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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA,

4 v.

17 CR 357 (LAK)

5 DAVID BLASZCZAK, THEODORE
6 HUBER, ROBERT OLAN,
CHRISTOPHER WORRAL,

7 Defendants.

Trial

8 -----x

9 New York, N.Y.

April 3, 2018

10 9:08 a.m.

11 Before:

12 HON. LEWIS A. KAPLAN,

13 District Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN,
16 Interim United States Attorney for the
17 Southern District of New York

18 IAN PATRICK MCGINLEY
19 BROOKE E. CUCINELLA
20 JOSHUA A. NAFTALIS
Assistant United States Attorneys

21 FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant Blaszczyk
22 SABRINA P. SHROFF
DAVID PATTON

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APPEARANCES (Continued)

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for Defendant Huber

BARRY H. BERKE

DANI R. JAMES

NOLAN J. ROBINSON

ALLEN & OVERY LLP

Attorneys for Defendant Olan

DAVID C. ESSEKS

REBECCA DELFINER

EUGENE E. INGOGLIA

SHEARMAN & STERLING LLP

Attorneys for Defendant Worrall

STEPHEN R. FISHBEIN

JOHN A. NATHANSON

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1 (Trial resumed; jury not present)

2 THE COURT: Good morning, everyone. First of all, for
3 your information, I've issued a ruling on the non-CMS motion.
4 My clerk will pass out copies. I don't think this made it on
5 ECF yet.

6 Secondly, I have a note from a juror. It's Ms. Levy.
7 I'm looking for what her number is, but you will probably find
8 it faster than I will.

9 MS. JAMES: I believe she's juror No. 8, your Honor.

10 THE COURT: Okay. And the note reads as follows: "I
11 am writing to you because I didn't have an opportunity to speak
12 to you during the jury selection. I was brought into the room
13 near the end of the process on Friday." That, of course is not
14 correct. She was voir dired a week ago Monday. "And expected
15 to have a chance to ask to speak to you and the attorneys
16 privately before possibly being put on a jury. A security
17 guard told me yesterday" -- that is to say Monday, April 2nd --
18 "that he thought I would have that chance yesterday. I also
19 spoke to someone in the courtroom (the clerk,) who suggested I
20 write a letter to you to explain the scheduling issues that I
21 didn't have a chance to tell anyone about. So that's what I'm
22 doing.

23 "I wanted to say to you privately that I do not think
24 I can be fair to either side if I am on this jury. I have a
25 sibling that was a federal prosecutor.

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1 "I also wanted to say that I don't think it is fair to
2 me to put me on the jury. I have been willing to in the past
3 and will do so in the future, but I am the sole director of a
4 girls' seven-week summer camp in May and am responsible for the
5 safety and well-being of over 280 girls. This time of year is
6 the busiest for me, as I speak constantly to parents and girls
7 about the girls' physical and emotional needs or concerns,
8 things such as severe allergies that we accommodate at camp,
9 issues in the home or in school that may carry over into the
10 summer, et cetera, determine how to address those needs, plan
11 the summer, hire doctors, nurses and other staff, travel to
12 Maine to oversee ongoing construction at camp, travel to speak
13 to families who have not yet committed to send their child to
14 camp, but who I have not yet met who have a nervous first-time
15 camper who would benefit from another visit, and many, many
16 other responsibilities.

17 "These are the things that must get done during the
18 months of April and May before the start of camp and could not
19 be done if I am in a courtroom for several weeks. This is a
20 small family business that doesn't have other full-time staff
21 available to take on my responsibilities, nor could anyone,
22 since I'm the face of camp, and the one parents and campers
23 expect to speak to, and the one who must understand the issues
24 and concerns, and the one responsible for addressing those
25 issues.

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1 "This is on top of my visiting with my elderly
2 grieving parents every morning following the loss of my
3 brother, helping my young son through loss issues for the same
4 reason. Having to be in New York City daily for weeks will
5 also create childcare issues for me, as my husband needs to
6 help his father during and after chemotherapy treatments.

7 "Apart from the travel I will need to do for camp, I
8 am flying to Atlanta on April 27th for a family wedding. I
9 will also be in Maine full time for camp starting at the end of
10 May."

11 Counsel, what are your views?

12 MR. BERKE: Your Honor, if we could have one moment to
13 consult.

14 THE COURT: Yes.

15 (Pause)

16 MR. PATTON: Your Honor, the defense moves for cause
17 for a number of reasons. I think it would be appropriate to
18 inquire further, but at this point, based on what your Honor
19 read, we would move for cause. We are concerned about the
20 mention that she couldn't be fair, tagged along with the fact
21 that she has a brother who's a federal prosecutor.

22 THE COURT: Who was a federal prosecutor.

23 MR. PATTON: Fair enough.

24 THE COURT: Which she did not disclose in the
25 voir dire.

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1 MR. PATTON: Which is also troubling. I think that
2 there's no doubt that there's a lot of this that reads as she
3 just doesn't want to do it. And all of the concerns about the
4 camp, I don't know that there's a real hardship issue here.
5 And it strikes me that that's the real, probably, underlying
6 basis, but the other stuff is concerning, and I worry about --

7 THE COURT: I'm sorry, what is the stuff that's
8 concerning?

9 MR. PATTON: The fact that she's saying that she
10 doesn't think she could be fair, that she may be very upset for
11 serving for a lengthy period, and if she does have some biased
12 based on -- she's the one who disclosed the federal prosecutor.
13 I don't know what that means. I think it probably merits some
14 further inquiry.

15 But between that, mentioning the cancer care, and I
16 can't recall now the family member that she mentions, but part
17 of the government's opening was these people were making money
18 off of cancer patients, which is not true. But to the extent
19 that she's feeling that that's a piece of this case and that
20 she couldn't be fair, that's concerning.

21 THE COURT: Well, she didn't articulate that.

22 MR. PATTON: Fair enough, but I think that she -- I'm
23 not quite sure why she mentioned it, and I think it does
24 further --

25 THE COURT: She mentioned it because she doesn't want

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1 to be in court. She wants to be out. That's what it says.

2 MR. PATTON: I understand, but I'm certainly concerned
3 given that the government seems to be headed in a direction of
4 saying that cancer care was, in some way, put at risk by the
5 actions of our client. I mean, I have the same reaction to
6 that as your Honor does.

7 THE COURT: You're stretching it.

8 MR. NAFTALIS: Your Honor, that's not what we said,
9 just so the record is clear.

10 THE COURT: I understand. Go ahead.

11 MR. PATTON: The point is, I think it at least merits
12 some further discussion with the juror.

13 THE COURT: Anybody else?

14 MS. CUCINELLA: The government would agree that
15 further inquiry is appropriate before striking her for cause or
16 anything else.

17 THE COURT: Just give me a moment to find the relevant
18 parts of the transcript. Maybe somebody can assist me by
19 finding where the hardship question was asked on Monday
20 afternoon last, page number.

21 THE LAW CLERK: 143.

22 THE COURT: 143.

23 (Pause)

24 And where is it that she responded? She responded in
25 some way to the question, did she not? The hardship question

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1 is on page 143 from the voir dire. Or maybe she didn't respond
2 at all, but it's a little hard to tell.

3 MR. BERKE: Your Honor, I do have, on page 156, it's
4 Ms. Levy, this is just you talking about -- if this is what
5 your Honor is talking about at page 156, talking about being
6 her parents support system.

7 THE COURT: Thank you for that, yes, but that's when
8 we were discussing what she said, and let's just identify where
9 she said it.

10 MR. INGOGLIA: Judge, it may be 144.

11 THE COURT: Yes. I understand that the reporter --

12 MR. NAFTALIS: I think it was 163.

13 THE COURT: Well, that's when we were going around the
14 room and people were giving some personal details. But
15 possibly 144 I'm told; is that right? We can do this
16 contextually because some of them are mentioned by name.

17 MR. PATTON: It looks like that is about three
18 quarters down the page at 144, starting at line 17. That's
19 what it looks like.

20 THE COURT: Yes, that's absolutely right. And then
21 she made the other comment when we were going around the room.
22 All right. So she was asked, along with everybody else, at
23 page 143: "Does any of you feel that serving on a jury in this
24 case would be such a hardship to you that you should be excused
25 and somebody else here this afternoon or who was here this

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1 morning, should serve on the jury instead of you? Anybody in
2 the jury box feel that way?"

3 And then at 144, line 17, she responds, obviously, to
4 her having had her hand up or at least standing. She said:
5 "It's more of a personal issue. I had, I'm sorry, a brother
6 that passed away a little over a year ago and I'm a support
7 system for my parents who are grieving." I asked: "Who are
8 what?" And she repeated: "Who are grieving his loss; so every
9 day I'm visiting them first before I go to work."

10 So that was her response then, and now we have three
11 pages. All right. Let's bring Ms. Levy into the courtroom.

12 (Juror present)

13 THE COURT: Ms. Levy, good morning.

14 JUROR: Morning.

15 THE COURT: You can just stand right over there. So I
16 got your letter. First of all, you say your brother -- your
17 handwriting is a little hard. It's a lot better than mine.
18 I'm sorry, it's a little hard to read.

19 JUROR: Sorry.

20 THE COURT: You say you have a brother who was a
21 federal prosecutor?

22 JUROR: I have a sister that was a federal prosecutor.
23 On the other page, it was my brother that passed away.

24 THE COURT: Okay. So you had or you have a sister?

25 JUROR: I have a sister.

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1 THE COURT: Who's a prosecutor? And where was she a
2 federal prosecutor?

3 JUROR: In the U.S. Attorney's Office, where they are.

4 THE COURT: Here?

5 JUROR: Yes, Southern District.

6 THE COURT: And when was that?

7 JUROR: Maybe -- I would say maybe 12 years ago. I'm
8 not a hundred percent sure. It was when Mary Jo White was
9 there.

10 THE COURT: Okay. That was 1993 to
11 2000--and--something. Okay. Now, is there anything about the
12 fact that she was there, your sister, that would make it hard
13 for you, in a criminal case in this district, to give both
14 sides a fair trial?

15 JUROR: I would -- I would hope that I would give both
16 sides a fair trial. I -- between my -- I'm just -- and I
17 apologize. I didn't realize that yesterday we were walking
18 into the trial, and I didn't have an opportunity to share other
19 things that were going on. The fact --

20 THE COURT: We'll come back to that in a minute.
21 Let's focus on the question that I asked you. Could you be
22 entirely fair and impartial, regardless of the fact that you
23 have a sister who, years ago, was an assistant in the U.S.
24 Attorney's Office for this district?

25 JUROR: I would try and do my best.

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1 THE COURT: And you think you could?

2 JUROR: I would hope so.

3 THE COURT: All right. Now, you do remember that I
4 asked on Monday last, March 26th, I think, I asked whether
5 there was anybody who, for any reason, thought they couldn't be
6 fair that they hadn't told us about? Do you remember that?

7 JUROR: And I brought up my situation with my parents
8 and my deceased -- recently deceased brother.

9 THE COURT: You brought that up in response to a
10 different question.

11 JUROR: Right.

12 THE COURT: I asked whether there was any reason that
13 we hadn't been told about that anybody on the panel felt they
14 couldn't be fair; do you remember that?

15 JUROR: Yes.

16 THE COURT: And you didn't indicate at that time any
17 concern based on your sister's previous service in the U.S.
18 Attorney's Office; am I right?

19 JUROR: Correct.

20 THE COURT: Okay. Now, let's get on to the other
21 things. I asked whether anybody felt that serving on this case
22 would be a hardship, and you did answer that. And you
23 mentioned that your brother had passed away a little over a
24 year ago, which of course we all sympathize with you about, and
25 that you were a support system for your parents, who were still

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1 grieving, and that you visit them every day before you go to
2 work.

3 Now, we all understand that. Any reason you couldn't
4 visit them before you come down here?

5 JUROR: I live in Westchester. I'm up at 6:00, and
6 I'm on a 7:00-something -- I was on a 7:00-something train this
7 morning, just like I was yesterday and last week.

8 THE COURT: Couldn't you see them in the evening?

9 JUROR: I have an almost-11-year-old child that is
10 struggling with where I am. I tried to explain. I'm the one
11 that picks him up at school. He's off this week. He was
12 planning to come into the office to be with me. We don't go
13 away in April because of my job responsibilities, and he's
14 struggling with -- we all are -- we are all grieving over the
15 loss, and my child can't go to sleep without my trying to put
16 him to bed to reassure him that what happened to his uncle is
17 not going to happen to me.

18 It's just a lot of family on top of the fact that my
19 father-in-law was recently diagnosed with cancer and is
20 receiving chemotherapy treatments and is down 20 pounds, and my
21 husband is dealing with it. I mean, I'm --

22 THE COURT: You're overwhelmed, I understand.

23 JUROR: Yes. I have things coming in so many
24 directions. Yesterday, looking at the gallery while everyone
25 was talking, I'm also looking at the family members, or people

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1 I'm assuming are family members, who were concerned about their
2 loved ones that are here, and just in a place that a lot is
3 coming.

4 THE COURT: We understand that. You understand that
5 the problem that we have is if we had known this whole story
6 earlier, we would not be in a position where if we let you go,
7 we've already used up one of the alternates, that would use up
8 a second, and it's a long trial. And if we had known about all
9 these things earlier, allowances could have been made for that.
10 There's no way to do that now.

11 JUROR: And I apologize. I thought yesterday more of
12 us were going to be called in to have more discussion. That's
13 what I was under the assumption that was going to happen, and
14 when I walked in here and saw a courtroom, I --

15 THE COURT: I think you misunderstood. Well, you
16 certainly did misunderstand, and sometimes there are
17 misunderstandings. Counsel, if any of you want to suggest any
18 further inquiry to me, come to the sidebar. If not, we'll have
19 Ms. Levy go back inside. Okay? All right. Please go back in
20 the jury room, and we'll let you know.

21 MR. ESSEKS: Judge, sorry. Could we approach for a
22 second?

23 THE COURT: All right. Wait a minute, Ms. Levy. Why
24 don't you come to this side.

25 (Continued on next page)

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1 (At the side bar)

2 MR. ESSEKS: Could the Court just inquire what her
3 sister does now, what kind of law that she practices?

4 THE COURT: Sure. Anything else?

5 MS. CUCINELLA: No.

6 THE COURT: Thanks.

7 (Continued on next page)

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1 (In open court)

2 THE COURT: Where did she go? Bring Ms. Levy back,
3 please.

4 (Juror present)

5 THE COURT: One more question, Ms. Levy. What does
6 your sister do now?

7 JUROR: She's an attorney for UBS.

8 THE COURT: Does she do any criminal practice at all?

9 JUROR: I don't know. We don't discuss it.

10 THE COURT: Okay. Thank you. You can step back
11 inside.

12 (Juror not present)

13 THE COURT: Okay. Counsel?

14 MR. BERKE: Nothing from the defense, your Honor.
15 We're comfortable.

16 THE COURT: You're comfortable with the jury?

17 MR. BERKE: Yes.

18 THE COURT: With not excusing her?

19 MR. BERKE: Exactly.

20 MS. CUCINELLA: May we have one moment, your Honor?

21 THE COURT: Mr. Patton, that goes for you?

22 MR. PATTON: We're interchangeable.

23 MR. BERKE: Mr. Patton will definitely let you know if
24 he disagrees with me.

25 THE COURT: You're all brilliant, but your stars shine

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1 in particular ways.

2 MR. BERKE: You compliment me, your Honor; so thank
3 you.

4 MS. CUCINELLA: The government's view is that she
5 appears to be unstable and has expressed that she has trouble
6 focusing; so --

7 THE COURT: Boy, it's amazing. Yes. So what is the
8 government's bottom line?

9 MS. CUCINELLA: We would move for cause.

10 THE COURT: Spell it out, please.

11 MS. CUCINELLA: That she expressed that she had
12 difficulty focusing on what was being said in the courtroom and
13 that she was staring out at family members, suggesting that she
14 is focused on what is going on in her own life and it's
15 interfering with her ability to fairly consider what is being
16 presented in the courtroom.

17 THE COURT: Anybody want to respond to that?

18 MR. ESSEKS: Your Honor, I think you took her through
19 her ability to be fair. She identified issues that either side
20 could be theoretically worried about, but bottom line, she said
21 to the Court "I would try my best" and "I think I would be
22 fair" and I think you got her to the necessary point. We have
23 no objection. We don't think the government's objection is
24 well founded.

25 MR. BERKE: The only thing I would add is, we are

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1 concerned that the jurors are dropping like flies, and we're
2 worries that if the jurors see somebody writes a note and gets
3 off --

4 THE COURT: Well, at this rate, we're going to have a
5 mistrial next week.

6 MR. BERKE: Exactly.

7 THE COURT: You know, if we lose a juror a day.

8 MR. BERKE: So we would encourage you to keep her,
9 your Honor.

10 THE COURT: I'm going to get a neutral opinion. Maybe
11 even two of them.

12 (Pause)

13 I am told also by my staff that when she approached
14 them with a concern and was told to write a letter, the one
15 thing she got out was that she has a wedding in Atlanta and a
16 plane ticket on April 27th, which is mentioned at the bottom of
17 this letter. We're going to keep her.

18 Okay. Anything else before we continue?

19 MR. PATTON: Briefly, your Honor. I hope this is --

20 THE COURT: We're going to have to start at 8:30.

21 MR. PATTON: In all the flurry of last-minute motions,
22 I'm realizing that I was remiss in joining on the Huber and
23 Olan non-CMS issue. It affects us as well. I understand the
24 Court's ruling. I don't plan to argue it, but I just want to
25 make clear that we too join in that motion.

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1 THE COURT: Okay. And your application is also denied
2 on exactly the same basis.

3 MR. PATTON: I assumed it would be.

4 THE COURT: Okay. Let's get the jury, and let's get
5 going.

6 (Pause)

7 With respect to that motion, I have in mind a limiting
8 instruction, but now that Mr. Blaszcak has joined the motion,
9 the nature of that instruction might change. So if anybody
10 wants to propose in writing a limiting instruction, I'll
11 consider it.

12 MR. PATTON: Thank you. And we'll mark Ms. Levy's
13 note court exhibit next in order, and it's probably Exhibit D,
14 Court Exhibit D.

15 (Jury present)

16 THE COURT: Okay. Good morning, everybody. I'm sorry
17 for that delay. It was occasioned by a need to deal with an
18 issue that needed to be resolved before we proceeded.
19 Ms. Levy, I regret to say that the decision has been made not
20 to excuse you. We're all sympathetic, but we're just at a
21 place where that's the decision.

22 Okay. We'll now hear the opening statement on behalf
23 of Mr. Olan.

24 MR. ESSEKS: May I proceed, your Honor?

25 THE COURT: You may.

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1 MR. ESSEKS: So good morning. We heard a lot of words
2 yesterday from the prosecution, and I suggest to you that they
3 were long on labels. They're guilty, he knew it, and short on
4 details. Details about how it is that you're going to be able
5 to figure out, did he know.

6 And look, they can handle their opening any way they
7 want. It's their trial, and in fact, this morning, in just a
8 little while, we're going to get to the details. But it's easy
9 and dangerous to get caught up in labels, and we're, all of us,
10 guilty of doing that, especially these days.

11 So a criminal trial, with a man's liberty at stake, is
12 the last place where labels should govern. So I want to start
13 this morning and spend a few minutes talking with you about how
14 you're going to be able to tell what the truth is, and which
15 is, the government's got this wrong. That happens sometimes.

16 Rob Olan is an innocent man. He didn't think that any
17 of the information that came to him had been stolen from
18 anybody. He didn't think that the information that came to him
19 from Dave Blaszczyk had been improperly obtained from CMS. And
20 if he didn't think one of those two things, he didn't do
21 anything wrong.

22 We are here today because we have a disagreement with
23 the government. Rob has put his faith in you, each and every
24 one of you, to see clearly what he did or did not think or know
25 at the time. Faith to see past the labels. Faith to pay

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1 attention to the details because the details are why we're
2 having the trial. The details matter.

3 Now, as you consider the evidence in the case, there
4 are two big questions that you're going to have to answer. The
5 first is: Did anybody steal anything from CMS? And the second
6 is: If anybody stole anything from CMS, and whatever it is
7 that got stolen, got to Rob Olan? Did he know that there was
8 anything wrong with that?

9 Now, you heard a lot yesterday from the lawyers from
10 Mr. Blaszczyk and Mr. Worrall on the first question, did
11 anybody steal anything from CMS? I'm going to focus
12 principally in my remarks this morning on the second question,
13 what was in Rob Olan's mind and how are you going to know. But
14 I want to -- before I focus on that for the rest of my remarks,
15 I want to focus you on the following question. You have to
16 answer question one before you get to question two. You have
17 to decide that somebody stole something from CMS before you
18 ever get to a question about did Rob Olan know that there was
19 anything wrong with anything.

20 Now, on that second question, what was in Rob Olan's
21 mind, you heard the prosecutor yesterday, you heard him talk
22 about labels, and as I've suggested to you, not so many
23 details. But having heard from the prosecutor, some of you may
24 be thinking, how could he not have known? My answer is, he
25 didn't. I assuming you get past the first question, assuming

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1 anybody stole anything from CMS, and any of that information
2 got to Rob Olan, how is it that he maybe didn't know, that he
3 didn't know?

4 Easy. The case is all about perspective and context.
5 You can't judge Rob Olan without paying attention and
6 understanding clearly the perspective from which he saw what
7 happened in this case. We ask you, therefore, to stand in his
8 shoes and look at things from his point of view. It's a hard
9 thing to do, but it's the essence of your job as jurors. When
10 you do that, you will see he didn't think there was anything
11 wrong with any of the information that came to him.

12 You'll see that the information that came to him was
13 just like a whole bunch of other information that he got from
14 other consultants, not Dave Blaszcak, from other consultants,
15 year after year about what people at CMS said. Again and again
16 and again, he got this sort of information, separate from Dave
17 Blaszcak. He had no reason to think that when he got similar
18 information from Mr. Blaszcak, there was anything wrong with
19 it.

20 I want to talk with you a little bit this morning
21 about Rob Olan, the man. He's a public school kid from
22 New Jersey. He's the son of a school nurse and an accountant.
23 You'll hear him described as an honest, straight-shooting, rule
24 follower.

25 MR. NAFTALIS: Objection, your Honor.

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1 THE COURT: Sustained.

2 MR. ESSEKS: Growing up, Mr. Olan worked a typical set
3 of jobs. He had a paper route, mowed lawns, painted houses, he
4 grilled burgers at the Roy Rogers on the Jersey Turnpike.
5 After college, he got his first job in finance through an ad in
6 The New York Times. He worked for a few years as a research
7 analyst at a brokerage firm, and then he was hired by one of
8 his clients, Deerfield Capital. Rob has been at Deerfield for
9 16 years. He's a regular guy who's done well through hard
10 work.

11 You will learn that Deerfield is a good place, it's a
12 tightknit place. It's supportive in caring about all of its
13 people, and you'll see that Rob loved his work at Deerfield.
14 He was good at it. He made more money than he needed, and you
15 will see that he had no reason whatsoever to jeopardize all of
16 that by cheating.

17 Let's talk a little bit about Rob's job. You heard a
18 fair bit about Deerfield already. I'm not going to repeat all
19 of it, but I want to emphasize some basic things about what it
20 is he does all day because that context too matters. You've
21 heard that Deerfield is a hedge fund, which means it takes in
22 money from investors and then tries to put it to work.

23 Deerfield's clients included all the pension funds and
24 university endowments, and the numbers are big. So, for
25 instance, Deerfield would take in a hundred million dollars

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1 from a public pension fund, Teachers Retirement or something
2 like that, and try and turn a hundred million dollars into 110
3 or 120 over time. That's the job.

4 Rob's particular job at Deerfield was to be an expert
5 in medical device companies, to know everything there is to
6 know about them; so think artificial hips, heart pumps,
7 surgical robots. So what does that mean that Rob did all that?
8 I think it can be summed up essentially as learning and
9 studying stuff about the medical device field. What does it
10 mean he does? He reads a lot, lots and lots of e-mails,
11 hundreds of e-mails a day. You're going to see a lot of them
12 in the course of the trial.

13 He studies company financial statements. He speaks to
14 company management. He speaks to them at public presentations,
15 and he has private meetings with them. If Deerfield is an
16 investor in the company, he has meetings with management to
17 find out what's going on inside the company. He looks at
18 studies and surveys. He attends medical conferences to learn
19 cutting-edge science and medical advances; so he can understand
20 the devices and the environment in which the companies are
21 operating.

22 He speaks with analysts, who know lots about the
23 companies too, to get their point of view, and he speaks with
24 consultants, who have specialized knowledge and perspective on
25 things that are relevant to companies that he's interested in.

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1 Now, every professional investment advisor does this
2 sort of thing all the time because the job, Rob's job and the
3 job of any professional investment advisor, is just this, find
4 the important information so you can use it to invest. Find
5 the important information that not everybody knows, so you can
6 use it to invest. Or appreciate the significance of something
7 that everybody knows but not everybody appreciates, and
8 appreciate that before everybody else does.

9 This brings me to the first of three big points that I
10 want to focus you on, and that's this, there's nothing wrong
11 with trading on information -- on material, nonpublic
12 information, on information that not everybody knows, as long
13 as the information is obtained appropriately. It's only wrong
14 if Rob knew that some information that he got was obtained
15 improperly, it was somehow stolen.

16 Now, many people hear the term insider trading, and
17 they have their own ideas on whatever that means. At the end
18 of the case, the Judge is going to give you detailed
19 instructions on exactly what that means. I am not doing that.
20 I am talking to you today about what Rob's job entails because
21 what he does all day is look for information that not everybody
22 has, and you shouldn't think that that's wrong. It's not, and
23 it's not insider trading.

24 The second main point I want to focus you on is it's
25 okay to get information directly from CMS. That happens all

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1 the time. The government wants you to think that CMS is a
2 fortress or a lockbox, where nothing gets in and nothing gets
3 out, a dark place of secrets such that if you hear about
4 something that happened inside that dark fortress, you know
5 immediately you're not supposed to have heard that. But that's
6 just not the case.

7 Simply to do its job, CMS, as an institution, and you
8 heard a fair bit about this yesterday and you're going to hear
9 about it all the way through the trial. Simply to do its job
10 as an institution, CMS has to and does talk with a whole slew
11 of people and institutions.

12 We have a hokey diagram for you. CMS needs,
13 practically every day, to interact with each of the categories
14 of people and entities that are on the screen, doctors,
15 hospitals, the companies that make the stuff that gets
16 reimbursed, the professional societies -- meaning associations
17 of doctors who are specialists in this or that field and want
18 to talk to CMS and make sure that their voice is heard on
19 behalf of their patients -- market analysts, importantly
20 Congress, congressional staffers and even the White House.
21 There's politics through all of this.

22 CMS, every day to do what it needs to do, to carry out
23 its function, has conversations with all of these people. And
24 it needs to do so because it needs to assess the potential
25 ripple effects of any change that it might make in the payment

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1 system for U.S. healthcare. If you change one piece here, you
2 may effect a whole bunch of other things, and they need -- to
3 do their job right, they need to talk to a lot of people about
4 what they've done already and what they're thinking of doing,
5 in order to do their job right and make good decisions.

6 CMS's interaction with all of these stakeholders is
7 essential to striking the right balance between availability
8 and affordability of U.S. healthcare. And the information goes
9 in both directions. A lot of it is CMS going out and trying to
10 get information, but as you know well from your own -- all of
11 your regular interactions in life, you can't get without
12 giving, even if you're trying not to give. It's just always a
13 two-way street. CMS is not a fortress and it's not a lockbox.
14 It's Swiss cheese, and it's supposed to be.

15 Now, the evidence will show that for years Rob heard
16 from many consultants who spoke to CMS staff in meetings all
17 the time, and he heard from them about what they learned in
18 these meetings with people at CMS. And there's a common theme
19 that comes through, and you'll see it in the evidence, that Rob
20 heard from analysts, who had spoken with CMS staff about the
21 meetings, and so what does he understand? I mean, the meetings
22 are regular. They happen all the time. They're not secret.
23 They're not special. They're not suspicious. They're not
24 alarming. They're talked about openly.

25 Indeed, what you're going to see are reports that

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1 other analysts wrote talking about their meetings with CMS or
2 their conversations on the phone with people at CMS, and they
3 wrote it down and they blasted it out to a bunch of clients,
4 including Rob Olan at Deerfield. And what you'll see is those
5 analysts went into the meetings or talked on the phone,
6 however, they had conversations and they drew inferences.

7 So what do I mean? You go to a meeting, they pay
8 attention. What questions are asked? What questions aren't
9 asked? What topics come up? What topics don't come up? What
10 reactions are there to this topic or that topic? Facial
11 expressions. People go into a meeting, they read the room.
12 They draw inferences. They come out. They draw conclusions.
13 They write it up. They have an opinion. They're consultants,
14 and they're in the business of having opinions, and they
15 publish it.

16 Your common sense and experience will tell you that
17 that sort of thing happens every day, all day all across
18 Washington, D.C. and the evidence will show that that's exactly
19 what happened at CMS.

20 So what was Rob's perspective? We can go to the next
21 slide. This is Rob's perspective. CMS and CMS's interaction
22 with all of those people and entities that I talked about, over
23 there on the right. Mr. Blaszcak, on the left. What does Rob
24 know? He knew that Mr. Blaszcak spoke regularly with pretty
25 much all the people and entities who were, themselves, talking

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1 to CMS, and he knew that sometimes Dave Blaszczyk spoke to
2 CMS directly, just like the other consultants.

3 And then what did Mr. Blaszczyk do? He wrote it down
4 and he published it to a whole slew of clients, including
5 Deerfield and Rob Olan at Deerfield. Rob knew, in general,
6 that Dave Blaszczyk was talking to all of these people. He
7 didn't know exactly who, when, how, why, but he knew this is
8 what Blaszczyk does. He talks to lots and lots of people all
9 across Washington and Baltimore.

10 Rob didn't know for any particular prediction where
11 the information came from. It didn't matter. Knowing the
12 information may have come from CMS or even knowing that it did
13 come from CMS, not a crime. Asking a question and getting an
14 answer is not stealing. It's not insider trading. The
15 government has to prove that Rob knew the information came from
16 inside CMS and that it was stolen or improperly obtained, and
17 you will see no evidence of that because there is none.

18 And this leads me to the third big point I wanted to
19 talk with you about. Rob's actions show that he never thought
20 he was doing anything wrong. You won't see Rob hiding anything
21 from anybody. He didn't hide that he and his colleagues were
22 trading on information that came from Mr. Blaszczyk. He didn't
23 hide that Mr. Blaszczyk spoke to people at CMS. He didn't hide
24 that, at times, Mr. Blaszczyk had a different view about what
25 he thought CMS would do than other analysts did.

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1 There are no code words, no meetings in the rain under
2 a bridge, no walk and talk in the park, nothing like that in
3 this case. Nothing secret. Everything happened openly on
4 company e-mail, as you will see.

5 In fact, you'll see that Rob was the opposite of
6 secret. You've heard about the culture of openness at
7 Deerfield. It's central and essential to what Deerfield is,
8 and it's very important to your understanding of the
9 perspective and the context as you consider the evidence here.

10 You've heard that Deerfield valued openness and
11 consensus. And Jim Flynn, the head of Deerfield, insisted that
12 the analysts who did the work in this sector or that sector,
13 they had to debate out ideas among themselves and come, if they
14 could, to a consensus. But just getting to that consensus
15 wasn't enough.

16 Then you had to bring that trading recommendation to
17 the morning meeting that you've heard about, and the ideas were
18 debated at the morning meeting, at 8:30 in the morning.
19 Everybody was at that meeting, Flynn the boss, the traders who
20 executed the trades, all the analysts, Rob and Ted and various
21 others. The lawyer and the compliance officer, the CFO, the
22 administrative staff.

23 This wasn't a meeting that you slept through or you
24 spent flipping through your phone. This was a focused meeting,
25 start the day off, substantive discussion across the entire

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1 group about what we're doing and why. All out in the open.

2 The facts about Dave Blaszczyk and his information
3 were discussed at the morning meeting. They were discussed
4 this the presence of Deerfield's lawyer, David Clarke. They
5 were posted to the central database that you heard about, the
6 matrix, at Deerfield. Nothing was hidden.

7 And you'll see that this environment at Deerfield gave
8 Rob comfort, comfort that everyone's in this together, comfort
9 that if there were some issue that anybody had with anything
10 that anyone at the firm was doing, it's all out in the open.
11 And people were there to spot the issue and say, hey, are you
12 sure you should be doing that? That didn't happen. And that's
13 because Rob didn't think he was doing anything wrong, nor did
14 anybody else.

15 You'll see that Rob had lots of reasons for confidence
16 that Dave Blaszczyk, in particular, was playing by the rules,
17 reasons like, first, Deerfield checked out Dave Blaszczyk and
18 his companies through their regular due diligence right at the
19 beginning. Second, Deerfield checked with the lawyers for Dave
20 Blaszczyk's company to ensure that he was relying only on
21 public sources.

