners
3 : 4 0 P M 18 together.

3 : 4 0 P M 19 Q. And so here we see the same thing we've seen in other pro
3 : 4 0 P M 20 formas. You got the \$20 handling fee, the current volume, how
3 : 4 0 P M 21 much they can make currently. Then you throw in potential
3 : 4 0 P M 22 volume, what they can make annually. There's current volume
3 : 4 0 P M 23 per year, potential volume per year, and a missed potential of
3 : 4 0 P M 24 \$170,000 to \$175,000 per year.

3 : 4 0 P M 25 That's a lot of money, isn't it, Mr. Johnson?

3 : 4 1 P M 1 A. Based on this.

3 : 4 1 P M 2 Q. Okay. And then we've got Exhibit 1035.

3 : 4 1 P M 3 If you could pull that one up.

3 : 4 1 P M 4 So Ms. Harding sent her pro forma to Jeff Steadman,
3 : 4 1 P M 5 another BlueWave sales rep?

3 : 4 1 P M 6 A. That was her partner.

3 : 4 1 P M 7 Q. Okay. Her partner. Thank you.

3 : 4 1 P M 8 Jeff says, "I made a few changes to your original.
3 : 4 1 P M 9 Just thought I'd share. I will be presenting this today to all
3 : 4 1 P M 10 12 providers."

3 : 4 1 P M 11 Let's take a look at the one he put together. As you
3 : 4 1 P M 12 had mentioned before, Jeff is even a little more aggressive
3 : 4 1 P M 13 with his. He has P&H missed potential of \$145,000 per year of
3 : 4 1 P M 14 just P&H reimbursement. Then, like you've talked about, you
3 : 4 1 P M 15 get all these follow-up office visits; right? So you can make
3 : 4 1 P M 16 another over half million dollars with that. And so this
3 : 4 1 P M 17 BlueWave sales rep was telling Blackfoot Medical Practice they
3 : 4 1 P M 18 have a total missed revenue of \$691,000 a year. And you're
3 : 4 2 P M 19 telling me that's not a financial incentive?

3 : 4 2 P M 20 A. I'm telling you we -- I only saw this a month or two
3 : 4 2 P M 21 months ago. We did not promote this, period.

3 : 4 2 P M 22 Q. You didn't use pro formas to promote HDL tests?

3 : 4 2 P M 23 A. I did not. That lipid clinic pro forma on that one
3 : 4 2 P M 24 account, they asked what they were doing down the street. And
3 : 4 2 P M 25 it's really easy to recall exactly what we did at Berkeley,

3 : 4 2 P M 1 which was no problem. So that's what Burt sent to them. I

3 : 4 2 P M 2 knew that they were not going to be an account. I gave them

3 : 4 2 P M 3 the information they requested, and that was it.

3 : 4 2 P M 4 Q. I understand, Mr. Johnson, you -- let's see. What did I
3 : 4 2 P M 5 do with it? You keep wanting to talk about Berkeley HeartLab,
3 : 4 2 P M 6 what they were doing rather than BlueWave. Let me just, while
3 : 4 2 P M 7 we're on that, I'm going to show you Exhibit 7023.

3 : 4 2 P M 8 Berkeley HeartLab stopped paying P&H in 2012, didn't
3 : 4 3 P M 9 they?

3 : 4 3 P M 10 A. I think so.

3 : 4 3 P M 11 MR. LEVENTIS: Your Honor, may I approach?

3 : 4 3 P M 12 THE COURT: You may.

3 : 4 3 P M 13 BY MR. LEVENTIS:

3 : 4 3 P M 14 Q. Government's Exhibit 7023. This appears to be an email
3 : 4 3 P M 15 exchange between you, Tonya Mallory, and Cal Dent.

3 : 4 3 P M 16 A. Okay.

3 : 4 3 P M 17 Q. Is that right?

3 : 4 3 P M 18 A. Uh-huh.

3 : 4 3 P M 19 MR. LEVENTIS: We would move Government's
3 : 4 3 P M 20 Exhibit 7023 into evidence.

3 : 4 3 P M 21 THE COURT: Any objection?

3 : 4 3 P M 22 MR. COOKE: Standing objection.

3 : 4 3 P M 23 MR. ASHMORE: No objection.

3 : 4 3 P M 24 THE COURT: Very good. Plaintiffs' 7023 admitted
3 : 4 3 P M 25 over BlueWave objections.

3 : 4 3 P M 1 BY MR. LEVENTIS:

3 : 4 3 P M 2 Q. Now, the main gist of this email is about the NLA warning.
3 : 4 3 P M 3 we've walked about that in our context, where the National
3 : 4 3 P M 4 Lipid Association warned its members about the P&H fee issue.
3 : 4 3 P M 5 But this email, the reason I want you to look at this top part
3 : 4 3 P M 6 is Cal Dent is emailing you and Tonya Mallory in August of
3 : 4 3 P M 7 2012.

3 : 4 3 P M 8 A. Uh-huh.

3 : 4 3 P M 9 Q. And he's saying, "Last time I checked, Atherotech pays
3 : 4 3 P M 10 P&H. This is most likely coming from Berkeley, Celera, Quest
3 : 4 4 P M 11 who no longer pays P&H."

3 : 4 4 P M 12 That was effective January 31st, 2012.

3 : 4 4 P M 13 A. Okay.

3 : 4 4 P M 14 Q. Is that right? So Berkeley is not paying anymore after
3 : 4 4 P M 15 2012, are they?

3 : 4 4 P M 16 A. I guess they dropped it right in there. So --

3 : 4 4 P M 17 Q. All right.

3 : 4 4 P M 18 A. What was interesting about the NLA meeting, though, or the
3 : 4 4 P M 19 NLA warning, it came from Atherotech.

3 : 4 4 P M 20 Q. Okay. Let me just finish up this thought on the
3 : 4 4 P M 21 targeting. One last email I want to bring to your attention,
3 : 4 4 P M 22 and that is that, as late as 2013, Bluewave sales reps were
3 : 4 4 P M 23 still using that list, weren't they? They were still using
3 : 4 4 P M 24 that targeting criteria?

3 : 4 4 P M 25 A. I couldn't tell you. I'm sure it was out there. I think

3 : 4 4 P M 1 it was out with all the companies by then.

3 : 4 4 P M 2 Q. You said you think it was out there?

3 : 4 4 P M 3 A. I think it was out there with all the companies, yes.

3 : 4 4 P M 4 Q. Was it out there with BlueWave?

3 : 4 4 P M 5 A. I'm sure it might have been.

3 : 4 4 P M 6 MR. LEVENTIS: May I approach, Your Honor?

3 : 4 4 P M 7 THE COURT: You may.

3 : 4 4 P M 8 BY MR. LEVENTIS:

3 : 4 4 P M 9 Q. This is Government's Exhibit 7021. I'll give you that
3 : 4 5 P M 10 one.

3 : 4 5 P M 11 A. Okay.

3 : 4 5 P M 12 Q. All right. So this is an email from Julie Harding, the
3 : 4 5 P M 13 BlueWave sales rep we were talking about before, in January
3 : 4 5 P M 14 2013. And -- well, I guess, first, let me move to -- I don't
3 : 4 5 P M 15 have the number written down on my version. What number did I
3 : 4 5 P M 16 say? 7021?

3 : 4 5 P M 17 THE COURT: Is there an objection?

3 : 4 5 P M 18 MR. COOKE: Standing objection.

3 : 4 5 P M 19 MR. ASHMORE: No objection.

3 : 4 5 P M 20 THE COURT: Plaintiffs' 7021 admitted over BlueWave
3 : 4 5 P M 21 objection.

3 : 4 5 P M 22 BY MR. LEVENTIS:

3 : 4 5 P M 23 Q. So do you remember a helper named Lori Bianchini
3 : 4 5 P M 24 (phonetically)?

3 : 4 5 P M 25 A. Never heard of her.

3 : 4 5 P M 1 Q. We talked about helpers, Charles Maimone and Len Blasko,
2 that setup. Here, Julie is emailing her helper in 2013. And
3 if you look down, lo and behold, she says, "The criteria that
4 make a provider the perfect target." Look there. There's that
5 physician criteria list that includes money hungry. That's in
6 2013, isn't it?

3 : 4 6 P M 7 A. Yes, sir.

3 : 4 6 P M 8 Q. Now, again, speaking to Julie Harding, do you recall an
3 : 4 6 P M 9 issue she had with a promotional speech that Dr. Tom Dayspring
3 : 4 6 P M 10 did for HDL in 2012?

3 : 4 6 P M 11 A. I do not.

3 : 4 6 P M 12 Q. Dr. Dayspring had given his opinion that one of the HDL
3 : 4 6 P M 13 tests had no value. It was the small-density LDL test. Do you
3 : 4 6 P M 14 remember that?

3 : 4 6 P M 15 A. I do not.

3 : 4 6 P M 16 Q. And HDL emailed Dr. Dayspring to ask if in the future he
3 : 4 6 P M 17 could sidestep such questions if he thinks the answer will have
3 : 4 6 P M 18 a negative impact on sales. Do you remember that?

3 : 4 6 P M 19 A. I do not.

3 : 4 6 P M 20 Q. Let me show you Exhibit 7019.

3 : 4 6 P M 21 MR. LEVENTIS: May I approach, Your Honor?

3 : 4 6 P M 22 THE COURT: You may.

3 : 4 6 P M 23 MR. LEVENTIS: Thank you.

3 : 4 7 P M 24 BY MR. LEVENTIS:

3 : 4 7 P M 25 Q. There you go.

3 : 4 7 P M 1 All right. So as you see here at the top, it's an
3 : 4 7 P M 2 email from Julie Harding to you, November 15th of 2012. Do you
3 : 4 7 P M 3 see that?

3 : 4 7 P M 4 A. I do.

3 : 4 7 P M 5 MR. LEVENTIS: Your Honor, we would move Exhibit 7019
3 : 4 7 P M 6 into evidence.

3 : 4 7 P M 7 THE COURT: Is there any objection?

3 : 4 7 P M 8 MR. COOKE: Standing objection.

3 : 4 7 P M 9 MR. ASHMORE: No objection, Your Honor.

3 : 4 7 P M 10 THE COURT: Plaintiffs' 7019 admitted over BlueWave
3 : 4 7 P M 11 objection.

3 : 4 7 P M 12 MR. LEVENTIS: Thank you, Your Honor.

3 : 4 7 P M 13 BY MR. LEVENTIS:

3 : 4 7 P M 14 Q. Let's turn to the second page -- well, first, we'll show
3 : 4 7 P M 15 there's Julie Harding to Brad Johnson, November 15th, 2012.
3 : 4 7 P M 16 She says "Thank you."

3 : 4 7 P M 17 Let's go back to where this thing starts. Let's go
3 : 4 7 P M 18 to page 2.

3 : 4 7 P M 19 A. Which page?

3 : 4 7 P M 20 Q. Page 2 down there at the bottom.

3 : 4 7 P M 21 It has the line beside it, Peter, "Dear
3 : 4 7 P M 22 Dr. Dayspring."

3 : 4 7 P M 23 A. I see that.

3 : 4 7 P M 24 Q. So this is from Tonya Mallory. It says, "Dear
3 : 4 7 P M 25 Dr. Dayspring, I have been asking for feedback from the field

3 : 4 8 P M 1 about many different things. And during that process, I have
3 : 4 8 P M 2 received feedback with some concerns about how you present at
3 : 4 8 P M 3 some of the talks you give. I hope you will not take offense
3 : 4 8 P M 4 to this, but it is important to let you know. A specific
3 : 4 8 P M 5 example that was provided was your opinion of SDLDL."

3 : 4 8 P M 6 Is that small-density LDL tests?

3 : 4 8 P M 7 A. That is correct.

3 : 4 8 P M 8 Q. Is that one of the ones HDL offers?

3 : 4 8 P M 9 A. That is a test HDL offers as well as Berkeley.

3 : 4 8 P M 10 Q. "According to the sales guys, they have heard you say that
3 : 4 8 P M 11 you do not give any value to that test and only use LDLP.

3 : 4 8 P M 12 while that might be true, expressing this opinion in an open
3 : 4 8 P M 13 conversation or dinner presentation creates a big problem for
3 : 4 8 P M 14 the sales guys because it makes them look like they have duped
3 : 4 8 P M 15 a doc into ordering something that they don't need, which is
3 : 4 8 P M 16 not true because, even though some docs may not need it, the
3 : 4 8 P M 17 health coaches really do need it. Could you please be really
3 : 4 9 P M 18 carefully with these types of questions as they come up? I
3 : 4 9 P M 19 hate to ask this, but if they ask you this question, could you
3 : 4 9 P M 20 sidestep, if you think the answer will have a negative impact
3 : 4 9 P M 21 on sales, or even meet with the rep in advance to get a
3 : 4 9 P M 22 heads-up on what he expects to be problem questions."

3 : 4 9 P M 23 Then we'll go back -- so she emails that to --

3 : 4 9 P M 24 Dr. Dayspring responds, and then Tonya Mallory sends this
3 : 4 9 P M 25 exchange on November 14th, 2012, on the first page to you and

3 : 4 9 P M 1 defendant Cal Dent. And Tonya tells you, "he" -- being
3 : 4 9 P M 2 Dr. Dayspring -- "has confirmed that he will be on his Ps and
3 : 4 9 P M 3 Qs. Let me know."