22 And, finally, as you've seen, Dave Blaszczyk published
23 what he found. He wrote it down. He printed it out, and he
24 sent it out to a bunch of people. And it doesn't make any
25 sense that he would get stolen information, and then he'd write

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1 it down and send it out to 20 or 30 or 50, or however many
2 clients.

3 Before I finish, I want to address two particular
4 aspects of the government's allegations. As I said,
5 Mr. Naftalis started with a lot of labels and few details. He
6 mentioned just two particular aspects of trading that he says
7 they're going to prove. I want to talk about those two very
8 briefly.

9 The first is something to do with cancer treatment in
10 2012, something that you'll learn a lot about, radiation
11 oncology treatment, which is simply treating cancer with
12 radiation. And the allegation is that in May 2012,
13 Mr. Blaszczyk predicted that CMS would make a cut in
14 reimbursement for this cancer treatment, and the allegation is
15 that that prediction was based on information that
16 Mr. Blaszczyk had stolen from CMS.

17 The evidence will show that Rob Olan did not believe
18 Dave Blaszczyk's prediction. You're going to see that in black
19 and white. He did not believe the prediction, and that means
20 the government's going to try and prove to you, try to convince
21 you that Rob Olan is guilty of insider trading on a tip that he
22 thought was flatout wrong. It's not going to make any sense to
23 you.

24 The second bit of trading that Mr. Naftalis spoke
25 about is something to do with dialysis trades in 2013. Now,

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1 look, Rob is not charged with those trades. He had nothing to
2 do with them. They happened in 2013, after, as Mr. Berke
3 showed you, Mr. Fogel moved from the devices group to the
4 services group. Rob and Ted stayed in devices. Whatever
5 happened with these trades, if anything, nothing to do with
6 Rob.

7 That brings me then to Jordan Fogel. I have only a
8 few words to say about him today. There will be more later. I
9 want to start with this, the documents -- and you're going to
10 see a lot of documents in this case -- the documents will not
11 show that Rob did anything wrong. If there's an allegation
12 against Rob, it will come only from one man, only from Jordan
13 Fogel.

14 Mr. Berke described him yesterday as a troubled young
15 man, and I suggest to you that when you have sat through the
16 trial and learned a lot about Mr. Fogel, you're going to think
17 that that's an apt description, and you'll see clearly, through
18 the course of the trial, that Mr. Fogel is a liar. He lies to
19 protect himself. He blames others over and over.

20 When you've heard his testimony, you will have a long
21 list of the things about which he has lied. You will see that
22 he has lied again and again and again to these prosecutors
23 sitting here in this courtroom, and you will conclude that you
24 can't trust anything he says.

25 Now, ladies and gentlemen, as you listen to the

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1 evidence, we ask you again to put yourselves in Rob's shoes.
2 Look at the situation from his perspective, and then ask
3 yourselves these questions: Did Rob Olan's actions ever show
4 that he thought he was doing anything wrong? Did he ever
5 discuss the idea that any of the information that came from
6 Mr. Blaszcak was stolen or improperly obtained? Is there any
7 document that shows that he thought that the information he got
8 was bad?

9 You'll see that the answers to all these questions are
10 "No." When you've seen and heard all the evidence, you will
11 conclude that Rob Olan is a good man, who was doing his best;
12 that he acted in good faith, and he believed that others were
13 doing the same. You will conclude that Rob Olan is an innocent
14 man. Thank you for listening.

15 (Continued on next page)

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Blum - direct

1 THE COURT: Thank you, Mr. Esseks.

2 The government will call its first witness.

3 MS. CUCINELLA: The government calls Jonathan Blum.

4 JONATHAN DAVID BLUM,

5 called as a witness by the Government,

6 having been duly sworn, testified as follows:

7 THE WITNESS: Jonathan David Blum, J-o-n-a-t-h-a-n,
8 David, D-a-v-i-d, B-l-u-m, Blum.

9 THE COURT: You may proceed, Ms. Cucinella.

10 MS. CUCINELLA: Thank you, your Honor.

11 DIRECT EXAMINATION

12 BY MS. CUCINELLA:

13 Q. Good morning, Mr. Blum.

14 Are you familiar with the Centers for Medicare and
15 Medicaid Services?

16 A. Yes.

17 Q. Is that commonly known as CMS?

18 A. Yes.

19 Q. Is CMS a government agency?

20 A. Yes.

21 Q. How are you familiar with CMS?

22 A. In 2009, I joined CMS to be its director for the Center for
23 Medicare, and I stayed with the agency through May of 2014.

24 Q. Will you tell the jury, broadly speaking, what CMS does?

25 A. CMS oversees and administers the federal financing

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Blum - direct

1 healthcare financing programs. There's two main functions.
2 One is to oversee the federal Medicare program that provides
3 health insurance benefits to those over age 65 and those who
4 are disabled, and it also provides grants to states for states
5 to run their own Medicaid programs.

6 Q. You said that it runs the federal Medicare and Medicaid
7 program -- Medicare program, excuse me. What does that mean?

8 A. People who are over age 65 or who have a disability for
9 more than two years are entitled to receive health insurance
10 benefits from the federal Medicare program. CMS pays providers
11 for healthcare services delivered to those beneficiaries, and
12 it also contracts with private managed care companies that
13 choose to offer Medicare benefits to those that can receive the
14 benefits.

15 Q. When you say "beneficiaries," are those the people who
16 receive services under Medicare?

17 A. Correct.

18 Q. When you say private management services, what do you mean?

19 A. Medicare beneficiaries have a choice to receive their
20 benefits through the direct federal government program or to
21 purchase coverage through private health insurance companies,
22 like Humana, UnitedHealthcare. Most Medicare beneficiaries
23 choose the federal choice, but about a third choose private
24 managed care companies.

25 Q. Mr. Blum, approximately how much money would you say is

I43KBLA2

Blum - direct

1 under CMS's control?

2 A. Each year the program spends, in benefits and grants to
3 states, far more than \$1 trillion a year.

4 Q. What percentage is that, approximately, of the nation's
5 healthcare spending?

6 A. About a third, maybe.

7 Q. How does the budget of CMS compare to other government
8 agencies?

9 A. It's one of the largest federal agencies in terms of
10 dollars spent. It's probably the top two or three in the
11 federal government for total dollars spent.

12 Q. Now, Mr. Blum, you testified that you began at CMS in 2009.
13 What was your role in 2009?

14 A. I joined CMS in March 2009 as the director for the Center
15 for Medicare.

16 Q. Did you have more than one role while you were at CMS?

17 A. I was promoted in 2013 to be the agency principal deputy
18 administrator.

19 Q. Those two roles that you just mentioned, are they both
20 political appointments?

21 A. Yes.

22 Q. By whom were you appointed?

23 A. By the White House.

24 Q. Who was in the White House at that time?

25 A. The President was Barack Obama.

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Blum - direct

1 Q. Approximately how many years did you work at CMS?

2 A. About five and a half.

3 Q. What years were those?

4 A. From March 2009 to May 2014.

5 Q. While you were at CMS, were you in charge of the Center for
6 Medicare?

7 A. Yes.

8 Q. Was the Center for Medicare tasked with establishing
9 certain policies while you were there?

10 A. It was the lead part of the agency that established the
11 payment rates that are paid to healthcare providers directly,
12 hospitals, physicians, nursing homes, and it also had the lead
13 responsibility to contract and to set the contracting payment
14 rules and contracting rules with managed care companies that
15 offer services to Medicare beneficiaries.

16 Q. Are the terms policies and rules somewhat interchangeable
17 in the way that you are using them?

18 A. Yes.

19 Q. What types of things did CMS reimbursement rules apply to?

20 A. They applied to any service that was covered by the
21 program. The program covers hospital benefits, physician
22 benefits, skilled nursing benefits, pharmaceutical benefits,
23 and anytime that a beneficiary receives a service that's paid
24 by the program, the program would pay back providers for those
25 services provided.

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Blum - direct

1 Q. Would it include reimbursement for cancer treatments?

2 A. Yes.

3 Q. For end-stage renal disease?

4 A. Yes.

5 Q. Is end-stage renal disease sometimes referred to as ESRD?

6 A. Yes. It is dialysis care. That's for those patients who
7 have kidney failure.

8 Q. Now, while CMS was developing these policies, were there
9 rules that governed whether CMS employees could discuss the
10 policy before it was publicly announced?

11 A. Because the payment rates were considered significant
12 rules, they had to follow notice and comment procedures, which
13 means that the public would have the right to comment on CMS's
14 proposed payment changes. Those went through very orderly
15 processes, and the decisions, discussions, that were made
16 before the public release were kept very confidential, within
17 the agency and the executive branch that would review the
18 decisions, but the process is designed, by law, to be very
19 precise and to give the public the opportunity to comment at
20 the same time.

21 Q. When you say it's designed to give the public opportunity
22 to comment, is that after a proposed rule has been announced?

23 A. That's right. So, the process is designed that every
24 stakeholder that has an interest in a particular rule has the
25 right to submit written comments. The agency is required to

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Blum - direct

1 review those comments, to consider those comments, when making
2 its final decisions.

3 Q. You just used the term "stakeholder." What does that mean?

4 A. To me, it means any entity that's paid by the Medicare
5 program. That means anybody that receives benefits from the
6 Medicare program or it means Congress, that has the task to
7 oversee the Medicare program.

8 Q. What is predecisional information?

9 A. It's -- before rules are published, are posted publicly,
10 there is a vigorous review, debate, analyses that happen within
11 the federal agencies. Option papers are developed, drafts are
12 produced. Those options get briefed to policymakers, very
13 senior policymakers that work within the executive branch, and
14 all of that material, written material, is kept very
15 confidential within the clearance chain that happens before
16 rules get posted.

17 Q. Would you say that predecisional information is considered
18 nonpublic information?

19 A. Yes.

20 Q. With respect to that predecisional information, is that
21 covered by rules that govern employees at CMS?

22 A. All CMS staff are trained on their responsibilities to keep
23 this information confidential. New staff get trained on the
24 procedures. Staff get continuously trained on their
25 obligations to keep confidential information confidential. And

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Blum - direct

1 that's a continuous process that all CMS staff go through
2 during their time working for the agency.

3 Q. And that's for the predecisional period until the proposed
4 rule is announced; is that right?

5 A. That's right.

6 Q. Was there a practice for when proposed CMS regulations were
7 made public?

8 A. Both the proposed rules and the final rules were generally
9 posted at about 4:00 o'clock, 4:15, on the day they were
10 scheduled to be posted, after the financial markets closed.

11 Q. Why was that?

12 A. I think there was a concern that the financial markets
13 needed time to digest the information. It was complicated.
14 And it was a concern that by having the rules posted after the
15 financial markets, that those that followed the financial
16 markets would have sufficient time to understand the rules
17 before the markets opened the next day.

18 Q. Did there come certain times at CMS when you learned that
19 there had been leaks of predecisional information?

20 A. Yes.

21 Q. How, if at all, did you react to learning that?

22 A. I think in three main ways: Number one, that when those
23 leaks came to my attention, we had a formal office in CMS that
24 dealt with potential ethics breaches, and I referred those
25 leaks to that office. Second, that I directed our teams to do

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Blum - direct

1 more training to staff to reinforce the guidelines for keeping
2 materials confidential. And I took more direct control of the
3 paper flow to ensure that the number of staff who saw the
4 papers, saw the predecisional materials, was narrowed.

5 Q. Did you take it seriously?

6 A. Absolutely.

7 Q. I'd like to direct your attention to the binder in front of
8 you.

9 MS. CUCINELLA: And I will also ask Ms. Pyun to put up
10 on your screen what's been marked for identification as
11 Government Exhibit 1318.

12 Q. Do you recognize this?

13 A. Yes.

14 Q. What is it?

15 A. This is an email communication with me and our chief of
16 staff at the time.

17 MS. CUCINELLA: The government offers 1318.

18 MR. FISHBEIN: Objection.

19 THE COURT: Ground in a word.

20 MR. FISHBEIN: Hearsay. And there's a
21 characterization on the second page, it's the second email
22 down, that I believe is inappropriate.

23 MS. CUCINELLA: Your Honor, may we approach? It's
24 nonhearsay.

25 THE COURT: Yes, and bring me a copy I can read.

I43KBLA2

Blum - direct

1 MR. FISHBEIN: I have it.

2 MS. CUCINELLA: I believe you have a binder.

3 THE COURT: I have a binder? That would be this one?

4 (Continued on next page)

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Blum - direct

1 (At the sidebar)

2 THE COURT: What am I looking at?

3 MR. FISHBEIN: 1318.

4 THE COURT: Yes. That, I know. That was the part I
5 got.

6 MR. FISHBEIN: So, my objection is that there are a
7 variety of statements, such as: "Our documents are leaking;
8 this is a criminal offense." This is basically people at CMS
9 talking about what they believe happened. Those are factual
10 assertions, and saying it's a criminal offense, I think, usurps
11 the role of the jury as well.

12 MS. CUCINELLA: Your Honor, these are prior consistent
13 statements. The defendants opened on the fact that senior CMS
14 officials are going to say now that there is an indictment on
15 the table, that this is something that they take seriously,
16 implying that the leaks were not something that were taken
17 seriously back in the day. So, this is nonhearsay. It's prior
18 consistent statements.

19 With respect to the fact that this is a criminal
20 offense, we're happy to have a limiting instruction on that.
21 It goes to the fact that they're taking it seriously.

22 MR. PATTON: Your Honor, could I be heard on that?

23 THE COURT: I can't hear you.

24 MR. PATTON: I just want to be heard on us. I think
25 Ms. Cucinella is referring to my opening. I did not say they

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Blum - direct

1 did not take it seriously. I said that they would come in and
2 suggest that their rules were more rigid than they actually
3 were, but that's an entirely different matter than
4 characterizing this as a criminal offense.

5 MS. CUCINELLA: This is directly responsive to that.

6 MS. JAMES: If I may be heard?

7 THE COURT: Give me a minute. I'll be right with you.

8 Okay. Go ahead, Ms. James.

9 MS. JAMES: I just wanted to join in the objection
10 with respect to the language about this is a criminal offense.
11 I think it's improper opinion testimony, and it does usurp the
12 role of the jury. And it's not even clear what -- it presents
13 a potential for confusion because whatever criminal offense he
14 may be talking about is not necessarily the criminal offense
15 that the jury is here to consider today. It's just prejudicial
16 and confusing.

17 THE COURT: That can be handled with an instruction.

18 Anything else? Have I heard it all?

19 MR. PATTON: I just want to make sure we're joined in
20 the objection.

21 MR. ESSEKS: And for Mr. Olan, your Honor.

22 THE COURT: Look, I'm going to assume henceforth, and
23 unless otherwise noted, any objection by one is an objection by
24 all. All right?

25 MR. ESSEKS: Thank you, Judge.

I43KBLA2

Blum - direct

1 MR. PATTON: Thank you.

2 MS. JAMES: Your Honor, I want to note, while the
3 government has provided one binder to the front counsel table,
4 we don't have it at the back. It just hinders our ability to
5 work on these documents and objections.

6 MS. CUCINELLA: The government had suggested trading
7 exhibits the night before witnesses took the stand. Defendants
8 didn't want to do that, so at this point, we have --

9 MS. JAMES: I'm asking that they be available here at
10 counsel table.

11 THE COURT: Have them available.

12 MR. FISHBEIN: Your Honor, apart from "it's a criminal
13 offense," there is a hearsay element as well. Here's another
14 one: "I'm confident the source is our briefing slides." If
15 this witness wants to say that their briefings were leaking,
16 then he can testify to that, but having an email say that who
17 the source is, that's hearsay.

18 THE COURT: Look, I take it the whole point of this is
19 simply to show that this witness reacted upon being told these
20 things, right?

21 MS. CUCINELLA: Yes.

22 THE COURT: Is it offered for the truth of what he was
23 told?

24 MS. CUCINELLA: No.

25 THE COURT: That's the end of the hearsay objection.

I43KBLA2

Blum - direct

1 MR. FISHBEIN: I think the jury is going to take it
2 that way, honestly, and I think that the criminal offense is
3 very prejudicial.

4 THE COURT: I'll deal with that. Okay, thank you.

5 (Continued on next page)

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Blum - direct

1 (In open court)

2 THE COURT: Okay. Members of the jury, Government
3 Exhibit 1318 is going to be received for a limited purpose.
4 This is the first time that's happening in this trial. It
5 probably will happen more. So let me explain what's going on
6 as clearly as I can.

7 You're about to see it. It's an email chain. It's
8 offered for one purpose alone: It's offered to show how
9 Mr. Blum and the agency he ran reacted, given what they were
10 told -- what he was told. It is not offered to prove the truth
11 or accuracy of what he was told. This is an age-old
12 distinction. A silly example I always use, but it makes the
13 point, is this: If it were for some reason important in a case
14 to know that somebody told the witness that the moon is made of
15 green cheese, the person -- the evidence that somebody said
16 that is admissible to show that the witness was told that and
17 what he did in consequence of being told that. It is not
18 evidence of what the moon is made of. That's what's going on
19 here. A series of statements made to Mr. Blum, not offered for
20 the truth of those statements made to him, but, rather, offered
21 to explain what he did and why he did it.

22 Now, there's one other thing about this exhibit that I
23 need to mention: You will find an email in here, part of the
24 chain, in which Mr. Blum said something was a criminal offense.
25 That may have been his opinion at the time. That's not the

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Blum - direct

1 point. The point is, I will instruct you on the law. Whether
2 he was right or wrong about thinking it was a criminal offense
3 is not for your consideration. You should disregard the
4 characterization. You're, of course, entitled to consider that
5 perhaps he was upset, and that's why he said it, maybe he
6 thought it was a criminal offense, but right or wrong, it
7 doesn't matter. I'm the judge of the law, and all of this, of
8 course, involves an incident as to which, as I understand it,
9 none of the defendants are accused. This is all offered to
10 explain what Mr. Blum knew, what he understood, and how he
11 reacted. That's the point.

12 Okay. With that background, maybe we'll do this more
13 quickly in the future. Let's proceed.

14 (Government's Exhibit 1318 received in evidence)

15 THE COURT: Publish the exhibit.

16 BY MS. CUCINELLA:

17 Q. Starting at the back of Government Exhibit 1318 --

18 MS. CUCINELLA: Is it on the jurors' screens as well?

19 JUROR: Yes.

20 Q. -- Mr. Blum, can you explain what's going on in this email?

21 MS. CUCINELLA: Ms. Pyun, can you take that down.

22 Just leave it up. Thank you.

23 THE WITNESS: This is an email to me from my colleague
24 at the time, Lauren Aronson, who directed CMS's Office of
25 Legislation where she brought to my attention, and to some of

I43KBLA2

Blum - direct

1 my colleagues, that very detailed proposals was being
2 circulated by Washington healthcare lobbyists.

3 BY MS. CUCINELLA:

4 Q. Did you respond to the email?

5 A. Yes.

6 Q. What was your response?

7 A. My response was one of extreme concern and extreme anger
8 that our predecisional materials were being shared before being
9 made public.

10 Q. At this point in time, did you believe the leaks to be
11 happening from inside CMS or from somewhere else?

12 A. No. The timing of which suggested to me that the leaks
13 were happening was CMS made its own decisions and began to
14 brief other parts of the clearance process, the executive
15 branch. I felt given the timing, that the leaks were happening
16 once documents were leaving CMS and being reviewed by the
17 Department of Health and Human Services and by the Office of
18 Management and Budget.

19 Q. Is the leak that you're referring to here, does this
20 involve what you were talking about earlier, predecisional
21 information?

22 A. Yes.

23 Q. In your email on October 19th, 2012, at 10:09 a.m., you
24 say, "This is a criminal offense."

25 Why did you say that?

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Blum - direct

1 A. I had a good understanding of the rules and requirements of
2 how CMS was to treat predecisional materials. I was also
3 trying to send a very strong message to my colleagues, to my
4 superiors, that the agency needed to treat the issue seriously.

5 Q. Thank you.

6 MS. CUCINELLA: Ms. Pyun, you can take that down.

7 Q. Mr. Blum, if predecisional information is disclosed prior
8 to a proposed rule being announced publicly, how, if at all,
9 does that impede the function of CMS?

10 A. Well, CMS's rule-making process and any federal agency's
11 rule-making process is based upon the notion that the entire
12 public that can be affected by the proposed rules, the final
13 rules, have the right to comment. It's a very strong precedent
14 and a very strong principle that every stakeholder has the
15 right to receive the materials at the same time. If materials
16 are being shared predecisional, that indicates that the
17 agencies are not following their processes. The processes are
18 designed to be fair to all stakeholders, to make sure that
19 everybody has the right to comment at the same time. And leaks
20 indicate beyond that there are staff potentially violating the
21 rules, that the process is not being fair. And that's a
22 longstanding principle that those that work in federal agencies
23 are tasked to ensure.

24 Q. Other than the perception of fairness, does it impede the
25 agency in other ways?

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Blum - direct

1 A. Well, my task was to brief and to convince my superiors,
2 very senior policymakers in the federal government, of very
3 serious, complicated, significant decisions. The other impact
4 that when a document, predecisional materials, get leaked, that
5 it begins to trigger lobbying, begins to trigger powerful
6 forces to try and stop decisions. So, when leaks happen, my
7 job became more tough and more difficult to manage the process
8 flow and to convince my superiors of the right course for the
9 Medicare program.

10 Q. Mr. Blum, when you worked at CMS, did you work with an
11 individual named Christopher Worrall?

12 A. Yes.

13 Q. Do you see Mr. Worrall in the courtroom today?

14 A. Yes.

15 Q. Please identify him by where he is sitting and an article
16 of clothing he's wearing?

17 A. Sitting over there with a red tie.

18 Q. And at what table are you referring to?

19 A. The second tier table.

20 MS. CUCINELLA: Your Honor, may the record reflect
21 that the witness has identified Defendant Worrall?

22 THE COURT: Yes.

23 BY MS. CUCINELLA:

24 Q. Mr. Blum, we're going to talk more about both the
25 rule-making process and confidentiality in a minute. I want to

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Blum - direct

1 talk for a moment about your background and how you ended up at
2 CMS.

3 Where did you go to school?

4 A. I went to College at UPenn, University of Pennsylvania, and
5 to graduate school at the Kennedy School at Harvard University.

6 Q. After school, where did you work?

7 A. My first job was working for the federal government in the
8 White House budget office. I started there in the summer of
9 '97 and stayed there for about three and a half years.

10 Q. What did you do after that?

11 A. I joined the professional staff for the senate finance
12 committee in 2001 to 2004, and then after that, joined a
13 private consulting firm from 2004 to 2009, and in 2009, I
14 joined CMS.

15 Q. Will you remind the jury what your first role was when you
16 joined CMS?

17 A. I was first tapped to be the director for the Center for
18 Medicare at CMS.

19 MS. CUCINELLA: I'm going to ask that, Ms. Pyun, if
20 you can pull up for the witness' identification, please,
21 Government Exhibit 1252.

22 Q. Mr. Blum, do you recognize this?

23 A. Yes.

24 Q. What is it?

25 A. This is the organizational chart of CMS at 2010,

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Blum - direct

1 April 2010.

2 MS. CUCINELLA: The government offers Government
3 Exhibit 1252.

4 THE COURT: Received.

5 (Government's Exhibit 1252 received in evidence)

6 THE COURT: Publish.

7 BY MS. CUCINELLA:

8 Q. Mr. Blum, will you tell the jury what they're looking at,
9 hopefully, on their screens?

10 A. They're looking at the organizational chart of the agency.
11 At the time in 2010, there were five main policy and
12 operational centers, one of which was the Center for Medicare.
13 There were other offices that were smaller that reported
14 directly to the CMS administrator, but it provides the
15 organization and the senior staff structure for the agency.

16 Q. And you testified that you were the deputy administrator
17 and director for the Center for Medicare, correct?

18 A. That's right.

19 Q. And that's in the bottom left-hand corner?

20 A. Correct.

21 Q. What were some of your duties and responsibilities in that
22 role?

23 A. There were two main responsibilities. The first was to
24 direct and to oversee the payment process, the payment policy
25 process for those healthcare providers that are paid directly

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Blum - direct

1 by the Medicare program. That includes hospitals, physicians,
2 nursing homes, dialysis facilities.

3 The other part was to oversee the payment and the
4 contracting of private managed care plans that provide services
5 to Medicare beneficiaries.

6 Q. You just described two parts. Were those known by
7 particular names?

8 A. Well, the statute defines those parts. And the statute
9 defines the first part, the direct payments to providers, as
10 Part A and Part B. And the statute defines the other part, the
11 managed care part, as Part C and Part D.

12 Q. With respect to Part A and Part B and Part C and Part D,
13 did those all fall underneath the Center for Medicare?

14 A. There were different offices throughout the agency that had
15 some degree of responsibility for the Medicare program. The
16 Center for Medicare was the lead office that oversaw those
17 functions.

18 Q. Where physically was the Center for Medicare located?

19 A. In the Baltimore, Maryland headquarters.

20 Q. Did you oversee a team of people in your role?

21 A. Yes.

22 Q. Approximately how large was your team?

23 A. The team fluctuated during my time there, but it ranged
24 between 750 staff to about 800 and so staff.

25 MS. CUCINELLA: Ms. Pyun, you may take that down.

I43KBLA2

Blum - direct

1 Q. Mr. Blum, to whom did you report?

2 A. Most of my time, Marilyn Tavenner.

3 Q. Is CMS part of the executive branch?

4 A. Yes.

5 Q. Mr. Blum, what is the relationship between CMS and
6 Congress?

7 A. A couple of things: Congress defines the legislation that
8 governs the Medicare program, and the Medicare program goes
9 through frequent changes year to year. It's given authority
10 that's governed by the Congress. Congress sets the budget for
11 the agency, the number of staff it can hire. And Congress also
12 engages in very vigorous oversight, holds hearings, does
13 oversight hearings, to the agency's operations.

14 Q. In your role, did you personally interact with Congress?

15 A. Yes, frequently.

16 Q. What kinds of things did you share with members of Congress
17 and their staff when you would interact with them?

18 A. I would state, define, defend, CMS's policy positions.
19 Those could be in formal hearings, those could be in staff
20 briefings, those could be in one-on-one phone calls. Members
21 of Congress often contacted the agency to urge us to take
22 certain actions, make certain decisions, and I would listen,
23 ask questions, and answer questions the best I could.

24 Q. Were you called to testify before Congress?

25 A. Yes.

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Blum - direct

1 Q. On numerous occasions?

2 A. I think 12 times.

3 Q. During any of your interactions with Congress or their
4 staff, would you share predecisional information?

5 A. I treated the Congress, I treated their staff, like any
6 other member of the public, not to share predecisional
7 materials with those offices.

8 Q. At times, were you pressured by Congress or their staff to
9 share predecisional information?

10 A. Absolutely. Congress had a very strong interest, and
11 certain members of Congress that had particular stakes in bills
12 or legislation would push the agency, would push me, for
13 predecisional information.

14 Q. Would you fall under that pressure?

15 A. I would politely push back and not provide that.

16 Q. Now, Mr. Blum, you mentioned earlier that there are rules
17 that govern what CMS employees could and couldn't talk about
18 publicly. How did you come to learn what types of rules govern
19 CMS employee conduct?

20 A. All staff that join the agency go through new staff
21 orientation that takes about a day or two where they are
22 briefed on the various rules. All staff have to go through
23 periodic trainings to refresh those rules. More senior staff
24 go through more intensive training. Political staff go through
25 more intensive training and more intensive review. There are

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Blum - direct

1 all staff emails that are sent periodically to remind staff of
2 their responsibilities under the law and under the regulations.

3 Q. You just mentioned obligations under the law. Were you
4 also trained on statutes that apply to CMS employees?

5 A. There were multiple statutes that applied to all federal
6 workers about their responsibilities with various rules and
7 information. Agencies also had the discretion to set their own
8 rules, but those were policies that were continuously
9 communicated to staff.

10 MS. CUCINELLA: Ms. Pyun, will you please pull up
11 Government Exhibit 2206 for identification for the witness.

12 Q. Mr. Blum, do you recognize this?

13 A. Yes.

14 Q. And what is it?

15 A. This describes the federal rules, federal regulations for
16 all governmental staff and their use of nonpublic information.

17 MS. CUCINELLA: The government offers Government
18 Exhibit 2206.

19 MR. FISHBEIN: Objection; no date, no distribution
20 relevance.

21 THE COURT: What about that?

22 MS. CUCINELLA: I'm sorry?

23 THE COURT: What about that?

24 MS. CUCINELLA: The witness just testified that they
25 were trained on the statute. With respect to the date --

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Blum - direct

1 THE COURT: It's not a statute.

2 MS. CUCINELLA: Sorry?

3 THE COURT: It's not a statute.

4 MS. CUCINELLA: With respect to the laws that governed
5 the use of public information.

6 THE COURT: Yes, I understand. But the objection was
7 there's no date and no information yet about distribution. So,
8 what do you say about that?

9 MS. CUCINELLA: Well, with respect to distribution, he
10 testified that he was trained on it.

11 THE COURT: No, he said that he was trained. He
12 didn't say he was trained on this one. And I don't see a date
13 on here. And it would not be helpful if this was in the
14 Lincoln administration.

15 MS. CUCINELLA: Fair, your Honor. We can do this
16 after a break, and we can provide the Court with a date.

17 THE COURT: Very good.

18 MS. CUCINELLA: Okay.

19 Ms. Pyun, I will ask you, instead, to pull up
20 Government Exhibit 1222 for the witness' identification.

21 BY MS. CUCINELLA:

22 Q. Mr. Blum, I believe you also have a hard copy of this in
23 your binder. Do you recognize this document?

24 A. Yes.

25 Q. What is it?

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Blum - direct

1 A. It's an all-staff email that all CMS staff received in
2 April 2011 to remind them of various requirements, regulations,
3 statutes, that govern their day-to-day work.

4 Q. I'm going to ask that you look at this time in your binder
5 also at Government Exhibits 410 and 411.

6 Do you recognize those?

7 A. Yes.

8 Q. What are they?

9 A. They're documents that were provided to CMS staff to
10 outline their requirements of keeping nonpublic information
11 confidential.

12 MS. CUCINELLA: The government offers Government
13 Exhibits 1222, and 410, and 411.

14 MR. FISHBEIN: No objection to 1222. On 410 and 411,
15 it's the same objection. So, perhaps we can get a date?

16 MS. CUCINELLA: I'm happy to go forward with 1222 at
17 this time.

18 THE COURT: 1222 is received.

19 (Government's Exhibit 1222 received in evidence)

20 THE COURT: I reserve judgment on the other ones.

21 MS. CUCINELLA: May we publish?

22 THE COURT: Yes.

23 MS. CUCINELLA: Ms. Pyun, if you'll please publish the
24 first page.

25

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Blum - direct

1 BY MS. CUCINELLA:

2 Q. Mr. Blum, can you tell the jury what they're looking at
3 here?

4 A. They're looking at a cover email that was sent to all CMS
5 staff in April of 2011 that reminded staff to review their
6 various requirements of the federal law.

7 Q. Turning to the second page, what policy specifically does
8 this memo refer to?

9 A. The requirements to keep confidential information
10 confidential, not to share predecisional information publicly.

11 MS. CUCINELLA: Ms. Pyun, if you can highlight the
12 second paragraph.

13 Q. There's a reference in the second paragraph to market
14 sensitive information. What did you understand that to mean in
15 this context?

16 A. Any decisions or data that could affect the financial
17 markets.

18 Q. And why is market sensitive information referenced here in
19 connection with the employee nondisclosure policy?

20 A. Well, the decisions that CMS makes can often affect the
21 stocks of healthcare companies that are traded on the financial
22 markets. CMS has longstanding principles not to make
23 predecisional material public to anybody. That includes the
24 financial markets. We were under oversights and -- regarding
25 potential leaks of predecisional information and took those

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Blum - direct

1 leaks very seriously during my time at CMS.

2 Q. Turning to the third page, there is an explanation, I
3 believe it starts in the second paragraph.

4 MS. CUCINELLA: Ms. Pyun, if you can highlight that.

5 Q. It describes nonpublic information.

6 Mr. Blum, do you have an understanding of whether
7 information needed to be market sensitive in order for it to be
8 nonpublic?

9 A. No. There is --

10 Q. I'm sorry, did you have an understanding?

11 A. Oh, yes.

12 Q. What is that understanding?

13 A. There's lots of information that CMS staff have come to
14 know that doesn't necessarily have financial market
15 implications. Oftentimes they're asked to review coverage
16 decisions regarding trade secrets, oftentimes they come to
17 learn information regarding contractors to the agency. So, the
18 definition of nonpublic information is bigger than market
19 sensitive data.

20 Q. Looking --

21 MS. CUCINELLA: Ms. Pyun, if you'll highlight here
22 footnote 1. Sorry, the footnote is at the bottom.

23 Q. What do these footnotes refer to?

24 A. Those are references to federal regulations and federal law
25 that govern or that authorize these requirements.

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Blum - direct

1 Q. Based on what CMS does, what was your understanding of what
2 types of information were subject to this nondisclosure policy?

3 A. It was a large body of data and information. CMS makes
4 very serious and very important decisions that govern the
5 healthcare economy. CMS is asked to review technologies for
6 coverage by the Medicare program that are very sensitive to
7 those companies that make those products. The staff is
8 continuously working on and reviewing policies and decisions
9 that have a huge impact on the healthcare financial sector, the
10 whole healthcare delivery system.

11 Q. So, would information relating to a proposed rate cut fall
12 under this policy?

13 A. Yes.

14 Q. Would information relating to a final policy issued by CMS
15 fall under this?

16 A. Yes.

17 MS. CUCINELLA: Looking, finally, Ms. Pyun, at the
18 paragraph that begins at the bottom, the final paragraph on the
19 page. I think it continues to the second page, but we can
20 start here.

21 Q. Mr. Blum, what does this last paragraph refer to?

22 A. There is -- for all federal workers, there is prohibitions
23 on holding stocks in companies that are regulated by the
24 agencies where the federal worker works. This is language to
25 remind staff that they should not make any financial decisions

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Blum - direct

1 based upon the information they come to learn in the course of
2 their business. This applies to CMS. This language, I think,
3 applies to every federal worker that is employed by the federal
4 government.

5 Q. So, applying this standard to your role, would you have
6 been allowed to trade in healthcare stocks --

7 A. No.

8 Q. -- given your position?

9 A. No. There was a dollar threshold, that you couldn't hold
10 stocks beyond a certain dollar threshold.

11 Q. Why not?

12 A. Because the government principle, the policy principle, is
13 that those that work in the federal government should not
14 benefit from the actual work that they do. The work is
15 intended for a public purpose, not for personal financial gain.

16 Q. Thank you.

17 MS. CUCINELLA: Ms. Pyun, you can take that down.
18 Thank you.

19 Q. Now, Mr. Blum, CMS is a public agency, correct?

20 A. Yes.

21 Q. What, if anything, is the tension between restrictions on
22 information sharing and the need for the agency to be
23 transparent?

24 A. Well, the policy processes happen in a very public way.
25 They give the rights for those that are affected by the

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Blum - direct

1 policies the right to comment, the right to review, the right
2 to understand what the agency has proposed. That's balanced by
3 the fact that there is a very rigorous decision process that
4 happens before policies are proposed publicly. Those policies
5 have oftentimes significant dollar impacts. They're reviewed
6 carefully not only within the CMS agency, but by the cabinet
7 department, Health and Human Services. They're reviewed
8 oftentimes very vigorously by the White House and the White
9 House budget office. Decisions CMS makes has tremendous impact
10 to the overall federal budget and the overall healthcare
11 economy, and the process is designed to carefully balance the
12 tension between giving those policymakers the rights to make
13 decisions based upon good information, complete information,
14 and also the right for the public to understand what has been
15 proposed and how the agency made those proposals.

16 Q. While you were at CMS, did you make a call for more
17 transparency?

18 A. There was a policy, I guess a desire, for the agency during
19 my time there to make more of the information that CMS had,
20 particularly around claims information, payment claims
21 information, more public, but in a very controlled way. CMS,
22 Medicare, is the largest healthcare purchaser in our country.
23 It's probably the most sophisticated purchaser. And how it
24 pays for healthcare services, who it pays for healthcare
25 services, has public policy value to improve the healthcare

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Blum - direct

1 system.

2 And so I was interested, my colleagues were
3 interested, in ways for us to give much more information to the
4 public about how the Medicare program pays, who it pays, and
5 how it pays for healthcare services.

6 Q. You said that that data related to payment claims
7 primarily; is that right?

8 A. That's right.

9 Q. How is that different from predecisional information?

10 A. Well, data that was shared publicly generally had a
11 two-year lag to it. It was carefully scrubbed for its
12 accuracy. It was released in a way that was transparent and in
13 a broad public release, but we never shared predecisional
14 materials, predecisional data, to the public before it was made
15 public in a controlled way.

16 Q. Did you ever call for CMS to share predecisional
17 information about rate cuts?

18 A. No.

19 Q. Why not?

20 A. That violated the longstanding processes that violated the
21 principles of being fair, and it violated the rights of the
22 president and his senior team to make decisions in a way that
23 was pure, but the agency, during my time, never called for
24 predecisional materials to be made public before they were made
25 public.

I43KBLA2

Blum - direct

1 Q. We talked about the nondisclosure policies. Were there
2 other policies that governed the conduct of CMS employees?

3 A. Yes.

4 Q. What were some of those policies?

5 A. There were rules around receiving gifts, there were rules
6 around negotiating for new employment, there were rules around
7 political activities in private life.

8 Q. Let's talk about the first two you mentioned. First, you
9 said that there were rules around receiving gifts. What was
10 your understanding of those rules?

11 A. The general rule that I understood was that federal workers
12 were not permitted to take gifts that were greater than \$20
13 from those that were not members of their own family.

14 Q. Would that include dinners?

15 A. Gifts over \$20, yes.

16 Q. Same with drinks or baseball tickets?

17 A. Over \$20.

18 Q. You also said that there were rules and regulations around
19 seeking new employment?

20 A. Correct.

21 Q. What were those?

22 A. The rules were that if somebody were seeking healthcare
23 work outside of the federal government, particularly with
24 entities or companies that were regulated by that agency, they
25 had to disclose that to their ethics person, and they had to

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Blum - direct

1 recuse themselves from any work that could affect that particular
2 company.

3 Q. Now, Mr. Blum, you testified --

4 THE COURT: Before you move on, Ms. Cucinella, you
5 used the word "recused." Can you tell the jury what you meant?

6 THE WITNESS: That means not participating in any work
7 or any decisions that would affect that particular company.

8 MS. CUCINELLA: Thank you, Judge.

9 BY MS. CUCINELLA:

10 Q. Now, Mr. Blum, you testified earlier that you worked with
11 Mr. Worrall while you were at CMS, correct?

12 A. Yes.

13 Q. Do you have an understanding of how long Mr. Worrall worked
14 at CMS?

15 A. He was there at the agency before I got to the agency in
16 2009.

17 Q. And he was still there when you left?

18 A. Yes.

19 THE COURT: Are you moving into another subject?

20 MS. CUCINELLA: I am.

21 THE COURT: Okay. Let's take our morning break. Ten
22 minutes, please, folks.

23 (Recess)

24 (Jury not present)

25 THE COURT: Let's get the jury.

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Blum - direct

1 MR. ESSEKS: Your Honor, I'm sorry, we're just getting
2 Mr. Olan.

3 THE COURT: You can start getting the jury, but don't
4 come through the door until he's here.

5 Off the record.

6 (Discussion off the record)

7 (Jury present)

8 THE COURT: The defendants and the jurors are all
9 present, as they have been throughout.

10 You may continue, Ms. Cucinella.

11 MS. CUCINELLA: Thank you, your Honor.

12 BY MS. CUCINELLA:

13 Q. Before the break, Mr. Blum, you had just testified that
14 Mr. Worrall was at CMS when you joined, correct?

15 A. Correct.

16 Q. Do you have a recollection of what Mr. Worrall's role at
17 CMS was when you joined in 2009?

18 A. He was the special assistant to Dr. Jeff Kelman, and
19 Dr. Jeff Kelman was the chief medical officer for the Part C
20 and Part D parts of the Medicare program.

21 Q. When you say "special assistant," what does that mean?
22 What does that title mean at CMS?

23 A. Most senior staff at CMS had one person assigned to them to
24 really help them perform their jobs. Special assistants could
25 help manage calendars, could write memos, do data analysis, but

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Blum - direct

1 really it was a staff resource to senior CMS staff to help them
2 do their jobs.

3 Q. You testified that Dr. Kelman was focused on Part C and D;
4 is that right?

5 A. Correct.

6 Q. Remind the jury what Part C and Part D are.

7 A. Part C and Part D are the managed care side of the Medicare
8 group, the private companies that provide services to Medicare
9 beneficiaries.

10 Q. Along with working on Part C and Part D, did Dr. Kelman
11 have additional roles?

12 A. Jeff Kelman was very skilled at understanding medical data,
13 claims data. He was very knowledgeable regarding the health
14 care system. And from time to time, and fairly often, I asked
15 him to help me with Part A and Part B policy issues.

16 Q. In connection with the help you requested from him on Part
17 A and Part B, did he assist with payment systems?

18 A. He was tasked by me to help me monitor new payment systems
19 that were going into effect. During my time at CMS, I was
20 personally focused on two very complicated, very controversial
21 payment systems that were going into effect for the first time,
22 and I asked Dr. Kelman to help me understand, help me monitor
23 the impact of those payment changes going into effect.

24 Q. What were those two payment systems?

25 A. There was a new payment system to pay for durable medical

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Blum - direct

1 supplies - hospital beds, oxygen tanks. The program was
2 directed by Congress to reduce those payments quite
3 dramatically.

4 And the other payment system was a brand new payment
5 system to pay for dialysis services. Previous to 2010, the
6 program paid separately for the facility costs and the drugs
7 that were associated with dialysis treatments, and Congress
8 directed CMS to combine those two pieces to one payment bundle.

9 Q. Approximately when did Dr. Kelman start assisting with the
10 payment processes in Part A and Part B?

11 A. It was probably in the summer of 2009 when I asked Jeff to
12 help me with these two projects.

13 Q. You mentioned the dialysis program. Again, is that
14 something that's commonly referred to as ESRD?

15 A. ESRD is the condition that patients have, and it means
16 kidney failure, and those patients require permanent lifetime
17 dialysis care to stay alive.

18 Q. We are going to come back to some of the changes to the
19 dialysis payment system.

20 Focusing on Mr. Worrall, did his role at CMS evolve
21 over time?

22 A. Yes. Chris, to my observation, was very skilled and very
23 competent with his data work, and I had an interest in really
24 having more of our payment teams to adopt the same data
25 analysis and claims monitoring that we did for these new

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Blum - direct

1 payment systems. And so I asked our team to create a new role
2 for the Center for Medicare that would be tasked to help all of
3 the payment policy teams become more proficient and use claims
4 data to help the policy -- to help develop new policies.

5 Q. As a result of having a role on a payment team, would it be
6 common to attend meetings in connection with the rule-making
7 process?

8 MR. FISHBEIN: Objection; speculation.

9 Q. If you know.

10 THE COURT: Just a minute. Rephrase the question.

11 Q. Do you have an understanding of whether individuals
12 associated with payment teams would attend meetings in
13 connection with CMS's rule-making process?

14 MR. FISHBEIN: Objection.

15 THE COURT: Sustained as to form.

16 Q. Do you know who attended meetings as part of CMS's
17 rule-making process?

18 A. There were many staff that attended meetings with me --
19 with other policy principals on policy issues. There were many
20 staff who were involved throughout the agency that were part of
21 the conversations.

22 Q. Did that include members of payment teams?

23 A. Yes.

24 Q. Sitting here today, can you testify for sure about what
25 meetings Mr. Worrall attended and which he did not?

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Blum - direct

1 A. No.

2 MS. CUCINELLA: Ms. Pyun, I'm going to ask you to pull
3 up for the witness.

4 Q. And direct you to your binder, Mr. Blum, to Government
5 Exhibit 1224-A, which has marked for identification.

6 Do you recognize this?

7 A. Yes.

8 Q. What is it?

9 A. When CMS commissioned the data monitoring work for the new
10 bundled payment system for dialysis care, or ESRD, that work
11 was performed by a private contractor called Acumen. They
12 received a contract from CMS to collect the data for the
13 analysis and then to do the claims analysis. This is one of
14 the reports that summarizes their work.

15 MS. CUCINELLA: The government offers Government
16 Exhibit 1224-A.

17 THE COURT: Received.

18 (Government's Exhibit 1224-A received in evidence)

19 MS. CUCINELLA: May we publish, your Honor?

20 THE COURT: You may.

21 BY MS. CUCINELLA:

22 Q. Mr. Blum, do you see Mr. Worrall's name on Government
23 Exhibit 1224-A?

24 A. Yes.

25 Q. What was Mr. Worrall's role in connection with this

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1 project?

2 A. He, to my understanding, was the main project officer for
3 the contract. Each CMS contract had a project officer. He
4 would work very closely with the contractor to define the
5 analysis, to produce the analysis, and to produce summaries of
6 the analysis for myself and for the payment teams. But Chris
7 was a point person for the work that oversaw the contractor's
8 work.

9 Q. What is your understanding of the data that is contained in
10 1224-A?

11 A. We were very interested to know what happened to those
12 patients that received dialysis care before and after the new
13 payment system went into effect. We wanted to make sure that
14 their care was consistent and that they didn't have any other
15 healthcare consequences once the new payment system went into
16 effect. We heard concerns from the public that if care was
17 somehow disrupted or the drug that went along with the dialysis
18 care was somehow reduced inappropriately, that people would
19 have heart attacks, they would have strokes, they would have
20 bad outcomes. And we were very mindful to track what happened
21 to people before and after the new payment system went into
22 effect to ensure that they received the same degree of services
23 and the same high quality of services, and also not have bad
24 outcomes, like heart attacks and strokes, for example.

25 The claims data that CMS produces gave us a very clear

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1 indication for the before and after trends for patients that
2 received these services.

3 Q. Is this a document that should have been shared outside of
4 CMS?

5 A. This document is posted or dated June 2012, though CMS did
6 not begin to share this claims tracking information until the
7 spring of 2013.

8 Q. So, does that mean it shouldn't have been shared prior to
9 that?

10 A. This document also has a --

11 Q. I'm sorry, can you answer the question first?

12 A. Sorry. Can you say it back again?

13 Q. Sure.

14 You said that this claims data was not shared until
15 the spring of 2013. Should this document have been shared
16 prior to that?

17 A. No.

18 Q. Okay. And go ahead. I believe you were making a second
19 point?

20 A. All CMS documents that were not meant to be shared had a
21 footnote on it that said that the data is not authorized to be
22 released publicly, and this document has that footnote on it.

23 Q. Why shouldn't this data have been shared publicly, beyond
24 just the label that it shouldn't be?

25 A. It was new data. We weren't yet confident in the trend

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1 lines. This new payment system went into effect in 2010. It
2 was a very sensitive payment policy, it was a very sensitive
3 issue. I had a clear interest in making sure this policy was
4 not overturned by Congress. I wanted to be the one to control
5 the message for this data.

6 Q. If this data got out before CMS was ready to share it,
7 could that interfere with the functioning of the agency?

8 A. If this data was not well understood, if the data was
9 early, that a critic of the new payment system or somebody that
10 wanted to block the agency from this change could use the
11 information to convince the Congress to overturn it. It takes
12 a high degree of sophistication, clinical background, claims
13 background, to fully understand the data. So CMS always had an
14 interest, when releasing data, that it was well understood,
15 that it had a long tail or a lag to make sure that we
16 understood that it was accurate, and it was not misleading in
17 any way.

18 Q. Thank you.

19 MS. CUCINELLA: Ms. Pyun, you may take that down.

20 Q. Mr. Blum, did you think highly of Mr. Worrall's work?

21 A. Yes.

22 Q. Did you recommend him for a promotion?

23 A. I wanted him to grow with the agency. I certainly thought
24 that the new position that we had created, that he would be a
25 great candidate for that role. We considered other CMS staff

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1 for the role, but in the end, we determined that Chris was the
2 best person for this new role.

3 Q. Did he receive a pay increase for his new role?

4 A. I believe so, yes.

5 Q. Do you recall what status the government pay scale his new
6 role was?

7 A. I think he was a GS14. And his first role under Dr. Jeff
8 Kelman, and this new role, was a GS15. That's a higher pay
9 scale than a GS14.

10 Q. When you were considering Mr. Worrall for this promotion,
11 did you meet with him to discuss the possibility of a
12 promotion?

13 A. I met with him at least a couple of times, first just to
14 get an understanding of his interest to stay with the agency,
15 and just to provide my thoughts for things that he could do in
16 the agency. I had a clear interest that he stay at the agency
17 and grow with the agency. And the process took longer than I
18 had hoped, and Chris met with me to get an update on the status
19 of the new position and his consideration for it.

20 Q. What, if anything, did Mr. Worrall express to you about his
21 desire to stay with the agency?

22 A. He was clearly interested to grow, he was clearly
23 interested to have the opportunity to earn a higher income and
24 to assume more responsibility.

25 Q. What were the factors that you considered in recommending

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1 and granting this promotion for Mr. Worrall?

2 A. I wanted him to grow with the agency. I thought he was a
3 great talent. I was also aware that he was considering other
4 opportunities and wanted to create an opportunity for him to
5 stay within the agency.

6 Q. With respect to other opportunities, did you have an
7 understanding of what kind of other opportunities he was
8 considering?

9 A. No.

10 Q. At the time that you recommended, and Mr. Worrall received,
11 his promotion, were you aware of Mr. Worrall's friendship with
12 Mr. Blaszczyk?

13 A. No.

14 Q. Sitting here today, do you have any personal knowledge of
15 Mr. Worrall's relationship with Mr. Blaszczyk?

16 A. No.

17 Q. We have talked a fair amount this morning about CMS's
18 rule-making procedure. And you've talked about payment rules
19 and reimbursement rules; is that right?

20 A. Yes.

21 Q. How often are payment rules updated, so to speak?

22 A. So, each payment system that CMS maintains goes through an
23 annual process. The Congress has directed the agency to make
24 updates to those rules. Sometimes Congress changes a law that
25 requires a new payment regulation to put the new payment into

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1 effect. And the statute requires that CMS consider more
2 routine changes to each payment system every year.

3 Q. So, let's talk about the period of time in between when you
4 either get a mandate or a directive from Congress to update a
5 rule until the time that the proposed rule is published.

6 What's happening at CMS during this period?

7 A. If Congress changes the Medicare statute, it can provide
8 very detailed descriptions and instructions for how the agency
9 should make the change. Most often, Congress provides broad
10 parameters and gives discretion to the agency to fill in the
11 details. During the period when Congress passes a law to the
12 time when CMS has to implement the law, through notice and
13 comment rule-making, CMS works very hard to try to understand
14 what Congress meant by the change. If the Congress gave CMS
15 discretion to make its own calculations, fill in the details,
16 then the staff begin to develop options and data analyses for
17 policymakers in the executive branch to consider.

18 Q. So, in terms of developing those policies, what is actually
19 going on in the day to day at CMS?

20 A. The process is designed to have many levels of review.
21 These are very complicated decisions, they have decisions that
22 have far and wide impact, and teams -- the payment policy team
23 that has responsibility for that payment system will begin to
24 develop options, to define the broad questions that the agency
25 has to answer, they will begin a series of briefings to people

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1 that reported to me -- to me, to my superiors, to the cabinet
2 secretary, the Department of Health and Human Services, and
3 sometimes to the White House.

4 Q. During this period, are documents circulated with CMS
5 relating to the proposed regulation?

6 A. The process is designed to make sure that the head of CMS
7 gets the benefit of different offices and different
8 perspectives within the agency. The documents that are
9 developed by the Center for Medicare, the payment policy teams,
10 get shared with the Office of the General Counsel, they get
11 shared with the Office of the Actuary, they often get shared
12 with other offices, other centers, that have knowledge, that
13 have an interest in the policy process.

14 Q. Are they also shared within the Center for Medicare?

15 A. They can be. The staff was encouraged, during my time, to
16 collaborate, to work together, to share best practices. Many
17 payment systems have overlap, what happens in one payment
18 system can affect other payment systems. So the staff was
19 certainly encouraged to work together and to share best
20 practices.

21 Q. What, if anything, do you know about the document
22 management system at CMS?

23 A. The CMS staff was encouraged to share or to save their
24 documents to the CMS shared drives. They were encouraged not
25 to share or to -- sorry, to save their documents to their own

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Blum - direct

1 laptop hard drive, laptops can break, they can get lost, so the
2 CMS staff was encouraged to post and to save documents to the
3 CMS shared drives.

4 Q. You testified a moment ago that collaboration between and
5 among payment teams was encouraged. Was there any restriction
6 on discussing a proposed rule with another employee in the
7 Center for Medicare?

8 A. No. Oftentimes, rules were briefed together, and I was
9 briefed by the teams, there was multiple teams that would come
10 to meetings. And so there was no prohibition on policy
11 decisions that were shared, that were developed. Over time, we
12 began to become much more concerned with regard to market
13 sensitive data and took steps for certain decision points to be
14 on a need-to-know basis.

15 Q. During that period, again from the time that Congress
16 mandates or directs that a rule be updated to the time when the
17 proposed rule is published, did CMS have meetings with
18 individuals from outside the agency?

19 A. Sometimes. It was clear public knowledge -- the process
20 that CMS followed, it was clear public knowledge that on
21 certain times of the year, that CMS was working on certain
22 payment systems. Sometimes members of the Congress, sometimes
23 industry groups, would seek meetings with CMS staff in order to
24 provide perspective, give recommendations, for what policies
25 CMS should consider.

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1 Q. Were those meetings open to the public?

2 A. No.

3 Q. Were there meetings held during this period that were open
4 to the public?

5 A. Beyond just the payment systems, CMS has other functions
6 and other duties to set coding parameters, set payment terms,
7 to review technologies for coverage. CMS, throughout the day
8 and throughout the week, has continuous public meetings
9 regarding various functions that it's tasked to perform.

10 Q. So, if someone came to the CMS campus in Baltimore for a
11 public meeting --

12 THE COURT: Sorry, could I just stop you for a minute
13 to clarify.

14 You referred to the phrase "coding parameters." Could
15 you explain what that meant?

16 THE WITNESS: So, every healthcare service that's
17 delivered to a patient has a payment code. So, when a
18 physician submits its bill to an insurer, Medicare or a private
19 insurer, they submit a code for payment purposes. And those
20 codes are set by CMS.

21 THE COURT: Well, for example -- well, explain what
22 you meant by "coding parameters" as opposed to codes.

23 THE WITNESS: So, the agency reviews requests to
24 create new codes by physicians, by manufacturers of healthcare
25 technologies. The creation of new codes can lead to different

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1 payment amounts that get paid to healthcare providers.

2 THE COURT: So just to take a helpful example, which
3 I'm making it up -- this may have nothing do with reality -- if
4 somebody goes for an annual physical, and the doctor gives you
5 an electrocardiogram --

6 THE WITNESS: Yeah.

7 THE COURT: -- there might be a code for an annual
8 physical that includes the electrocardiogram along with what
9 else is done, and then there's a payment for that bunch of
10 services, or there might be two codes, one for the physical and
11 one for the electrocardiogram.

12 Hypothetically, could that be the case, first of all?

13 THE WITNESS: Yes.

14 (Continued on next page)

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1 THE COURT: And so when you talk about coding
2 parameters, one of the things you are talking about is whether
3 to have two different codes in that circumstance, rather than
4 one; is that accurate?

5 THE WITNESS: Yes.

6 THE COURT: Okay. Let's go on.

7 BY MS. CUCINELLA:

8 Q. With respect to the coding meanings that you talked about,
9 those are handled in public meanings, correct?

10 A. Correct.

11 Q. And those would be held at CMS's campus in Baltimore?

12 A. Correct.

13 Q. What was the procedure for people who wanted to attend the
14 public meeting in Baltimore?

15 A. They were open to any member of the public. There were
16 space limitations, depending on the conference room that was
17 used. They could only hold certain numbers of people, and
18 people had to pre-register through the CMS websites in order to
19 attend the public meetings.

20 Q. Did they have to sign in when they arrived at CMS? Right?

21 A. No -- yes, yes, they had to sign in with the security
22 guard.

23 Q. And when someone came to CMS for a public meeting, were
24 they then allowed to go into other parts of CMS and visit staff
25 or friends there?

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1 A. They were permitted to go to the CMS auditorium or the
2 CMS cafeteria, and then if they needed to go to a different
3 floor of the building, they had to be escorted by a CMS staff
4 person.

5 Q. With respect to these public meetings, during these
6 meetings, did CMS disclose any pre-decisional information
7 relating to upcoming reimbursement rules?

8 A. No. They were generally opportunities for the public to
9 give recommendations to the agency, but the agency never shared
10 pre-decisional materials during these public meetings.

11 Q. I think you also mentioned, before we started talking about
12 the public meetings, that sometimes there would be meetings,
13 again during this phase between Congress' mandate and the
14 publication of the proposed rule with certain stakeholder; is
15 that right?

16 A. Yes.

17 Q. Did CMS disclose pre-decisional information during those
18 meetings?

19 A. No.

20 Q. Why not?

21 A. Because generally at the time of those meetings, No. 1, the
22 policies weren't even determined yet. They were meant to be
23 listening sessions. And, No. 2, that if pre-decisional
24 materials were to be shared, it would violate the processes
25 that the agency held true, that the point was to give all

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Blum - Direct

1 members of the public the opportunity to comment at the same
2 time in a controlled way. And any meeting that happens, that I
3 participated in, before the rules -- before the proposed rule,
4 was -- there was a clear statement that this was a meeting for
5 listening only and not to discuss pre-decisional decisions.

6 Q. Once a rule was proposed, so at the end of this period, did
7 CMS engage more regularly with the public?

8 A. Yes. It was common for the public to seek face-to-face
9 meetings with the CMS staff, once the meetings were published.
10 The staff would brief congressional staff. Different
11 stakeholders group would seek time with CMS to explain their
12 comments. Oftentimes comments were complicated to understand,
13 and it was in CMS's interest to better understand those
14 comments that were coming from the public.

15 Q. During these meetings, would you or CMS staff be permitted
16 to preview or signal what the final rule would be?

17 A. No. That was considered to be pre-decisional.

18 Q. You mentioned Congress. We talked about Congress briefly
19 when you first took the witness stand. Remind the jury what
20 was Congress' role in the rule-making process?

21 A. Congress had several roles. No. 1, that Congress
22 authorized the statute, and they gave the agency the right to
23 issue those rules.

24 Congress often changed the statute but gave discretion
25 to the agency on how to implement it. And Congress would

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Blum - Direct

1 engage in vigorous oversight to ensure that the laws they
2 passed were implemented as they intended.

3 Congress also provides the funding that runs federal
4 agencies, and so those funding processes go through Congress,
5 and Congress authorizes the budget dollars that are used to run
6 the agency and Congress seeks to understand how to improve the
7 programs and how to change laws in the future, and would often
8 seek input and advice from the federal agencies about how to
9 improve the laws that were being run by the federal agencies.

10 Q. Did you have a practice with respect to whether or not you
11 would share confidential information with Congress during those
12 sessions?

13 A. I treated the Congress, like any member of the public, that
14 they do not have the right to pre-decisional materials.

15 Q. Mr. Blum, who is Dan Todd?

16 A. Dan Todd worked for Senator Hatch. Senator Hatch was the
17 Chairman of the Senate Finance Committee, the lead committee in
18 the Senate that oversaw CMS.

19 Q. So what was his role with respect to CMS?

20 A. Dan Todd, I believe, covered part B issues for Senator
21 Hatch and was the lead healthcare staffer for Senator Hatch and
22 the Senate Finance Committee on Medicare part B issues.

23 Q. During your time at CMS, were you in communication with Dan
24 Todd?

25 A. I communicated frequently with all committee staff, and

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1 that included Dan Todd.

2 Q. And what, if anything, was your practice with respect to
3 disclosing confidential information --

4 THE COURT: Just a second.

5 MS. CUCINELLA: Oh, sorry.

6 THE COURT: What's part B?

7 THE WITNESS: Part B is the part of Medicare that
8 finances physician services, dialysis services, lab services,
9 but is generally anything that occurs at a physician office or
10 in an outpatient hospital setting.

11 THE COURT: You may continue.

12 MS. CUCINELLA: Thanks, Judge.

13 BY MS. CUCINELLA:

14 Q. What, if anything, was your practice with respect to
15 disclosing confidential information about proposed regulations
16 to Dan Todd?

17 A. It was the same as any member of the public, not to discuss
18 pre-decisional materials.

19 Q. Was there a process that congressional staffers were
20 supposed to follow in terms of speaking with members of
21 CMS staff?

22 A. The staff was generally encouraged to contact CMS office of
23 legislation, that would then figure out the best way to deal
24 with the member or the staffer's question. Many members of
25 Congress or staff knew me personally, and they would contact me

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Blum - Direct

1 or contact my colleagues at the agency directly.

2 Q. You were in a senior role at CMS, correct?

3 A. Correct.

4 Q. Were more junior CMS staffers supposed to engage with
5 Congress?

6 A. Not generally. Very difficult skill set to interact with
7 members of Congress. They can be quite demanding. They can be
8 quite unreasonable from time to time, and the practice was that
9 those staff who were senior, those staff that were skilled,
10 those staff that understood the Congress were the ones that
11 would interact with Congress and their staffs.

12 Q. What types of things would you discuss with Dan Todd and
13 other congressional staffers?

14 A. Dan Todd and all congressional committee staff, were very
15 interested in the day-to-day workings, operations of the policy
16 making process. They drafted the laws that CMS implemented.
17 They had clear ideas for how they were to be implemented. As
18 you can imagine, the Medicare decisions were very politicized.
19 Democrats had one point of view. Republicans oftentimes had a
20 different point of view. And it was CMS's job to understand
21 how to balance those different political tensions that were
22 constantly being raised at the agency.

23 Q. As part of that, did you preview what CMS was going to do
24 with a proposed regulation?

25 A. No.

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1 Q. Did there come a time when you got angry with Dan Todd?

2 A. Yes.

3 Q. Tell the jury what happened?

4 A. CMS made a payment reduction that affected a maker of a
5 genetic testing product for the BRCA gene. That's breast
6 cancer. That company was based in Senator Hatch's home state.
7 Senator Hatch and Dan Todd expressed clear frustration with
8 CMS, with me, my boss, Marilyn Tavenner, with the payment
9 reduction.

10 My boss made a indication to Senator Hatch that
11 CMS would fix the issue, and then Dan Todd contacted me at
12 least once or twice to get an update on CMS's decision.

13 Q. And what happened after Dan Todd contacted you and asked
14 for an update on what CMS was thinking on its decision?

15 A. I explained to him that we were going through a deliberate
16 process, that I considered the process to be no different from
17 any other notice and comment process, that we hadn't come to
18 any decisions, those decisions were still pre-decisional and
19 not to be shared. I believed that Dan asked me to review what
20 CMS was thinking with a company that was affected by it. I
21 said no, and I pushed back on him.

22 Q. After you had -- was that a comfortable conversation?

23 A. I believe it was quite heated.

24 Q. After you had that heated conversation, what, if anything,
25 did you do?

1 A. I was very sensitive to members of Congress who pushed me
2 to make decisions that I felt were wrong or that violated the
3 process, and I took a note to myself to document the
4 conversation.

5 MS. CUCINELLA: The government -- Ms. Pyun, if you can
6 pull up government 1377 for the witness for identification.

7 Q. Do you recognize this, Mr. Blum?

8 A. Yes.

9 Q. What is it?

10 A. This is a note that I sent to myself to document the
11 conversation that I had with Dan Todd.

12 MS. CUCINELLA: The government offers Government
13 Exhibit 1377.

14 MR. FISHBEIN: Objection, hearsay.

15 THE COURT: The exhibit is received. You may publish
16 it, but I'm going to give an instruction with respect to the
17 exhibit.

18 (Government's Exhibit 1377 received in evidence)

19 THE COURT: The statement attributed in the second
20 sentence of the memorandum to Senator Hatch and the statement
21 attributed in the third sentence to Marilyn are both received
22 not for the truth of the matter stated, but only for the fact
23 that this witness wrote them down, true or false.

24 Yes, paragraph No. 2 is also received only as a
25 statement by the witness and not for the truth of what Dan Todd

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1 said to him. On that basis, it's received.

2 BY MS. CUCINELLA:

3 Q. Mr. Blum, looking at Government Exhibit 1377, which I
4 believe the jury has now too, is this an e-mail you sent to
5 yourself?

6 A. Yes.

7 Q. And what date did you send it to yourself?

8 A. December 18th, 2013.

9 Q. And just remind the jury what they're looking at. What
10 exactly did you e-mail to yourself?

11 A. They were notes of my conversation with Dan Todd, following
12 Senator Hatch's conversation with Marilyn Tavenner.

13 Q. And with respect to the first statement on the list here,
14 what were you trying to convey in statement No. 1?

15 A. Well, I knew that the cut that CMS made for the genetic
16 test had a material impact on the company that makes the test,
17 Myriad. I knew that any change CMS would make would also have
18 a material effect on their overall financial position, and I
19 treated CMS's process and CMS's decision to change the payment
20 as very market sensitive. Marilyn Tavenner committed to
21 Senator Hatch that we would look at the situation, but she did
22 not commit to Senator Hatch what the change would be.

23 Q. So you viewed it as nonpublic pre-decisional information?

24 A. Yes.

25 Q. Thank you. Ms. Pyun, you can take that down. Thank you.

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Blum - Direct

1 Mr. Blum, when you joined CMS, was there a practice
2 with respect to CMS engaging with the investment community?

3 A. Yes. There was a dedicated office and a dedicated staff
4 who was tasked to communicate, to explain, to interact with the
5 Wall Street community regarding CMS policies.