3 : 4 9 P M 4 And then you forward that on to Julie. What did you
3 : 4 9 P M 5 think she meant by he would be on his Ps and Qs?

3 : 5 0 P M 6 A. Hold on one second.

3 : 5 0 P M 7 What was your question? I'm sorry.

3 : 5 0 P M 8 Q. What did you think Ms. Mallory meant when she said that
3 : 5 0 P M 9 the doctor had confirmed that he will be on his Ps and Qs?

3 : 5 0 P M 10 A. I'm sure that he would meet with a sales representative to
3 : 5 0 P M 11 see if there was going to be an issue in advance.

3 : 5 0 P M 12 Q. Okay. Let's move on. I wanted to make sure to talk about
3 : 5 0 P M 13 this Navigant study that came up again.

3 : 5 0 P M 14 A. Okay.

3 : 5 0 P M 15 Q. We're at Exhibit -- let's see. I think it was admitted as
3 : 5 0 P M 16 a BlueWave exhibit.

3 : 5 0 P M 17 BlueWave 142; is that right?

3 : 5 0 P M 18 Okay. Navigant study here. Now, the test money, I
3 : 5 0 P M 19 believe you had something along the lines of this study, you
3 : 5 0 P M 20 think shows you guys were -- validates everything you're doing
3 : 5 1 P M 21 and Singulex was excited about the results. That's what I
3 : 5 1 P M 22 wrote down. Does that sound right?

3 : 5 1 P M 23 A. That is correct.

3 : 5 1 P M 24 Q. Okay. Let's turn to page 3.

3 : 5 1 P M 25 It's kind of in the middle there, Peter.

3 : 5 1 P M 1 It says, "In order to assess any potential risks" --
3 : 5 1 P M 2 I want to make clear what Navigant was looking at, Mr. Johnson.

3 : 5 1 P M 3 "In order to assess any potential risks, the
3 : 5 1 P M 4 following documents were reviewed: Applicable policies,
3 : 5 1 P M 5 Bluewave communications responding to NCI document requests" --
3 : 5 1 P M 6 which is Navigant; right?

3 : 5 1 P M 7 A. Uh-huh.

3 : 5 1 P M 8 Q. So your communications with Navigant.

3 : 5 1 P M 9 "Marketing materials," but looks like only those
3 : 5 1 P M 10 provided by Singulex.

3 : 5 1 P M 11 "HIPAA certification, conference call logs,
3 : 5 1 P M 12 independent contractor contracts." And then they've got this
3 : 5 1 P M 13 "Singulex processing and handling agreement" between Singulex
3 : 5 1 P M 14 and the physician. Now, I believe Mr. Cooke asked you about
3 : 5 1 P M 15 that, and you -- and he said, "Was the P&H amount shared?" And
3 : 5 1 P M 16 you said something to the effect of it should have been.

3 : 5 2 P M 17 Do you know if that P&H amount was shared with
3 : 5 2 P M 18 Navigant?

3 : 5 2 P M 19 A. Yes, it was. I mean, it -- Singulex created it. It was
3 : 5 2 P M 20 between Singulex and the physician.

3 : 5 2 P M 21 Q. Okay. Let's -- I believe this is not yet into evidence.
3 : 5 2 P M 22 Let's talk about this one. This is Plaintiffs' Exhibit 1433.

3 : 5 2 P M 23 MR. LEVENTIS: May I approach, Your Honor?

3 : 5 2 P M 24 THE COURT: You may.

3 : 5 2 P M 25 MR. LEVENTIS: Thank you.

3 : 5 2 P M 1 **BY MR. LEVENTIS:**

3 : 5 2 P M 2 **Q.** Take a look at that one. So, Mr. Johnson, this appears to
3 : 5 2 P M 3 be an email between Sandra Tankersley, Chris Castro -- who
3 : 5 2 P M 4 appears to be with Navigant -- and you, defendant Cal Dent, and
3 : 5 2 P M 5 some others. Do you see that up at the top?

3 : 5 3 P M 6 **A.** I do.

3 : 5 3 P M 7 **MR. LEVENTIS:** Your Honor, we would move Government's
3 : 5 3 P M 8 Exhibit 1433 into evidence.

3 : 5 3 P M 9 **THE COURT:** Any objection?

3 : 5 3 P M 10 **MR. COOKE:** No objection.

3 : 5 3 P M 11 **MR. ASHMORE:** No objection.

3 : 5 3 P M 12 **THE COURT:** Very good. Plaintiffs' 1433 admitted
3 : 5 3 P M 13 without objection.

3 : 5 3 P M 14 **BY MR. LEVENTIS:**

3 : 5 3 P M 15 **Q.** Okay. So this document appears to be providing Navigant
3 : 5 3 P M 16 with some of these documents I just read off. And I'm just
3 : 5 3 P M 17 going to -- I just want to quickly point out here at the
3 : 5 3 P M 18 bottom, in Number 2, Ms. Tankersley is telling Navigant -- it's
3 : 5 3 P M 19 in the second paragraph. At the bottom, it says, "For quick
3 : 5 3 P M 20 reference, I'm attaching a copy of the processing and handling
3 : 5 3 P M 21 agreement. The agreement is self-explanatory and readily
3 : 5 3 P M 22 available to independent sales contractors."

3 : 5 3 P M 23 Do you see that?

3 : 5 3 P M 24 **A.** I do.

3 : 5 3 P M 25 **Q.** So let's look at the contract that was shared with

3 : 5 3 P M 1 Navigant. It is on page 10. Take a look at paragraph A,
3 : 5 3 P M 2 Mr. Johnson.

3 : 5 3 P M 3 Let's pull that up, Peter.

3 : 5 4 P M 4 MR. PHANEUF: I'm sorry. I didn't hear you.

3 : 5 4 P M 5 MR. LEVENTIS: Can you blow up paragraph A for me so
3 : 5 4 P M 6 we can see it a little better.

3 : 5 4 P M 7 BY MR. LEVENTIS:

3 : 5 4 P M 8 Q. "Singulex will reimburse physician a process and handling
3 : 5 4 P M 9 fee of" --

3 : 5 4 P M 10 A. Which one are you at? I'm sorry. I was --

3 : 5 4 P M 11 Q. Look up on the screen.

3 : 5 4 P M 12 A. I apologize. I was looking at another agreement.

3 : 5 4 P M 13 Q. Okay. The P&H amount is blacked out, isn't it,
3 : 5 4 P M 14 Mr. Johnson?

3 : 5 4 P M 15 A. It is.

3 : 5 4 P M 16 Q. So Navigant didn't know how much P&H you guys were paying,
3 : 5 4 P M 17 did they?

3 : 5 4 P M 18 A. Actually, Singulex set the amount. Singulex provided the
3 : 5 4 P M 19 amount. Singulex provided the document, yes.

3 : 5 4 P M 20 Q. Right. So it's Singulex's fault. Is that what you're
3 : 5 4 P M 21 saying?

3 : 5 4 P M 22 A. I'm saying this is a Singulex document. Singulex paid
3 : 5 4 P M 23 them for the audit. So I know they had this information.

3 : 5 4 P M 24 Q. All right. Well, let's go to page 3 again of the Navigant
3 : 5 4 P M 25 report. I think it's -- can you get to page 3, the list of

1 documents that were reviewed. It's the Navigant report. It
2 is -- sorry. It's Exhibit 1087 on page 3.

3 All right. I want to talk about things that were not
4 shared with Navigant. We just saw that list there.

5 So tell me, did you share with Navigant any of the
6 pro formas that we've been looking at?

7 A. I would not know what was provided from Sandra.

8 Q. Did you send them the Burt Lively pro forma? You were
9 involved in that one, weren't you?

10 A. We did not share that.

11 Q. Did you send them any of the emails you had from
12 physicians whose attorneys were questioning the legality of the
13 P&H payments?

14 A. Yes, sir. Anytime someone had a question regarding the
15 processing and handling regarding Singulex, that was sent
16 straight to them.

17 Q. Okay. So on Navigant's list here, tell me which number on
18 this list those attorney warnings would have been provided
19 through. They weren't provided to Navigant, were they,
20 Mr. Johnson?

21 A. What do you mean?

22 Q. The attorneys warnings.

23 A. Attorney warnings?

24 Q. Did you provide those to Navigant?

25 A. Anytime we had one, we sent it to them, yes, we did.

3 : 5 6 P M 1 Q. Mr. Johnson, maybe I'm not asking the question correctly.

3 : 5 6 P M 2 THE COURT: I think he's thinking Singulex.

3 : 5 6 P M 3 Mr. Johnson, did you send it to Navigant?

3 : 5 6 P M 4 THE WITNESS: That's correct. We sent everybody to
3 : 5 6 P M 5 Singulex.

3 : 5 6 P M 6 THE COURT: His question is, did you send those
3 : 5 6 P M 7 letters to Navigant?

3 : 5 6 P M 8 THE WITNESS: I would not know if those went to
3 : 5 6 P M 9 Navigant or not. I know they went to Singulex, so --
3 : 5 6 P M 10 because --

3 : 5 6 P M 11 BY MR. LEVENTIS:

3 : 5 6 P M 12 Q. Right. But we're talking about Navigant, Mr. Johnson.

3 : 5 6 P M 13 A. Okay. But Singulex -- never mind. I'll say it.

3 : 5 6 P M 14 Q. Go ahead.

3 : 5 6 P M 15 A. Navigant was paid by Singulex, and they did an audit
3 : 5 6 P M 16 between Singulex and Bluewave looking at their relationships
3 : 5 6 P M 17 and making sure we was all on the same page. So I --

3 : 5 6 P M 18 Q. Right. I'm just trying to find out, how can they be on
3 : 5 6 P M 19 the same page if you're not giving them all the documents,
3 : 5 6 P M 20 Mr. Johnson?

3 : 5 6 P M 21 A. We gave them all the documents that pertained to Singulex.
3 : 5 6 P M 22 We didn't give them documents pertaining to HDL. And the
3 : 5 7 P M 23 reason behind it is -- I think I mentioned this earlier -- you
3 : 5 7 P M 24 got to realize Singulex was a competitor of HDL any which way
3 : 5 7 P M 25 you looked at it. They asked for our contractors from our

3 : 5 7 P M 1 HDL -- or BlueWave HDL contracts. And according to Gene
3 : 5 7 P M 2 Sellers, that would have violated a confidentiality agreement
3 : 5 7 P M 3 with HDL and -- so --

3 : 5 7 P M 4 Q. Mr. Johnson, I mean, you shared -- I'll talk about
3 : 5 7 P M 5 Singulex then.

3 : 5 7 P M 6 Here's a document where you blacked out the P&H
3 : 5 7 P M 7 number, didn't you?

3 : 5 7 P M 8 A. The Singulex document?

3 : 5 7 P M 9 Q. That's all right. We can move on. Let's see. We heard
3 : 5 7 P M 10 about the Department of Justice subpoena.

3 : 5 7 P M 11 Do you remember that?

3 : 5 7 P M 12 A. The one in 2013?

3 : 5 7 P M 13 Q. Exactly. That's right. It was in January 2013; isn't
3 : 5 7 P M 14 that correct?

3 : 5 7 P M 15 A. Yes.

3 : 5 7 P M 16 MR. LEVENTIS: I don't believe it's in evidence, so
3 : 5 7 P M 17 I'd like to present Exhibit 1555.

3 : 5 7 P M 18 May I approach, Your Honor?

3 : 5 7 P M 19 THE COURT: You may.

3 : 5 7 P M 20 BY MR. LEVENTIS:

3 : 5 8 P M 21 Q. Mr. Johnson, does that look like the Department of Justice
3 : 5 8 P M 22 subpoena you received?

3 : 5 8 P M 23 A. It looks like it.

3 : 5 8 P M 24 MR. LEVENTIS: Okay. Your Honor, we'd move 1555 into
3 : 5 8 P M 25 evidence.

3 : 5 8 P M 1 MR. COOKE: No objection.

3 : 5 8 P M 2 MR. ASHMORE: No objection, Your Honor.

3 : 5 8 P M 3 THE COURT: Department -- Plaintiff 1555 is admitted
3 : 5 8 P M 4 without objection.

3 : 5 8 P M 5 Is this going to take -- I was getting ready to
3 : 5 8 P M 6 take a break. It's been about an hour and a half.

3 : 5 8 P M 7 MR. LEVENTIS: I'm trying to move --

3 : 5 8 P M 8 THE COURT: I'm not trying to rush you. What I'm
3 : 5 8 P M 9 trying to ask you is, do you want -- wish me to -- if it's not
3 : 5 8 P M 10 going to take long, we'll let you go through this. If not, I'm
3 : 5 8 P M 11 going to take a break now.

3 : 5 8 P M 12 MR. LEVENTIS: Let's go ahead and break, and then
3 : 5 8 P M 13 I'll move it.

3 : 5 8 P M 14 THE COURT: Very good. Let's take our afternoon
3 : 5 8 P M 15 break.

3 : 5 8 P M 16 (Jury out.)

3 : 5 9 P M 17 THE COURT: You may be seated.

3 : 5 9 P M 18 Mr. Leventis, I don't want you to feel like
3 : 5 9 P M 19 you're being rushed.

3 : 5 9 P M 20 MR. LEVENTIS: Oh, don't worry.

3 : 5 9 P M 21 THE COURT: I'm not trying to do that to you. I'm
3 : 5 9 P M 22 just trying to keep my jury -- we're asking them, all of us, a
3 : 5 9 P M 23 lot today. And I think after about an hour and a half, every
3 : 5 9 P M 24 study shows people start wandering. And I didn't want you to
3 : 5 9 P M 25 go into something new that would take us and break you in the

3 : 5 9 P M 1 middle of your examination.

3 : 5 9 P M 2 AS I've told you and Mr. Ashmore and Mr. Cooke,
3 : 5 9 P M 3 we are not rushing anybody here. We're going to get through
3 : 5 9 P M 4 this, as long as it takes. Obviously, Mr. Johnson was on the
3 : 5 9 P M 5 stand for a considerable period of time. That was his right to
4 : 0 0 P M 6 be heard on this, and you have -- the government has every
4 : 0 0 P M 7 right to fully cross-examine the witness. So I don't want you
4 : 0 0 P M 8 to feel rushed.

4 : 0 0 P M 9 MR. LEVENTIS: Thank you, Your Honor.

4 : 0 0 P M 10 THE COURT: If we go longer, that's what it'll be.
11 okay?

4 : 0 0 P M 12 MR. LEVENTIS: Thank you.

4 : 0 0 P M 13 THE COURT: Take a break.

4 : 0 0 P M 14 (Recess.)

4 : 1 3 P M 15 THE COURT: Please be seated.

4 : 1 3 P M 16 Any matters we need to address before we bring
4 : 1 3 P M 17 the jury back?

4 : 1 3 P M 18 MR. LEVENTIS: No, Your Honor.

4 : 1 3 P M 19 MR. COOKE: Nothing.

4 : 1 3 P M 20 THE COURT: Very good. Let's bring in the jury.
4 : 1 4 P M 21 (Whereupon the jury entered the courtroom.)

4 : 1 5 P M 22 THE COURT: Please be seated.

4 : 1 5 P M 23 Mr. Leventis, you may continue your
4 : 1 5 P M 24 cross-examination.

4 : 1 5 P M 25 MR. LEVENTIS: Thank you, Your Honor.

4 : 1 5 P M 1 BY MR. LEVENTIS:

4 : 1 5 P M 2 Q. Mr. Johnson, there's one last issue I'd like to go
4 : 1 5 P M 3 through, and that's -- just a little while ago, you started to
4 : 1 5 P M 4 talk about what was happening from June of 2013, the big summit
4 : 1 5 P M 5 meeting, I believe Mr. Cooke called it.

4 : 1 5 P M 6 Do you remember that testimony?

4 : 1 5 P M 7 A. I do.

4 : 1 5 P M 8 Q. And at that time -- I guess let me back up. When we
4 : 1 5 P M 9 broke, we had the subpoena from the Department of Justice.
4 : 1 5 P M 10 That was the beginning of 2013.

4 : 1 5 P M 11 So then you hire White Arnold & Dowd; correct?

4 : 1 5 P M 12 A. Yes.

4 : 1 5 P M 13 Q. Linda Flipppo testified last week. So we have them coming
4 : 1 6 P M 14 in representing you, and then we get to this June meeting.

4 : 1 6 P M 15 Mr. Johnson, there wasn't any confusion in June, was
4 : 1 6 P M 16 there?

4 : 1 6 P M 17 A. A lot of confusion in June.

4 : 1 6 P M 18 Q. Ropes & Gray told you the practice was a red flag and that
4 : 1 6 P M 19 the continued payment of P&H fees posed a high level of risks,
4 : 1 6 P M 20 that the Department of Justice would consider the payments to
4 : 1 6 P M 21 constitute violations of the Anti-Kickback Statute and the
4 : 1 6 P M 22 False Claims Act, and that it was prudent for HDL to stop
4 : 1 6 P M 23 paying the doctors, didn't they?

4 : 1 6 P M 24 A. No, sir, they did not.

4 : 1 6 P M 25 Q. What do you think that they said?

4 : 1 6 P M 1 A. I was there in the meetings. I know what they said.

4 : 1 6 P M 2 Q. So we've heard testimony --

4 : 1 6 P M 3 A. You asked the question. So he got up. Brien started
4 : 1 6 P M 4 talking about the meetings and direction with the government
4 : 1 6 P M 5 and went over a few things. And then his gist of the
4 : 1 6 P M 6 conversation was -- he said, "We told the government we're
4 : 1 6 P M 7 going to be the forefronts of health care. We're going to
4 : 1 6 P M 8 start going away from processing and handling fee."

4 : 1 7 P M 9 And that's when Cal said, "What"?

4 : 1 7 P M 10 And that's when Tonya said, "Wait a minute. I told
4 : 1 7 P M 11 y'all we would go away from it if everybody else is on an equal
4 : 1 7 P M 12 playing field."

4 : 1 7 P M 13 And that's when Brien -- I guess that's the name. I
4 : 1 7 P M 14 want to say Michael every time, but it's Brien. That's when
4 : 1 7 P M 15 Brien said, "Can somebody start walking me through the
4 : 1 7 P M 16 processing and handling fee, when it originated, who's all
4 : 1 7 P M 17 doing it, why they're all doing it? Walk me through everything
4 : 1 7 P M 18 about it."

4 : 1 7 P M 19 That's why, if you notice, the homework assignment
4 : 1 7 P M 20 was you get legal opinions on it, can you get processing and
4 : 1 7 P M 21 handling fee letters on it, which I faxed in Cleveland, Boston,
4 : 1 7 P M 22 LipoScience, and Atherotech on that information as well.

4 : 1 7 P M 23 And he said -- at that meeting, he said, "Okay. You
4 : 1 7 P M 24 gave us a bunch of questions. Let's look at it." That was it.
4 : 1 7 P M 25 That was the just -- after we walked out of that meeting, not

4 : 1 7 P M 1 one of our attorneys said we got to stop this today. Nobody
4 : 1 7 P M 2 said that. Even Ropes & Gray did not say we've got to stop
4 : 1 7 P M 3 this right now, period.

4 : 1 8 P M 4 Q. Okay. So we heard the testimony of Nick Pace. He was
4 : 1 8 P M 5 there.

4 : 1 8 P M 6 A. That's right.

4 : 1 8 P M 7 Q. We heard the testimony of Linda Flipppo. She was there.

4 : 1 8 P M 8 A. Uh-huh.

4 : 1 8 P M 9 Q. They weren't confused.

4 : 1 8 P M 10 A. Actually, Linda Flipppo actually stated in her -- in her
4 : 1 8 P M 11 testimony that she was confused after that meeting.

4 : 1 8 P M 12 Q. The problem was you didn't like what they had to say,
4 : 1 8 P M 13 wasn't it?

4 : 1 8 P M 14 A. No, sir. If they said, "Hey, listen, this is illegal. We
4 : 1 8 P M 15 got to go away from it," done. There was no problem. There
4 : 1 8 P M 16 was not even a question from our standpoint on it.

4 : 1 8 P M 17 Q. So as of that June meeting, what had you shared with White
4 : 1 8 P M 18 Arnold & Dowd?

4 : 1 8 P M 19 A. What did I share?

4 : 1 8 P M 20 Q. What had you shared with White Arnold & Dowd?

4 : 1 8 P M 21 A. I faxed --

4 : 1 8 P M 22 Q. Did you share with them the pro formas?

4 : 1 8 P M 23 A. No, I didn't share that lipid clinic pro forma or whatever
4 : 1 8 P M 24 you want to talk about.

4 : 1 8 P M 25 Q. Okay.

4 : 1 8 P M 1 A. But -- so I did fax the information to the lab on all the
4 : 1 8 P M 2 processing and handling fees, because I had reps from those
4 : 1 8 P M 3 companies who had them and sent them in. And I don't remember
4 : 1 8 P M 4 the next time we even talked to White Arnold & Dowd.

4 : 1 8 P M 5 Q. Okay. Now, you want to keep talking about these other
4 : 1 9 P M 6 labs. I'm asking you about what BlueWave was doing and what
4 : 1 9 P M 7 BlueWave shared with their attorney White Arnold & Dowd.

4 : 1 9 P M 8 You didn't share a pro forma with them, did you?

4 : 1 9 P M 9 A. White Arnold & Dowd had everything we had. They had
4 : 1 9 P M 10 already sent an expert in to copy, because of this subpoena
4 : 1 9 P M 11 here, every email, every hard drive, every phone, every laptop,
4 : 1 9 P M 12 every iPad. Every document that we had in our systems, they
4 : 1 9 P M 13 came in and copied that.

4 : 1 9 P M 14 So if they didn't, I need to know because we got a
4 : 1 9 P M 15 bill for about \$485,000 to say they did.

4 : 1 9 P M 16 Q. And the testimony has been that you never talked to White
4 : 1 9 P M 17 Arnold & Dowd for an opinion about processing and handling, did
4 : 1 9 P M 18 you?

4 : 1 9 P M 19 A. I did not ask them for an opinion, correct.

4 : 1 9 P M 20 Q. Because they were there at that meeting, and you knew what
4 : 1 9 P M 21 they were going to say?

4 : 1 9 P M 22 A. No, I did not know what they were going to say. Mark
4 : 1 9 P M 23 White said, "Hey, let Ropes & Gray handle this. Let them walk
4 : 1 9 P M 24 through it. We'll figure out what we're doing." That's it.

4 : 1 9 P M 25 Mark White said not one time but numerous times, "Let

4 : 2 0 P M 1 the big dogs handle this." And that's his quote over and over
4 : 2 0 P M 2 again. Now, Mark White is pretty straight and direct to the
4 : 2 0 P M 3 point.

4 : 2 0 P M 4 Q. Did Mark White know what you, Cal Dent, and Tonya Mallory
4 : 2 0 P M 5 were doing out in the field?

4 : 2 0 P M 6 A. We were not doing anything illegal out in the field.

4 : 2 0 P M 7 Q. Did Mark White know -- excuse me -- did Linda Flipppo know
4 : 2 0 P M 8 what you guys were doing out in the field?

4 : 2 0 P M 9 A. We were not doing anything illegal in the field.

4 : 2 0 P M 10 Q. Did you share with them the pro formas? Did you share
4 : 2 0 P M 11 with them the money-hungry doctor list? Did you share with
4 : 2 0 P M 12 them emails talking about how this is a lucrative business
4 : 2 0 P M 13 proposition?

4 : 2 0 P M 14 Mr. Cornwell sat there and talked -- and the Judge
4 : 2 0 P M 15 asked him a question. He said, "What did you mean by
4 : 2 0 P M 16 lucrative?"

4 : 2 0 P M 17 He said, "the process and handling fees."

4 : 2 0 P M 18 Did you tell any of those attorneys any of those
4 : 2 0 P M 19 stories?

4 : 2 0 P M 20 A. They had every document that we had pertaining to anything
4 : 2 0 P M 21 we've ever done. So everything was sitting right in front of
4 : 2 0 P M 22 them. No one ever said, "You've got to stop this."

4 : 2 0 P M 23 I really want to emphasize this. Linda Flipppo did
4 : 2 1 P M 24 say there was confusion. You can pull up her testimony. She
4 : 2 1 P M 25 said there was confusion after that meeting, and there was

4 : 2 1 P M 1 confusion after that meeting.

4 : 2 1 P M 2 Q. So --

4 : 2 1 P M 3 A. So Ropes & Gray never said stop. So --

4 : 2 1 P M 4 Q. I'm sorry. I didn't mean to interrupt you. Go ahead.

4 : 2 1 P M 5 A. That's okay.

4 : 2 1 P M 6 Q. So if they didn't know what they were doing, how did they
7 know to tell you what to stop doing?

4 : 2 1 P M 8 A. They were at the meeting with Ropes & Gray taking the
9 lead. They knew everything we were doing. We had already had
10 discussions before because when we sat down and met with Mark
11 White, John Galese & Ingram, Gene Sellers. We discussed
12 everything that was going on across the board, and there was no
13 problems.

4 : 2 1 P M 14 And I know we talked about Michael Ruggio's legal
15 opinion. We talked about all those things and what all the
16 other labs were doing in the field as well.

4 : 2 1 P M 17 Q. And Mark White and Gene Sellers, they are not health care
18 attorneys, are they?

4 : 2 1 P M 19 A. No, sir.

4 : 2 1 P M 20 Q. And so after this meeting, you feared the gig was up. And
21 so you thought, "All right. I got to figure out what else to
22 do here. Maybe I can get a favorable opinion."

4 : 2 2 P M 23 And that's why you went to Brett King, isn't it?

4 : 2 2 P M 24 A. No.

4 : 2 2 P M 25 Q. Brett King is your friend, isn't he?

4 : 2 2 P M 1 A. I sent that legal test to Brett King and asked him if he
4 : 2 2 P M 2 can take a look at it. And he says, "Hey, I've got a friend
4 : 2 2 P M 3 that can do it," which went to school with him. That was
4 : 2 2 P M 4 Lauren DeMoss. I was --

4 : 2 2 P M 5 Q. Is Brett King --

4 : 2 2 P M 6 A. Hold on.

4 : 2 2 P M 7 Q. Sorry.