6 Q. Was that office permitted to discuss pre-decisional
7 information?

8 A. No.

9 Q. When you arrived at CMS, what was your reaction to this
10 practice?

11 A. I felt that that practice was an inappropriate use of
12 government resource; that I felt that CMS should engage its
13 direct stakeholders. Those are the healthcare providers, the
14 healthcare beneficiaries, members of Congress that have a
15 direct stake in the program. I urged our staff and asked our
16 staff not to spend time with those entities that don't have a
17 direct stake in the Medicare program.

18 Q. Why?

19 A. We had a lot of work to do. We had new laws to implement.
20 The Affordable Care Act was being considered. The time that
21 the CMS staff was spending on answering questions, responding
22 to the market analyst community was a ton of time that I felt
23 was not good use of government resource and government time.

24 Q. How, if at all, was the change in practice communicated to
25 employees of CMS?

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1 A. I sent e-mails to staff. I canceled briefings that were
2 scheduled with the Wall Street community. When staff raised
3 questions that came to them regarding -- from the Wall Street
4 community, I asked them not to respond, don't spend time on
5 that.

6 Q. Based on your interactions with staff after you implemented
7 this new practice, did you have an understanding about whether
8 or not staff, the CMS staff, was upset about the change?

9 A. I think the staff felt that --

10 MR. FISHBEIN: Objection.

11 THE COURT: Sustained as to form.

12 Q. After you implemented this practice, Mr. Blum, did you
13 interact with CMS staff?

14 A. Those senior staff that reported to me.

15 Q. And based on your interactions, did you come to an
16 understanding of the staff's reaction to the new practice?

17 MR. FISHBEIN: Objection. Can we get who?

18 THE COURT: I'm sorry, you dropped your voice.

19 MR. FISHBEIN: We'd like to know who. I mean we're
20 hearing "senior staff."

21 THE COURT: Sustained as to form.

22 BY MS. CUCINELLA:

23 Q. Who on the senior staff did you speak with?

24 A. The staff that was spending the most time interacting with
25 the Wall Street community was the part C and part D staff.

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1 There were staff that were responsible for the payment staff,
2 Tom Hutchinson, Sherry Rice. I think those two staff
3 particularly that I worked very closely with felt they were
4 spending too much time, way too much time interacting with the
5 questions coming from the Wall Street community. Both of them
6 clearly thanked me for not having to spend time with those --
7 with that audience.

8 Q. And, Mr. Blum, to be clear, even though you changed the
9 practice, it was never permitted to discuss pre-decisional
10 information with the investment community, correct?

11 A. Correct.

12 Q. Are you familiar with the term "political intelligence
13 consultant"?

14 A. Yes.

15 Q. What is your understanding of what a political intelligence
16 consultant does?

17 A. They are consultants that generally serve the Wall Street
18 community to help explain, to help inform, to help predict
19 different government actions that can affect the financial
20 markets.

21 Q. While you were at CMS, did you have a view of whether it
22 would be appropriate or inappropriate for a CMS employee to
23 disclose pre-decisional information to a political intelligence
24 consultant?

25 A. Similar to any other member of the public or to Congress,

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Blum - Direct

1 that I felt that it was inappropriate to share pre-decisional
2 material with anybody, that included consultants.

3 Q. Mr. Blum, have you ever met David Blaszczyk?

4 A. I don't believe so.

5 Q. While you were at CMS, did you come to learn his name?

6 A. Probably.

7 Q. Were there times -- I think we talked about one at the
8 beginning, when you first took the stand -- where you learned
9 at CMS of nonpublic information leaking out?

10 A. Yes, there were several times.

11 Q. Generally, what was your reaction to these leaks?

12 A. It was anger, it was disappointment. It said to me that
13 our processes had broke down. It said to me that CMS wasn't
14 holding true to its principles of fairness, to ensure that all
15 stakeholders had the right to the same information at the same
16 time, and so it was a feeling of both anger and very strong
17 disappointment.

18 Q. What, if any, steps did you take to try and prevent leaks
19 while you were at CMS?

20 A. When leaks came to my attention, I referred them to the
21 CMS ethics officer to review and to investigate. I asked our
22 operations team to send out more communications to CMS staff to
23 remind them of their obligations not to share important
24 information, and I took more direct control of the paper flow
25 that went to different federal offices, to restrict and contain

1 the number of people that had access to the information.

2 Q. I'm going to direct your attention to a couple of exhibits
3 in your binder for identification, specifically Government
4 Exhibits 1322, 1323, 1328 and 1346. Do you recognize these
5 documents?

6 A. Yes.

7 Q. Are these e-mails that reflect your reaction to alleged
8 leaks at CMS?

9 A. They're e-mails with the people that were part of the
10 review process that were discussing with me how the review
11 process should go forward, and they're my suggestions of
12 restricting the paper flow and not sending copies to different
13 federal offices by e-mail.

14 MS. CUCINELLA: The government would offer Government
15 Exhibits 1322, 1323, 1328 and 1346.

16 THE COURT: Received.

17 (Government's Exhibits 1322, 1323, 1328 and 1346
18 received in evidence)

19 MS. CUCINELLA: Let's just look at one of these. Your
20 Honor, may we publish Government's Exhibit 1346?

21 THE COURT: Yes.

22 MS. CUCINELLA: If we can put up -- is there another
23 page?

24 THE COURT: The one in the binder you provided to me
25 has three pages.

I43PBLA3

Blum - Direct

1 MS. CUCINELLA: I think if we start on the second
2 page.

3 BY MS. CUCINELLA:

4 Q. Mr. Blum, can you explain to the jury what they're looking
5 at here?

6 A. So this is an e-mail that came from Carolyn Zollar, the
7 trade association has for our particular hospital sector, and
8 she sent an e-mail to CMS staff that she became aware of
9 pre-decisional information.

10 Q. And who forwards this information on to you?

11 A. Lawrence Wilson.

12 Q. Who is Lawrence Wilson?

13 A. Lawrence Wilson was the director of our chronic care policy
14 team. He and his team had responsibility for multiple payments
15 systems.

16 Q. And with respect to Mr. Wilson's e-mail, he writes: "The
17 information data in the e-mail is very precise and could only
18 have come from within the department." What did you understand
19 that to mean?

20 A. It meant to me that -- that somebody from the outside got
21 ahold of a very detailed analyses or detailed descriptions of
22 what CMS was considering for this proposed rule.

23 Q. And how did you react?

24 A. I said to Lawrence that I was disappointed, and I referred
25 the matter our ethics office.

I43PBLA3

Blum - Direct

1 Q. There was a reference in the e-mail to OIG. What is OIG?

2 A. The Office of the Inspector General.

3 Q. And what does the Office of the Inspector General do?

4 A. Each cabinet has their own OIG office, whose main task is
5 to investigate and to monitor the activities of the federal
6 worker. They're the primary law enforcement office that
7 governs day-to-day actions of the federal agencies.

8 Q. Thank you. Ms. Pyun, you may take that down. Thank you.

9 Mr. Blum, I want to talk to you now about a couple,
10 just a couple of the specific rules that you worked on. I'm
11 going to direct your attention to the second binder that's
12 sitting next to you, and what has in there marked for
13 identification Government Exhibits 2200, 2201, 2202, 2203, 2204
14 and 2205. Do you recognize these?

15 A. Yes.

16 Q. Did you review this binder before you took the stand?

17 A. Yes.

18 Q. Describe generally what the documents in that binder are?

19 A. So each agency that issues any proposed rule, any final
20 regulation, has to publish those documents in the Federal
21 Register. It's the way that the federal government
22 communicates the official documents to the public, and these
23 are the actual copies of the publication by the Federal
24 Register for these various proposed and final rules.

25 Q. So there are both proposed and final rules in that binder?

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Blum - Direct

1 A. Yes.

2 MS. CUCINELLA: The government offers 2200, 2201,
3 2202, 2203, 2204 and 2205.

4 THE COURT: Received.

5 (Government's Exhibits 2200, 2201, 2202, 2203, 2204
6 and 2205 received in evidence)

7 BY MS. CUCINELLA:

8 Q. Let's just look at the cover page of one of them. On
9 Government Exhibit 2200 -- we're not going to walk through each
10 of these rules. Looking at this cover page, there's a date at
11 the top. Is that the date that the rule is published to -- is
12 made available to the public?

13 A. It would take the Federal Register sometimes several days,
14 several weeks sometimes, to publish the rules. The official
15 notice happens via the CMS website and oftentimes that the
16 rules are posted for public display before they're printed in
17 the Federal Register.

18 Q. And when you say they're posted for public display, is
19 that, you referred earlier to when something is posted after
20 4:00 p.m.?

21 A. Correct.

22 Q. Will you remind the jury what that process is?

23 A. There's a very detailed process that gets produced when a
24 rule is about to be posted. The CMS communications team
25 develop sometimes weeks in advance the actual schedule for when

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Blum - Direct

1 the rule is to be posted. Rules that are posted have to be
2 signed by the CMS leader. They have to be signed by the Health
3 and Human Services Secretary. They have to be cleared by the
4 OMB, and until those three things happen, then the agency can't
5 post the rule. And so it was very difficult to predict when
6 all of those three things would happen, and until those happen,
7 the agency did not have the right to post the rule.

8 Q. And until the agency posts the rule, should anyone outside
9 of CMS have access to a play-by-play of what's going on inside
10 CMS?

11 A. No, it's all pre-decisional.

12 Q. This rule, Government Exhibit 2200 is a proposed rule from
13 2009. You were new to the agency at this point, correct?

14 A. Correct.

15 Q. Okay. Let's fast forward to 2012. Did there come a time
16 where you were involved in a rule involving radiation oncology?

17 A. Yes.

18 Q. Tell the jury about your involvement in that rule?

19 A. There were longstanding concerns that were raised by the
20 press, by the physician community that CMS was paying too much
21 for certain services for cancer treatment, radiation
22 treatments, and the agency, during my time, took several
23 actions to reduce payments to those -- for those services.

24 Q. And what was your involvement in the development of those
25 rules?

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Blum - Direct

1 A. I directed the staff to consider options to reduce the
2 payments. I navigated the process through the agency to review
3 health payment options. I briefed the Secretary of Health and
4 Human Services on the recommendation, and I briefed policy
5 officials working at the White House on these reductions.

6 Q. I'm going to ask Ms. Pyun if you could please pull up for
7 identification for the witness, Government Exhibit 1815.

8 Mr. Blum, do you recognize this?

9 A. Yes.

10 Q. What is it?

11 A. This is a cover note from staff that worked in the Center
12 for Medicare on a policy paper for the physician fee schedule
13 rule for 2013.

14 MS. CUCINELLA: The government offers Government
15 Exhibit 1815.

16 THE COURT: It's received.

17 (Government's Exhibit 1815 received in evidence)

18 THE COURT: Is that not in any of these binders up
19 here? How many binders should I have for this witness?

20 MS. CUCINELLA: This should be in the exhibit binder,
21 not the rule binder. We're not going to go back to the rule
22 binder. So the first binder you've been dealing with.

23 THE COURT: Supposedly in order?

24 MS. CUCINELLA: In order of the outline.

25 THE COURT: No, but we'll go forward.

I43PBLA3

Blum - Direct

1 MS. CUCINELLA: I'd be happy to walk you up a copy.

2 THE COURT: That would be great, if you're going to
3 examine him.

4 MS. CUCINELLA: Yes. May we publish to the jury?

5 THE COURT: Yes.

6 BY MS. CUCINELLA:

7 Q. Mr. Blum, would you explain to the jury what they're
8 looking at here?

9 A. They're looking at a document that describes all of the
10 proposed payment changes that the agency planned to make for
11 this particular proposed rule.

12 Q. Where in the process, with respect to the proposed rule, is
13 this paper in terms of when it is sent to you?

14 A. This is very early in the process. The proposed rule for
15 the physician payment system is posted typically around
16 July 1st, and this is a very early step in the clearance
17 process for that rule to be posted.

18 Q. If you can turn to what I believe is the third page and
19 No. 4 -- I guess it would be the fourth page of the exhibit,
20 the third page of the memo -- 4C. What's going on in 4C?

21 A. This paragraph describes our, CMS's, planned intention to
22 reduce payments for certain therapy, cancer therapy treatments
23 by about \$250 million.

24 Q. You said this is early on in the process. At this point,
25 would CMS know the exact steps that it's going to take or the

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Blum - Direct

1 policy it's going to propose?

2 A. There's many steps that the rule has to go through before
3 it can be posted. It has to be briefed to me, to my superiors.
4 It has to be briefed to the Department of Health and Human
5 Services. Oftentimes the secretary took direct interests to
6 payment policies that we're working on, and it had to be
7 briefed and cleared by the White House budget office.

8 Q. And do you know the exact policy, at this point, of how
9 much you're going to reduce the procedure time for treatment
10 delivery for both IMRS and SBRT at this point? And I'm going
11 to come back to defining those.

12 A. I believe that CMS had discretion for how it could make
13 these cuts. They also had the discretion to increase payment
14 for these services. I knew these cuts would be controversial;
15 so there's no way I could have known, or anyone could have
16 known, what the final outcome would have been by April of 2013.

17 Q. Okay. We're talking about cuts. What are these cuts to?

18 A. These are cuts to physicians that provide these services to
19 their patients. The physician fee schedule pays physicians
20 that perform procedures to Medicare patients, and these would
21 be cuts to physician practices.

22 Q. So reimbursement for physician services?

23 A. Correct.

24 Q. And this, specifically when we're referring to the
25 treatment delivery for IMRT and SBRT, do you know what those

1 are?

2 A. They're a particular kind of cancer therapy treatments that
3 are delivered particularly to those patients that had prostate
4 cancer.

5 Q. With respect to this proposed change to the reimbursement
6 rule, did you have an understanding of whether this change
7 could effect for-profit companies?

8 A. Yes. There are for-profit companies that manufacture and
9 that lease the machines to physicians that provide these
10 services. So as physicians get paid less for these services,
11 it can have a downstream impact on companies that manufacture
12 and that lease the machines to physician practices.

13 Q. And in the paragraph that's highlighted right now, the last
14 sentence says, "We would propose to reduce the procedure time
15 for treatment delivery for both IMRT and SBRT based on publicly
16 available information developed by the American College of
17 Radiology." Does that mean that what you were going to do in
18 your proposal was public?

19 A. No, it just said that we had data, and that we had
20 recommendations from the physician community for things for us
21 to consider. CMS had the discretion to take the
22 recommendation, not take the recommendation, change the
23 recommendation. So it was in fully CMS's discretion whether or
24 not to make this cut.

25 Q. Okay. Ms. Pyun, you may take that down.

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Blum - Direct

1 We're going to move on from radiation oncology to
2 ESRD. We talked about ESRD and dialysis treatment a few times
3 so far today. Did there come a point when the way that
4 physicians and services for dialysis -- the way that Medicare
5 paid for that was changed?

6 A. So in 2007 or 2008, I think late 2007, Congress passed a
7 law to direct the agencies to develop a new payment system for
8 dialysis services. That new payment change was directed to go
9 into effect in 2010, and previous to 2010, that CMS make
10 separate payments for the facility charges for dialysis care
11 and for the drugs that were delivered during dialysis care.

12 There were longstanding concerns that those two
13 separate payment systems created strong incentives for dialysis
14 providers to overly prescribe drugs to dialysis patients that
15 could produce patient harm. So Congress directed the agency to
16 build one payment system for both the facilities and the
17 related drugs to create a much stronger financial incentive to
18 give dialysis patients the correct amount of the drug.

19 Q. Was this a big change?

20 A. I thought it was. I thought it was one of the most
21 significant changes that the agency was going to make during
22 2010.

23 Q. And the change was to be implemented in 2010, correct?

24 A. Correct.

25 Q. When did the agency propose its policy for how the change

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Blum - Direct

1 would be implemented?

2 A. I believe the fall of 2009.

3 Q. Was it supposed to be released in the fall of 2009?

4 A. I think it got delayed. I'm not sure why, but I think
5 there was some issue that caused the rule to be delayed to the
6 fall.

7 Q. So it was released later than expected?

8 A. Yes.

9 Q. You said it was the fall of 2009?

10 A. I believe so.

11 Q. What, if anything, would be your reaction if someone had
12 language from the proposed regulation in August of 2009?

13 MR. FISHBEIN: Objection.

14 THE COURT: Sustained.

15 Q. Did there come a time when there was another big change to
16 the ESRD rule?

17 A. In January 2013, Congress passed legislation to direct the
18 agency not to change the methodology but to change the amount
19 of the new payment rate that was established for dialysis
20 services.

21 Q. Do you remember the name of the directive that Congress
22 enacted that had you to do that, that asked you to do that?

23 A. The law was known as ATRA. I'm not sure what ATRA stands
24 for but A-T-R-A.

25 Q. Would it be the American Taxpayer Relief Act?

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Blum - Direct

1 A. That sounds right.

2 Q. And explain to the jury how that would affect reimbursement
3 rates for EFRD?

4 A. The role of Congress was to reduce the overall payment rate
5 that CMS sets. When CMS set the payment rate for 2010, it made
6 a prediction for how much drug use would be delivered to
7 dialysis patients that was the basis for the payment. But it
8 turned out that the drug use fell much faster than what was
9 predicted, and there was a recommendation made to Congress from
10 the General Accountability Office directing CMS to change the
11 payment rate to capture the savings from that lower drug use.

12 Q. And when was the directive from the General Accountability
13 Office made to Congress?

14 A. I believe in the fall of 2012.

15 Q. So then in January of 2013, Congress issued or passed a law
16 directing CMS to make a change?

17 A. Correct.

18 Q. How soon after CMS received this directive from Congress
19 did your team start working on this?

20 A. I believe pretty soon after the law was passed. The
21 natural cycle for the payment teams is to begin working on
22 these rules in the early part of the year. The law that
23 Congress passed coincided with the time that CMS begins
24 considering options for the proposed rule.

25 MS. CUCINELLA: I'm going to ask Ms. Pyun, if you

1 will, to pull up Government's Exhibit 1225A for the witness.

2 It should also be in your binder and, your Honor,
3 hopefully in yours as well.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. What is it?

7 A. So I asked all of the payment teams, there were about
8 twelve or so, to meet with me before they began the formal work
9 of the payment proposed rules. I asked them to brief me on the
10 major decisions to be considered, the things that CMS should
11 tee up for the proposed rule cycle, to get a sense for myself
12 of the calendar, when critical decisions had to be made and I
13 have to start to engage my superiors. And this is a document,
14 a presentation for a briefing with me that was done in 2013.

15 MS. CUCINELLA: The government offers the 1225A.

16 THE COURT: Received.

17 (Government's Exhibit 1225A received in evidence)

18 MS. CUCINELLA: May we publish?

19 THE COURT: You may.

20 BY MS. CUCINELLA:

21 Q. So, Mr. Blum, if we can just briefly walk the jury through
22 what's in this presentation. You said this is a presentation
23 for you; is that right?

24 A. Correct.

25 Q. Do you know who was involved in developing this

1 presentation?

2 A. It was the payment teams. There was about maybe six to
3 seven people, sometimes more, that was dedicated to one payment
4 system. I asked that the junior staff take the lead to prepare
5 this presentation; one, to give me a chance to interact with
6 the junior staff, and give them some more experience in how to
7 brief policymakers.

8 Q. And do you know which junior staff were involved in this?

9 A. I don't.

10 Q. With respect to this presentation, looking through the
11 slides, what was the purpose of the slides? What did you learn
12 from them?

13 A. I learned about what the key decision points that the
14 agency would have to make. I learned and got more sensitized
15 to the fact that Congress passed -- has to pass a new law that
16 directed the agency to produce the payment rates, and I got an
17 early indication from the CMS staff that the cuts that they
18 were projecting following the law was bigger than the cut that
19 Congress had planned for when it passed the law.

20 Q. Explain that concept to the jury?

21 A. Well, Congress, my understanding was, when it passed a law,
22 gave broad discretion to the agency for how it calculated the
23 cuts that was planned, and the data used, the actual
24 calculation methodologies. My understanding is that when
25 Congress passed the law, they had their own assumptions for

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Blum - Direct

1 what the cut would be based upon, the GAO report.

2 But what CMS was seeing was that the drug use was
3 following -- was falling faster than we had predicted; so in
4 early 2013, the staff began to give me a sense that the cuts
5 that could be taken by CMS was bigger than what Congress
6 projected back in January 2013.

7 Q. Turning to the last page of this presentation -- it might
8 be the second-to-last page. Yes, that one. What are we
9 looking at here?

10 A. These are really the key questions that I wanted the staff
11 to tee up, not just for 2013 but for the future. I had a
12 strong interest that the staff become more analytic, more data
13 driven. And one of the questions that I asked all of the
14 payment teams to address with me is what should be the analytic
15 focus for each payment system for that year, but also for the
16 future, to give me a sense where to dedicate resources and
17 where to dedicate time for the year.

18 Q. Did this presentation contain information that was
19 confidential to CMS?

20 A. Yes.

21 Q. Did you consider it nonpublic?

22 A. Pre-decisional, yes.

23 Q. Should this presentation have been shared outside of CMS?

24 A. No.

25 Q. So this presentation is in early 2013, correct?

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Blum - Direct

1 A. Yes.

2 Q. That's the start of this process?

3 A. Correct.

4 Q. Throughout this spring, did you continue to engage with the
5 ESRD payment team on the proposed policy?

6 A. Yes. Similar to all the payment systems, there's multiple
7 briefing, multiple interactions. I probably met with the
8 payment team two or three times regarding the SRD rule during
9 the first part of 2013.

10 Q. And during those interactions, when you discussed -- did
11 you discuss what CMS was thinking in terms of the proposed
12 policy?

13 A. The staff presented options to me. They were clearly
14 seeing that the cut that could be justified by the data was
15 bigger than the public was understanding. We considered
16 different options for how to calculate the cut, for how to
17 phase the cut in, but this payment proposal went through
18 multiple iterations to come to the final proposed policy.

19 Q. You just mentioned calculate the cut and phase the cut in.
20 What are those two concepts?

21 A. Well, the agency for this particular rule had discretion
22 for two key decision points. The first was how big of a cut to
23 calculate, and the Congress directed CMS to reduce payments for
24 dialysis services, but it gave discretion for how to calculate
25 the cut, which data to use, and what the cut should ultimately

1 be.

2 The agency also had the discretion to phase the cut in
3 over multiple periods of time, and it was often the case that
4 when Medicare made payment cuts, that it would phase them in
5 during a two-, three-, four-year period in order to limit their
6 impact to hospitals, physicians, or other healthcare providers.

7 Q. While all of this was going on, did you make a presentation
8 to a coalition called the Kidney Care Partners?

9 A. Yes.

10 Q. What is Kidney Care Partners?

11 A. They're an industry group of companies that provide
12 dialysis services and dialysis supplies to chronic kidney
13 failure patients. They're a coalition of either 20, 30
14 companies who, I think, is main goal is to lobby the Congress,
15 lobby CMS for payment policy purposes.

16 Q. You made a presentation to them in the spring of 2013?

17 A. Yes.

18 Q. What was the purpose of that presentation?

19 A. They invited me to speak, to give an update on CMS general
20 payment policies. We had been tracking the implementation to
21 the new dialysis payment system very carefully. By the spring
22 of 2013, that I felt very confident that the tracking data was
23 showing a very good story. The story was, to me, that Medicare
24 program had reduced payments substantially for dialysis
25 services during 2010, without the healthcare consequences that

1 some in the industry predicted.

2 There are many companies that belong in the Kidney
3 Care coalition that had argued to me, that argued to the
4 Congress that the new payment system was going to be a failure,
5 that it was going to harm patient care, and in the spring of
6 2013, that I felt very confident and wanted to convey that
7 message to this industry group.

8 Q. You just mentioned that you wanted to talk about the new
9 payment system. Are you talking about the new payment system
10 that was implemented in 2010 that you mentioned earlier?

11 A. Yes. So we had been tracking the new payment system very
12 carefully since 2010, and by the time we got to 2013, we had
13 come to a very strong understanding that the new payment system
14 had not disrupted care to Medicare beneficiaries, did not lead
15 to more heart attacks or strokes or other negative consequences
16 and, in fact, we started to come to the conclusion that the new
17 payment system was working to improve patient care, rather than
18 detract from it.

19 Q. So you were having your successes?

20 A. I was very proud of the work that the team had done.

21 Q. Was it part of the purpose of the Kidney Care Partners
22 meeting, to preview any changes to the reimbursement rule?

23 A. It wasn't my intention, no.

24 Q. And did you give a presentation at that meeting?

25 A. Yes.

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Blum - Direct

1 Q. I'm going to direct your attention to 1335A in your binder.

2 And, Ms. Pyun, if you can pull that up for
3 identification.

4 Do you recognize this?

5 A. Yes.

6 Q. What is it?

7 A. This is a copy of the slides that I presented to the Kidney
8 Care Partners meeting.

9 MS. CUCINELLA: The government offers 1335A.

10 THE COURT: Received.

11 (Government's Exhibit 1335A received in evidence)

12 MS. CUCINELLA: May we publish?

13 THE COURT: You may.

14 MS. CUCINELLA: Thank you.

15 BY MS. CUCINELLA:

16 Q. Mr. Blum, this is a presentation that you gave at that
17 meeting?

18 A. Yes.

19 Q. If we can flip through this presentation, starting with the
20 agenda. What was your agenda for this presentation?

21 A. My agenda was to describe the data monitoring that the
22 agency had taken, to look at the new payment system going into
23 2010, and to portray the data-tracking story that we were
24 seeing.

25 Q. And with respect to, you also have a bullet here for the

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Blum - Direct

1 policy focus for 2013. Were you going to preview the rule for
2 2013?

3 A. No.

4 Q. Did you, in fact, present data to this organization?

5 A. Yes.

6 Q. Was that data backward-looking or forward-looking?

7 A. It was backward-looking. It was a trend line that I think
8 went through 2012, to look at the before and after, when the
9 new payment system went into effect for healthcare claims paid
10 for services delivered to dialysis patients.

11 Q. Let's just look at a few of those slides. So what are we
12 looking at here?

13 A. This is a trend line of the percent of dialysis patients
14 who are receiving certain drugs associated with their dialysis
15 care, and what it shows is that the amount of drugs being
16 delivered fell dramatically after the new payment system went
17 into effect.

18 Q. And when did the data go through?

19 A. It goes through November of 2012.

20 Q. Looking at the next page, what data is reflected here?

21 A. It's the average use of drug, Epoetin, delivered to the
22 dialysis patient through the course of treatment.

23 Q. What's Epoetin?

24 A. The drug that's delivered to patients during dialysis care.

25 Q. And looking going to the slide that's marked page 10,

1 what's reflected here?

2 A. This looks like a trend line of patients, dialysis
3 patients, who experienced a cardiac event during the course of
4 their treatment with dialysis care, and what it shows is that
5 the rate of dialysis patients that had cardiac events didn't
6 change before and after the new payment system went into
7 effect.

8 THE COURT: What does AMI stand for?

9 THE WITNESS: It stands for heart attacks. Cardiac
10 something.

11 THE COURT: Acute myocardial infarction?

12 THE WITNESS: Thank you, heart attack.

13 MS. CUCINELLA: Thank you, Judge.

14 BY MS. CUCINELLA:

15 Q. And looking at the last slide, which is marked Government
16 Exhibit 12. I'm sorry, the page is 12. What's reflected here?

17 A. There is another drug called Sensipar that is delivered to
18 dialysis patients, and this slide indicates that the use of
19 Sensipar went up after the bundle was put into effect. This
20 drug was not part of the bundle, but was paid separately before
21 and after the new payment system went into effect.

22 Q. And when was the data for -- what universe of data is
23 reflected on this slide?

24 A. It was data through September 2012.

25 Q. So you testified a moment ago that your focus was how the

I43PBLA3

Blum - Direct

1 2010 rule was being implemented successfully, correct?

2 A. Correct.

3 Q. Did you receive questions during this presentation --

4 A. Yes.

5 Q. -- on the change that was mandated by ATRA, or the American
6 Taxpayer Relief Act?

7 A. There was one or two questions regarding how CMS planned to
8 implement this new law.

9 Q. Do you recall how you responded to these questions? Do you
10 recall what the questions were, first of all?

11 A. I think the question was around how CMS was thinking about
12 the calculation, what the size of the cut was predicted to be.

13 Q. And do you recall how you reacted to this question?

14 A. I said that the agency would go through normal notice and
15 the comment process, and that I couldn't speak until that
16 proposed rule was made public.

17 Q. At the time you gave this presentation, did you know what
18 the proposed cut would be?

19 A. No.

20 Q. Did anyone?

21 A. I don't think so, no.

22 Q. What was the response to the presentation that you gave at
23 KCP in March of 2013?

24 A. I think there were two responses; one, is they were
25 thankful for the information. It was the first time that the

1 agency really had provided such detailed data to an industry
2 group. They also asked me for more data, for more information
3 and for more transparency for how CMS makes its payment policy
4 decisions.

5 Q. I'm going to ask Ms. Pyun if you can pull up for the
6 witness Government Exhibit 1334 for identification.

7 Do you recognize this?

8 A. Yes.

9 Q. What is it?

10 A. It's a note from Kathleen Lester, who is the lead staffer
11 for the Kidney Care Partners, to me, wanting to thank me for
12 the presentation; and, two, asking for more data and more data
13 information.

14 MS. CUCINELLA: Government offers Government
15 Exhibit 1334.

16 THE COURT: Received.

17 (Government's Exhibit 1334 received in evidence)

18 MS. CUCINELLA: May we publish?

19 THE COURT: You may.

20 BY MS. CUCINELLA:

21 Q. Looking at the bottom e-mail, this is the e-mail that you
22 received from Ms. Lester; is that right?

23 A. Yes.

24 Q. Along with thanking you, you mention that she made a
25 request for additional data, correct?

I43PBLA3

Blum - Direct

1 A. Correct.

2 Q. Why does she indicate that she can't share this live?
3 What's your understanding of that?

4 A. I asked the Kidney Care Partners not to distribute my
5 slides to their members. I was comfortable with them being
6 posted for display during my talk, but I asked her not to share
7 the slides to her members.

8 Q. Why didn't you want the slides shared?

9 A. The data was early. I felt confident that the story was
10 good, but the data was still early, and I would prefer not to
11 have material shared that was just a very early snapshot of the
12 data.

13 Q. How, if at all, does that relate to CMS's need to control
14 when data was shared?

15 A. I also wanted to control the message, and so I wanted to
16 make sure that the public, or Congress, the community heard
17 from CMS loud and clear that this new payment system was a
18 success. I didn't want anybody to misinterpret the data to
19 argue otherwise.

20 If you didn't have the data and the full story putting
21 all the slides together, you could make an incorrect
22 conclusion, and I felt very strongly that this new payment
23 system was a huge success for the agency, for the Medicare
24 program, and I wanted to make sure that that message came from
25 me.

I43PBLA3

Blum - Direct

1 Q. And do you recall forwarding this e-mail on, looking at the
2 top e-mail?

3 A. Yes.

4 Q. Who did you forward this on to?

5 A. To Chris Worrall and to Jeff Kelman.

6 Q. Why did you forward it to Chris Worrall?

7 A. I wanted their advice whether or not we should share the
8 underlying data that went into the slide presentation.

9 Q. You also state in the first sentence: "Your work had an
10 impact." What did you mean by that?

11 A. The audience was clearly impressed by the presentation.
12 The presentation took away any criticism that could be levied
13 at the agency. I was very proud of the work that was done by
14 the team, to, one, be on track and to implement this new
15 payment system. The KCP audience, I think, were stunned by the
16 presentation. They were stunned by the story, and it had a
17 real impact to preserve the payment system.

18 Q. And Mr. Worrall was involved in tracking the ESRD data?

19 A. Correct, yes.

20 Q. With respect to the request for more data, do you know if
21 more data was ultimately shared with KCP?

22 A. I delegated this request to the payment teams, and I asked
23 them to deal with this. And I did not personally respond to
24 Kathy's request.

25 Q. Just looking one more time at Kathy's e-mail, at the bottom

I43PBLA3

Blum - Direct

1 she says -- no, sorry. Paragraph right above, yes. The last
2 sentence there: "Having the data would be extremely helpful,
3 especially given the major changes the program is going to
4 experience in this rule making." What did you understand that
5 to mean?

6 A. There was a longstanding dispute between the dialysis
7 providers and CMS about the degree of data that was being
8 shared in producing the various proposed rules. The industry
9 continued to request more information, more data so they could
10 shadow calculate what CMS was producing. But it wasn't
11 something that I personally wanted to deal with, and I asked
12 our team to deal with.

13 Q. Do you know if the data that the rule -- the future rule
14 was based on was ultimately released to the public before the
15 rule was released?

16 A. I don't believe there was any data that was released before
17 the rule was published. There was data that was published in
18 the rule to explain CMS's calculations, but I'm not aware of
19 any data that was published prior to the rule's public release.

20 Q. And you're referring to data that the rule is based on,
21 correct?

22 A. Correct.

23 Q. The 2013 rule?

24 A. Correct.

25 Q. With respect to data that was released in the spring of

I43PBLA3

Blum - Direct

1 2013, was that data you were relying on to establish the rule?