4 : 2 2 P M 8 A. You asked me a question. I'd like to answer, please.

4 : 2 2 P M 9 You asked me a question. The question was, the only
4 : 2 2 P M 10 thing that I knew we didn't have had been seen by an attorney
4 : 2 2 P M 11 was the legal test. Nobody had ever sat down and physically
4 : 2 2 P M 12 graded them. And so from my standpoint, I told Cal -- I says,
4 : 2 2 P M 13 "I'd hate to know we had answers on there that were wrong," and
4 : 2 2 P M 14 that's why it was sent, period.

4 : 2 2 P M 15 Q. And so you've talked a lot about LeClairRyan, Michael
4 : 2 2 P M 16 Ruggio.

4 : 2 2 P M 17 A. Uh-huh.

4 : 2 2 P M 18 Q. Why didn't you go to them for advice?

4 : 2 2 P M 19 A. Because HDL had already hired them and already paid for
4 : 2 2 P M 20 all the advice. And she had already paid -- Tonya had already
4 : 2 3 P M 21 paid 3 or \$400,000 for the legal opinions and the Exponent
4 : 2 3 P M 22 studies and everything else.

4 : 2 3 P M 23 And also -- hold on one second. You also had
4 : 2 3 P M 24 Singulex over here. Singulex already had a legal opinion as
4 : 2 3 P M 25 well.

4 : 2 3 P M 1 You also got to realize we already had a legal
4 : 2 3 P M 2 opinion when we was at Berkeley. I would sit here -- I can
4 : 2 3 P M 3 understand your argument if we were the only person in the
4 : 2 3 P M 4 world out there that was offering the process and handling
4 : 2 3 P M 5 fees, but we were not.

4 : 2 3 P M 6 And the thing was is what was even more interesting
4 : 2 3 P M 7 is Atherotech was offering it. Boston was offering it.
4 : 2 3 P M 8 Cleveland was offering it, Tethys. All these other labs were
4 : 2 3 P M 9 offering this, and all of them had legal opinions. And we've
4 : 2 3 P M 10 even seen the exact legal opinions they've had since the
4 : 2 3 P M 11 exhibits have now been produced, which confirms what we'd saw.

4 : 2 3 P M 12 And we also learned our competitors are the ones that
4 : 2 3 P M 13 threw us under the bus in all this stuff, which is interesting
4 : 2 3 P M 14 because they offered no-balance billing, they offered process
4 : 2 3 P M 15 and handling fees, they offered very similar tests to ours. So
4 : 2 4 P M 16 I guess I'm confused.

4 : 2 4 P M 17 Q. Mr. Johnson, those other labs aren't on trial here this
4 : 2 4 P M 18 week, are they?

4 : 2 4 P M 19 A. No, sir.

4 : 2 4 P M 20 Q. Okay. Thank you. And you didn't anticipate that Brett
4 : 2 4 P M 21 King would actually go to an actual health care attorney, did
4 : 2 4 P M 22 you?

4 : 2 4 P M 23 A. No. I knew Brett King was going to send it to somebody
4 : 2 4 P M 24 that he knew could answer it because he couldn't. I had no
4 : 2 4 P M 25 problem with that.

4 : 2 4 P M 1 Q. So since 2010, when you were paying P&H fees, all the way
4 : 2 4 P M 2 up to now, 2013, BlueWave had never hired a health care law
4 : 2 4 P M 3 attorney, had they?

4 : 2 4 P M 4 A. No, we did not. And I'd like to elaborate.

4 : 2 4 P M 5 Again, I want to emphasize this to everybody. HDL
4 : 2 4 P M 6 had a 600-man firm. Singulex used Ballard Spahr on their
4 : 2 4 P M 7 contract and also got time and motion study on it. We already
4 : 2 4 P M 8 knew the time and motion studies at Berkeley. We knew what
4 : 2 4 P M 9 everybody else was doing out there in this situation.

4 : 2 4 P M 10 I keep thinking y'all wanted me to hire a lawyer who
4 : 2 5 P M 11 would disagree with them, and I'm not sure that that's the
4 : 2 5 P M 12 case.

4 : 2 5 P M 13 Q. So you ultimately got an opinion from Lauren DeMoss, who
4 : 2 5 P M 14 was at Maynard Cooper.

4 : 2 5 P M 15 Do you know how large a firm Maynard & Cooper is?

4 : 2 5 P M 16 A. I have no idea. I don't know if they're 50 or 100 men or
4 : 2 5 P M 17 10.

4 : 2 5 P M 18 Q. And you got that opinion on November 14th, 2013. We've
4 : 2 5 P M 19 seen the email. I guess we can go ahead and pull it up. It's
4 : 2 5 P M 20 Exhibit 1002. Let's pull it up there, from Lauren DeMoss.

4 : 2 5 P M 21 It says, "Brett, please find the attached compliance
4 : 2 5 P M 22 questionnaire "-- which is what we've talked about, and we'll
4 : 2 5 P M 23 get to that.

4 : 2 5 P M 24 The other thing that I think Mr. Cooke kind of
4 : 2 5 P M 25 breezed through there was this 11th Circuit opinion in the

4 : 2 5 P M 1 Medfusion case.

4 : 2 5 P M 2 A. Okay.

4 : 2 5 P M 3 Q. Now, Medfusion is a pharmacy that's in Birmingham,
4 Alabama, not far from you; right?

4 : 2 5 P M 5 A. Well, actually, they're in Mobile, Alabama.

4 : 2 5 P M 6 Q. Okay.

4 : 2 5 P M 7 A. And the reason I even testified to this -- the reason they
4 : 2 6 P M 8 sent the information is Brett -- I said, "Brett, give her all
4 : 2 6 P M 9 the information on me." Brett told her I had a sterile
4 : 2 6 P M 10 pharmacy in Alabama. Brett told her that we were one of the
4 : 2 6 P M 11 only sterile pharmacies in the state.

4 : 2 6 P M 12 He said, "Hey, listen. She's got some information on
4 : 2 6 P M 13 a case that happened in south Alabama. I wanted to make sure
4 : 2 6 P M 14 you stayed above board and not get hit with any of this stuff."
4 : 2 6 P M 15 That was for the Medfusion case.

4 : 2 6 P M 16 I know nobody in the Medfusion case or anything
4 : 2 6 P M 17 pertaining to it.

4 : 2 6 P M 18 Q. But you had heard about it; is that right?

4 : 2 6 P M 19 A. No, sir, I had not heard about it. Now, I'd heard what I
4 : 2 6 P M 20 stated in my deposition. I had heard about the case in North
21 Florence where a compound pharmacy doing non-sterile products
22 was billing 15,000 a script and, not only that, they were
23 inducing doctors by walking in and saying, "Hey, every
24 prescription you write, you get X, Y, and Z dollars," because I
25 think the FBI raided them. And I actually knew one of the guys

1 that used to work over there.

2 Q. Okay. Let's talk about the Medfusion case.

3 Peter, do you mind turning to page 6. It's the front
4 page of the -- yeah.

5 So this was attached to the email that Ms. DeMoss
6 sent. This is the cover page of this 11th Circuit case about
7 Medfusion, and you can see Chris Vernon is the first name on
8 here.

9 He was the CFO at Medfusion, wasn't he? Do you know
10 Chris?

11 A. I've never actually -- just so you know, I've never read
12 the Medfusion case. I took a glance at the first two sentences
13 and looked to see if I knew anybody involved in it.

14 Q. Okay. Well, it's about commissions paid to third-party
15 salespeople, and they were held to be kickbacks.

16 You knew that, didn't you?

17 A. No, sir, I did not.

18 Q. And then DeMoss -- we turn here to the second attachment
19 that she sent you.

20 And you talk about you think you emailed this to Cal,
21 and you and Cal Dent got on the phone and talked about this;
22 right?

23 A. I believe so.

24 Q. Okay. Let's turn to page 90. So this Medfusion case is
25 pretty long. So we'll just go straight to page 90.

4 : 2 8 P M 1 A. Okay.

4 : 2 8 P M 2 Q. Here's the first part of the compliance test. You've gone
4 : 2 8 P M 3 over this. We will --let's turn to page 17. "How much is a
4 : 2 8 P M 4 P&H fee? Can you pay any amount?"

4 : 2 8 P M 5 I just want to emphasize it says, "When a physician
4 : 2 8 P M 6 accepts a handling fee from a lab, this may not only be a
4 : 2 8 P M 7 double payment but the government may view the fee as intended
4 : 2 8 P M 8 to induce the physicians to refer to the laboratory."

4 : 2 8 P M 9 A. That's right.

4 : 2 8 P M 10 Q. And then in Number 26, she says, "The P&H fee appears to
4 : 2 8 P M 11 be prohibited."

4 : 2 8 P M 12 And she came to this conclusion and you still hadn't
4 : 2 8 P M 13 shared with her the pro formas, the money-hungry criteria, any
4 : 2 8 P M 14 of this evidence that we've gone over these past two weeks, did
4 : 2 8 P M 15 you?

4 : 2 8 P M 16 A. Let's look. "However, the P&H fee appears to be
4 : 2 8 P M 17 prohibited. (See Question 17 above.)" Again, she said "may."

4 : 2 8 P M 18 THE COURT: Mr. Johnson, the question was, did you
4 : 2 8 P M 19 share the information about the pro formas with Ms. DeMoss?
4 : 2 9 P M 20 That's the question.

4 : 2 9 P M 21 THE WITNESS: The only thing I shared with Ms. DeMoss
4 : 2 9 P M 22 was our legal test question because we never had an answer or a
4 : 2 9 P M 23 legal opinion on it to make sure that we weren't doing anything
4 : 2 9 P M 24 wrong.

4 : 2 9 P M 25 BY MR. LEVENTIS:

4 : 2 9 P M 1 Q. And now you got it, the fees appear to be prohibited;
4 : 2 9 P M 2 right?

4 : 2 9 P M 3 A. No, sir. She said again "See Question 17 above."

4 : 2 9 P M 4 Q. I'm talking about right before that where it says, "The
4 : 2 9 P M 5 P&H fee appears to be prohibited."

4 : 2 9 P M 6 A. Yeah, but also in parentheses she says, "See Question
4 : 2 9 P M 7 Number 17 above."

4 : 2 9 P M 8 Q. Okay.

4 : 2 9 P M 9 A. So -- all right.

4 : 2 9 P M 10 Q. Okay. We can turn to page -- you want to look at 17?

4 : 2 9 P M 11 A. Yeah.

4 : 2 9 P M 12 Q. All right. 17. I read the part where it says it's
4 : 2 9 P M 13 intended to induce the physician.

4 : 2 9 P M 14 what other part of 17 did you want to talk about?

4 : 2 9 P M 15 A. "When a physician accepts a handling fee from a lab, this
4 : 2 9 P M 16 may not only be a double payment but the government may" --
4 : 2 9 P M 17 again "may" -- "view the fee as intended to induce the
4 : 2 9 P M 18 physician to refer to the laboratory."

4 : 2 9 P M 19 Again "may." We had heard "may" from Elizabeth
4 : 3 0 P M 20 Strawn's thing in March of 2014. So "may" has been brought up
4 : 3 0 P M 21 several times.

4 : 3 0 P M 22 Q. And so you got this opinion from Ms. DeMoss.

4 : 3 0 P M 23 You and Mr. Dent got on the phone and talked about
4 : 3 0 P M 24 it; right?

4 : 3 0 P M 25 A. I feel like we did, yes, sir.

4 : 3 0 P M 1 Q. And if we look at -- let's -- Peter, I'm sorry to make you
4 : 3 0 P M 2 jump around like this. Let's go back to the first page in the
4 : 3 0 P M 3 email, 1002.

4 : 3 0 P M 4 So you got this opinion back in November 2013;
4 : 3 0 P M 5 correct?

4 : 3 0 P M 6 A. Correct.

4 : 3 0 P M 7 Q. You got a subpoena from the Department of Justice.

4 : 3 0 P M 8 when was that?

4 : 3 0 P M 9 A. January something -- 25th, 2013. Something like that.

4 : 3 0 P M 10 Q. January 2013?

4 : 3 0 P M 11 A. Somewhere in there.

4 : 3 0 P M 12 Q. Okay. What I'm trying to figure out, Mr. Johnson, is if
4 : 3 0 P M 13 we look at the top of this page, Brett King produces this email
4 : 3 0 P M 14 string which doesn't arrive to your attorneys until May of
4 : 3 1 P M 15 2017.

4 : 3 1 P M 16 what did you do with those emails that you got from
4 : 3 1 P M 17 Ms. DeMoss that we haven't seen?

4 : 3 1 P M 18 A. We gave y'all everything you asked for. Now, I don't know
4 : 3 1 P M 19 why somebody is saying, hey, this was only produced in May
4 : 3 1 P M 20 2017, because I remember when Flippo comes to our office. I
4 : 3 1 P M 21 remember when she sent all the people up there to get all of
4 : 3 1 P M 22 our information off our computers and everything else across
4 : 3 1 P M 23 the board. So we did not hide any information at all from
4 : 3 1 P M 24 y'all.

4 : 3 1 P M 25 Q. Did you share Ms. DeMoss's opinion with White Arnold &

4 : 3 1 P M 1 Dowd?