2 A. No. The data that I presented to the Kidney Care Partners
3 was monitoring data, was tracking data. My understanding is
4 that data did not feed into the direct calculation that CMS was
5 going to make in order to calculate the payment reduction.

6 Q. Thank you.

7 Ms. Pyun, if you can take that down, please, and can
8 you pull up, please, Government Exhibit 1349 for
9 identification.

10 Do you recognize this document, Mr. Blum?

11 A. Yes.

12 Q. What is it?

13 A. The first e-mail? The first document?

14 Q. Yes, the first page.

15 A. This is a note that was sent to me from Lawrence Wilson.
16 Lawrence was the senior-most member of the dialysis payment
17 team, and it was him describing a conversation -- I guess a
18 note that he got from Dan Todd that describes various trends in
19 the dialysis payment exhibit.

20 MS. CUCINELLA: The government offers Government
21 Exhibit 1349.

22 THE COURT: Received.

23 (Government's Exhibit 1349 received in evidence)

24 MS. CUCINELLA: May we publish?

25 THE COURT: Yes.

1 BY MS. CUCINELLA:

2 Q. Starting with the note from Dan Todd, it goes to Lawrence
3 Wilson. Can you just remind the jury who Lawrence Wilson is?

4 A. He was the senior-most person on the dialysis payment team.

5 (Continued on next page)

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I43KBLA4

Blum - Direct

1 BY MS. CUCINELLA:

2 Q. So, he would have been working on the rule that was to be
3 proposed in the summer of 2013?

4 A. He had a team of about maybe five to six people that
5 reported to him, and he was the point person that I trusted on
6 this role.

7 Q. And then, going to the first page, he writes a note to you.
8 Why is he sending Dan Todd's note to you?

9 MR. FISHBEIN: Objection.

10 THE COURT: Sustained.

11 MS. CUCINELLA: Withdrawn.

12 BY MS. CUCINELLA:

13 Q. Mr. Blum, what was your understanding of what Mr. Wilson
14 was trying to bring to your attention?

15 A. I think he was trying to convey to me and to Ms. Richter
16 that the hill was getting a sense that the drug use for
17 dialysis patients was falling fast and that the cut that they
18 had planned to make with the legislation could be bigger when
19 CMS did its final calculations.

20 Q. What's the date of this email?

21 A. May 2nd, 2013.

22 Q. You just mentioned Liz Richter. Who was Ms. Richter?

23 A. She was my direct deputy for the Part A and Part B team.
24 Lawrence Wilson reported to her.

25 Q. He's writing to you because the Hill has heard the cut may

I43KBLA4

Blum - Direct

1 be higher than expected; is that right?

2 A. Correct.

3 Q. At this point, did you take any steps to confirm, one way
4 or the other, what the cut would be?

5 A. I didn't know what the cut was going to be when this email
6 came to me. There were still multiple decisions to clear. The
7 rule had not been fully briefed to the Secretary or to the
8 White House, so there was no public policy for us to even
9 describe at this point.

10 Q. There is a reference in this email to "SFC." What is SFC?

11 A. The Senate Finance Committee.

12 Q. There's also reference to "OACT." What is OACT?

13 A. The office of the Chief Actuary. They're the entity within
14 CMS that does the official calculations for various payment
15 policies.

16 Q. How do you respond to Lawrence Wilson's email?

17 A. I think I said thank you for the update or thank you for
18 the information.

19 MS. CUCINELLA: I'm going to ask, Ms. Pyun, if you can
20 take that down and please pull up government exhibit 1352 for
21 identification.

22 Q. Do you recognize this?

23 A. Yes.

24 Q. What is it?

25 A. So, my direct staff will give me documents each night that

I43KBLA4

Blum - Direct

1 outline my schedule for the next day and any documents that I
2 had to review for the next day that evening.

3 Q. Looking at 1352 in your binder, are there attachments to
4 this email?

5 A. Yes, I believe so.

6 Q. Do you recognize those attachments?

7 A. Yes.

8 Q. What are they?

9 A. Those are the briefing papers that were prepared to brief
10 various policy principals in CMS and the departments on the
11 end-stage renal disease proposed rule.

12 MS. CUCINELLA: The government offers Government
13 Exhibit 1352.

14 THE COURT: Received.

15 (Government's Exhibit 1352 received in evidence)

16 MS. CUCINELLA: May we publish, your Honor?

17 THE COURT: You may.

18 BY MS. CUCINELLA:

19 Q. So, looking at the first page of Government Exhibit 1352,
20 this is the schedule you just described?

21 A. I believe so, yes.

22 Q. And what's the date of this email?

23 A. It's May 8, 2013.

24 Q. Turning now to the actual briefing paper, what's discussed
25 in this briefing paper?

I43KBLA4

Blum - Direct

1 A. It's discussing policy decision points that the agency can
2 make for the proposed rule for ESRD that was going to be
3 released in 2013.

4 Q. Looking at page 3 of the briefing paper, what's included
5 here?

6 A. It provides the estimated payment reduction that CMS
7 calculated to implement the new legislation that Congress
8 passed, and it provides options for how CMS could consider
9 whether or not to phase that cut in over time.

10 Q. What are the options that are presented here? Can you
11 explain them to the jury briefly?

12 A. Well, the only option that the agency considered for the
13 size of the cuts was about 12 percent. That was based upon the
14 data and the methodology that CMS used. The agency considered
15 the option to phase the cut in during a one-year period of
16 time, meaning take the full 12 percent in one-year cut, or
17 phase that cut in over a two-, or three-, or four-year period.

18 Q. Was there a recommendation?

19 A. The recommendation that the team gave to Marilyn Tavenner
20 was not to phase the cut in. Marilyn Tavenner decided to
21 propose that the rate cut should be phased in over a three-year
22 period, and that recommendation was presented to the Secretary.

23 Q. Okay. We're going to talk about that process in a little
24 bit more detail.

25 Before we move on from this exhibit, is the rationale

I43KBLA4

Blum - Direct

1 for these policies included in this briefing paper?

2 A. I believe so in a very summary fashion.

3 Q. So, 1352 includes the potential options with respect to the
4 phase-in; is that correct?

5 A. Correct.

6 Q. This briefing is then given to whom?

7 A. Documents were used for multiple briefings. This document
8 was probably presented to me and was probably presented to
9 Marilyn Tavenner and other policy principals.

10 Q. I'm going to direct your attention now --

11 MS. CUCINELLA: Ms. Pyun, if you can pull up
12 Government Exhibit 1358. I believe that's a two-page document.

13 Q. Do you recognize this document?

14 A. Yes.

15 Q. What is it?

16 A. It's a document exchange discussing how papers should be
17 shared for department policy principals, for the briefing, for
18 this particular proposed rule.

19 MS. CUCINELLA: The government offers Government
20 Exhibit 1358.

21 THE COURT: Received.

22 (Government's Exhibit 1358 received in evidence)

23 MS. CUCINELLA: May we publish?

24 THE COURT: You may.

25 Q. Looking at the bottom email, who is Jennifer Cannistra?

I43KBLA4

Blum - Direct

1 A. Her job was to coordinate briefings and coordinate paper
2 for the Secretary of Health and Human Services and her key
3 policy principals.

4 Q. The email begins -- it's addressed to you, and then it
5 states, "Kathleen and I just talked about the close-hold review
6 of ESRD."

7 Do you know what she is referring to there?

8 A. So, during this time period was the time period that I
9 started to insist that market-sensitive data be not shared
10 widely, that hard copies of briefing materials be passed out
11 and then collected. And this rule really followed, I think,
12 for the first time these new procedures that were being put in
13 place to limit the access and to control the paper flow.

14 Q. So, these were new efforts that were being taken to ensure
15 confidentiality; is that right?

16 A. These were reinforced efforts to make sure that those data
17 points, those decisions, that were very market-sensitive were
18 given to only those that had a need to know.

19 Q. What specifically did you want to do?

20 A. The goal that I had was to make sure that those that had to
21 make the decision had the necessary information to make their
22 decisions, but to make sure that others that were not part of
23 the kind of formal clearance chain have access to the
24 information.

25 Q. In the second paragraph, Ms. Cannistra writes, "I

I43KBLA4

Blum - Direct

1 understand CMS leadership was briefed today with redacted
2 numbers."

3 Do you know what she was referring to?

4 A. For very sensitive data, that we started to, at this time
5 period, pass out paper that had a cross-out to the actual
6 number. We would describe that number orally, but we were very
7 concerned that very sensitive documents were being shared
8 outside of the process, and for very sensitive data, for very
9 sensitive numbers, we began to X out or blacken out the actual
10 number and describe it orally rather than in written form.

11 Q. And with respect to the ESRD, the proposed ESRD rule, would
12 that be the 12 percent number you're talking about?

13 A. There were two very sensitive points to that rule. One was
14 the percent cut, the 12 percent, and the degree of the
15 phase-in.

16 Q. What did you do after you received this email from
17 Ms. Cannistra?

18 A. I think that the conclusion was that we would produce paper
19 that was written, and that we would pass it out during
20 briefings, and collect it back, and would ask that it be
21 shredded once collected back.

22 Q. Do you recall -- and this was for the session where you
23 were going to brief the Secretary of Health and Human Services?

24 A. Correct.

25 Q. Who was that at the time?

I43KBLA4

Blum - Direct

1 A. Kathleen Sebelius.

2 Q. Do you recall when that briefing was to take place?

3 A. It was very late in the process. I believe that her
4 schedule was very tight, and that we had difficulty finding
5 time to meet with her in person, but I believe the briefing
6 happened days before the rule was scheduled for posting.

7 MS. CUCINELLA: Ms. Pyun, if you can pull up
8 Government Exhibit 1364.

9 Q. Mr. Blum, do you recognize this document?

10 A. Yes.

11 Q. What is it?

12 A. This is a email from me to Kathleen Cantwell and Lawrence
13 Wilson that summarize the Secretary's decision for the ESRD
14 proposed rule.

15 MS. CUCINELLA: The government offers Government
16 Exhibit 1364.

17 THE COURT: Received.

18 (Government's Exhibit 1364 received in evidence)

19 BY MS. CUCINELLA:

20 Q. So, Mr. Blum, you briefed the Secretary; is that right?

21 A. Yes.

22 Q. And as part of that briefing, was a decision made about
23 what the ultimate policy would be?

24 A. Yes.

25 Q. What was that decision?

I43KBLA4

Blum - Direct

1 A. The Secretary supported the 12 percent reduction. The
2 recommendation that was presented to her was to phase the cut
3 in over a three-year period. And the Secretary changed the
4 decision and asked that the cut be phased in during a one-year
5 period, or all at once.

6 Q. Who attends the Secretary's briefing?

7 A. They're typically the most senior members of the
8 Secretary's staff. I believe for this briefing, there was no
9 more than eight people in the room for the briefing.

10 Q. Would junior CMS staff have transparency into this
11 briefing?

12 A. They did not attend this briefing.

13 Q. Who would have known about the Secretary's decision to not
14 include a transitional phase-in after the decision is made, but
15 before the rule was published?

16 MR. FISHBEIN: Objection.

17 THE COURT: Sustained as to form.

18 Q. Do you have an understanding of whether the Secretary's
19 decision was communicated after the decision was made, but
20 before the rule was published?

21 A. I communicated to our policy teams what the Secretary's
22 decision was. They had to actually write the rule to conform
23 to the Secretary's decision. So this note was my communication
24 back to the policy teams, back to the regulation teams, for
25 what policy should go into the proposed rule.

I43KBLA4

Blum - Direct

1 Q. Do you recall when this rule was published?

2 A. It was published in early July.

3 Q. Up until the time the rule was published, should anyone in
4 the investment community have had a play-by-play of what was
5 happening inside CMS?

6 MR. FISHBEIN: Objection.

7 THE COURT: Overruled.

8 Q. You may answer.

9 A. No.

10 Q. Showing you what's been marked as Government Exhibit
11 2203 -- actually, withdrawn.

12 Mr. Blum, after this proposed rule was released in
13 early July of 2013, do you recall what the reaction was?

14 A. Yes.

15 Q. What was it?

16 A. I think the industry, primarily the dialysis industry, was
17 very angry. They were very surprised by the size of the cut,
18 and they were surprised that CMS chose not to phase in the cut
19 over a multiyear period.

20 Q. How were these reactions communicated to you, if at all?

21 A. They were communicated in a couple of forums. Number one,
22 during face-to-face meetings with the industry, they were
23 communicated to us through the Congress, either through
24 personal contact or through written letters.

25 Q. Did you hold public meetings in between the time of the

I43KBLA4

Blum - Direct

1 proposed rule and when the final rule was issued?

2 A. I don't believe so, no.

3 Q. Did you hold meetings with stakeholders?

4 A. Yes.

5 Q. And their views were communicated to you there?

6 A. Yes.

7 Q. In those meetings, did you signal to stakeholders or anyone
8 else what the final rule would be?

9 A. We had discussed in the proposed rule that CMS may consider
10 different options in order to phase in the cut, and that was
11 public knowledge, that CMS had the authority to phase in the
12 cut, but we did not signal to anyone what the final decision
13 would be.

14 Q. Until the final rule was made public, would you have
15 considered information relating to the final decision and
16 whether there would be a phase-in or the nature of the phase-in
17 to be public information or nonpublic information?

18 A. Nonpublic.

19 Q. How, if at all, does it impact the agency if CMS's policy
20 and final decision gets leaked ahead of the announcement of the
21 final rule?

22 MR. FISHBEIN: Objection; asked and answered, I think,
23 two or three times.

24 THE COURT: Sustained. I think you've covered that.

25 MS. CUCINELLA: Give me one moment.

I43KBLA4

Blum - Direct

1 (Pause)

2 MS. CUCINELLA: I'm going to direct, Ms. Pyun, if you
3 can pull up Government Exhibit 1369.

4 BY MS. CUCINELLA:

5 Q. Mr. Blum, do you recognize this document?

6 A. Yes.

7 Q. What is it?

8 A. This is a copy of my schedule and the papers that I was
9 asked to review for the next business day. It was sent to me
10 on September 23rd, 2013.

11 MS. CUCINELLA: The government offers 1369.

12 THE COURT: Received.

13 (Government's Exhibit 1369 received in evidence)

14 Q. In September of 2013 -- this is in between when the
15 proposed ESRD rule was issued and when the final rule was
16 issued -- what kinds of things were you involved in?

17 A. It was really to help direct the team on what options to
18 consider for the final rule, to understand that our data
19 calculations were sound, to review with the payment teams
20 various comments that we had received that we chose to address,
21 and to guide and to direct the briefing papers that we
22 presented to my superiors.

23 Q. Looking at Government Exhibit 1369 --

24 MS. CUCINELLA: May we publish that to the jury, your
25 Honor?

I43KBLA4

Blum - Direct

1 THE COURT: You may.

2 Q. -- what's reflected in Government Exhibit 1369?

3 A. These are the recommendations the agency planned to make
4 for the final regulation for both the ESRD payment rule and for
5 the durable medical rule.

6 Q. With respect to the ESRD rule, was a final decision on what
7 the transition would be made at this point in time?

8 A. It was briefed to the Secretary, it was briefed to the
9 White House principals, to follow the normal course. My
10 understanding is that this was a -- that it followed the normal
11 course and was treated very sensitively at the same time.

12 Q. Directing your attention to Government Exhibit 1373 for
13 identification, do you recognize this?

14 A. Yes.

15 Q. What is it?

16 A. This is a note from the Secretary's office to the
17 Secretary's policy principals regarding a planned CMS briefing
18 on the home health and the ESRD rule.

19 MS. CUCINELLA: The government offers Government
20 Exhibit 1373.

21 THE COURT: Received.

22 (Government's Exhibit 1373 received in evidence)

23 Q. Looking at the second --

24 MS. CUCINELLA: May we publish?

25 THE COURT: Yes.

I43KBLA4

Blum - Direct

1 BY MS. CUCINELLA:

2 Q. Looking at the second page of this, the title is "Close
3 Hold OS Principals Briefing for The Final Payment Rules."

4 Why is it "close hold"?

5 A. Well, this document was produced after we began to really
6 restrict the number of people with paper for very sensitive
7 decision points, and this document deals with very sensitive
8 decision points.

9 Q. Ms. Pyun just highlighted in the middle of a page a
10 close-hold note. It says that "The attachment materials and
11 above call-in number are only being provided in this email and
12 will not be included in the Outlook appointment that is already
13 on your calendar."

14 Do you have an understanding of why that was?

15 A. That was a way to control which people called in to the
16 meetings. That oftentimes policy principals who were part of
17 the process worked in different buildings, they were on travel,
18 and there was a strong desire to make sure only those people
19 that had a need to consider the information had access to the
20 briefing materials.

21 Q. What was the date of this briefing?

22 A. November 8, 2013.

23 Q. During the fall of 2013, before the final rule was
24 released, did you get a number of questions about what CMS's
25 final decision would be?

I43KBLA4

Blum - Direct

1 A. I probably got many questions from the industry, from
2 stakeholders, from members of Congress, what CMS was planning
3 for the final.

4 Q. How, if at all, did you respond to those questions?

5 A. I responded my usual way, that those decisions would be
6 made public when the rule was posted publicly.

7 MS. CUCINELLA: Your Honor, may I have one moment?

8 THE COURT: Yes.

9 (Pause)

10 MS. CUCINELLA: Nothing further.

11 THE COURT: Thank you.

12 It looks like a perfect time for lunch, folks. See
13 you back at 2:00 o'clock.

14 (Luncheon recess)

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I43KBLA4

AFTERNOON SESSION

2:00 PM

(In open court; jury not present)

THE COURT: Who's going first on the defense side?

MR. FISHBEIN: I am, your Honor. May I go to the podium? Thank you.

THE COURT: Ms. Cucinella, it would be useful if we had the witness list, too.

MS. CUCINELLA: I'm sorry?

THE COURT: We'd like to have the witness list, too.

MS. CUCINELLA: Oh. We'll get you that.

THE COURT: Thank you.

MR. NAFTALIS: Will there be reciprocity?

THE COURT: Yes. I will give you a list of all the witnesses I'm going to call.

(Discussion off the record)

(Continued on next page)

I43KBLA4

Blum - cross

1 (Jury present)

2 THE COURT: The defendants and jurors are all present,
3 as they have been throughout.

4 The witness is reminded he is still under oath.
5 Please be seated, everybody.

6 Cross-examination by Mr. Fishbein on behalf of
7 Mr. Worrall.

8 CROSS-EXAMINATION

9 BY MR. FISHBEIN:

10 Q. Good afternoon, Mr. Blum. I think you know I'm Stephen
11 Fishbein. I represent Mr. Worrall in this case.

12 Mr. Worrall's primary responsibility at CMS was with
13 respect to the claims monitoring project; isn't that true?

14 A. During the first part of my time at CMS, he was assigned to
15 Dr. Jeff Kelman. He undertook various tasks that Jeff assigned
16 to him. When he was promoted to the new position, he was
17 working for the center more broadly to help the center more
18 broadly analyze claims information for the entire Medicare
19 program.

20 Q. Okay. So, by analyzing claims medication, you're referring
21 to this claims monitoring project?

22 A. We were trying to understand Medicare payments much more
23 deeply, Medicare payment trends, and we had various tools,
24 various databases, that we used to better understand the
25 program.

I43KBLA4

Blum - cross

1 Q. And one of them, do you remember, was called Datalink? Do
2 you recall that?

3 A. There was a claims database that was used for the two
4 payment systems that I talked about earlier today.

5 Q. Okay. But was that called Datalink?

6 A. I don't know what it was called.

7 Q. Okay. But there was a claims database that Mr. Worrall
8 worked on; is that correct?

9 A. Correct.

10 Q. I think you said that there was an outside company that
11 helped CMS administer this database; is that right?

12 A. That CMS contracted with a firm called Acumen.

13 Q. Acumen is a firm, it's a company, on the West Coast in
14 California, correct?

15 A. They have offices in D.C. and California.

16 Q. And they're experts in data analytics; is that fair?

17 A. Correct.

18 Q. So, Mr. Worrall's role was to administer or to oversee that
19 contract with Acumen; is that right?

20 A. Correct. Our understanding was the actual data analysis
21 was being performed by Acumen, and Chris' role was to serve as
22 the contract officer to oversee the work and to make sure that
23 it was responsive to the contract.

24 Q. So, Mr. Worrall was kind of a liaison between Acumen, who's
25 doing the data analytics, and CMS, correct?

I43KBLA4

Blum - cross

1 A. He was also a person that I trusted to help explain the
2 data to me.

3 Q. Okay. And he was involved in making requests for data from
4 Acumen; is that correct?

5 A. There were questions that I asked the team to analyze, and
6 those tasks got translated to a contract with Acumen.

7 Q. Now, this database was based on Medicare claims; is that
8 correct?

9 A. Correct.

10 Q. And what that means is that when individuals or healthcare
11 providers are seeking reimbursement, they submit a claim,
12 correct?

13 A. Correct.

14 Q. And so this database had a large number of claims submitted
15 by Medicare beneficiaries, correct?

16 A. It had the entire claims universe for a period of time for
17 all claims that were paid by the Medicare program.

18 Q. And Acumen would take that data, and they would perform
19 various analysis on it, correct?

20 A. That was directed by CMS.

21 Q. Okay. Directed by CMS; is that right?

22 A. Yes.

23 Q. If you could look at Government Exhibit 1224-A. I believe
24 you were shown it on your direct testimony. It will come up on
25 your screen. I don't know if you have still have your

I43KBLA4

Blum - cross

1 government binder, but it should be there.

2 This is entitled, "ESRD PPS Summary of Findings From
3 the 2011 Monitoring Program." Is this the work product or one
4 piece of work product from this claims monitoring that we have
5 been discussing?

6 A. Yes.

7 Q. And if you look at the authors, the first several are from
8 Acumen, correct?

9 A. Yes.

10 Q. Because this the first instance they were doing the data
11 monitoring -- I mean they were doing the data analytics,
12 correct?

13 A. Yes.

14 Q. Then it has a number of people at CMS, including
15 Mr. Worrall; is that right?

16 A. Yes.

17 Q. Now, if you look at the table of contents, which if we
18 could just turn a couple of pages -- I think it's after the
19 summary, I'm sorry. Keep going. There we go. -- there's a
20 host of different types of analysis that Acumen had done in
21 this particular report, correct?

22 A. Yes.

23 Q. And so we're looking at drug usage, right? Is that right?

24 A. Yes.

25 Q. Frequency of home dialysis and other things of that nature,

I43KBLA4

Blum - cross

1 correct?

2 A. Yes.

3 Q. I'm not going to go through them all, but it's a fairly
4 detailed analysis that they did, correct?

5 A. Yes.

6 Q. The date on the cover of the report is June 2012; is that
7 right?

8 A. Yes.

9 Q. Now, did I understand your direct testimony to be that this
10 was eventually made public?

11 A. I don't know whether it was. The document should not have
12 been made public during 2012.

13 Q. I think you said that the data in it was made public in the
14 spring of 2013; is that right?

15 A. There was a distinction I'm making between the actual data
16 analysis versus the raw data. And so, CMS posted the data
17 analysis, those various trend lines, but I don't believe CMS
18 ever posted the raw data that went into those trend lines.

19 Q. Okay. But some of the data -- it sounds like what you're
20 saying, some of the data that's reported on in this report was
21 made public in the spring of 2013; is that your testimony?

22 A. Correct.

23 Q. And the report itself, you're saying, shouldn't have been
24 made public, at least not in 2012?

25 A. Correct.

I43KBLA4

Blum - cross

1 Q. If you could look at Defense Exhibit 34 for identification.

2 Do you recognize this -- well, do you recognize this
3 document?

4 A. Yes.

5 Q. What is it?

6 A. This is a report to Congress from the General
7 Accountability Office regarding their analysis of the dialysis
8 payment bundle.

9 Q. I think you referred to this in your direct testimony,
10 didn't you?

11 A. This report that was given to Congress was the basis for
12 their change to the legislation.

13 Q. And what's the date of the report?

14 A. December 7, 2012.

15 MR. FISHBEIN: Your Honor, the defense offers Defense
16 Exhibit 34.

17 MS. CUCINELLA: No objection.

18 THE COURT: Received.

19 (Defendants' Exhibit 34 received in evidence)

20 BY MR. FISHBEIN:

21 Q. If you could go, Mr. Blum, to footnote 32, please.

22 Do you see in footnote 32, there is a reference to
23 "CMS ESRD Prospective Payment System Overview of 2012
24 Claims-Based Monitoring"?

25 A. Yes.

I43KBLA4

Blum - cross

1 Q. That is the report that is Exhibit 12 -- Government Exhibit
2 1224-A, correct?

3 A. Yes.

4 Q. And it says here that this was available on the CMS
5 website, right?

6 A. Yes.

7 Q. And it says here that it was accessed as of November 4,
8 2012, correct?

9 A. Yes.

10 Q. So it was available in 2012?

11 A. I guess so.

12 Q. If you could now look at Defense Exhibit 133.

13 Do you recognize this document?

14 A. No.

15 Q. Have you ever heard of the Medicare Learning Network?

16 A. Yes.

17 Q. What is it?

18 A. What it means for CMS to communicate to healthcare
19 providers.

20 Q. And was that also something that was available through
21 CMS's website?

22 A. I don't know.

23 Q. Have you ever heard of something called the CMS Medicare
24 FFS Provider e-News?

25 A. I don't believe -- probably, but I don't recall precisely.

I43KBLA4

Blum - cross

1 Q. Are you aware that CMS communicated with beneficiaries and
2 with the healthcare community through various publications?

3 A. Yes.

4 Q. And that included the area of fee-for-service providers?

5 A. Correct.

6 MR. FISHBEIN: The defense offers Exhibit 133.

7 MS. CUCINELLA: There doesn't appear to be a
8 foundation for this.

9 THE COURT: Sustained.

10 BY MR. FISHBEIN:

11 Q. If you could look at the document, Mr. Blum, and I will
12 just direct your attention to the fourth bullet point -- I'm
13 sorry, there are two sets of bullet points, so it's actually
14 the fifth, and I'm just going to ask you: What is the
15 earliest -- Mr. Blum, what's the earliest that this ESRD 2011
16 monitoring program report that Mr. Worrall worked on was made
17 publicly available?

18 THE COURT: I'm sorry, what is it we're talking about?
19 Are you talking about 1224-A?

20 MR. FISHBEIN: Yes, 1224-A.

21 Q. So we saw that it was in the GAO report, it was referred to
22 in the GAO report, correct?

23 A. Correct.

24 Q. In 2012, right?

25 A. Correct.

I43KBLA4

Blum - cross

1 Q. Is that correct?

2 And so now what I'd like -- the question I have for
3 you is: What is the earliest date on which Government Exhibit
4 1224-A was made publicly available?

5 A. I'm not sure if you're referring to the point of this link
6 is to the same report, but it says 2011.

7 THE COURT: I'm sorry, can I hear that again?

8 MR. FISHBEIN: I think I can clarify.

9 BY MR. FISHBEIN:

10 Q. Mr. Blum, Government Exhibit 1224-A, the title is, "ESRD --

11 THE COURT: Let me just thank you, Mr. Fishbein. I'm
12 sorry, forgive me. Go ahead.

13 Q. Mr. Blum, if you look at Government Exhibit 1224-A, the
14 title of it is, "Summary of Findings From The 2011 Monitoring
15 Program," correct?

16 A. I don't have it in front of me.

17 Correct.

18 Q. Okay. Now, what I'd like to ask is: Do you have a
19 recollection of the earliest date on which this document,
20 Government Exhibit 1224-A, was made public?

21 A. No.

22 Q. Now, if you could look at Defense Exhibit 133, I'm going to
23 ask if that refreshes your memory.

24 A. I didn't review that document that you just showed me
25 previously.

I43KBLA4

Blum - cross

1 Q. I'd like you to review it now. Is that okay?

2 A. Sure.

3 Q. So if you'd look at Exhibit 133, and I am going to direct
4 your attention to the sixth bullet, and then I'm also going to
5 direct your attention to page 133-4. If we could go to 133-4,
6 at the bottom, and just read that to yourself.

7 Mr. Blum, isn't it a fact that the document marked as
8 Government Exhibit 1224-A, the 2011 monitoring program summary,
9 was made available by CMS on August 15th, 2012?

10 MS. CUCINELLA: Objection. He said he didn't know.
11 He's attempting to refresh his recollection. He can't now ask
12 if it's a fact.

13 THE COURT: Well, he's changed course. He's no longer
14 trying to refresh his recollection, he's asking him about the
15 fact.

16 So, Mr. Blum, is it a fact that Government's Exhibit
17 1224-A, the 2011 monitoring program summary, was made available
18 by CMS on August 15th, 2012?

19 THE WITNESS: I can't tell from this link whether that
20 links to the same report, so it's hard for me to answer your
21 question.

22 BY MR. FISHBEIN:

23 Q. But you'll agree that there was, on the CMS website in
24 August of 2012, a link to a report -- you can't say which one
25 it was -- but the title was the same as Government Exhibit

I43KBLA4

Blum - cross

1 1224-A?

2 A. Yes.

3 Q. And I think you had said in your testimony, Mr. Blum, that
4 you thought that the data underlying this 2011 monitoring
5 program report was not available till later, until the spring
6 of 2013, right?

7 A. The data changed -- the data was refreshed continuously,
8 and CMS was continually monitoring the data. The Acumen report
9 that you're showing is just one point in time, but doesn't
10 reflect the current thinking or what the thinking was in 2012
11 and 2013.

12 Q. My question is a little different. Just a few minutes ago,
13 you said that your view was that the 2011 monitoring program
14 report marked as Government Exhibit 1224-A, that, in your view,
15 that should not have been published in 2012, right?

16 A. My memory was that the agency began talking about it, that
17 I began talking about the data during 2013.

18 Q. Your memory was mistaken, it turns out, correct?

19 A. According to this, yes.

20 Q. And so you weren't quite right about the chronology of when
21 CMS information about this monitoring project became public,
22 right?

23 A. For this particular report.

24 Q. Now, Mr. Blum, CMS wanted the public to know that it was
25 collecting this claims data and analyzing it, correct?

I43KBLA4

Blum - cross

1 A. Correct.

2 Q. And I think you mentioned that you had some discussions
3 with Congress about the fact that you would do that, right?

4 A. There were several members of Congress who were very
5 interested and very concerned regarding the limitation to the
6 new payment system and urged CMS to take due care when putting
7 it in place.

8 Q. One of the things that they were concerned about was the
9 drop in the use of certain drugs associated with kidney
10 dialysis; is that right?

11 A. That was one theory that they were concerned about.

12 Q. Can you explain that for the jury, please, what their
13 concern was specifically?

14 A. Well, the payments before 2010 of the Medicare program paid
15 separately for the drugs delivered and for the services
16 provided. There was concerns and studies that indicated that
17 Medicare beneficiaries, due to the financial incentives, were
18 being prescribed too many of these drugs, and that payments
19 were combined, so that would create stronger financial
20 incentives to reduce those -- overdelivery of those drugs.
21 Some in the Congress were concerned that it may go too far and
22 reduce the drug use too much, and that concerned certain
23 members of Congress.

24 Q. And what types of drugs? Was there some sort of -- well,
25 let me strike that.

I43KBLA4

Blum - cross

1 Are you familiar with the term "ESA drugs"?

2 A. Yes.

3 Q. And what does that stand for?

4 A. That's one of the drugs -- I'm not sure what it stands for,
5 but it's one of the drugs delivered commonly to dialysis
6 patients.

7 Q. So there was this category of drugs called ESA drugs, and
8 Congress was concerned that they were being prescribed less as
9 a result of the change in law; is that fair?

10 A. Some members of Congress were concerned that the new
11 payment system would cause providers to provide less than
12 appropriate of these particular drugs.

13 Q. So, one of the things that CMS wanted Congress and the
14 public to know about was what the claims monitoring was showing
15 with respect to the decline in drug use; isn't that right?

16 A. Yes.

17 Q. And this data about the drug use, that was contained in
18 this database that Mr. Worrall worked on; is that right?

19 A. The database was the primary tool that we used to monitor
20 the payment change before and after that went into place.

21 Q. Now, because of Congress's and the public's interest CMS
22 made public the data that was in the database pertaining to the
23 ESA drugs, correct?

24 A. Made public the summary analyses. It never made public the
25 actual data.

I43KBLA4

Blum - cross

1 Q. Well, it made public certain information about the decline
2 of ESA drugs, correct?

3 A. Correct.

4 Q. We'll get to in a minute exactly what that was.

5 Was one of the forums in which CMS made public the
6 information in the database something called public use files?

7 A. Public use files is a broad term that CMS used for any data
8 or analyses that were posted for public consumption.

9 Q. Do you recall that there were data and analysis posted for
10 public consumption about this issue, about the decline in ESA
11 drugs?

12 A. Yes.

13 Q. Was another way that CMS made this information public
14 through meetings with industry representatives, like the KCP
15 meeting you mentioned?

16 A. That was one forum, yes.

17 Q. Who made the decision to take information from the data
18 monitoring database and to make that public?

19 A. I did.

20 Q. And so this was information, before it was made public,
21 that was in this category of nonpublic information that you
22 described to the prosecutors, right, because it's internal CMS
23 information; is that fair?

24 A. I don't understand the question.

25 Q. Before it was posted on the Internet or disclosed to

I43KBLA4

Blum - cross

1 industry representatives, it was broadly in this category of
2 nonpublic information at CMS?

3 A. It hadn't been made public yet.

4 Q. Okay. And on direct, you talked about a very broad
5 category of nonpublic information about CMS deliberations and
6 CMS information. Do you remember that?

7 A. Yes.

8 Q. So, this would fall into that category?

9 A. Yes.

10 Q. Until you decided to make it public, right?

11 A. Yes.

12 Q. And did you seek anybody's approval at CMS before deciding
13 to make this public?

14 A. I have the authority to decide whether it was public or
15 not.

16 Q. Was there any process that you went through, like forms you
17 had to fill out or process that you had to go through --

18 A. No.

19 Q. -- in order to make that decision? I'm sorry?

20 A. No.

21 Q. So there was no set procedure on how you make data like
22 that public?

23 A. No.

24 Q. That was a decision that you made based on your weighing
25 the benefits to the public versus confidentiality, correct?

I43KBLA4

Blum - cross

1 A. That was my decision to make.

2 Q. Are you aware of a policy, by the way, that dictates who
3 has authority to make decisions like this?

4 A. No.

5 Q. Now, the public use files that are posed on the Internet,
6 those are available to everybody, correct?

7 A. Yes.

8 Q. The entire public?

9 A. Yes.

10 Q. In other words, they're not screened so they only go to
11 certain people, you don't need a password or anything like
12 that?

13 A. They're public use files.

14 Q. They're available to the world, correct?

15 A. Yes.

16 Q. Okay.

17 MR. FISHBEIN: Your Honor, I'd like to read a
18 stipulation at this point. It's Defense Exhibit 4001.

19 THE COURT: Members of the jury, a stipulation is an
20 agreement among the lawyers as to a particular fact. You're
21 obliged to accept the stipulation -- the stipulated facts as
22 true unless I otherwise tell you.

23 Go ahead.

24 MR. FISHBEIN: "It is hereby stipulated and agreed" --
25 and with your Honor's permission, I'm going to skip the names

I43KBLA4

Blum - cross

1 of all the lawyers, of which there are many.

2 THE COURT: Thank goodness.

3 MR. FISHBEIN: "It is hereby stipulated and agreed:
4 Defense Exhibits 38, 67, 95, and 103 are authentic, true, and
5 correct copies of public records of CMS, that set out the
6 activities of CMS, and consist of public use files reporting on
7 the ESRD Prospective Payment System Claims-Based Monitoring
8 Program, and were publicly available on CMS's website."

9 And, your Honor, the defense offers Exhibits 38, 67,
10 95, and 103.

11 THE COURT: Where will I find copies?

12 MR. FISHBEIN: Those are in the large binder.

13 THE COURT: Well, that narrows it down.

14 MR. FISHBEIN: And they're in tabs 6, 7, 8, and 9,
15 your Honor.

16 THE COURT: I see.

17 (Continued on next page)

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I43PBLA5

Blum - Cross

1 THE COURT: Okay. They are received.

2 (Defendants' Exhibits 38, 67, 95 and 103 received in
3 evidence)

4 BY MR. FISHBEIN:

5 Q. Mr. Blum, if we could go to --

6 THE COURT: Except, could I just interpose a question?
7 Oh, I see. I missed one of the numbers you read off. Go
8 ahead. I got it.

9 BY MR. FISHBEIN:

10 Q. Okay. If you could go, Mr. Blum, to Defense Exhibit 67,
11 which is your tab 7 in the notebook in front of you. Mr. Blum,
12 do you recognize this as the public use file for the fourth
13 quarter of 2012?

14 A. I don't ever recall downloading myself the public use file.
15 I was aware that they were made available. I don't recall ever
16 personally using those data use files.

17 Q. Okay. If you see the title of this document, it's been
18 stipulated that this is a public use file. Do you see it says:
19 ESRD Prospective Payment System Overview of 2011, 2012
20 Claims-Based Monitoring Program; is that correct?

21 A. Yes.

22 Q. And that's the program that we've been talking about the
23 analysis of the Medicare claims that Mr. Worrall was working
24 on, correct?

25 A. Yes.

I43PBLA5

Blum - Cross

1 Q. And if you look at the second paragraph, the one that says:
2 From 2011 to date, do you see it says: CMS's monitored usage
3 rates for ESRD-related drugs, biologicals and related
4 procedures, and then it continues; do you see that?

5 A. Yes.

6 Q. And the ESRD-related drugs, that includes these ESA drugs
7 that Congress was concerned about, right?

8 A. Yes.

9 Q. And, in fact, this paragraph pretty much describes the
10 data-monitoring program that Mr. Worrall was working on, right?

11 A. In very summary form, yes.

12 Q. And then if you look at the last paragraph on this page, do
13 you see it says: For each outcome, data is displayed monthly
14 for the two-year period prior to the implementation of the ESRD
15 PPS and for each month from January 2011 to December 2012; do
16 you see that?

17 A. Yes.

18 Q. Okay. So do you understand that CMS made public the data
19 concerning the ESA drugs, the usage rates, through December of
20 2012?

21 A. Yes. But to be clear, we did not post the data. We posted
22 the summary information.

23 Q. When you say the data, what do you mean by that?

24 A. The raw claims information.

25 Q. So raw claims, meaning that --

1 A. The actual data points.

2 Q. Yes. So in other words, a data point would be that Steven
3 Fishbein filed a claim asking for reimbursement for kidney
4 dialysis on a certain date?

5 A. That's right.

6 Q. And claims-level data, obviously, is individual to
7 particular people, right?

8 A. Correct.

9 Q. And you would never release that because that has
10 individual identifiable information, right?

11 A. Not in this form, no.

12 Q. So there's laws against disclosing that type of
13 information, right?

14 A. Correct.

15 Q. But what CMS was interested in, from a policy point of view
16 was the trend; isn't that fair to say?

17 A. Correct.

18 Q. Okay. So sticking with Defense Exhibit 67 --

19 THE COURT: Before we leave this, though.

20 Are you, Mr. Blum, distinguishing between individual
21 claims, like the hypothetical claim for Mr. Fishbein on the one
22 hand, and summary information for the whole United States on
23 the other? Or is there some other comparison that you're
24 making?

25 THE WITNESS: There are certain data files, not this

I43PBLA5

Blum - Cross

1 one, where CMS posts the actual claims files that are stripped
2 of any patient data points. This data is more summary analysis
3 that comes from the claims analysis.

4 THE COURT: What was in Exhibit 1224A that's not in
5 this exhibit?

6 THE WITNESS: The actual claims that are being paid
7 for by the Medicare program.

8 THE COURT: Every single one?

9 THE WITNESS: Right.

10 THE COURT: So if 190,000 people had these dialysis
11 drugs in the period covered, there would be 190,000 listings in
12 that Exhibit 1224?

13 THE WITNESS: More than that because dialysis patients
14 get these treatments four times a week, five times a week for
15 their whole life. These -- this Excel file can never hold the
16 full universe of Medicare claims.

17 THE COURT: Wasn't Exhibit 1224 like about this thick?

18 THE WITNESS: Yes, but it was the summary data with
19 the summary information.

20 THE COURT: Maybe you can try, Mr. Fishbein.

21 BY MR. FISHBEIN:

22 Q. Exhibit 1224A was a summary and description of this very
23 detailed, very numerous individual claims data, correct?

24 A. Correct.

25 Q. And the public use files were also a summary and

1 description of the very detailed claim data, correct?

2 A. Correct.

3 THE COURT: How, if at all, were they different?

4 THE WITNESS: The Acumen reports provided a lot more
5 context, a lot more description -- a lot more description
6 regarding the methodology for how the analysis was done. This
7 spreadsheet that was posted, posted the data points that were
8 used in order to do the analyses.

9 MR. FISHBEIN: Your Honor, I may have neglected for
10 permission to publish Exhibit 67 to the jury.

11 THE COURT: Sure. Go ahead.

12 BY MR. FISHBEIN:

13 Q. Mr. Blum, in any event, the Acumen study that we saw was
14 made public in December of 2012, correct?

15 A. According to what you just told me, yes.

16 Q. Do you know when this public use file that had data through
17 December 2012, do you know when that was made public?

18 A. No, but I think you're going to tell me.

19 Q. Mr. Blum, you anticipate. If you can look behind the blue
20 sheet in that same tab, do you see an e-mail? Do you see that?

21 A. Yes.

22 Q. Okay. It's Defense Exhibit 66. Do you recognize the
23 people on that e-mail?

24 A. No.

25 Q. I'm sorry?

I43PBLA5

Blum - Cross

1 A. No, I don't.

2 Q. You don't recognize the name Michelle Cruse?

3 A. She worked -- sorry, where are you?

4 Q. It's Defense Exhibit 66.

5 A. I believe she worked for the payment team within CMS, but
6 she wasn't someone that I worked with often.

7 Q. Do you recognize this as an internal CMS e-mail?

8 A. Yes.

9 MR. FISHBEIN: Your Honor, I offer Defense Exhibit 66.

10 MS. CUCINELLA: Could we have one moment, your Honor?

11 (Pause)

12 No objection, your Honor.

13 THE COURT: 66 is received.

14 (Defendants' Exhibit 66 received in evidence)

15 MR. FISHBEIN: And if we could publish that as well.

16 THE COURT: Yes.

17 BY MR. FISHBEIN:

18 Q. Mr. Blum, this is an e-mail dated April 15th, 2013,
19 correct?

20 A. Yes.

21 Q. And what the e-mail refers to is the posting -- it's
22 actually the replacement of the third quarter of 2012 public
23 use file, replacing it with the fourth quarter of 2012 public
24 use file, correct?

25 A. Yes.

1 Q. And so does it appear that the public use file for the
2 fourth quarter of 2012, marked as Defense Exhibit 67, was made
3 public by CMS around April 15th of 2013?

4 A. For this quarter data release, yes.

5 Q. And I believe you said that the proposed rule, the proposed
6 ESRD rule, was July 1st of 2013, correct?

7 A. Correct.

8 Q. So this would have been several months before the proposed
9 rule came out, this data was made public, correct?

10 A. Correct.

11 Q. Now, sticking with Defense Exhibit 67, if you can turn --
12 and this is in Excel, so we don't have pages, but if you flip
13 and it may be tabbed in your version, Mr. Blum. There's a
14 slide: Percent of ESRD beneficiaries receiving ESAs by month?

15 THE COURT: How are we to navigate to that,
16 Mr. Fishbein? Help us out.

17 MR. FISHBEIN: I believe in Mr. Blum's -- well, it's
18 on the screen, No. 1. Does that help, your Honor?

19 THE COURT: No. I was born before the electronic age.

20 MR. FISHBEIN: I can tell you how many pages, and
21 Excel does not allow us to stamp each page; so I can count
22 them. It's one, two, three --

23 THE COURT: I think you're up to getting around that.

24 MR. FISHBEIN: I can come up and show you, but for
25 right now --

I43PBLA5

Blum - Cross

1 THE COURT: With a pencil.

2 MR. FISHBEIN: What is that?

3 THE COURT: Go ahead.

4 BY MR. FISHBEIN:

5 Q. Okay. Mr. Blum, do you have on your screen in front of you
6 a slide called: Percent of ESRD beneficiaries receiving ESAs
7 by month?

8 A. Yes.

9 Q. Okay. And that was part of this public use file, correct?

10 A. Yes.

11 Q. And what does this show?

12 A. This shows that the percent of Medicare patients receiving
13 dialysis care, that the percent that was receiving this
14 particular class of drugs, ESAs, were lower after the new
15 payment system went into effect.

16 Q. And it's actually showing -- it's showing the usage of
17 these ESA drugs from January of 2009, right up through
18 November -- actually, we'll get to the data in a second, but it
19 looks like at some point towards the end of 2012, correct?

20 A. Yes.

21 Q. And there's data files at the end, and if you can go and,
22 again, I think it's flagged in your version, Mr. Blum, but if
23 you can put up on the screen the anemia management data page
24 from this exhibit. And, Mr. Blum, do you see that this is a
25 chart that shows the same information but in numerical form

1 instead of a graph?

2 A. Correct.

3 Q. And if you look at the numbers, do you see that it starts
4 in January of 2009, and it shows the percentage of
5 beneficiaries using ESAs, correct?

6 A. Correct.

7 Q. And then it goes right through to December of 2012,
8 correct?

9 A. Correct.

10 Q. So CMS made public, several months before the proposed ESRD
11 rule came out, what the trend of the usage was of these ESA
12 drugs through December of 2012, correct?

13 A. Correct.

14 Q. Now, you mentioned that the adjustment to the ESRD payment
15 reimbursement that was done in 2013 was driven by a
16 congressional statute; is that right?

17 A. Correct, but I believe that CMS also had the authority to
18 make the change without Congress, but Congress directed the
19 agency to make the change.

20 Q. Okay. And you referred to, I think it was, the American
21 Taxpayer Relief Act, right?

22 A. Correct.

23 Q. And that was a law passed by Congress in early 2013, right?

24 A. January, I believe.

25 Q. And that was a law that required CMS or requested CMS to

I43PBLA5

Blum - Cross

1 recalculate the reimbursement for kidney dialysis, right?

2 A. Correct.

3 Q. And the basis for recalculating the reimbursement was this
4 idea that the usage of these ESA drugs had gone down, right?

5 A. Correct.

6 Q. And so what people were interested in knowing was how much
7 they had gone down because that would affect the amount of the
8 cut to the reimbursement, correct?

9 A. That was one data point, yes.

10 Q. Okay. And I think you referred in your direct testimony to
11 a -- when they made the adjustment, eventually it was a
12 reduction of 12 percent, right?

13 A. That was CMS's proposal, yes.

14 Q. CMS proposed 12 percent. And that was based on the decline
15 of the use of ESA drugs, correct?

16 A. Yes.

17 Q. Correct?

18 A. One of the data points, yes.

19 Q. The most important, right?

20 A. Yes.

21 Q. Okay. Now, do you recall that the statute had in it an end
22 date as of which CMS was to look at the decline in ESA drugs?

23 A. I don't recall what the statute said.

24 Q. Do you remember whether there was an end date?

25 A. Not that I can recall.

I43PBLA5

Blum - Cross

1 Q. Okay. If you could look at Government Exhibit 2204. It's
2 your Tab 10. Do you recognize that?

3 A. Yes.

4 Q. And what is it?

5 A. That's the Federal Register notice that published the ESRD
6 proposed rule for 2013.

7 Q. The rule we're talking about, right?

8 A. Yes.

9 MR. FISHBEIN: Okay. Your Honor, I offer
10 Exhibit 2204.

11 MS. CUCINELLA: I believe it's already in evidence.

12 THE COURT: I believe so.

13 MR. FISHBEIN: I'm sorry?

14 THE COURT: I thought it was in.

15 MR. FISHBEIN: Okay. If it's in --

16 THE COURT: It is in.

17 MR. FISHBEIN: It's in, okay.

18 BY MR. FISHBEIN:

19 Q. Mr. Blum, I'd like you to look at page -- the page numbers
20 are in the upper right-hand corner -- 40841. Now, this is the
21 proposed rule making a reduction to the reimbursement for
22 kidney dialysis, correct, in 2013?

23 A. Correct.

24 Q. Okay. And typically CMS would explain its methodology when
25 it published the rule, right?

1 A. Correct.

2 Q. And if you go here and look in the middle column, towards
3 the bottom, there's a paragraph that says section 1881(b)(14),
4 and a lot of statutory mumbo-jumbo that I'm going to avoid, and
5 about a third of the way down, if you'll follow me, it says:
6 "The secretary shall make reductions to the single payment for
7 renal dialysis services to reflect the Secretary's estimate of
8 the change in utilization of ESRD-related drugs and
9 biologicals, excluding oral-only ESRD-related drugs, by
10 comparing per-patient utilization data from 2007 with such data
11 from 2012." Do you see that?

12 A. Yes.

13 Q. And so to help the jury understand, the Secretary is the
14 Secretary of Health and Human Services, right?

15 A. Yes.

16 Q. And when they're referring to these drugs, again, that
17 includes the ESA drugs that we've been talking about?

18 A. Correct.

19 Q. So isn't it correct, Mr. Blum, that by statute, the
20 relevant period for the drop in ESA drugs was until the end of
21 2012?

22 A. But CMS was seeing data drop faster than the data that we
23 posted on the -- through the public use files.

24 Q. Thank you. But not the question I asked.

25 The question is whether -- isn't it true that when

1 Congress passed the law governing this reduction to the ESRD
2 payment, they said that the reduction was to be made based on
3 the decline in ESA drugs as of the end of 2012?

4 A. The data that CMS had. Yes.

5 Q. The statute essentially had a cutoff that said when you
6 make this reduction, you're going to look at the decline in
7 ESAs through the end of 2012, correct?

8 A. Based upon the data that CMS had.

9 Q. Right. But CMS data through the end of 2012?

10 A. Correct.

11 Q. Not CMS data in 2013, right?

12 A. I can't recall precisely which data went into the
13 calculation but that's what the statute said.

14 Q. Okay. But for now, let's just start with what the statute
15 required. The statute required you to look through the end of
16 2012, right?

17 THE COURT: I don't think that this is a useful
18 exercise because what the statute says is reflects. It does
19 not say based upon, it does not say only. It just says
20 reflects.

21 MR. FISHBEIN: Okay. Well, we're going to look at
22 another exhibit.

23 BY MR. FISHBEIN:

24 Q. Mr. Blum, if you could look at Exhibit 78, Defense
25 Exhibit 78.

1 THE COURT: Which tab is this, Mr. Fishbein?

2 MR. FISHBEIN: This is Tab 11.

3 Q. Do you recognize this document, Mr. Blum?

4 A. I believe so, yes.

5 Q. What is it?

6 A. This is a data table that CMS made available to the public
7 to explain how it made its proposed reduction.

8 Q. So this is kind of after the proposed rule came out, you
9 wanted to explain to the public how you got to the 12 percent?

10 A. There were many questions from the industry that came at
11 CMS to explain how it did the calculation, and this data table
12 was provided to help answer those questions.

13 Q. Okay. But again, are we talking about how you got to the
14 12 percent in the proposed rule?

15 A. I believe so, yes.

16 MR. FISHBEIN: Your Honor, I offer Defense Exhibit 78?

17 MS. CUCINELLA: No objection.

18 THE COURT: Received.

19 (Defendants' Exhibit 78 received in evidence)

20 MR. FISHBEIN: And if we could publish this to the
21 jury, please?

22 THE COURT: Sure.

23 BY MR. FISHBEIN:

24 Q. Now, do you see there are several columns, but there's a
25 column called 2007 claims and a column called 2012 claims,

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Blum - Cross

1 right?

2 A. Yes.

3 Q. And that's because the calculation of the 12 percent was
4 based on seeing what the decline in ESAs was between 2007 and
5 2012?

6 A. That was one data point, yes.

7 Q. And if you look at footnote one, it says, quote, the --
8 "The latest available claims data for this proposed rule is
9 based on the CY2012 ESRD facility claims updated through
10 December 31st, 2012." Do you see that?

11 A. Yes.

12 Q. So doesn't that tell you, Mr. Blum, that this calculation
13 was based on 2012 data?

14 A. The data that the agency had.

15 Q. Through 2012?

16 A. Correct.

17 Q. Okay. And as we saw, the public use file included data
18 through the end of 2012, correct?

19 A. I believe so.

20 Q. Now, you continued to monitor this use of ESA data into
21 2013, correct?

22 A. Yes.

23 Q. And if I could direct your attention to Defense Exhibit
24 103, which is your tab 9, which has been admitted into
25 evidence, this is the public use file for the second quarter of

1 2013; is that correct?

2 A. I can't tell which quarter this is from this data file.

3 Q. And if we could publish this again to the jury, and it's
4 the last paragraph on this page.

5 A. So search in 2013.

6 Q. Through June 2013. The one you said before was through
7 December 2012, right?

8 A. Correct.

9 Q. And now we're going to look at one through June of 2013?

10 A. Correct.

11 Q. And again, this was made public by CMS, correct?

12 A. Correct.

13 Q. And if we could go now --

14 MR. FISHBEIN: And I apologize, your Honor, again the
15 pages are not numbered, but we'll put it up on the screen to
16 the slide: Percent of the ESRD beneficiaries receiving ESAs by
17 month.

18 THE COURT: And this is what exhibit?

19 MR. FISHBEIN: This is exhibit Defense Exhibit 103.

20 THE COURT: Okay.

21 BY MR. FISHBEIN:

22 Q. Now, Mr. Blum, you mentioned that CMS was seeing a decline
23 in the use of these ESA drugs, correct?

24 A. Correct.

25 Q. And if you look at this chart, what this is showing is on

1 the horizontal axis on the bottom, that's the dates, right?

2 A. Correct.

3 Q. And then the vertical axis is how much of these ESA drugs
4 are being used, right?

5 A. Correct.

6 THE COURT: I'm sorry, the vertical axis is what?

7 MR. FISHBEIN: It's the percent of ESRD beneficiaries
8 receiving ESA.

9 THE COURT: Yes, I thought the question was actually
10 different.

11 MR. FISHBEIN: I can rephrase, your Honor.

12 Q. Is this chart, again, showing the decline in the use of
13 ESAs that CMS was looking at?

14 A. Yes.

15 Q. Yes.

16 THE COURT: Look, what it says is, the vertical axis
17 is the percentage of beneficiaries receiving it.

18 MR. FISHBEIN: Right.

19 THE COURT: Which may or may not be the same thing as
20 the number of beneficiaries receiving it.

21 MR. FISHBEIN: Fair enough, your Honor. I'll ask the
22 question.

23 THE COURT: And, indeed, it would be consistent with
24 the amount of the drugs prescribed going up on a certain set of
25 assumptions.

1 MR. FISHBEIN: Okay, your Honor. I will ask a couple
2 of questions on that.

3 THE COURT: So let's try to be a little more precise.

4 BY MR. FISHBEIN:

5 Q. Okay. Mr. Blum, in the public use file, you wanted to
6 accurately inform the public about the usage of these ESA
7 drugs, right?

8 A. We wanted to show the trend lines that we were seeing
9 before and after the new payment system went into effect.

10 Q. Right. One of the trend lines you wanted to show related
11 to the usage of these ESA drugs, correct?

12 A. It was one data point that we were tracking very carefully.

13 Q. And the measure that you chose to put in the public use
14 files was the measure reflected in the slide, which is percent
15 of ESRD beneficiaries receiving ESAs?

16 A. That was one of the measures that we decided to post
17 publicly.

18 Q. Presumably, you decided to post them because it was
19 accurate and reflected the trend that you were interested in,
20 right?

21 A. My understanding, the data would lag, the data would change
22 because claims would get adjudicated, but it was the best
23 snapshot that we felt that was -- that we provided to the
24 public.

25 Q. Okay. And at least according to this slide, you see that

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Blum - Cross

1 there's a decline in the percentage of beneficiaries receiving
2 these ESA drugs between 2010 and the end of 2012, correct?

3 A. Correct.

4 Q. And then into the first few months of 2013 it actually
5 levels off, at least that's what this slide shows?

6 A. Yes.

7 Q. Now, you mentioned that in addition to the public use
8 files, and we saw that the Acumen report was public, you also
9 made some presentations on this topic to industry associations;
10 is that right?

11 A. During 2013, yes.

12 Q. And one of those was Kidney Care Partners, right?

13 A. Correct.

14 Q. And that presentation was on March 5th of 2013; is that
15 right?

16 A. I believe so, yes.

17 Q. Again, several months before the proposed ESRD rule came
18 out?

19 A. Correct.

20 Q. Now, Kidney Care Partners is a leading dialysis
21 organization, correct?

22 A. I'm not sure I would call them leading, but they are one of
23 the key organizations.

24 Q. Fair enough. And it has a number of members, right?

25 A. I believe so.

1 Q. Which include dialysis companies, patient groups and
2 others, correct?

3 A. Yes.

4 Q. And this presentation, by the way, do you remember where it
5 was?

6 A. It was in Arlington, Virginia.

7 Q. And by the way, did Mr. Worrall attend that presentation
8 with you at Kidney Care Partners?

9 A. I believe so, yes.

10 MR. FISHBEIN: And if we can look at Defense Exhibit
11 53, I think it's tab 12, and I'm going to read a stipulation on
12 this one, too. May I do that, your Honor, read Defense
13 Exhibit 129 that's a stipulation?

14 THE COURT: Yes.

15 MR. FISHBEIN: It is hereby stipulated and agreed
16 among the parties that defense exhibits -- and there's a list
17 of exhibits, but one of them is Exhibit 53 -- are authentic,
18 true and correct copies of records that were in the possession,
19 custody and control of Kidney Care Partners. Defense
20 Exhibit 53 is a listing of the attendees at a KCP meeting on
21 March 5th, 2013, which record was made at or near the time of
22 the events reported therein and was kept in the ordinary course
23 of KCP's activities, and it was a regular business practice of
24 KCP to make and keep such records. And the defense offers
25 Defense Exhibit 53.

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Blum - Cross

1 MS. CUCINELLA: No objection.

2 THE COURT: Received.

3 (Defendants' Exhibit 53 received in evidence)

4 BY MR. FISHBEIN:

5 Q. So, Mr. Blum, if you look at Defense Exhibit 53, it's
6 entitled Board Meeting Attendees, March 5th, 2013. That's the
7 date that you presented to KCP, right?

8 A. I believe so, yes.

9 Q. And if we can publish this to the jury.

10 And so this is a list, both by affiliation and by the
11 name of the various people that attended your presentation,
12 correct?

13 A. I didn't take attendance during the meeting.

14 Q. But it was a big room, and there were a bunch of people
15 there, right?

16 A. Yes.

17 Q. Amgen is on this list. Who is Amgen?

18 A. They're a drug manufacturer that manufactures one of the
19 main drugs that goes into dialysis care.

20 Q. So they manufacture one of these ESA drugs, correct?

21 A. Correct.

22 Q. And Vedita is on here. What does Vedita do?

23 A. Vedita is the largest provider of dialysis services in the
24 U.S.

25 Q. And then also Fresenius Medical, they're also a dialysis

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Blum - Cross

1 provider, correct?

2 A. They're the second provider.

3 Q. So you have the biggest providers of dialysis. These are
4 people, by the way, getting the reimbursement from CMS, right?

5 A. These are the companies, yes.

6 Q. Companies. They provide the dialysis care, and then they
7 put in the claims and they get reimbursed by CMS, right?

8 A. CMS doesn't pay drug manufacturers. CMS pays providers
9 that then purchase drugs.

10 Q. Okay. Fair enough. So you have the dialysis providers
11 here, you have Amgen, which makes the ESA drugs, correct?

12 A. Correct.

13 Q. And you have various dialysis associations of doctors,
14 right?

15 A. Yes.

16 Q. Nurses?

17 A. Yes.

18 Q. Several dozen people, correct?

19 A. Yes.

20 Q. And do you remember that, in fact, there were several dozen
21 people at this presentation?

22 A. It was a large room with a large audience.

23 Q. Now, you would consider a presentation like that
24 essentially making this information public, wouldn't you?

25 A. Yes.

1 Q. Because it was so many people and you really had no control
2 over what they did with the information, right?

3 A. It was a large meeting with a large group.

4 MR. FISHBEIN: Now, if we can go to -- you can take a
5 look at Defense Exhibit 57, which is your tab 13, and I believe
6 the government offered this already. I have it, and he has it
7 as Defense Exhibit 57. So I'll offer Defense Exhibit 57.

8 THE COURT: We're not going to double up here. We're
9 going to have enough paper.

10 MR. FISHBEIN: Perhaps Ms. Cucinella can tell us what
11 the Government Exhibit is.

12 MS. CUCINELLA: It's Government Exhibit 1335A.

13 THE COURT: 1335A.

14 MR. FISHBEIN: Okay. And if Ms. Cucinella wants to
15 tell me with respect to other ones that I've named, that's fine
16 as well. I'm happy to use the government exhibits.

17 BY MR. FISHBEIN:

18 Q. Now, Mr. Blum, these are the slides that you presented to
19 Kidney Care Partners in March of 2013, correct?

20 A. Yes.

21 Q. And the slides themselves were actually given to Kidney
22 Care Partners in advance of the presentation, right?

23 A. Yes, they were asked not to share them.

24 Q. But they were electronically or physically delivered to
25 them, right?

I43PBLA5

Blum - Cross

1 A. They had a laptop in order to project the slide that was
2 delivered before my talk.

3 Q. Okay. Now, if we can go to the agenda. So we're going to
4 go to the second page. You gave an update on CMS's monitoring
5 of ESRD bundled payment system, right?

6 A. Yes.

7 Q. And that included a discussion of these same trends that
8 we've been talking about, right?

9 A. Yes.

10 Q. And the next item is policy focus for 2013, what was that?

11 A. There were many policies the agency was considering for
12 dialysis care, one of them was a new demonstration program
13 called the ESCO program that the community had a lot of
14 questions about, and that was a topic that I anticipated
15 questions about.

16 Whenever I gave public talks, people asked me about
17 the status of the Affordable Care Act, and just general payment
18 trends, payment policies of the agency. That was just kind of
19 a standard topic that I would list with any talk that I gave.

20 Q. So this was sort of policy priorities, if you will, of CMS
21 that you were thinking about in 2013?

22 A. For the full gamut of Medicare, the Affordable Care Act or
23 anything that the agency was thinking about.

24 Q. Okay. But sort of you had to pick and choose; so it was
25 kind of some of the priorities of CMS's policies for 2013?

I43PBLA5

Blum - Cross

1 A. I would think that I presented in topics to this bullet
2 point. The presentation only focused on the various trend
3 lines that I presented.

4 Q. I mean, do you remember, or you had it as part of your
5 agenda, right?

6 A. Yes.

7 Q. So you think you just skipped over it, or you think you
8 said something with respect to that?

9 A. I probably talked about the status of the Affordable Care
10 Act. There was a huge interest in the provider community about
11 new payment models that the agency was testing, standing up.
12 There were so many things that the agency was working on at the
13 time during 2013, it was probably the busiest time ever for the
14 agency in its history.

15 Q. And I understand it was a while ago. So do I take it that
16 you don't remember precisely what you covered as part of that
17 bullet point?

18 A. I remember precisely presenting the slides that you just
19 showed.

20 Q. Okay. But you don't remember precisely what you presented
21 with respect to that bullet point?

22 A. I remember taking questions regarding -- from the audience.

23 Q. And then in terms of the slides, if you'll flip to pages
24 57-4 and 57-5, again, you see these graphs, one is percentage
25 of the ESRD beneficiaries receiving ESAs by month, correct?

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Blum - Cross

1 A. Correct.

2 Q. And the other one is monthly Epoetin usage; do you see that
3 one?

4 A. Yes.

5 Q. And that actually is showing the number of units of the
6 drug, correct?

7 A. Correct.

8 Q. And, again, you wanted the healthcare community, including
9 dialysis providers, the doctors, the medication companies, you
10 wanted them to understand these trends, correct?

11 A. I wanted them to see the same picture that we were seeing
12 for the broad trends regarding the payment system.

13 Q. And the source of this data was the claims monitoring
14 database that Mr. Worrall worked on, correct?

15 A. Correct.

16 Q. And he was sitting right next to you when you made this
17 presentation in this public setting, right?

18 A. I don't think he was sitting right next to me, but he was
19 in the room.

20 Q. Okay. Now, you met with Kidney Care Partners again before
21 the proposed rule came out, correct?

22 A. I don't know, but it wasn't uncommon for me to take
23 meetings with various industry groups.

24 Q. If you could look at Defense Exhibit 71, which is your tab
25 16, and just read it to yourself. And I'll ask you whether

1 that refreshes your memory as to whether you met with Kidney
2 Care Partners again in April of 2013.

3 A. This is not my document. I don't think I had a chance to
4 review it.

5 Q. I understand, but if you could just look at it and see if
6 that jogs your memory as to whether you may have met with
7 Kidney Care Partners again?

8 A. I recall meeting with Kidney Care Partners several times
9 during 2013.

10 Q. Now, you mentioned on direct that after your March meeting
11 with Kidney Care Partners, they requested some additional data,
12 correct?

13 A. Yes.

14 Q. And what they were asking for was the claims level data
15 that we talked about before, the individual-by-individual data,
16 correct?

17 A. I don't believe so. I think what they were looking for was
18 greater understanding about how CMS made its various
19 calculations with respect to the bundled payment.

20 Q. If we could show you what's been marked as Government
21 Exhibit 1335, and if you look at the bottom of Government
22 Exhibit 1335, that's an e-mail that you testified about on
23 direct, correct?

24 A. I'm sorry?

25 Q. We're going to have to go to the next page. We're looking

1 at the end of 1335, yes?