4 : 3 1 P M 2 A. Actually, this was in our computer. I did not send it to
4 : 3 1 P M 3 them personally.

4 : 3 1 P M 4 Q. You did not send Ms. DeMoss's opinion to White Arnold &
4 : 3 1 P M 5 Dowd?

4 : 3 1 P M 6 A. I did not.

4 : 3 1 P M 7 Q. So while White Arnold & Dowd is meeting with the
4 : 3 1 P M 8 Department of Justice, they had no idea you had this opinion,
4 : 3 1 P M 9 did they?

4 : 3 1 P M 10 A. The answers to the test questions, no, unless they looked
4 : 3 1 P M 11 it up, since they photocopied everything we already had.

4 : 3 2 P M 12 Q. In fact, the first time you produced it was in May 2017
4 : 3 2 P M 13 right before your deposition, wasn't it?

4 : 3 2 P M 14 A. Actually, no, sir. We had people come to our office four
4 : 3 2 P M 15 different times and photocopy stuff off our computers, our
4 : 3 2 P M 16 drives, hard drives, everything.

4 : 3 2 P M 17 As I said, again, we did not hide anything. There's
4 : 3 2 P M 18 not one thing we hid. And, I mean, you can talk to our
4 : 3 2 P M 19 computer guy, Greg French, who will attest to that. So they
4 : 3 2 P M 20 all came in and did it, and they billed us for it. And they
4 : 3 2 P M 21 really billed us for it.

4 : 3 2 P M 22 Q. Did you share Ms. DeMoss's opinion with any of your
4 : 3 2 P M 23 attorneys prior to May 2017?

4 : 3 2 P M 24 A. As I said again, they copied all this information. Did I
4 : 3 2 P M 25 physically send this to one of my attorneys? No, I did not.

4 : 3 2 P M 1 Q. All right. Thank you.

4 : 3 2 P M 2 MR. LEVENTIS: That's all the questions, Your Honor.

4 : 3 2 P M 3 THE COURT: Very good.

4 : 3 2 P M 4 Mr. Ashmore, cross-examination?

4 : 3 2 P M 5 MR. ASHMORE: Thank you, Your Honor.

4 : 3 2 P M 6 CROSS-EXAMINATION

4 : 3 2 P M 7 BY MR. ASHMORE:

4 : 3 3 P M 8 Q. Mr. Johnson, Mr. Leventis asked you about what was going
4 : 3 3 P M 9 on in the field.

4 : 3 3 P M 10 To be clear, Tonya Mallory was never in the field; is
4 : 3 3 P M 11 that correct?

4 : 3 3 P M 12 A. That is correct.

4 : 3 3 P M 13 Q. He also asked you about Government Exhibit 7018, and this
4 : 3 3 P M 14 dealt with Dr. Fialkow and the medical advisory board.

4 : 3 3 P M 15 And just briefly, the idea as to whether or not to
4 : 3 3 P M 16 extend an invitation for him to join the medical advisory board
4 : 3 3 P M 17 came from Russ Warnick; correct?

4 : 3 3 P M 18 A. That is correct.

4 : 3 3 P M 19 Q. That was his suggestion?

4 : 3 3 P M 20 A. That is correct.

4 : 3 3 P M 21 Q. And did he have some relationship with Dr. Fialkow?

4 : 3 3 P M 22 A. My understanding, they had worked together on something
4 : 3 3 P M 23 before, and I think that's why. I think Dr. Fialkow reached
4 : 3 3 P M 24 out to Russ, from what I understood, and Russ was like, "Hey,
4 : 3 3 P M 25 you need to do this."

4 : 3 3 P M 1 Q. Now, in the many emails that we've seen, there is a
4 : 3 3 P M 2 statement in one that says -- and it's penned by you, and it
4 : 3 4 P M 3 says, "Tonya says things that aren't true."

4 : 3 4 P M 4 what did you mean by that?

4 : 3 4 P M 5 A. I can answer that question pretty easy. Tonya said, when
4 : 3 4 P M 6 we first started selling tests, "Hey, Brad, we can handle the
4 : 3 4 P M 7 volume." I think Tonya can attest that we hammered the volume.

4 : 3 4 P M 8 Tonya says, "Hey, we can get tests turned around in
4 : 3 4 P M 9 four days." It might have took two weeks initially to start
4 : 3 4 P M 10 with. That was what I was talking about pertaining to things,
4 : 3 4 P M 11 because the fact is she will overpromise sometimes in
4 : 3 4 P M 12 situations like that. And that's what I meant by that.

4 : 3 4 P M 13 Q. So is it fair to say she doesn't always get her facts
4 : 3 4 P M 14 right?

4 : 3 4 P M 15 A. That's correct.

4 : 3 4 P M 16 Q. And you don't suggest any evidence that she ever acted
4 : 3 4 P M 17 with bad intent?

4 : 3 4 P M 18 A. No, sir. Actually, all the evidence on Tonya, she sent
4 : 3 4 P M 19 everything that we ever saw or we ever sent to her attorneys.
4 : 3 4 P M 20 And even the follow-ups, we saw them all. And they were
4 : 3 4 P M 21 handled. And I -- she loved LeClairRyan like there was no
4 : 3 5 P M 22 tomorrow. And so I think she just liked sending them emails
4 : 3 5 P M 23 almost. They jumped on stuff that she sent to them too.

4 : 3 5 P M 24 Q. And that was the process. There was some rumblings in the
4 : 3 5 P M 25 field, it went to you and Mr. Dent and then went to Tonya, and

4 : 3 5 P M 1 it went --

4 : 3 5 P M 2 A. That's correct.

4 : 3 5 P M 3 Q. -- to the lawyers; correct?

4 : 3 5 P M 4 A. That's correct. That is correct.

4 : 3 5 P M 5 Q. And, ultimately, in every situation I think we've talked
4 : 3 5 P M 6 about in this trial, there was some resolution reached; is that
4 : 3 5 P M 7 fair?

4 : 3 5 P M 8 A. Actually, I don't know if there was one that was not
4 : 3 5 P M 9 reached, based on everything I've read. And what was even more
4 : 3 5 P M 10 interesting about the lawyers that had complained and said
4 : 3 5 P M 11 something was illegal, most all of them worked for a
4 : 3 5 P M 12 competitor, which is interesting in itself.

4 : 3 5 P M 13 Q. And, again, to be clear, the Bluewave contract with HDL,
4 : 3 5 P M 14 those that participated in that from the HDL side would be
4 : 3 6 P M 15 Tonya Mallory, Russ Warnick; correct?

4 : 3 6 P M 16 A. Yes, sir.

4 : 3 6 P M 17 Q. And Joe McConnell; correct?

4 : 3 6 P M 18 A. I think Joe was involved as well, correct. I know he was
4 : 3 6 P M 19 at one of the meetings.

4 : 3 6 P M 20 Q. And I believe you established previously that -- actually,
4 : 3 6 P M 21 all of y'all were involved in this -- in the setting of the
4 : 3 6 P M 22 initial processing and handling fee?

4 : 3 6 P M 23 A. That is correct. I think we all discussed it.

4 : 3 6 P M 24 Q. Now, the Bluewave contract was canceled by HDL in January
4 : 3 6 P M 25 of 2015; right?

4 : 3 6 P M 1 A. That is correct.

4 : 3 6 P M 2 Q. HDL was interested in buying Bluewave prior to that time?

4 : 3 6 P M 3 A. That is correct. Actually, Tonya discussed about buying
4 : 3 6 P M 4 us in 2000 -- I think in '12, we discussed that. That was one
4 : 3 6 P M 5 issue as well.

4 : 3 6 P M 6 And I don't think they actually had the capital to do
4 : 3 6 P M 7 it at that time. December 2014, the Goliases, which owned 52,
4 : 3 6 P M 8 53 percent, which also owned -- I want to say -- Helen Labs out
4 : 3 7 P M 9 of Texas had called me and Cal and says, "Could y'all please
4 : 3 7 P M 10 meet with us? We would like to purchase Bluewave." And we
4 : 3 7 P M 11 said, "Fine. We'll meet with you. We don't have a problem."

4 : 3 7 P M 12 We sat in Atlanta at the Atlanta airport Marriott
4 : 3 7 P M 13 for, like, six, seven hours negotiating a deal. And they were
4 : 3 7 P M 14 tickled pink and says, "Hey, all we got to do is run this by
4 : 3 7 P M 15 Joe. I think we're going to be good to go."

4 : 3 7 P M 16 Q. Who -- who actually canceled the contract? How did you
4 : 3 7 P M 17 find out your contract was being canceled in January 2015?

4 : 3 7 P M 18 A. I think they sent an email or a fax or they called us.
4 : 3 7 P M 19 It's one of the three. I can't remember exactly which one. I
4 : 3 7 P M 20 just remember going, "Okay. Here it goes."

4 : 3 7 P M 21 Q. Who is "they"?

4 : 3 7 P M 22 A. Actually, Joe McConnell.

4 : 3 7 P M 23 Q. Joe McConnell?

4 : 3 7 P M 24 A. Yes.

4 : 3 7 P M 25 Q. Because Tonya Mallory was gone by then?

4 : 3 7 P M 1 A. That's correct.

4 : 3 7 P M 2 Q. She left in September 2014; correct?

4 : 3 7 P M 3 A. That is correct.

4 : 3 7 P M 4 Q. And so I need to know who you were -- who canceled your
4 : 3 7 P M 5 contract? Was it anybody other than Joe McConnell? Who --

4 : 3 8 P M 6 A. I would assume it was Ropes & Gray, the attorneys that
4 : 3 8 P M 7 represented HDL sent it as well.

4 : 3 8 P M 8 Q. Well, when Tonya got fired, did you become the CEO?

4 : 3 8 P M 9 A. No, sir, I did not.

4 : 3 8 P M 10 Q. Was Doug Sbertoli still with HDL when -- in January of
4 : 3 8 P M 11 2015 when the contract was terminated?

4 : 3 8 P M 12 A. He was.

4 : 3 8 P M 13 Q. Was Ms. Laura Hoey with Ropes & Gray still involved?

4 : 3 8 P M 14 A. Yes, I've been told she was.

4 : 3 8 P M 15 MR. ASHMORE: Your Honor, I believe that's all I
4 : 3 8 P M 16 have.

4 : 3 8 P M 17 THE COURT: Very good, Mr. Ashmore.

4 : 3 8 P M 18 Mr. Cooke, anything on redirect?

4 : 3 8 P M 19 MR. COOKE: Yes, Your Honor. And to prove I'm going
4 : 3 8 P M 20 to be quick, I'm going to stay right here.

4 : 3 8 P M 21 THE COURT: Good. You stay where you want to.

4 : 3 8 P M 22 REDIRECT EXAMINATION

4 : 3 8 P M 23 BY MR. COOKE:

4 : 3 8 P M 24 Q. You were asked about the -- Dr. Trippe, who ordered the
4 : 3 9 P M 25 Plavix test. That's the CP --

4 : 3 9 P M 1 A. CYP2C19, yes.

4 : 3 9 P M 2 Q. Is it correct that he's the one that requested that that
4 : 3 9 P M 3 be ordered on his previous --

4 : 3 9 P M 4 A. That is correct. He was -- actually, the words I would
4 : 3 9 P M 5 use is "tickled pink," he was so excited about the test.

4 : 3 9 P M 6 Q. Did I understand you to say that it was HDL's practice to
4 : 3 9 P M 7 keep some of the leftover blood from each specimen and freeze
4 : 3 9 P M 8 it so that it could be used later if necessary?

4 : 3 9 P M 9 A. That is true. Actually, Tonya had done something that was
4 : 3 9 P M 10 revolutionary. She had bought these coolers and put them in
4 : 3 9 P M 11 HDL, where the blood could be stored before what's called a --
4 : 3 9 P M 12 I keep wanting to say proteomics for new clinical trials down
4 : 3 9 P M 13 the road with other companies out there, not so much for
4 : 3 9 P M 14 advanced testing and things, but to be utilized in research.

4 : 3 9 P M 15 Q. So if the doctor requested that the test be run on his
4 : 3 9 P M 16 samples that were frozen, would he get another processing and
4 : 4 0 P M 17 handling fee for that?

4 : 4 0 P M 18 A. No, sir, not at all.

4 : 4 0 P M 19 Q. So this doctor, when he ordered all those tests to be
4 : 4 0 P M 20 done, he did it without getting any processing and handling fee
4 : 4 0 P M 21 for that?

4 : 4 0 P M 22 A. That's correct. He wanted that test. He ordered it.
4 : 4 0 P M 23 There was no fees at all.

4 : 4 0 P M 24 Q. Is that true for all what you call add-ons?

4 : 4 0 P M 25 A. That is 100 percent true for all of them, correct.

4 : 4 0 P M 1 Q. There would be no process and handling fee paid for that?

4 : 4 0 P M 2 A. That's correct. There was no process and handling fee
4 : 4 0 P M 3 paid for that at all.

4 : 4 0 P M 4 Q. Talking about Exhibit 1612, which was the pro forma
4 : 4 0 P M 5 that -- that you and Mr. Lively were involved in?

4 : 4 0 P M 6 A. Okay.