2 A. Yes.

3 Q. You testified about that on direct, that's about Kidney
4 Care Partners requesting some additional data, correct?

5 A. Correct.

6 Q. And then the continuation of what's the rest of this
7 exhibit, which was not on the prior government exhibit, is some
8 correspondence, some additional correspondence within CMS on
9 the same topic, correct?

10 A. But there is a formal letter that I believe Kidney Care
11 Partners sent to me that I don't think is listed here in this
12 e-mail chain.

13 Q. This e-mail chain is just a continuation of the one you
14 testified about on direct, correct?

15 A. I believe so.

16 Q. And you recognize this as, in fact, an e-mail that was sent
17 internally at CMS, right?

18 A. The first e-mail, I don't believe that I ever saw. I don't
19 think that I'm on it, but the second e-mail was one that I
20 forwarded to Chris and to Jeff Kelman.

21 MR. FISHBEIN: Your Honor, the defense offers
22 Government Exhibit 1335.

23 MS. CUCINELLA: No objection.

24 THE COURT: Received.

25 (Government's Exhibit 1335 received in evidence)

I43PBLA5

Blum - Cross

1 BY MR. FISHBEIN:

2 Q. So, Mr. Blum, if you can -- when I say the bottom, the
3 earliest e-mail in time is Kidney Care Partners requesting
4 additional data from you, correct?

5 A. Yes.

6 Q. Okay. And then there's a follow up to that; do you see
7 that? There's an e-mail from Chris Worrall to Lawrence Wilson
8 and others; do you see that?

9 A. Yes.

10 Q. And it's the same date, March 7th. I guess a day later,
11 March 7, 2013?

12 A. Yes.

13 Q. And you see in the third paragraph it says: KCP requested
14 some very specific data files, and later on it says: These
15 people are looking for patient-level files with privacy
16 protected identifiers. Do you see that?

17 A. Yes.

18 Q. And so isn't it the case that what Kidney Care Partners
19 wanted is they wanted the drill-down on the claims-by-claims
20 data, as opposed to the general trend line?

21 A. I never fully understood, nor took the time to understand,
22 what Kidney Care Partners was asking for. I asked Lawrence
23 Wilson and the staff to respond to the request.

24 Q. Okay. Now, you saw the presentation to Kidney Care
25 Partners. Did you give presentations like that, that discuss

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Blum - Cross

1 the trends and the use of these ESA drugs, to any other
2 industry groups in 2013?

3 A. I recall presenting to a small dialysis provider meeting.
4 There were two broad categories of dialysis providers, those
5 that were well-funded, large, for-profit generally. There was
6 another group that was non-profit. I believe I made a similar
7 presentation to that group, and I was invited to commit a
8 presentation to the Kidney Physicians Society meeting in
9 Georgia in the late summer, fall of 2013.

10 Q. Do you know when the presentation to the smaller group was?

11 A. I don't remember.

12 Q. But it was in 2013?

13 A. I believe so, yes.

14 Q. And the final rule, by the way, came out in November of
15 2013, correct?

16 A. Correct.

17 Q. And so do you believe these other presentations were before
18 the final rule?

19 A. Yes.

20 Q. And would you have given the same kind of slide deck at
21 those?

22 A. I think I gave the exact same slide presentation.

23 Q. So between Kidney Care Partners and the smaller dialysis
24 group and the dialysis place in Atlanta, these slides were made
25 public, correct?

I43PBLA5

Blum - Cross

1 A. That I spoke to three different meetings, at least three
2 different meetings, with the same presentation.

3 Q. Right. But you would regard that as making them public,
4 correct?

5 A. Yes.

6 Q. I'd like to now show you what I believe was admitted as
7 Government Exhibit 1225A, and I have -- it's the same document.
8 It's got a defense exhibit on it instead of a government, but
9 it's your tab 17, or if you still have the government one, you
10 can look at that.

11 Mr. Blum, this is the review that you said was
12 prepared for you at the beginning of 2013, at the beginning of
13 this process of the ESRD rule making; is that correct?

14 A. That's right.

15 Q. Now, this deck here, this is not a draft rule, correct?

16 A. This is a presentation that was delivered to me before the
17 rule was issued.

18 Q. Right. And before the rule was drafted even, correct?

19 A. The early stages of the drafting.

20 Q. So in other words, this deck was at the very early stages?

21 A. Yes.

22 Q. And, for example, this does not include the 12 percent
23 figure that we've mentioned, which is where CMS ended up with
24 respect to that rule?

25 A. No, it does not.

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Blum - Cross

1 Q. And it doesn't say anything about the phase-in, correct,
2 which you also testified about?

3 A. No, it does not.

4 Q. Okay. Now, let's just go through this. So the first page,
5 which is slide two, is entitled Overview of Payment System,
6 correct?

7 A. Yes.

8 Q. And again, if we could have this published. I don't know
9 if the jury is seeing this. So now we're on slide two,
10 Overview of Payment System.

11 Mr. Blum, this is a listing of the various statutes
12 that govern the ESRD rule making, correct?

13 A. Correct.

14 Q. And those are laws of Congress which are public, right?

15 A. Correct.

16 Q. And then if we go to slide three, this is some information
17 about CMS's budget, right?

18 A. This describes how much CMS pays for -- over time, for
19 dialysis care.

20 Q. And there's a reference to OACT at the bottom, right?

21 A. Yes.

22 Q. Is that the Office of the Actuary?

23 A. Yes.

24 Q. And you understood that if people asked OACT for this type
25 of information, they would make it available, right?

I43PBLA5

Blum - Cross

1 A. This data was not shared publicly, to my understanding, but
2 if somebody were to call the Actuary's Office, they would
3 possibly provide it.

4 Q. Then, if you go to next page, page 4, it says: Last year's
5 identified issues; do you see that?

6 A. Yes.

7 Q. Now, this ESRD rule making was an annual occurrence for a
8 period of years, correct?

9 A. Correct.

10 Q. So there was an ESRD kidney dialysis rule in 2012, right?

11 A. Yes.

12 Q. And there was another one in 2013?

13 A. Yes.

14 Q. And the 2013 is the one we're talking about, but there had
15 been one in 2012, right?

16 A. Correct.

17 Q. So there was a Federal Register entry, a long rule that was
18 published in November of 2012, right?

19 A. Correct.

20 Q. And that publication, made public by CMS, identified some
21 of the issues that CMS had been looking at and how it resolved
22 it in 2012, right?

23 A. It was common in rules for the agency to signal broad
24 policy issues that it would consider in the future.

25 Q. But by last year's identified issues, that's referring to

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Blum - Cross

1 the issues that were identified in the rule the prior year,
2 namely 2012, right?

3 A. Yes.

4 Q. And that was public, correct?

5 A. If somebody bothers to read the rule, yes.

6 Q. Fair enough. It's fine print and long, but anybody could
7 have access to that, right?

8 A. Yes.

9 Q. And so these issues were not secret; these issues were
10 referred to in that prior rule?

11 A. Yes.

12 Q. Okay. If we could turn to page 5, there is a short
13 reference to ESRD facilities in Guam, Mariana Islands and
14 American Samoa, correct?

15 A. Correct.

16 Q. And this was actually a requirement, that CMS look at this,
17 a requirement of another Congressional statute called MIPPA,
18 correct?

19 A. Correct.

20 Q. Which is a public law available to the public, right?

21 A. Yes.

22 Q. And if you turn to page 6, it's called: Accomplishments
23 made and opportunities left to address. Accomplishments,
24 again, refers to implementation of items in 2012, correct?

25 A. Correct. And before 2012.

1 Q. Right. Which was made public in these Federal Register
2 rules that were published in 2012 and before, correct?

3 A. Correct.

4 Q. And opportunities refers to items that CMS had flagged in
5 these prior rules of things that it was going to look at,
6 correct?

7 A. Some of them, I don't recall the precise language the
8 agency used in the prior year rule.

9 Q. Okay. Well, let's take an example. The second bullet
10 point under Opportunities. It says: "Propose a methodology to
11 address wages in Puerto Rico;" do you see that?

12 A. Yes.

13 Q. Okay. So now if you can look with me at Defense
14 Exhibit 105, which is your tab 25, do you recognize that?

15 A. Yes.

16 Q. What is it?

17 A. That's the final regulation for the ESRD payment rule that
18 was published November 9th, 2012.

19 Q. So this is the prior year's ESRD rule, correct?

20 A. That's right.

21 MR. FISHBEIN: Your Honor, we offer Defense
22 Exhibit 105.

23 THE COURT: Received.

24 (Defendants' Exhibit 105 received in evidence)

25 BY MR. FISHBEIN:

1 Q. And I'm going to ask you, Mr. Blum, to go bottom left-hand
2 corner of the page, to pages 12 and 13, and we can publish
3 those to the jury.

4 And, Mr. Blum, if you look on the right side of the
5 page 105-12, there's a section that starts Comment, right?

6 A. Yes.

7 Q. And this is the process you referred to before, you publish
8 a rule, people comment, CMS responds, right?

9 A. Correct.

10 Q. And so somebody wrote in a comment, they said: We want you
11 to look at the reimbursement for facilities in Puerto Rico,
12 right?

13 A. Correct.

14 Q. And then if you look on the right side of the page, it
15 says, first column, about two-thirds of the way down: "We will
16 include in the calendar year 2014 ESRD PPS proposed rule, the
17 methodology we propose to use to address wages in rural Puerto
18 Rico when we no longer apply the wage index floor." Do you see
19 that?

20 A. Yes.

21 Q. And now, if you go back to the February 6th slide deck we
22 were looking at, page 6, and you see the bullet point says
23 propose a methodology to address wages in Puerto Rico since the
24 wage index floor transition;" do you see that?

25 A. Yes.

I43PBLA5

Blum - Cross

1 Q. So that was clearly something that was flagged in the prior
2 year rule, right?

3 A. Right. I don't recall ever spending time on this issue in
4 the presentation. This issue was so small, it didn't merit
5 time.

6 Q. But my point is that opportunity section are things that
7 had been flagged by CMS in the prior rule?

8 A. Yes, but I don't recall spending time on this issue during
9 that meeting.

10 Q. Okay. Page 7, policy commitments, and again, these are
11 references to public statutes that have various requirements
12 for CMS, correct?

13 A. Correct.

14 Q. And then page -- again, nothing secret there. These
15 statutes are public information, right?

16 A. Correct.

17 Q. Okay. Page 8, greatest opportunities, and the first bullet
18 refers to GAO recommendations and the General Accountability
19 Office, of course, are public, right?

20 A. When they're finalized, yes.

21 Q. Do you happen to know when this one was finalized?

22 A. No.

23 Q. If you look at Defense Exhibit 122, which is tab 26, do you
24 recognize that?

25 A. I don't think that I read this report. I probably read a

1 draft of it when it was issued.

2 Q. Okay. Do you know what it is, though?

3 A. Yes.

4 Q. What is it?

5 A. It's a report that's issued to the Congress from the
6 General Accountability Office to give recommendations on how to
7 approve the dialysis payment system.

8 MR. FISHBEIN: Your Honor, I offer Defense
9 Exhibit 122.

10 MS. CUCINELLA: No objection.

11 THE COURT: Received.

12 (Defendants' Exhibit 122 received in evidence)

13 BY MR. FISHBEIN:

14 Q. And if we could go to one, two, three four pages in,
15 there's a letter. Keep going. Okay. Do you see it's dated
16 March 1st, 2013?

17 A. Yes.

18 Q. And, again, that was before the proposed ESRD in 2013 came
19 out, right?

20 A. I can't see the -- March 1st it came out?

21 Q. Yes.

22 A. Yes.

23 Q. So the proposed rule that we've been talking about with the
24 12 percent, that's the subject of this slide deck, came out in
25 July of 2013, right?

I43PBLA5

Blum - Cross

1 A. Can you go back to the title report before it. I just want
2 to make sure I see it.

3 Q. Sure, sure.

4 A. So these are two separate issues of two separate GAO
5 reports that we're talking about. This has to do with the low
6 volume adjustment. I think the report that you just mentioned,
7 had to do with the overall bundle calculation.

8 Q. We might have lost our place. Let's go back to the slide
9 deck, which is Government Exhibit 1225A. Right? This is the
10 February 6th slide deck that you said was presented to you at
11 an early stage of the process for ESRD in 2013, right?

12 A. Correct.

13 Q. And now we're on slide 8. And does the jury have this? I
14 just want to make sure that it's published to the jury.

15 Slide 8, the first bullet says: Evaluate the
16 eligibility criteria for low-volume facilities, right?

17 A. Correct.

18 Q. And then it refers to a GAO recommendations, right?

19 A. Correct.

20 Q. And that is the GAO report that's Defense Exhibit 122,
21 right?

22 A. Correct.

23 Q. Which is published on March 1st of 2013, right?

24 A. Correct.

25 Q. Okay. So, again, just these opportunities here, these are

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Blum - Cross

1 matters that were referred to in public documents, right?

2 A. Correct.

3 Q. So now we go to --

4 A. But hold on a second. The presentation was made in
5 February. I believe the GAO report was posted March 1st, after
6 the presentation.

7 Q. Okay.

8 A. Giving my staff the opportunity to review GAO reports
9 before they're made public, so CMS can see these the reports
10 before they're made public by the GAO.

11 Q. Understood. But certainly, at any point after March 1st,
12 the fact that GAO was making those recommendations would not be
13 secret?

14 A. Correct.

15 Q. Okay. So now, I think we're up to slide 9, and it says:
16 Policy recommendations for rule making cycle, and again, these
17 are kind of a repetition of some of the matters that we've
18 already seen, correct?

19 A. Right, but this slide begins to provide the outline of how
20 CMS plans to develop the proposed values of payment rule.

21 Q. Like implement section 632 of the American Taxpayers Act,
22 that's the public law that you're required to?

23 A. Right. Oftentimes, agencies have discretion of which years
24 these provisions go into effect. There's resource
25 considerations, there's staff time considerations, and

I43PBLA5

Blum - Cross

1 generally the agencies have a flexibility to choose which
2 sections to implement due to resource demands.

3 Q. Understood. But, for example, one of the bullets is
4 evaluate the wage index for Puerto Rico, right?

5 A. Right, that --

6 Q. And we saw that that one was already filed in the prior
7 year's report?

8 A. At one potential opportunity.

9 Q. Right. And then the next page, page 10, appendix one,
10 outstanding med PAC GAO and OIG recommendations, right?

11 A. Correct.

12 Q. And the first GAO report referred to there was issued on
13 December 7th, 2012. I think we already looked at that one,
14 correct?

15 A. Correct.

16 Q. So that would have been public by this point, correct?

17 A. Correct.

18 Q. And the second one, we were just talking about. That was
19 made public on March 1st, 2013?

20 A. But that was in still in draft form. CMS produced this.

21 Q. Right. But as of February 6th, when the slide deck was
22 prepared, that GAO report was in draft; is that what you're
23 saying?

24 A. Right, and that was internal to the agency.

25 Q. Understood. But as of March 1st, 2013, that GAO report was

1 public, correct?

2 A. Correct.

3 Q. Okay. And now, on page 11, analytical focus, and I think
4 you've described on direct that this was CMS's focus for the
5 upcoming year; is that right?

6 A. Their planned focus, but these were topics that the team
7 presented to me for me to agree with or to me to modify. They
8 were --

9 Q. So they didn't have to necessarily agree with all of these?

10 A. I don't recall, and we were constrained for staff resource,
11 but I had a clear interest in pushing the team to spend more
12 time on data and quantifiable analysis.

13 Q. Okay. Now, a number of these areas of focus, again, were
14 things that CMS had already discussed publicly in prior rules
15 or in other sections, correct?

16 A. It's -- each bullet point provided the staff's thoughts
17 about areas that they could pursue to improve the payment
18 systems over time.

19 Q. Understood. But my question is, aren't these things, these
20 policy priorities, that were referred to publicly by CMS
21 previously?

22 A. These are broad categories of areas of focus the agency had
23 before 2013, and I'm sure as today. But again, these provide
24 the roadmap for potential analytic plan that the agency would
25 pursue.

I43PBLA5

Blum - Cross

1 Q. So, for example, Mr. Blum, the second bullet point there,
2 evaluate part D drug use, and in particular, the increasing use
3 of Sensipar; do you see that?

4 A. Yes.

5 Q. Didn't you say on direct that that was one of the topics
6 you covered with KCP, that you showed them a slide on the
7 increasing use of Sensipar?

8 A. This also says that the agency was considering taking
9 action to somehow curtail -- or that would analyze ways to
10 curtail that growth.

11 Q. But it was certainly something that you were willing to
12 discuss with the public, that there was this increase in use of
13 Sensipar, right?

14 A. Correct. That was a very sensitive point, what kind of
15 actions that the agency would take in order to potentially curb
16 that growth.

17 Q. Okay. But now here, it did not say what action the agency
18 took, correct?

19 A. It says that that one potential area that the agency will
20 focus on is the growth in that particular drug.

21 Q. Right. So it refers to the growth in Sensipar, right?

22 A. Correct.

23 Q. And that was also in the KCP presentation that was public,
24 right?

25 A. Correct.

I43PBLA5

Blum - Cross

1 Q. Another one for the future, the first one, evaluate the
2 cost of providing shorter and more frequent home dialysis
3 sessions; do you see that?

4 A. Yes.

5 Q. And that was the subject of prior rules that comments in
6 these prior rules as to whether CMS should increase the number
7 of sessions for which they would reimburse, correct?

8 A. That was one consistent recommendation that came to the
9 agency. This bullet point says, to me, that the agency would
10 take further steps to consider changes to that payment policy.

11 Q. Mr. Blum, wouldn't it be fair to say that nothing in this
12 slide deck would be a surprise to an outsider that followed CMS
13 closely?

14 A. It would certainly -- this slide deck provides the
15 beginning roadmap to how CMS planned to develop the proposed
16 rule. I remember the conversation being very sensitive, being
17 the first conversation that I became aware of, of requirements
18 to reduce the payment bundle. This was a presentation that was
19 prepared for me, that was not shared to any other policy
20 official, and I expected the presentation to stay within the
21 CMS confines.

22 Q. I understand, Mr. Blum. But wouldn't it be fair to say
23 that none of this would be a surprise to an analyst on the
24 outside that closely followed CMS?

25 MS. CUCINELLA: Objection.

1 THE COURT: Sustained.

2 Q. In general, Mr. Blum, these were topics that were known
3 outside of CMS, correct?

4 A. These were areas that the agency had spoken about, but
5 again, this slide deck provides the roadmap for the policies,
6 for the issues, and for the analytic plan to change the payment
7 system over time.

8 Q. Was CMS's 2013 ESRD rule-making process interfered with in
9 any way because of the release of this slide deck?

10 A. I can't say for sure for now. What I can say is the
11 expectation for all CMS staff that participated within these
12 briefings, and there were many of them, not just on the ESRD
13 but on every payment system, that they were confidential. They
14 were the early start to the process. They were a chance for me
15 to interact with the team and that conversation was not to be
16 shared outside of CMS.

17 Q. Are you aware of any harm that CMS suffered as a result of
18 the disclosure of this slide deck outside of CMS?

19 A. There is harm when the stakeholders believe that the
20 process isn't fair, and when stakeholders believe that some
21 have information before others do and the policies that we
22 considered in 2013 and before were very controversial, were
23 very difficult to sustain, were subject to tremendous scrutiny
24 by the Congress and by the overseers. And if the process was
25 violated, and if there was a perception that the process wasn't

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Blum - Cross

1 fair, that would damage the agency and make it much more
2 difficult to sustain very controversial decisions.

3 Q. Mr. Blum, you testified on direct that there were
4 circumstances where it came to your attention that there had
5 been a leak that troubled you; do you remember that?

6 A. Yes.

7 Q. It never came to your attention that this document was
8 leaked, correct?

9 A. I don't believe so.

10 Q. And you can't identify any particular harm or interference
11 with your process that was caused by the leak of this document,
12 correct?

13 A. I can say that any leak of the document that's unauthorized
14 compromises the policy processes.

15 Q. I understand that's your overall view, but what I'm asking
16 you is can you identify any particular harm that was caused to
17 CMS by the leak of this particular document?

18 MS. CUCINELLA: Objection.

19 THE COURT: Sustained. We're now into the realm of
20 argument.

21 MR. FISHBEIN: Okay. If we could now go to Government
22 Exhibit 1332, at tab 18.

23 THE COURT: We're going to take our break here, 15
24 minutes, folks.

25 (Recess)

1 (Jury present)

2 THE COURT: Okay. The jurors and the defendants all
3 are present.

4 You may proceed, Mr. Fishbein.

5 BY MR. FISHBEIN:

6 Q. Mr. Blum, are you familiar with something called the AY
7 modifier?

8 A. No.

9 Q. Do you recall any discussion of a concept about the AY
10 modifier in connection with the ESRD rule in 2013?

11 A. Possibly.

12 Q. But you don't know what it is?

13 A. I don't recall. I'm sorry.

14 Q. Okay. Now, you testified that you began at CMS in 2009,
15 correct?

16 A. Yes.

17 Q. And at that time, Mr. Worrall was working with Dr. Kelman,
18 correct?

19 A. Yes.

20 Q. And Dr. Kelman, I think you said, was on the Medicare C and
21 D side, correct?

22 A. He was the chief medical officer for the Part C and Part D
23 program.

24 Q. Which is the insurance part of Medicare, right?

25 A. Managed care, yes.

I43KBLA6

Blum - Cross

1 Q. And the A and B side is where the ESRD rule that we have
2 been talking about arose, correct?

3 A. Correct.

4 Q. Now, were you aware, by the way, that Mr. Worrall, when he
5 was working for Dr. Kelman, was based in Washington, D.C.?

6 A. I don't know where Chris was -- worked. My interaction
7 with him were generally in Baltimore.

8 Q. Let me show you, Mr. Blum, what's been marked as Defense
9 Exhibit 113.

10 MR. FISHBEIN: And I am going to read a stipulation.

11 THE COURT: Tell me the exhibit number again, please?

12 MR. FISHBEIN: 113.

13 THE COURT: Thank you.

14 MR. FISHBEIN: And I am reading a stipulation that's
15 Defense Exhibit 127.

16 "It's hereby stipulated and agreed by and among the
17 parties: Defense Exhibit 113 is an authentic true and correct
18 copy of notifications of personnel actions and requests for
19 personnel actions related to Christopher Worrall's employment
20 at the Centers for Medicare and Medicaid Services. Defense
21 Exhibit 113 consists of CMS records that were made at or near
22 the time of the events described therein, were kept in the
23 ordinary course of CMS's activities, and it was the regular
24 practice of CMS to keep such records."

25 And I offer Defense Exhibits 113.

I43KBLA6

Blum - Cross

1 THE COURT: 113 is received.

2 (Defendants' Exhibit 113 received in evidence)

3 BY MR. FISHBEIN:

4 Q. Mr. Blum, do you recognize the type of document in this
5 exhibit?

6 A. Yes.

7 Q. What are these?

8 A. These are documents that get produced when a federal worker
9 is hired or their position status changes because this is the
10 recordkeeping that the agency used on its personnel.

11 Q. And these relate to Mr. Worrall, so these would show each
12 position he held, and how much he got paid, and that type of
13 information, correct?

14 A. I believe so, yes.

15 Q. And then if you flip forward, there are numbers on the
16 bottom left-hand corner, we're going to go to 113-83.

17 Do you see, in the upper right-hand corner, there's a
18 date March 13, 2009? Do you see that?

19 A. Yes.

20 Q. Is that around the time that you started at CMS?

21 A. Two days before.

22 Q. Which was two days before?

23 A. This was two days before I started.

24 Q. Okay. And this shows Mr. Worrall as working at the Center
25 for Drug and Health Plan Choice. Do you see that?

I43KBLA6

Blum - Cross

1 A. Yes.

2 Q. What was that?

3 A. That was the organization that was one of the precursors to
4 the Center for Medicare. Before my time with CMS, there were
5 two separate centers, Part A and Part B and Part C and Part D.
6 When I joined the agency, those two centers became one combined
7 center.

8 Q. Do you remember when the combination was?

9 A. It happened pretty much the day I got there in practice,
10 and then it became merged, part of the organization, during
11 2010.

12 Q. Okay. But at least in March of 2009, Mr. Worrall was
13 working for the Center for Drug and Health Plan Choice,
14 correct?

15 A. And that was the former name to the Part C and Part D side
16 of the Center for Medicare.

17 Q. Okay. On the Part C and D side, correct?

18 A. Correct.

19 Q. You see it says "Washington, D.C. USA," correct?

20 A. Yes.

21 Q. And CMS did have an office in Washington, D.C., right?

22 A. It had a small office in Washington, D.C.

23 Q. And then if you go to 113-85, do you see that one is as of
24 February 2010?

25 A. Yes.

I43KBLA6

Blum - Cross

1 Q. And you see that he's still at the Center for Drug and
2 Health Plan Choice in Washington, D.C., correct?

3 A. The Center for Drug and Health Plan Choice was based in
4 Baltimore. CMS staff often worked in both the D.C. office and
5 the Baltimore office. They had to pick one location for their
6 assignment. I worked in both offices, but had
7 Washington, D.C., as my official city and state.

8 Q. Okay. And this reflects that Mr. Worrall, as of
9 February 2010, his official place was Washington, D.C.,
10 correct?

11 A. It doesn't reflect where he spent all of his time.

12 Q. But it does reflect that Washington, D.C., was his official
13 location, correct?

14 A. Duty station, yes.

15 Q. And then, actually, if you go to 113-87, June 2010, that
16 changes, right, and he switches from Washington, D.C., to
17 woodland, Maryland. Do you see that?

18 A. Yes.

19 Q. And Woodland is Baltimore, correct?

20 A. That's the Baltimore headquarters.

21 Q. Okay. Now, did there come a time in 2010 when Mr. Worrall
22 briefly served in a role working for you to replace somebody
23 else?

24 A. For maybe a day when my Special Assistant was on vacation.

25 Q. And that was Amy Larrick, your Special Assistant?

I43KBLA6

Blum - Cross

1 A. Yes.

2 Q. So, he filled in as a Special Assistant for you for one day
3 in 2010?

4 A. One day, maybe two days.

5 Q. Okay. But very brief, correct?

6 A. Yes.

7 Q. Now, I think you mentioned Mr. Worrall, there came a time
8 when he was promoted, correct?

9 A. Yes.

10 Q. Do you remember when that was?

11 A. I think it was late 2012 or early 2013.

12 Q. And --

13 A. But I'm sure you have documentation to show us.

14 Q. I mean, do you recall that it was mid-December of 2012?

15 A. That sounds about right.

16 Q. Okay. And how did that come about?

17 A. I was very impressed with the data tracking work that was
18 being done for the two payment systems. I had an interest in
19 having that work be extended to all of our payment teams and to
20 really use claims information. I felt that if there was a
21 dedicated resource whose task or whose primary function was to
22 help support the other payment policy teams, to use claims
23 information to improve payment systems, that we could make
24 better policies.

25 Q. Now, the claims monitoring that you were impressed with,

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Blum - Cross

1 that was the project that Mr. Worrall was working on, correct?

2 A. Yes.

3 Q. And so, your thought was that that claims monitoring was
4 useful for certain areas of CMS, and it would make sense to
5 broaden it; is that fair?

6 A. Correct.

7 Q. Now, did you have in mind who should get this position that
8 you were creating?

9 A. I asked the team to go through the normal process to create
10 a new position, to post it publicly, to have people apply to
11 it. I encouraged Chris to apply to it, and I clearly thought
12 that he was well qualified to take that role.

13 Q. And was it, in fact, posted for?

14 A. I believe so, yes.

15 Q. And were there applications submitted and a process that
16 was pursued?

17 A. I believe so, but I didn't personally take part in the
18 interview process.

19 Q. All right. In your view, did Mr. Worrall deserve the
20 promotion that he got?

21 A. I asked my -- our deputy to lead the search. I trusted her
22 opinion. She was someone who was known to be fair and a good
23 judge of CMS staff, and she recommended to me that Chris get
24 the job.

25 Q. But I guess I'm asking your view because you were the boss

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Blum - Cross

1 of the area, correct?

2 A. I supported the decision. But I also wanted to make sure
3 that somebody else had a chance to review it and to give me
4 confidence that it was the right decision.

5 Q. Fair enough. But from your perspective -- and you had
6 worked with Mr. Worrall at this point, correct?

7 A. Correct.

8 Q. You believed that he deserved this position, correct?

9 A. I was very impressed with Chris' work, and I felt that he
10 was deserving of a promotion.

11 Q. And that was based on your experience working with him,
12 right?

13 A. Correct.

14 Q. Now, I think you said that you spoke to him about his
15 career at CMS; is that right?

16 A. It was common for me to talk to more junior staff to give
17 them recommendations for how they should think about their
18 careers and hopefully stay with the agency.

19 Q. And I think you said you spoke to him several times about
20 these topics; is that right?

21 A. Twice, maybe.

22 Q. And he told you that he wanted a career at CMS; isn't that
23 correct?

24 A. Chris gave me every indication that he wanted to find a way
25 to stay within the agency, that he wanted to earn more money,

I43KBLA6

Blum - Cross

1 wanted to take on more responsibility, wanted to be promoted to
2 a GS15, but I was hopeful that he would have stayed with the
3 agency, and he gave me a very strong indication that he wanted
4 to stay for the right opportunity and for the right salary
5 level.

6 Q. When you say that he wanted more money, he said that he
7 wanted more money within CMS, correct?

8 A. Correct.

9 Q. And he did stay at least as long as you stayed, right?

10 A. He was there until I left, yes.

11 Q. And when you had these conversations with him, you
12 understood that he was proud of the work that he did at CMS,
13 correct?

14 A. Yes.

15 Q. And he believed in what he was doing?

16 A. Yes.

17 Q. If we can look at Government Exhibit 1337, which is at tab
18 5. Do you recognize this document?

19 A. Yes.

20 Q. What is it?

21 A. So, there were frequent changes to our senior staff
22 organization, people got promoted, people left, and
23 periodically the team would send the titles for different CM
24 leadership positions.

25 Q. Is this a document that was routinely prepared at CMS?

I43KBLA6

Blum - Cross

1 A. Probably once a month or so.

2 MR. FISHBEIN: The defense offers Government Exhibit
3 1337.

4 MS. CUCINELLA: No objection.

5 THE COURT: Received.

6 (Government's Exhibit 1337 received in evidence)

7 BY MR. FISHBEIN:

8 Q. If we could go to the page marked "Center for Medicare
9 Parts A and B Leadership." You see at the top, it says,
10 "Office of the Center Director," and it has the positions of
11 various people? Do you see that?

12 A. Yes.

13 Q. And you are the director?

14 A. Yes.

15 Q. And, again, this one came out in April of 2013, correct?

16 A. Yes.

17 Q. So, this is during the time that the ESRD rule was being
18 considered, right?

19 A. Yes.

20 Q. And underneath you, there's a variety of people. So, you
21 have Liz Richter, who I think you said was a deputy director?

22 A. For Part and Part B, yes.

23 Q. Then there are some people who have the title Special
24 Assistant. Do you see that?

25 A. Yes.

I43KBLA6

Blum - Cross

1 Q. What is a Special Assistant?

2 A. They're people who are assigned to a senior staff. Some
3 staff had one Special Assistant, some had more, depending on
4 the complexity of their work, and they have various duties.
5 They can range from helping to manage calendars, helping to
6 produce documents, helping to do analyses, but they're people
7 who have a very general job description, whose job basically is
8 to support their direct senior leader.

9 Q. So, for example, Sara Vitolo, that was your Special
10 Assistant, correct?

11 A. Correct, she was one of them.

12 Q. And Gay Burton was Liz Richter's Special Assistant,
13 correct?

14 A. Yes.

15 Q. Now, Chris Worrall, he was not a Special Assistant, was he?

16 A. He was promoted to a new position.

17 Q. Which is Senior Technical Advisor, correct?

18 A. I think that was the title that was given.

19 Q. If you look here on this exhibit, isn't that what it says?

20 A. Yes.

21 Q. And that was a more discrete role; isn't that right?

22 A. That was often a role when -- or title given to someone who
23 was GS15 without a staff to supervise, that most GS15s had
24 staff that they supervised, but sometimes the agency promoted
25 people to that job category that had senior level

I43KBLA6

Blum - Cross

1 responsibility without a team that reported to them.

2 Q. So, just to be clear, Mr. Worrall was not a Special
3 Assistant assigned to you, or Ms. Richter, or any other senior
4 staff within the Center for Medicare, correct?

5 A. I believe that he reported to Liz Richter. I forget who
6 his direct supervisor was during this time period, but his role
7 was elevated from being one of Special Assistant to taking a
8 broader role during the fall of 2012.

9 Q. Well, let's talk about what he actually did, okay?

10 So, Mr. Worrall had responsibility for this data
11 monitoring, correct?

12 A. Yes.

13 Q. And I think you said he was the contract officer for the
14 Acumen contract, correct?

15 A. He was the contract liaison, contract officer to the Acumen
16 work.

17 Q. Right. And he also interacted with other government
18 agencies with respect to the data monitoring, correct?

19 A. I don't know if he did or not.

20 Q. Do you know, for example, whether he worked with the Food
21 and Drug Administration with respect to data monitoring issues?