4 : 4 0 P M 7 Q. I wanted to just do some quick math. That one supposed
4 : 4 0 P M 8 that practice would do 200 tests a week; right? That's higher
4 : 4 0 P M 9 than anybody else; right? I mean --

4 : 4 0 P M 10 A. That was higher than any one count in the entire world by
4 : 4 0 P M 11 60 or 70 tests, to give you an idea.

4 : 4 0 P M 12 Q. But you testified earlier that a phlebotomist can do
4 : 4 1 P M 13 between 30 and 35 tests a week?

4 : 4 1 P M 14 A. That is correct.

4 : 4 1 P M 15 Q. So would that come out to 5.7 additional phlebotomists
4 : 4 1 P M 16 that would be needed to do that?

4 : 4 1 P M 17 A. That is correct. Based on my experience in the
4 : 4 1 P M 18 industry -- and I've been in it, as far as most people, longer
4 : 4 1 P M 19 than anybody -- that is a correct assumption.

4 : 4 1 P M 20 Q. And the average salary range for a phlebotomist is how
4 : 4 1 P M 21 much?

4 : 4 1 P M 22 A. 48 for Quest, 52 for HDL. And if you use Aerotek, which
4 : 4 1 P M 23 is a part-time phlebotomist company that places people, it's 38
4 : 4 1 P M 24 an hour, which is a lot more than 52,000 a year.

4 : 4 1 P M 25 Q. So if -- let's just say 40,000. Can you hire a

4 : 4 1 P M 1 phlebotomist for 40,000 maybe?

4 : 4 1 P M 2 A. Maybe a medical assistant possibly, in that range.

4 : 4 1 P M 3 Q. All right. So if you multiply 5.7 times 40,000, that
4 : 4 1 P M 4 would be 228,000?

4 : 4 1 P M 5 A. Correct.

4 : 4 1 P M 6 Q. That's just for the salary of the phlebotomist?

4 : 4 1 P M 7 A. That's correct.

4 : 4 1 P M 8 Q. And the phlebotomists, I guess they get a couple weeks'
4 : 4 2 P M 9 vacation, so if you have 50 weeks times 200 tests times \$20 per
4 : 4 2 P M 10 test, that gives you \$200,000?

4 : 4 2 P M 11 A. I think that's right.

4 : 4 2 P M 12 Q. So under that pro forma, were you telling that practice --
4 : 4 2 P M 13 or Mr. Lively telling that practice that they would actually
4 : 4 2 P M 14 lose money on the process and handling fees?

4 : 4 2 P M 15 A. They would. There's -- they would be upside down.
4 : 4 2 P M 16 There's no discussion about it.

4 : 4 2 P M 17 Q. Well, was that -- would that be typical --

4 : 4 2 P M 18 A. That's a hundred percent, a hundred percent across the
4 : 4 2 P M 19 board.

4 : 4 2 P M 20 Q. Berkeley HeartLab quit paying process and handling fees in
4 : 4 2 P M 21 2012?

4 : 4 2 P M 22 A. That's what I think my partner said he might have attested
4 : 4 2 P M 23 to.

4 : 4 2 P M 24 Q. Does that have anything to do with the fact that they were
4 : 4 2 P M 25 bought out by Quest?

4 : 4 2 P M 1 A. I would venture to say that's got a lot to do because they
4 : 4 2 P M 2 was bought out by Quest in that area.

4 : 4 3 P M 3 Q. Does Quest have patient service centers?

4 : 4 3 P M 4 A. They do. They have lots of patient service centers.

4 : 4 3 P M 5 Q. Exhibit 7019, do you have it in front of you?

4 : 4 3 P M 6 A. I'm sure I do.

4 : 4 3 P M 7 Q. This is the one where Tonya wrote to a doctor --

4 : 4 3 P M 8 MR. LEVENTIS: Do you want us to pull it up?

4 : 4 3 P M 9 MR. COOKE: Yeah, that would be great.

4 : 4 3 P M 10 THE WITNESS: I got it. On talking to Dr. Dayspring?

4 : 4 3 P M 11 BY MR. COOKE:

4 : 4 3 P M 12 Q. Dr. Dayspring, where Tonya asked him to be careful what he
4 : 4 3 P M 13 says in his presentations --

4 : 4 3 P M 14 A. Yes, sir.

4 : 4 3 P M 15 Q. -- about this particular test. And do you see we skipped
4 : 4 3 P M 16 over his response. Can you find Dr. Dayspring's response on
4 : 4 3 P M 17 November 13? It's right in the middle of that page.

4 : 4 3 P M 18 A. Yep.

4 : 4 3 P M 19 Q. Okay.

4 : 4 3 P M 20 A. "I use LDLP and ApoB"?

4 : 4 3 P M 21 Q. Well, right above that. "Tonya, not a problem." Do you
4 : 4 3 P M 22 see that?

4 : 4 3 P M 23 A. Yep. "Tonya, not a problem. The real issue is not
4 : 4 4 P M 24 calling those markers small, dense LDLs and HDL2s, which would
4 : 4 4 P M 25 be a far more accurate representation of what is being

4 : 4 4 P M 1 measured. They, like the small LDLP, have utility in drug
4 : 4 4 P M 2 patients as markers of insulin resistance."

4 : 4 4 P M 3 Q. So is he saying that that test is worthless?

4 : 4 4 P M 4 A. No, he's not saying it's worthless. Because you also got
4 : 4 4 P M 5 to realize, there's another issue here. Dr. Dayspring is a
4 : 4 4 P M 6 believer in the LipoScience test, or the NMR test. He's one of
4 : 4 4 P M 7 the thought leaders in the world. You've got Jerry Secrest out
4 : 4 4 P M 8 of Alabama who's the thought leader in the world for the
4 : 4 4 P M 9 Atherotech or the VAP test. And then you've got -- for the
4 : 4 4 P M 10 small-grade gel electrophoresis test, you've got Robert
4 : 4 4 P M 11 Superko. So you have competing factions.

4 : 4 4 P M 12 Q. And the final thing I wanted to ask you about, the
4 : 4 4 P M 13 Navigant audit that was done by -- by Singulex --

4 : 4 4 P M 14 A. Uh-huh.

4 : 4 4 P M 15 Q. -- that they had done?

4 : 4 4 P M 16 A. Yes, sir.

4 : 4 4 P M 17 Q. Is there any way in the world that Navigant would not have
4 : 4 5 P M 18 gotten the amount of processing and handling fees from Singulex
4 : 4 5 P M 19 if they wanted it?

4 : 4 5 P M 20 A. Well, they had all that information. So I -- I mean,
4 : 4 5 P M 21 Philippe and them had even said they gave everything to them
4 : 4 5 P M 22 from their side to our side.

4 : 4 5 P M 23 Q. So when you gave them things that belonged to HDL, is that
4 : 4 5 P M 24 what you blacked things out of?

4 : 4 5 P M 25 A. Yes, sir. Actually, we had a huge issue with Navigant.

1 Navigant was wanting all our confidential information from HDL.
2 That means sales reps, customer list, and things which we were
3 not going to share. Because, immediately, if we did, that
4 violates our confidentiality agreement with HDL.

5 So Gene Sellers says, "Hey, we cannot do this." And
6 Cal and I had already discussed it. So we said, "Okay. Let's
7 give them what we can give them."

8 That's why it went back and forth, because we knew
9 whatever was given would be reported directly to Singulex.

10 Q. And then, in addition to that, did you give them
11 everything that they wanted relating to Singulex?

12 A. Yes, sir, we did.

13 Q. Thank you. That's all.

14 THE COURT: Very good. You may step down.

15 (Witness excused.)

16 THE COURT: BlueWave, do you have further witnesses?

17 MR. COOKE: We have no more witnesses. We do have a
18 couple of exhibits that we wanted to offer before we rest.

19 THE COURT: Okay. What exhibits?

20 MR. GRIFFITH: Your Honor, 511, we had talked
21 about --

22 THE COURT: This is BlueWave --

23 MR. GRIFFITH: BlueWave 511.

24 THE COURT: BlueWave 511. Okay.

25 MR. GRIFFITH: And we had talked about it. It was a

4 : 4 6 P M 1 CMS manual, and you wanted to -- you wanted -- we wanted to
4 : 4 6 P M 2 take judicial notice and put it into evidence. And we've got
4 : 4 6 P M 3 the cover sheet for it.

4 : 4 6 P M 4 THE COURT: Taking judicial notice is not necessarily
4 : 4 7 P M 5 putting it in.

4 : 4 7 P M 6 Does the government object to the manual? Have
4 : 4 7 P M 7 you seen the manual?

4 : 4 7 P M 8 MR. LEVENTIS: We haven't seen it. Just one second,
4 : 4 7 P M 9 Your Honor.

4 : 4 7 P M 10 THE COURT: Okay. Anything else, Mr. Griffith?

4 : 4 7 P M 11 MR. GRIFFITH: No, Your Honor.

4 : 4 7 P M 12 THE COURT: Okay. Beyond that, BlueWave rests?

4 : 4 7 P M 13 MR. COOKE: Yes, Your Honor.

4 : 4 7 P M 14 THE COURT: Very good.

4 : 4 7 P M 15 Mr. Ashmore?

4 : 4 7 P M 16 MR. ASHMORE: Your Honor --

4 : 4 7 P M 17 THE COURT: A formality.

4 : 4 7 P M 18 MR. ASHMORE: On behalf of defendant Tonya Mallory,
4 : 4 7 P M 19 we rest our case.

4 : 4 7 P M 20 THE COURT: Very good.

4 : 4 7 P M 21 Government, reply? Any evidence in reply?

4 : 4 7 P M 22 MR. SHAHEEN: Yes, Your Honor. We'd like to call one
4 : 4 7 P M 23 witness to the stand, Mr. Eric Hines.

4 : 4 7 P M 24 THE COURT: Very good.

4 : 4 7 P M 25 THE DEPUTY CLERK: Please place your left hand on the

4 : 4 7 P M 1 Bible and raise your right. State your full name for the
4 : 4 7 P M 2 record, please.

4 : 4 7 P M 3 **THE WITNESS:** Eric Allen Hines.

4 : 4 8 P M 4 (Witness sworn.)

4 : 4 8 P M 5 **THE DEPUTY CLERK:** You may be seated.

4 : 4 8 P M 6 **ERIC ALLEN HINES,**

4 : 4 8 P M 7 a witness called on behalf of the plaintiff, being first duly
1 : 3 6 P M 8 sworn, was examined and testified as follows:

9 **DIRECT EXAMINATION**

10 **BY MR. SHAHEEN:**

11 **Q.** Hello, Mr. Hines.

4 : 4 8 P M 12 **A.** Hello.

4 : 4 8 P M 13 **Q.** Welcome back.

4 : 4 8 P M 14 **A.** Nice to be back.

4 : 4 8 P M 15 **Q.** I'm sure it'll disappoint everyone in the courtroom to
4 : 4 8 P M 16 find out that I don't have hours of testimony that I'm trying
4 : 4 8 P M 17 to elicit from you. I actually only have a few questions.

4 : 4 8 P M 18 Since you last testified, there's been some confusion
4 : 4 8 P M 19 about the ratio of HDL claims versus Singulex claims, and I was
4 : 4 8 P M 20 hoping you could just quickly just sort of solve that issue for
4 : 4 8 P M 21 us.

4 : 4 8 P M 22 **A.** Okay. I'd be happy to.

4 : 4 8 P M 23 **Q.** And as a way into that, can you remind us what your
4 : 4 8 P M 24 damages calculations were regarding the total number of HDL and
4 : 4 8 P M 25 Singulex claims that were tainted by just the P&H kickbacks?

4 : 4 8 P M 1 **MR. GRIFFITH:** Your Honor, we object. That's not
4 : 4 8 P M 2 appropriate rebuttal.

4 : 4 8 P M 3 **THE COURT:** I think he's trying to give a background
4 : 4 8 P M 4 for the preliminary to the question, I just think reminding the
4 : 4 8 P M 5 jury. It's been 10 days. I overrule your objection. Go
4 : 4 9 P M 6 ahead.

4 : 4 9 P M 7 **BY MR. SHAHEEN:**

4 : 4 9 P M 8 **Q.** So can you remind us what your damages calculations were
4 : 4 9 P M 9 regarding the total number of HDL and Singulex claims that were
4 : 4 9 P M 10 tainted by just the P&H kickbacks?

4 : 4 9 P M 11 **A.** The damages I've calculated to Medicare and TRICARE for
4 : 4 9 P M 12 the kickback scheme were \$181,144,994.

4 : 4 9 P M 13 **Q.** And how many claims were associated with those damages?

4 : 4 9 P M 14 **A.** That was 354,002.

4 : 4 9 P M 15 **Q.** And as part of that larger analysis, were you able to
4 : 4 9 P M 16 separate HDL's tainted claims from Singulex's tainted claims?

4 : 4 9 P M 17 **A.** Yes, I was.

4 : 4 9 P M 18 **Q.** So what was the total number of HDL claims tainted by the
4 : 4 9 P M 19 P&H payments?

4 : 4 9 P M 20 **A.** The total number of HDL claims was 297,045.

4 : 4 9 P M 21 **Q.** And what were the damages associated with those HDL
4 : 4 9 P M 22 claims?

4 : 4 9 P M 23 **A.** \$174,202,100.

4 : 4 9 P M 24 **Q.** And what were the total number of Singulex claims that
4 : 4 9 P M 25 were tainted by the P&H payments?

4 : 4 9 P M 1 A. 56,957.

4 : 4 9 P M 2 Q. And what were the damages associated with those Singulex
4 : 5 0 P M 3 claims?

4 : 5 0 P M 4 A. \$6,942,894.

4 : 5 0 P M 5 Q. And can you also remind us what your damages calculations
4 : 5 0 P M 6 were regarding the total number of HDL and Singulex claims that
4 : 5 0 P M 7 were tainted by both the P&H kickbacks and the commission
4 : 5 0 P M 8 kickbacks?

4 : 5 0 P M 9 A. That damages figure was \$176,543,901.

4 : 5 0 P M 10 Q. And then, as part of your analysis, were you able to break
4 : 5 0 P M 11 that down between Singulex -- HDL claims and Singulex claims?

4 : 5 0 P M 12 A. Yes, I was.

4 : 5 0 P M 13 Q. All right. So what was the total number of HDL claims
4 : 5 0 P M 14 tainted by the P&H kickbacks and the commission kickbacks?

4 : 5 0 P M 15 A. That would be 289,818.

4 : 5 0 P M 16 Q. And what were the damages associated with those HDL claims
4 : 5 0 P M 17 regarding P&H and commission kickbacks?

4 : 5 0 P M 18 A. \$171,864,547.

4 : 5 0 P M 19 Q. And now what were the total number of Singulex claims that
4 : 5 0 P M 20 were tainted by both the P&H kickback and the commission
4 : 5 1 P M 21 kickbacks?

4 : 5 1 P M 22 A. 38,138.

4 : 5 1 P M 23 Q. And were you able to determine the damages associated with
4 : 5 1 P M 24 those claims?

4 : 5 1 P M 25 A. Yes.

4 : 5 1 P M 1 Q. And what were they?

4 : 5 1 P M 2 A. \$4,679,353.

4 : 5 1 P M 3 Q. And then, just quickly sort of a ballpark as to if you
4 : 5 1 P M 4 were to sort of divvy it up, what was the ratio of HDL claims
4 : 5 1 P M 5 to Singulex claims?

4 : 5 1 P M 6 A. For the kickback calculations, it was approximately 4
4 : 5 1 P M 7 percent for Singulex and 96 percent for HDL.

4 : 5 1 P M 8 Q. And then how about for the commission plus P&H kickback
4 : 5 1 P M 9 schemes?

4 : 5 1 P M 10 A. Approximately 3 percent for Singulex and approximately
4 : 5 1 P M 11 97 percent for HDL.

4 : 5 1 P M 12 Q. And the last time you were here, I had you walk through on
4 : 5 1 P M 13 a quarter-by-quarter basis for each of these questions. Don't
4 : 5 1 P M 14 want to do that now. But did those sort of ratios hold true
4 : 5 1 P M 15 for both of those?

4 : 5 1 P M 16 A. Yeah. Some variation, but they typically ranged for the
4 : 5 2 P M 17 kickback damages periods from approximately 3 to 6 percent for
4 : 5 2 P M 18 Singulex.

4 : 5 2 P M 19 Q. You mean P&H kickback when you say that right there;
4 : 5 2 P M 20 correct?

4 : 5 2 P M 21 A. I'm sorry. Say that again.

4 : 5 2 P M 22 Q. You just said "the kickbacks," and I want to make sure
4 : 5 2 P M 23 it's clear that you were referring just to P&H.

4 : 5 2 P M 24 A. Yes.

4 : 5 2 P M 25 Q. Okay.

4 : 5 2 P M 1 A. And that would be ranging from, by quarter, approximately
4 : 5 2 P M 2 3 to 6 percent related to Singulex, that the damages would be
4 : 5 2 P M 3 attributed to Singulex.

4 : 5 2 P M 4 Q. And what was the range on the P&H plus the commission
4 : 5 2 P M 5 kickbacks?

4 : 5 2 P M 6 A. It was similar. It was approximately 2 to 5 percent.

4 : 5 2 P M 7 Q. Okay.

4 : 5 2 P M 8 MR. SHAHEEN: Thank you, Your Honor. I have no
4 : 5 2 P M 9 further questions.

4 : 5 2 P M 10 THE COURT: Cross-examination?

4 : 5 2 P M 11 MR. GRIFFITH: None, Your Honor.

4 : 5 2 P M 12 THE COURT: Very good.

4 : 5 2 P M 13 MR. ASHMORE: No questions, Your Honor.

4 : 5 2 P M 14 THE COURT: You may step down.

4 : 5 2 P M 15 THE WITNESS: Thank you.

4 : 5 2 P M 16 THE COURT: The government rests?

4 : 5 2 P M 17 MR. LEVENTIS: The government rests, Your Honor.

4 : 5 2 P M 18 THE COURT: Mr. Hines, you can go.

4 : 5 2 P M 19 THE WITNESS: Thank you.

4 : 5 2 P M 20 (Witness excused.)

4 : 5 2 P M 21 THE COURT: Ladies and gentlemen, the parties have
4 : 5 2 P M 22 rested, not exactly early in the day as we had anticipated,
4 : 5 2 P M 23 but, nonetheless, we are now close to 5:00. There are matters
4 : 5 3 P M 24 I need to take up with counsel, and I need several hours to do
4 : 5 3 P M 25 that. So I'm going to ask you to come in at 11:00 tomorrow

4 : 5 3 P M 1 morning because I'm going to need to take some things. I don't
4 : 5 3 P M 2 want you sitting in the jury room waiting for us. So I'll have
4 : 5 3 P M 3 the lawyers back here at 8:30 when the courthouse opens, but
4 : 5 3 P M 4 I'm going to have you here at 11.

4 : 5 3 P M 5 Do not discuss the case. Do not do any
4 : 5 3 P M 6 independent research. I'll see you at 11:00 tomorrow morning.

4 : 5 3 P M 7 (Whereupon the jury was excused from the courtroom.)

4 : 5 3 P M 8 THE COURT: Please be seated. Well, the best laid
4 : 5 4 P M 9 plans of mice and men; right? We were hoping we would have
4 : 5 4 P M 10 everything wrapped up and do it in the morning, but so be it.

4 : 5 4 P M 11 Mr. Caruana, would you please give the draft
4 : 5 4 P M 12 court charge and the draft verdict form to counsel.

4 : 5 4 P M 13 THE DEPUTY: Hold on, Your Honor.

4 : 5 4 P M 14 THE COURT: Hold on just one second.

4 : 5 4 P M 15 THE DEPUTY: Sorry.

4 : 5 4 P M 16 (Pause.)

4 : 5 4 P M 17 THE COURT: Very good. Now, folks, let me encourage
4 : 5 4 P M 18 you that -- I know that many of you have wished that I would
4 : 5 4 P M 19 argue your closing argument for you. And I have the full
4 : 5 5 P M 20 confidence that each of you are fully capable of making your
4 : 5 5 P M 21 own closing argument and do not wish to have me do it. And I'm
4 : 5 5 P M 22 going to stay in my lane, and y'all stay in y'all's lane.

4 : 5 5 P M 23 So a lot of the back-and-forth between counsel
4 : 5 5 P M 24 was about that I should argue something which I thought was
4 : 5 5 P M 25 very -- intended to emphasize one party's argument versus

4 : 5 5 P M 1 another. And I urge you, as you go over this, let's not come
4 : 5 5 P M 2 in tomorrow and make a hundred stylistic complaints about
4 : 5 5 P M 3 things. If there's something wrong with it, obviously, you're
4 : 5 5 P M 4 going to let me know. But let's get to the -- there's some
4 : 5 5 P M 5 substantial legal questions here, and I want to spend our time
4 : 5 5 P M 6 on things that matter and not on things that I think you should
4 : 5 5 P M 7 have said it the way I want you to say it rather than the way
4 : 5 5 P M 8 somebody else wants you to say it.

4 : 5 5 P M 9 I've tried to do it as neutrally as I can.
4 : 5 5 P M 10 The -- I will tell you the issues that I think are worthy of
4 : 5 6 P M 11 significant discussion. The -- one of them is that the
4 : 5 6 P M 12 government -- and it came in this morning -- raised the issue
4 : 5 6 P M 13 that -- that you could have a violation of the Anti-Kickback
4 : 5 6 P M 14 Statute even if a service was performed within fair market
4 : 5 6 P M 15 value.

4 : 5 6 P M 16 Now, I don't think there's any question if
4 : 5 6 P M 17 there's a -- if it was done with double payment -- and I know
4 : 5 6 P M 18 that's one of the government's theories -- that it's not fair
4 : 5 6 P M 19 market value and relevant; it's already been paid. So you
4 : 5 6 P M 20 can't get paid twice for the same service. But I don't take
4 : 5 6 P M 21 the government's view that -- that -- that it is -- I read the
4 : 5 6 P M 22 statute on remuneration to say above fair market value. And I
4 : 5 6 P M 23 think Congress intended something by that. And that -- I think
4 : 5 6 P M 24 sometimes the parties have somewhat confused the issue between
4 : 5 7 P M 25 fair -- between the Anti-Kickback Statute and the fair -- and

4 : 5 7 P M 1 the False Claims Act.

4 : 5 7 P M 2 To the extent there were efforts to -- and there
4 : 5 7 P M 3 have been much evidence about this, about these pro formas and
4 : 5 7 P M 4 efforts to induce volume sales. In my mind, that is a medical
4 : 5 7 P M 5 necessity excessive bordering issue and not an anti-kickback if
4 : 5 7 P M 6 it's done within fair market value. That's my take on it.
4 : 5 7 P M 7 Honestly, if the government is correct and argues -- and the
4 : 5 7 P M 8 jury will decide this ultimately -- that these are -- that
4 : 5 7 P M 9 they've already been paid, that's another issue because you
4 : 5 7 P M 10 can't get paid twice for the same service.

4 : 5 7 P M 11 But I think we ought to talk about that issue,
4 : 5 7 P M 12 but my view is that -- that, to the straight-up question, not
4 : 5 7 P M 13 involving any other violations of the anti-kickback or False
4 : 5 7 P M 14 Claims Act, that if something's offered within fair market
4 : 5 8 P M 15 value, that's not remuneration because it's not profit. Okay?
4 : 5 8 P M 16 It's not for gain.

4 : 5 8 P M 17 So I know the government may have a different
4 : 5 8 P M 18 view. I'm willing to talk about it, but I want to tell you
4 : 5 8 P M 19 that's -- that's sort of my notion. And I really look to the
4 : 5 8 P M 20 statute, which gives, as an example -- and it's only an
4 : 5 8 P M 21 example -- about fair market value. I think that language
4 : 5 8 P M 22 means something, and it makes sense to me.

4 : 5 8 P M 23 Also, there has been an interest -- and I'm
4 : 5 8 P M 24 obviously open to discussing it -- about the advice-of-counsel
4 : 5 8 P M 25 defense. And Bluewave, I previously ruled Mr. Sellers'

4 : 5 8 P M 1 advised -- there was no -- and the defendants have not claimed
4 : 5 8 P M 2 they hired a health care attorney or that they ever presented
4 : 5 8 P M 3 the question or obtained such an opinion.

4 : 5 8 P M 4 There was a question out there about whether
4 : 5 8 P M 5 they could rely on the counsel for HDL. And I've heard the
4 : 5 9 P M 6 record; that is, hearing all the evidence, that would not be
4 : 5 9 P M 7 proper here. And, clearly, in my view, BlueWave is not
4 : 5 9 P M 8 entitled to advice-of-counsel defense.

4 : 5 9 P M 9 Remember, an advice-of-counsel defense is a
4 : 5 9 P M 10 complete defense; that is, to the extent the jury rules with
4 : 5 9 P M 11 it, it must -- it must be something that the -- the elements --
4 : 5 9 P M 12 most of the elements are that you must have fully disclosed to
4 : 5 9 P M 13 your counsel and that you relied on them. The evidence shows
4 : 5 9 P M 14 that between January of 2010, when HDL began paying process and
4 : 5 9 P M 15 handling fees, until April of 2012, when the Ruggio opinion was
4 : 5 9 P M 16 produced, there was no opinion. So you can't have relied on
4 : 5 9 P M 17 it. There's no reliance. And the defendant has the burden of
4 : 5 9 P M 18 proving an affirmative defense.

4 : 5 9 P M 19 And I'd note -- there's been no meaningful
4 : 5 9 P M 20 evidence about full disclosure to Ruggio of what was going out
5 : 0 0 P M 21 there, such as the activities in terms of activities in the
5 : 0 0 P M 22 field. So, for many reasons, the Ruggio letter cannot --
5 : 0 0 P M 23 cannot be the basis. It wasn't relied upon for the first two
5 : 0 0 P M 24 years and four months.

5 : 0 0 P M 25 And then within four months, Kung had issued his

5 : 0 0 P M 1 memorandum. And in January of 2013, Pace was hired to move
5 : 0 0 P M 2 away. So they're not relying upon the Ruggio opinion.

5 : 0 0 P M 3 The bottom line is, advice of counsel just
5 : 0 0 P M 4 doesn't fit here for Mallory. Now, saying that, all of this
5 : 0 0 P M 5 has come in for a different purpose, which is good faith and
5 : 0 0 P M 6 state of mind. Good faith is relevant to state of mind,
5 : 0 0 P M 7 because the government has the burden of proving by a
5 : 0 0 P M 8 preponderance of the evidence that the -- for every False
5 : 0 0 P M 9 Claims Act violation, it was a knowing violation, and for every
5 : 0 0 P M 10 AKS violation, it was a knowing and willful violation.

5 : 0 0 P M 11 And that willfulness, good faith, as you will
5 : 0 1 P M 12 see on the charge, is incompatible with willfulness. You
5 : 0 1 P M 13 can't -- they're not compatible with each other. So I have
5 : 0 1 P M 14 charged good faith as -- as a consideration regarding the
5 : 0 1 P M 15 government's obligation to carry its burden to prove scienter.
5 : 0 1 P M 16 So I treat it in that way. So the issue is presented, but it
5 : 0 1 P M 17 is all regarding the issue of state of mind as regarding the
5 : 0 1 P M 18 government's burden, whether the -- whether the government has
5 : 0 1 P M 19 carried its -- the issue will be whether it's carried the
5 : 0 1 P M 20 burden of proving that the -- that there was a knowing and
5 : 0 1 P M 21 willful violation of AKS and a knowing violation of the FCA. I
5 : 0 1 P M 22 just simply alert those issues to you so you know that I think
5 : 0 1 P M 23 there might be areas -- or perhaps after everybody's listened
5 : 0 1 P M 24 to all this, nobody will have much disagreement about this.

5 : 0 1 P M 25 I must also observe that the parties have spent

5 : 0 2 P M 1 a lot of time arguing about asking the question about process
5 : 0 2 P M 2 and handling fees being per se unlawful. And there are issues
5 : 0 2 P M 3 about, when you do anything by volume or per click, that that
5 : 0 2 P M 4 would be an issue. But the government's evidence is that there
5 : 0 2 P M 5 were activities going on in which volume sales were being
5 : 0 2 P M 6 promoted. There are issues about whether the service had
5 : 0 2 P M 7 already been paid for. Those are the issues.

5 : 0 2 P M 8 And I haven't sensed that the parties really
5 : 0 2 P M 9 have a lot of disagreement that if the service had already been
5 : 0 2 P M 10 paid for, you can't do it twice, or I heard the defendants say
5 : 0 2 P M 11 they disowned those statements by those salesmen. They said
5 : 0 2 P M 12 they didn't know about them or didn't approve them or weren't
5 : 0 2 P M 13 part of it. That's going to be up to the jury to determine all
5 : 0 2 P M 14 of that.

5 : 0 2 P M 15 And so maybe the parties aren't as far apart as
5 : 0 2 P M 16 they all make it out to be and that it's really an evidentiary
5 : 0 3 P M 17 question, which is exactly a jury question, about whether what
5 : 0 3 P M 18 was going on, at least reflected in some of those emails and
5 : 0 3 P M 19 pro formas and so forth, were outlier events unrelated to and
5 : 0 3 P M 20 for which the defendants here are not responsible or part of a
5 : 0 3 P M 21 pattern or a scheme to promote these sales. And that's for the
5 : 0 3 P M 22 jury.

5 : 0 3 P M 23 So I think you will see that I've tried to write
5 : 0 3 P M 24 the -- we've endeavored to write the charge neutrally. I
5 : 0 3 P M 25 don't -- I don't have a dog in this fight. The case has been

5 : 0 3 P M 1 excellently tried by all parties. And it's up to the jury for
5 : 0 3 P M 2 making that determination.

5 : 0 3 P M 3 So let's be here at 8:30 tomorrow. Miss Eunice,
5 : 0 3 P M 4 would you encourage the -- the folks downstairs not to do a
5 : 0 3 P M 5 strip search of these guys as they come in so we can get them
5 : 0 3 P M 6 through the door pretty quickly. As dubious as they may look,
5 : 0 3 P M 7 I think they're okay. And let's -- and let's -- you know,
5 : 0 4 P M 8 let's not keep the jury sitting back there at 11:00. Let's be
5 : 0 4 P M 9 ready to go. I will need some time if we make any changes,
5 : 0 4 P M 10 because I give the jury the charge. I will need to make edits
5 : 0 4 P M 11 and so forth. So let's get on and get it done.

5 : 0 4 P M 12 Mr. Ashmore, do you have something you'd like to
5 : 0 4 P M 13 say?

5 : 0 4 P M 14 **MR. ASHMORE:** Your Honor, you could tell from my body
5 : 0 4 P M 15 language, I assume.

5 : 0 4 P M 16 One thing that might need some attention, I got
5 : 0 4 P M 17 a 61-page demonstrative exhibit today from the government, and
5 : 0 4 P M 18 I would ask them to change the language in that. This is what
5 : 0 4 P M 19 they're going to present to the jury tomorrow. It's -- in a
5 : 0 4 P M 20 number of their exhibits state "legal opinions given to
5 : 0 4 P M 21 defendants re P&H fees," which is misleading. It implies to
5 : 0 4 P M 22 the jury that these third-party legal opinions have been given
5 : 0 4 P M 23 to my client and the other defendants. If they say
5 : 0 4 P M 24 "information given to defendants," I don't have an issue with
5 : 0 5 P M 25 it, but legal opinions, Judge, I think that's misleading.

5 : 0 5 P M 1 **THE COURT:** You know, I don't -- I kind of feel like
5 : 0 5 P M 2 that's argument. And I can see how the government could say
5 : 0 5 P M 3 they received these opinions from lawyers. That's what a legal
5 : 0 5 P M 4 opinion is. And I can understand how you would say that's
5 : 0 5 P M 5 misleading because they weren't retained by them. And that's
5 : 0 5 P M 6 just the grist for argument. You know, that, to me, is just
5 : 0 5 P M 7 argument.

5 : 0 5 P M 8 And I'm not big on interfering with the lawyers'
5 : 0 5 P M 9 closing argument. If something is a serious problem, I'll --
5 : 0 5 P M 10 I'll address it, but it's very rare that I would ever do that.
5 : 0 5 P M 11 So I think that's just in the -- that's in the -- that is in
5 : 0 5 P M 12 the spirit of what argument would be. So --

5 : 0 5 P M 13 Yes, sir, Mr. Cooke?

5 : 0 5 P M 14 **MR. COOKE:** Do you want to hear directed verdict in
5 : 0 5 P M 15 the morning or --

5 : 0 5 P M 16 **THE COURT:** Yeah, let's do that. Well, I don't know.
5 : 0 5 P M 17 why don't you -- I presume you want to repeat all the motions
5 : 0 5 P M 18 you've previously made; is that correct?

5 : 0 6 P M 19 **MR. COOKE:** Yes, and all the ones I didn't even think
5 : 0 6 P M 20 of before.

5 : 0 6 P M 21 **THE COURT:** well, that one -- that one, I can't give
5 : 0 6 P M 22 you, Mr. Cooke. The ones that you -- perhaps someone else
5 : 0 6 P M 23 would think of later, no. I will tell you that I have -- I
5 : 0 6 P M 24 have obviously addressed this issue. These are issues we've
5 : 0 6 P M 25 obviously addressed at every stage along the process here, at

5 : 0 6 P M 1 every stage of the preliminary to trial, at the end of the
5 : 0 6 P M 2 government's case, and now here. And, of course, the standard
5 : 0 6 P M 3 is whether a reasonable jury could render a verdict for the
5 : 0 6 P M 4 government in this case. I rule that taking -- it's a low bar,
5 : 0 6 P M 5 in a light most favorable to the nonmoving party, sure, there's
5 : 0 6 P M 6 sufficient evidence. There's ample evidence in the record to
5 : 0 6 P M 7 go to the jury. And there's -- I would say if somebody made
5 : 0 6 P M 8 the motion the other way, that also is true; that is, there's
5 : 0 6 P M 9 sufficient evidence in the record that a reasonable jury could
5 : 0 6 P M 10 render either decision.

5 : 0 7 P M 11 I make no comment on the weight of the evidence.
5 : 0 7 P M 12 That's something -- at this point, it's not my problem. I hope
5 : 0 7 P M 13 a jury will direct that problem so I won't have to make those
5 : 0 7 P M 14 determinations. I'm prepared to do it if I need to, but my
5 : 0 7 P M 15 obvious preference -- and I think everybody's preference -- is
5 : 0 7 P M 16 that the jury would make that determination.

5 : 0 7 P M 17 So, for those reasons, the BlueWave defendant's
5 : 0 7 P M 18 motion for a directed verdict is denied.

5 : 0 7 P M 19 **MR. COOKE:** Could I just ask the Court's indulgence
5 : 0 7 P M 20 because I do need to protect the record. I don't want to risk
5 : 0 7 P M 21 waiving it. Maybe in the morning could I just have five
5 : 0 7 P M 22 minutes to put it on the record?

5 : 0 7 P M 23 **THE COURT:** Yes, sir, absolutely.

5 : 0 7 P M 24 **MR. COOKE:** Could I mention to you an argument that
5 : 0 7 P M 25 you haven't heard before probably that you might just want to

5 : 0 7 P M 1 null over?

5 : 0 7 P M 2 THE COURT: Okay. Okay.

5 : 0 7 P M 3 MR. COOKE: And this -- you remember the Court
5 : 0 7 P M 4 excluded legal letters that the Justice Department got but that
5 : 0 7 P M 5 BlueWave wasn't aware of. And one of those that we had
5 : 0 7 P M 6 promoted was a letter that Ms. Levin (phonetically) wrote on
5 : 0 8 P M 7 behalf of Atherotech. And they made in there a really
5 : 0 8 P M 8 interesting argument of why processing and handling fees paid
5 : 0 8 P M 9 at fair market value do fall within the safe harbor of
5 : 0 8 P M 10 Anti-Kickback Statute.

5 : 0 8 P M 11 THE COURT: Okay.

5 : 0 8 P M 12 MR. COOKE: And what they said in that letter was
5 : 0 8 P M 13 that the Anti-Kickback Statute and the safe harbor there is
5 : 0 8 P M 14 very closely related to the Stark regulations. And that -- and
5 : 0 8 P M 15 that the Anti-Kickback Statute doesn't define aggregate, fixed
5 : 0 8 P M 16 in advance at fair market value, but the Stark regulation does.
5 : 0 8 P M 17 And the Stark regulation is at 42CFR1001.952 --

5 : 0 8 P M 18 THE COURT: Give me that again.

5 : 0 8 P M 19 MR. COOKE: Okay. That's not it?

5 : 0 8 P M 20 MR. TERRANOVA: That's the AKS.

5 : 0 8 P M 21 MR. COOKE: I'm sorry. 42CFR411.354(d)(1) and (2).
5 : 0 9 P M 22 And, there, that regulation does specifically contemplate
5 : 0 9 P M 23 personal services that are provided on a per-unit basis.
5 : 0 9 P M 24 And --

5 : 0 9 P M 25 THE COURT: But doesn't that same provision in the

5 : 0 9 P M 1 safe harbor discuss not based on volume or referrals?

5 : 0 9 P M 2 MR. COOKE: But the Stark regulation deals with
5 : 0 9 P M 3 exactly that. And so they make the argument that, in the
5 : 0 9 P M 4 absence of a definition in the AKS regulation or in the safe
5 : 0 9 P M 5 harbor, that you should import or look to the -- the exactly
5 : 0 9 P M 6 same worded regulation under the Stark Law.

5 : 0 9 P M 7 THE COURT: I'll take a look at that.

5 : 0 9 P M 8 Anything further?

5 : 0 9 P M 9 Did you want -- Mr. Ashmore, did you move for a
5 : 0 9 P M 10 directed verdict?

5 : 0 9 P M 11 MR. ASHMORE: well, I didn't know if Mr. Cooke -- it
5 : 0 9 P M 12 sounded like he was going to get another bite at the apple. I
5 : 1 0 P M 13 was just going to take my turn after his. I will make the
5 : 1 0 P M 14 motion at this time, Your Honor.

5 : 1 0 P M 15 THE COURT: Okay. And for the same reasons?

5 : 1 0 P M 16 MR. ASHMORE: For the same reasons.

5 : 1 0 P M 17 THE COURT: That motion is denied.

5 : 1 0 P M 18 Okay, folks, 8:30 tomorrow morning. Let's put
5 : 1 0 P M 19 down the officious pen. Let's get to the substance. And we'll
5 : 1 0 P M 20 be here bright and early, all of us.

5 : 1 0 P M 21 what is the issue on 511?

5 : 1 0 P M 22 Did the government take a view?

5 : 1 0 P M 23 MS. SHORT: No objection, Your Honor.

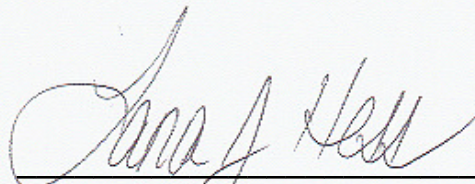
5 : 1 0 P M 24 THE COURT: Very good. Bluewave 511 admitted without
5 : 1 0 P M 25 objection.

MR. COOKE: Thank you.

* * * * *

CERTIFICATE

I, Tana J. Hess, CCR, FCRR, Official Court Reporter
for the United States District Court, District of South
Carolina, certify that the foregoing is a true and correct
transcript, to the best of my ability and understanding, from
the record of proceedings in the above-entitled matter.



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Official Court Reporter