22 A. The data monitoring project was created before my time, the
23 partnership with CMS and the FDA, but I don't know if Chris
24 personally interacted with the FDA.

25 Q. Do you know if he was a liaison to the Department of

I43KBLA6

Blum - Cross

1 Justice with respect to data monitoring issues?

2 A. I know that the Department of Justice was very interested
3 in the work CMS was doing. They wanted to use the information
4 to monitor fraud and abuse in the Medicare program. And I was
5 aware that Kelman and Chris were in conversation with certain
6 DOJ staff.

7 Q. In other words, the Department of Justice, in order to root
8 out fraud within the Medicare system, in part, relied on this
9 data monitoring; is that right?

10 A. So I believed, and I commonly believed, and I think Chris
11 Worrall believed, that there was power in this data to find
12 patterns of fraud abuse.

13 Q. Do you remember that Mr. Worrall also worked on something
14 called spending variations?

15 A. The spending variation was that it was an internal work
16 group that I commissioned for a broad section of the CMS team
17 to analyze healthcare spending trends to find opportunities to
18 reduce costs in the Medicare program, and as part of Chris' new
19 role, that I tasked him to provide the data infrastructure to
20 that working group.

21 Q. So, from what you're saying, would it be fair to say that
22 Mr. Worrall's focus was on this data monitoring and data
23 analytics?

24 A. The position that was created that I envisioned was that
25 this new role, Chris' role, would work with all the payment

I43KBLA6

Blum - Cross

1 teams and work with other offices throughout CMS to help them
2 analyze Medicare claims information, to identify ways to
3 improve the Medicare program.

4 Q. So the common denominator is that he was working with the
5 Medicare claims information, correct?

6 A. He was certainly very expert in claims data, claims
7 analysis, and somebody that I trusted to do that very
8 complicated work.

9 Q. Now, you mentioned the policy team. What is the policy
10 team?

11 A. There were probably a dozen policy teams that had
12 responsibility to work on, to manage, to oversee, the different
13 payment systems that CMS maintains. The Part A program,
14 there's roughly five payment systems that are part of Part A -
15 inpatient hospital, skilled nursing, rehab hospitals. Each of
16 those payment systems had a dedicated team that reported to Liz
17 Richter, who reported to me.

18 Q. Was there an ESRD policy team?

19 A. Yes.

20 Q. And who -- was there a gentleman named Lawrence Wilson that
21 was in charge of that?

22 A. Lawrence had several responsibilities, one of which was to
23 lead the policy team for ESRD payment system.

24 Q. And Chris Worrall was not on Lawrence Wilson's ESRD policy
25 team, correct?

I43KBLA6

Blum - Cross

1 A. He worked very closely with the team, but he was not part
2 of that team.

3 Q. And he worked closely with the team by sharing with the
4 team the results of his data monitoring that we have been
5 talking about, correct?

6 A. Correct.

7 Q. Now, you mentioned that you worked in both -- physically in
8 both D.C. and Baltimore; is that right?

9 A. Correct.

10 Q. And where was Liz Richter, do you know?

11 A. Out of Baltimore.

12 Q. And how about the special assistants, like Sara Vitolo, Gay
13 Burton, some of the other ones on this exhibit that we saw?

14 A. The assistants who were dedicated to me tended to follow
15 where I worked physically. The special assistants who were
16 dedicated to Liz Richter tended to follow her where she worked
17 physically.

18 Q. Do you know where Chris Worrall was physically located
19 within CMS?

20 A. The office is huge. We had a huge sea of cubicles
21 throughout the organization, sea of offices. I don't know
22 precisely where his office was.

23 Q. Okay. But it's not like -- because some of these sectors
24 within CMS are referred to as offices, like the Office of
25 Medicare or the Office of the Actuary. Those aren't physical

I43KBLA6

Blum - Cross

1 offices where there's a whole bunch of people together in one
2 office, correct?

3 A. They can be, certainly, depending on the organization of
4 the office and space availability. I think in general, that
5 teams try and sit with each other, but sometimes due to space
6 constraints or other constraints, that teams don't physically
7 sit together.

8 Q. And you're not aware of where Mr. Worrall physically sat,
9 correct?

10 A. I couldn't tell you where he sat.

11 Q. Now, on direct, you talked about the rule approval process,
12 and I want to talk to you a little bit about that.

13 If you can go to Defense Exhibit 800, it's tab 19. Do
14 you recognize this as an organizational chart of CMS?

15 A. It's a very broad picture of the CMS organization.

16 Q. Do you see that it focuses in particular on two of the
17 policy groups?

18 A. Yes.

19 Q. And those are the policy groups that deal with radiation
20 oncology and ESRD, correct?

21 A. Yes.

22 Q. And with respect to those, does it show how they report up
23 through the structure?

24 A. Yes.

25 MR. FISHBEIN: Defense offers Defense Exhibit 800.

I43KBLA6

Blum - Cross

1 MS. CUCINELLA: Objection.

2 THE COURT: Ground.

3 MS. CUCINELLA: He said it's a very broad. This is a
4 defense-created exhibit. It's not an accurate --

5 THE COURT: I'm sorry.

6 MS. CUCINELLA: It's a very broad, he said, example of
7 the organization. So, it's a defense-created exhibit rather
8 than a CMS-created organizational chart. He can use it as a
9 demonstrative, but --

10 MR. FISHBEIN: I don't think it matters who created
11 it. He says that it's an accurate portrayal. It is broad, it
12 doesn't show every single office, of which there are apparently
13 dozens, and dozens, and dozens. It focuses on the ones that
14 matter.

15 THE COURT: Well, it's an extract, right?

16 MR. FISHBEIN: Yes.

17 THE COURT: It's received.

18 (Defendants' Exhibit 800 received in evidence)

19 BY MR. FISHBEIN:

20 Q. So, Mr. Blum, looking at Exhibit 800, I just want to walk
21 through with you the rule-making process.

22 So, let's start with radiation oncology. There was --
23 there was a group called Hospital and Ambulatory Policy Group.
24 Do you see that towards the bottom?

25 A. Yes.

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Blum - Cross

1 Q. And who led that group?

2 A. When I first got to CMS, the person that led that office
3 was named Amy Bassano. She left that position, I think, in
4 2012, maybe, and Marc Hartstein took that role when she left.

5 Q. And within the Hospital and Ambulatory Policy Group, there
6 was a team that worked on the radiation oncology policy,
7 correct?

8 A. There was a team that worked on physician services, and one
9 of the responsibilities -- one of their many responsibilities
10 was radiation oncology payments.

11 Q. Just so that we're clear, Mr. Worrall was not within the
12 Hospital and Ambulatory Policy Group, correct?

13 A. No.

14 Q. And he wasn't on the physician services team, correct?

15 A. No.

16 Q. Now, when there was a radiation oncology rule, that would
17 first be discussed and developed at this level here within the
18 Hospital and Ambulatory Policy Group, correct?

19 A. Yes.

20 Q. I'm sorry?

21 A. Yes.

22 Q. And then there was a briefing process where more senior
23 people within CMS would receive briefings on the rule, correct?

24 A. Correct.

25 Q. And so, for example, Medicare Parts A and B, that was

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Blum - Cross

1 headed by Liz Richter?

2 A. Correct.

3 Q. So, if there was a proposed radiation oncology rule, it
4 might be briefed to Liz Richter, right?

5 A. Correct.

6 Q. And then after Liz Richter, it would go up to the Center
7 for Medicare, and you might receive a briefing on it?

8 A. The general practice was that any decision, recommendation
9 that was presented to the Office of the Administrator was first
10 presented to me for review and for approval.

11 Q. And, essentially, this is a sort of a chain, it starts at
12 the policy group, and then it goes to Medicare A and B, and
13 then it goes to you, and then after you, it would go to the
14 administrator of CMS, right?

15 A. Not necessarily. Sometimes there were policies that I had
16 a particular interest in that I would direct the teams to work
17 on before they were presented to me.

18 Q. Okay. But let's take the -- we're on radiation oncology.
19 Let's take the radiation oncology rules at issue in this case,
20 which you testified about on direct, about the treatment times
21 for certain radiation oncology procedures. You remember those?

22 A. Yes.

23 Q. So those would be developed by the -- and, by the way,
24 Hospital and Ambulatory Policy Group, was that also referred to
25 by HAPG, its initials?

I43KBLA6

Blum - Cross

1 A. I believe so.

2 Q. So that would be developed by the HAPG group, and then
3 Ms. Richter would receive some sort of briefing, correct?

4 A. I can't speak to how she ran her own process, but I expect
5 that decisions were presented to me, that they were both
6 developed, and they were well vetted. So I assume that there
7 was a robust process before it was presented to me.

8 Q. And it was presented to you eventually, correct?

9 A. Yes.

10 Q. And then after you, it was presented to the administrator
11 of CMS, right?

12 A. Generally, yes.

13 Q. And then after the administrator of CMS, it went up to the
14 Department of Health and Human Services, right?

15 A. Yes.

16 Q. Which is a part of the White House, that's part of the
17 executive function of the United States Government?

18 A. Yes. It's one cabinet agency in the federal government.

19 Q. Right. And as a cabinet agency, they report to the White
20 House, correct?

21 A. To the President, yes.

22 Q. The Secretary of Health and Human Services is appointed a
23 political appointment by the President of the United States?

24 A. Nominated by the President and confirmed by the Senate.

25 Q. Thank you.

I43KBLA6

Blum - Cross

1 Okay. And so, these rules -- and now we're talking
2 about the radiation oncology rule -- ultimately would have to
3 be passed on by Health and Human Services as well, correct?

4 A. Any proposed rule or final rule gets signed by the
5 Secretary.

6 Q. Now, on this chart, we also have "OMB." What is OMB?

7 A. That's the Office of Management and Budget.

8 Q. And what is their role in the review and approval of these
9 policy rules that we're talking about?

10 A. Any federal regulation that's posted by any federal agency
11 has to be reviewed and cleared by the OMB to ensure that rule
12 is consistent with the law, consistent with policy priorities,
13 and that it has a full vetting throughout the federal
14 government.

15 Q. Now --

16 A. Executive branch, I'm sorry.

17 Q. Was there an office within CMS called OSORA?

18 A. Yes.

19 Q. And what is that?

20 A. I forget what the acronym stands for, but they were the
21 office that managed the paper as it went through the various
22 clearance chains.

23 Q. So there was a process to distribute these briefing papers
24 and other materials about draft rules, correct?

25 A. Right. They would decide which offices would get copies of

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Blum - Cross

1 the rules within CMS and which offices had an interest in
2 various policy revisions.

3 Q. With all those levels that we just went through, it sounds
4 like there were dozens of units, within CMS and HHS and OMB,
5 that received these draft rules in advance; is that fair?

6 A. It depends on the rule. Certain rules had very narrow
7 interests and would get a much smaller review, and certain
8 rules get a very, I guess, wide interest and get more thorough
9 review.

10 Q. Okay. And we'll look at some of the specific ones, but let
11 me just first ask you: With respect to ESRD, the kidney
12 dialysis, that was in the chronic care policy group, correct?

13 A. Correct.

14 Q. And that's the one at the lowest left on this chart,
15 Exhibit 800?

16 A. Correct.

17 Q. Just to be clear, Mr. Worrall was never in the chronic care
18 policy group, correct?

19 A. No.

20 Q. Who was the head of the chronic care policy group in 2012
21 and 2013?

22 A. Lawrence Wilson was the person that directed four or five
23 teams within that group. I don't recall whether he had a
24 person that was the lead for the team, but I was the person
25 that I saw as the leader.

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Blum - Cross

1 Q. Was the development of the ESRD rule, the kidney dialysis
2 rule, similar to what you just mentioned with respect to
3 radiation oncology in that it was developed within the chronic
4 care policy group, the lower-level group, and then it would get
5 briefed up the chain all the way to HHS and OMB?

6 A. Correct.

7 Q. Now, did you attend briefings where draft rules were
8 discussed for radiation oncology or ESRD?

9 A. Yes.

10 Q. And do you recall that these briefings would occur in a
11 conference room in CMS?

12 A. For the briefings that were held with me, we had one
13 dedicated conference room. That's typically where the
14 briefings took place. When the briefings took place, the
15 administrator that -- she had her own dedicated conference room
16 where those briefings would take place. If staff were in
17 different locations, there would be a videoconference
18 sometimes, but there was generally one conference room for each
19 of the different levels of briefings.

20 Q. So, let's talk about your briefings, the briefings where
21 you were being briefed. Okay?

22 So there, you had a conference room, and so for the
23 radiation oncology briefings, did Mr. Hartstein attend?

24 A. Yes.

25 Q. Because he was head of the HAPG group, correct?

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Blum - Cross

1 A. Yes.

2 Q. And there would be staff members that attended, correct?

3 A. Yes.

4 Q. So, his staff within the HAPG group, correct?

5 A. Yes.

6 Q. And you don't remember Mr. Worrall attending any of those
7 meetings, do you?

8 A. The conference rooms were generally packed with people.
9 Generally, there were more than one issue being discussed
10 during that meeting. My schedule was challenging; it was
11 difficult to get one kind of set time for one dedicated topic,
12 so there would be multiple people in those briefing rooms
13 during these meetings.

14 Q. Just a simple question: You don't remember Mr. Worrall
15 being present at a briefing in that conference room on
16 radiation oncology where the draft rule was being discussed, do
17 you?

18 A. No.

19 Q. And with respect to the ESRD rules, Mr. Wilson would be
20 there because he was the head of the CCPG group that handled
21 the ESRD, correct?

22 A. Yes.

23 Q. And there would be staff members there as well, right?

24 A. Yes.

25 Q. And you don't recall Mr. Worrall being present at any of

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Blum - Cross

1 those either, do you?

2 A. I don't recall who was in the room precisely.

3 Q. Now, you mentioned that there came a time where you
4 restricted the distribution of briefing materials in the
5 presence of these briefings on, I think you said, a
6 need-to-know basis?

7 A. Yes.

8 Q. Or a close-hold basis?

9 A. Yes.

10 Q. And Mr. Worrall, he would not be in the need-to-know group,
11 correct?

12 A. I don't believe so, but I didn't personally control the
13 paper on a need-to-know basis, for how it was distributed.

14 Q. I understand, but from your perspective, you did not view
15 Mr. Worrall as being within the need-to-know group, correct?

16 A. No.

17 Q. Now, you mentioned that certain documents were posted on a
18 shared drive at CMS?

19 A. That was my understanding, that CMS broadly was encouraged
20 to share documents on the CMS shared drives.

21 Q. How many employees are there at CMS or were there in 2012
22 and 2013?

23 A. Roughly, five to six thousand employees.

24 Q. And you're not saying that five to six thousand employees
25 all had access to everything that was on this shared drive, are

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Blum - Cross

1 you?

2 A. My understanding is that different offices within CMS
3 maintained their own shared drives. I don't know who had
4 access to which shared drives, but staff were encouraged not to
5 have documents shared through their own personal laptops.

6 Q. So, for example, the HAPG group, that dealt with radiation
7 oncology, might have a shared drive?

8 A. I don't know.

9 Q. And you certainly don't know who had access to it?

10 A. No.

11 Q. And you don't know whether Mr. Worrall had access to it?

12 A. No.

13 Q. Now, I want to direct your attention to 2009.

14 Do you recall that there was a radiation oncology rule
15 promulgated by CMS that year?

16 A. It's vague in my memory. I was brand new to the agency,
17 and I don't have a good memory to that particular provision.

18 Q. Do you remember that there was an adjustment, a reduction,
19 to the reimbursement based on the utilization of expensive
20 equipment used for radiation oncology?

21 A. My understanding was a reduction for imaging services
22 broadly beyond just radiation oncology services.

23 Q. Chris Worrall did not have any involvement with that
24 radiation oncology rule in 2009, from your knowledge, did he?

25 A. Not that I know of.

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Blum - Cross

1 Q. And in 2009, I think you mentioned that there was an ESRD
2 rule in 2009, correct?

3 A. Correct.

4 Q. Did you have any involvement in that?

5 A. Yes.

6 Q. What was your involvement in that?

7 A. It was similar to any other payment rule, to decide certain
8 policy decisions, to help guide the policy development, and
9 then to ultimately brief my superiors on the policy decisions.

10 Q. And did you discuss any draft of that ESRD rule in 2009
11 with Mr. Worrall?

12 A. Not that I remember.

13 Q. In fact, you don't remember Mr. Worrall being involved in
14 the development of that rule, correct?

15 A. No.

16 Q. So, now let's move to 2012. Do you remember that there was
17 a radiation oncology rule in 2012?

18 A. Yes.

19 Q. And that was the one, I think you testified on direct, that
20 what CMS decided was that it was going to reduce the time that
21 it would reimburse for with respect to certain radiation
22 oncology procedures?

23 A. Yes.

24 Q. And those procedures are called IMRT and SBRT?

25 A. Yes.

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Blum - Cross

1 Q. And what they stand for, I'm not going to try to get into
2 it --

3 A. Nor am I.

4 Q. -- but it related to the reduction in those things,
5 correct?

6 A. Correct.

7 Q. Were you involved in that rule in 2012 --

8 A. Yes.

9 Q. -- the radiation oncology rule?

10 Did you discuss that rule with Mr. Worrall at any
11 point?

12 A. Not that I remember.

13 Q. Do you recall being at any briefings in which the cuts to
14 the IMRT and SBRT were discussed, where Mr. Worrall was
15 present?

16 A. I don't recall who was in the room for which meeting and
17 for which particular briefing.

18 Q. But you don't remember Mr. Worrall at any particular
19 briefings where those cuts were discussed, right?

20 A. No.

21 Q. If we can look at Defense Exhibit 320, it's tab number 20,
22 do you recognize this, Mr. Blum?

23 A. I believe so.

24 Q. What is it?

25 A. This is a invitation of staff to attend a briefing of the

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Blum - Cross

1 Secretary's senior advisors on CMS payment rules. I can't tell
2 which rule is being briefed.

3 Q. If you go to --

4 MR. FISHBEIN: If we can just show the witness --
5 320-3.

6 Q. I think you'll see -- let's see. Okay, but it's a
7 distribution of a policy paper --

8 A. Correct.

9 Q. -- is that correct?

10 A. Correct.

11 MR. FISHBEIN: Your Honor, the defense offers
12 Exhibit 320.

13 MS. CUCINELLA: No objection.

14 THE COURT: Received.

15 (Defendant's Exhibit 320 received in evidence)

16 BY MR. FISHBEIN:

17 Q. Now, Mr. Blum, I realize there's a lot of people on the
18 this, and -- perhaps we can show the jury -- I think there's
19 three pages of email addresses.

20 MR. FISHBEIN: Can we just show those.

21 Q. Mr. Blum, I'm not going to expect you to pick your own name
22 out, but hopefully I can get some help on that. It's on the
23 first page, a third of the way down. Do you see you were a
24 recipient, one of the many recipients, of this email?

25 A. Yes.

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Blum - Cross

1 Q. And the subject is "Principal Briefing Physician Fee and
2 OPPTS Proposed Rules." What is that?

3 A. When -- decisions were generally cleared through the CMS
4 but then always they were briefed to the different -- to the
5 staff in the different offices that reported to the Secretary,
6 that before decisions were presented to the Secretary, the
7 various offices and staff that reported to her would have a
8 chance to review those regulations, proposed regulations.

9 Q. If we can now go to the attachment, and we're going to go
10 to page 320-8, and if you'll look under the recommendation, do
11 you see it says, "We recommend proposing to reduce procedure
12 times to 30 minutes for IMRT treatment delivery and 60 minutes
13 for SBRT"? Do you see that?

14 A. Yes.

15 Q. So that's the radiation oncology rule that came out in
16 2012, correct?

17 A. That's the recommendation for that rule, yes.

18 Q. Do you remember that's, in fact, what CMS did?

19 A. I believe so, yes.

20 Q. So, this briefing paper has the specific numbers of what
21 CMS was considering to do with respect to this rule, correct?

22 A. For the time, yes.

23 Q. And the date of this is April of 2012, right?

24 A. Correct.

25 Q. And then the rule came out in July of 2012?

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Blum - Cross

1 A. Yes.

2 Q. So this was CMS's thinking with the specific numbers,
3 right?

4 A. It wasn't necessarily cleared by the administrator but it
5 was certainly recommendations that I was comfortable with.

6 Q. Right, okay. So, as of that time, that was CMS's thinking,
7 right?

8 A. Yes. But not CMS's policy.

9 Q. Okay, understood.

10 Now, Mr. Blum, I can ask you to go through -- well,
11 let me do this first: You saw that you were an addressee on
12 this, correct?

13 A. Yes.

14 Q. And if we can highlight and show the witness Liz Richter as
15 an addressee. I don't know if you see that. That's on page
16 320-3. It's the next page. And she was head of Medicare Parts
17 A and B, correct?

18 A. She was my deputy for Part A and Part B.

19 Q. Okay, and then on the previous page we have Mr. Hartstein,
20 who was head of HAPG, right?

21 A. Yes.

22 Q. And Ms. Bassano, who was -- what was her role at that time?

23 A. I don't know what her role was at that time. Their roles
24 changed. Amy was the head of HAPG in 2009, 2010, 2011, and she
25 stepped down when she had her twins.

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Blum - Cross

1 Q. And then Mr. Burton -- is Gay Burton a man or woman?

2 A. Woman.

3 Q. Okay. Ms. Burton is on here. She's a special assistant,
4 right?

5 A. Yes.

6 Q. And Amy Larrick is on here. She's a special assistant,
7 right?

8 A. Yes.

9 Q. Is Mr. Worrall on here anywhere?

10 A. I can't tell.

11 Q. I'll represent to you that he's not, and the government
12 will correct me if I am wrong.

13 My question to you, Mr. Blum is: This distribution
14 has a long list of specific people who were given that briefing
15 paper, correct?

16 A. Correct.

17 Q. And the reason for listing all those people is those were
18 the people that were supposed to get that information, correct?

19 A. For that briefing, yes.

20 Q. For that briefing?

21 And Mr. Worrall was not one of them, right?

22 A. According to this, no.

23 Q. And that's because he was working on data monitoring, he
24 was not working on developing this policy, correct?

25 A. I didn't decide who got -- was invited to these briefings

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Blum - Cross

1 but, generally, people that were part of the policy teams or
2 the review teams were invited to the briefings.

3 Q. So, if you were a part of the process of making the policy
4 or reviewing the policy, then you'd get invited, correct?

5 A. Correct.

6 Q. And the way you would be invited is being listed in these
7 distributions?

8 A. But somebody could easily forward this to anybody else in
9 the agency.

10 MR. FISHBEIN: Move to strike as speculation.

11 Q. And you don't have any knowledge of that, right, Mr. Blum?

12 A. No.

13 Q. Did you participate in briefings to the Office of
14 Management and Budget, OMB?

15 A. Generally, no. Those were staff-to-staff level briefings,
16 and I participated in briefings to senior White House policy
17 officials but rarely to the OMB staff.

18 Q. When you met with senior White House officials, would that
19 be a relatively small group from CMS?

20 A. It would be myself, generally, and maybe one other person.

21 Q. And that did not include Mr. Worrall, right?

22 A. No.

23 Q. Now let's go to the ESRD rule in 2013, and let's start with
24 the proposed rule that came out in July of 2013. Are you with
25 me?

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Blum - Cross

1 A. Yes.

2 Q. So, I think it was July 1st, correct?

3 A. Roughly, yes.

4 Q. And this is the proposed rule that we've been talking about
5 that proposed a cut of 12 percent to the reimbursement for
6 kidney dialysis?

7 A. Yes.

8 Q. And you're familiar with that. And you were involved in
9 that, correct?

10 A. Yes.

11 Q. Now, do you ever recall discussing the 12 percent cut with
12 Chris Worrall?

13 A. I clearly recall discussing the data trends with Chris and
14 with Jeff that supported a charge cut. I don't recall whether
15 or not I discussed particular payment policies with Chris or
16 anybody else, but I was very involved with Chris and with
17 Dr. Kelman on the overall payment to dialysis facilities.

18 Q. When you say you discussed with Chris the trends, are you
19 referring to the drop in ESAs that we spent a lot of time
20 talking about earlier this afternoon?

21 A. We were monitoring many, many different data points, and
22 that was one data point.

23 Q. You recall -- because that was Chris' job to work on that
24 data monitoring with respect to the ESAs, correct?

25 A. And to help me understand how the payment system was

1 working.

2 Q. But you don't recall telling Chris Worrall before the
3 proposed rule came out, we are going to cut this by 12 percent?

4 A. There was certainly conversation throughout the payment
5 teams about the size of the cut. There was certainly
6 conversation about the size of the cut that CMS was
7 contemplating was bigger than what the community was
8 predicting, but I don't recall certainly who I talked to other
9 than Lawrence Wilson.

10 Q. So, you did talk to Lawrence Wilson about the 12 percent
11 cut; you remember that, right?

12 A. He had to implement the decisions that were being made.

13 Q. Okay. And if we could now go to Defense Exhibit 327, it's
14 your tab 21, do you recognize that document, Mr. Blum?

15 A. This is an invitation for CMS staff to participate in a
16 briefing, I believe, with me on -- I'm not sure what topics.

17 Q. But this is an internal distribution of a policy paper in
18 preparation for a briefing at CMS, correct?

19 A. I believe so. I can't tell which briefing paper this is.

20 MR. FISHBEIN: Your Honor, the defense offers
21 Exhibit 327.

22 MS. CUCINELLA: No objection.

23 THE COURT: Received.

24 (Defendants' Exhibit 327 received in evidence)

25 BY MR. FISHBEIN:

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Blum - Cross

1 Q. Now, Mr. Blum, you see this one is actually coming from
2 you?

3 A. I didn't send this, but it came from my calendar.

4 Q. And the date is May 6, 2013, correct?

5 A. Yes.

6 Q. So, now, that's just a few months before the proposed ESRD
7 rule comes out, correct?

8 A. Yes.

9 Q. And if you look at the attachment -- and we're going to
10 page 327-5 -- do you see there's a recommendation there, "For
11 CY 2014, based on the above methodology, we propose to reduce
12 the CY 2014 ESRD PPS base rate by \$29.52 which is a 12 percent
13 reduction"? Do you see that?

14 A. Yes.

15 Q. And that's the 12 percent we've been talking about, that
16 was what CMS ultimately came up with for its cut for the
17 proposed rule, correct?

18 A. That was the estimate at the time. I think that number
19 changed slightly, but at the time it became public, that was
20 the number that was being used for internal briefing purposes.

21 Q. Okay. But when it became public, in July, it was still
22 around 12 percent, wasn't it?

23 A. I believe so, yes.

24 Q. And as of this date, May 6, 2013, this was CMS's internal
25 thinking, with the specific recommendation of 12 percent,

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Blum - Cross

1 correct?

2 A. That was the staff's estimate for what the cut should be.

3 Q. Okay. If we go back to the first page, we see that it was
4 sent from you, and you're also listed as one of the recipients,
5 correct?

6 A. Yes.

7 Q. And Mr. Wilson is on here, right, below Mr. Hartstein?

8 A. I don't see Mr. Wilson but I'm sure --

9 Q. If you go down, slightly to the right from Hartstein, you
10 see Wilson?

11 A. Yes, thank you.

12 Q. And because he's head of the CCPG group, that developed
13 this ESRD rule, correct?

14 A. Yeah, correct.

15 Q. And Ms. Bassano is on it, correct?

16 A. Yes.

17 Q. And then if you look further down, Amy Larrick is one of
18 the special assistants who is on it, correct?

19 A. Correct.

20 Q. Gay Burton is on it, one of the special assistants,
21 correct?

22 A. Yes.

23 Q. And lots of other people, right?

24 A. Yes.

25 Q. And, again, do you see Mr. Worrall on this one?

1 A. I cannot read that fast but I don't see him on this.

2 Q. I will represent to you -- and the government can correct
3 me if I am wrong -- that Mr. Worrall is not listed on this
4 distribution. And I have the same question to you as before:
5 This distribution was intended to go to the people that were
6 involved in the process of developing this rule, correct?

7 A. Correct. But, again, I didn't decide who was to be part of
8 that briefing.

9 Q. Now let's go to the 2013 ESRD final rule, which came out in
10 November of 2013; is that right?

11 A. I believe it came out later. There was a government
12 shutdown. I don't recall what date it came out but it came out
13 later than anticipated.

14 Q. Just so we're kind of clear on the chronology, the proposed
15 rule comes out in July, right?

16 A. For the Part B rules.

17 Q. Yes -- no, but for this one, this ESRD rule?

18 A. Generally, yes.

19 Q. But in 2013, it came out in July, correct?

20 A. Yes.

21 (Continued on next page)

22

23

24

25

I43PBLA7

Blum - Cross

1 Q. Okay. And the proposed -- it said we're going to be
2 proposed to cut the reimbursement for dialysis by 12 percent,
3 right?

4 A. Correct.

5 Q. And then there's a notice of comment period, and then
6 there's a final rule later in the year, correct?

7 A. Correct.

8 Q. And in this case, the final rule I think you said on
9 direct, it retained the 12 percent, right?

10 A. Yes.

11 Q. But then there was a phase-in period?

12 A. Correct.

13 Q. Do you remember what that phase-in period was?

14 A. I think it was three years.

15 Q. Now, do you recall discussing that phase-in period with
16 Chris Worrall?

17 A. For the final rule?

18 Q. Yes.

19 A. I don't recall.

20 Q. You don't recall discussing with him, correct?

21 A. No.

22 Q. And if we could go to Defense Exhibit 358, it's your tab
23 No. 22 --

24 THE COURT: I'm sorry. So I could this get clear in
25 my mind. The phase-in was in proposed rule or the final rule?

I43PBLA7

Blum - Cross

1 THE WITNESS: The final rule.

2 THE COURT: In the final. And in the proposed rule?

3 THE WITNESS: A 12 percent cut taken just in one year.

4 THE COURT: In one year. Okay. Thank you. Go ahead.

5 BY MR. FISHBEIN:

6 Q. So if we could go to tab -- Defense Exhibit 358 it's your
7 tab 22. Mr. Blum, is this another distribution of a policy
8 made in advance of a briefing?

9 A. Yes, this is going to the department of policy principals.

10 MR. FISHBEIN: And defense offers Exhibit 358.

11 MS. CUCINELLA: No objection.

12 THE COURT: Received.

13 (Defendants' Exhibit 358 received in evidence)

14 BY MR. FISHBEIN:

15 Q. And if you look, there's a long e-mail list, Mr. Blum.
16 It's dated November 6th of 2013. That would be before the
17 final rule came out, correct?

18 A. Correct.

19 Q. And if you go to the attachment, we're going to
20 page 358-11. If you see, under Background, it talks about an
21 impact analysis. It says: "In addition, it establishes a
22 four-year transition of the drug utilization reduction by
23 offsetting," et cetera, et cetera; do you see that?

24 A. Yes.

25 Q. And as of that date, this was CMS's proposal in terms of

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Blum - Cross

1 phase-in?

2 A. I don't recall whether it was a three-year proposal or a
3 four-year proposal, but I do recall that CMS recommended a
4 longer phase-in period.

5 Q. Yes. And all I'm asking is as of November 6th, the date of
6 this distribution, this policy paper contained the actual
7 recommendation that CMS was thinking of at that time, right?

8 A. That was CMS's recommendation.

9 Q. And it has the number, it has four years at this point?

10 A. That was not the policy yet. That was the recommendation.

11 Q. Understood. Understood. Now, if we look at the
12 distribution, you're on this, correct?

13 A. Yes.

14 Q. And Sara Vitolo was on it; she's your special assistant,
15 correct?

16 A. Yes.

17 Q. And lots of other people. And there's Marc Hartstein is on
18 it, correct?

19 A. Yes.

20 Q. And a number of people. And is Mr. Worrall on it?

21 A. I don't see him on it.

22 Q. And I'll represent to you that you do not. And same
23 question, the list of people that this was sent to was designed
24 to include the people that were involved in the development of
25 this rule, correct?

I43PBLA7

Blum - Cross

1 A. Yes.

2 Q. Now, you testified on direct that CMS would meet with
3 outsiders before a proposal rule came out, correct?

4 A. From time to time, yes.

5 Q. And so I mean, an example of that was you met with KCP
6 about the ESRD rule before the proposed rule came out, correct?

7 A. Correct.

8 Q. And there would be various constituents that wanted to be
9 heard even before a proposed rule came out, correct?

10 A. Sometimes, yes.

11 Q. And so they want to give you their input on what they
12 thought might should be in a proposed rule, right?

13 A. Sometimes, yes.

14 Q. And there were a number of these meetings, correct?

15 A. Yes.

16 Q. Now, you didn't track all such meetings that occurred,
17 correct?

18 A. Not me personally, no.

19 Q. So in other words, people didn't have to come to you and
20 seek approval and say, I want to meet with the industry before
21 the proposed rule, right?

22 A. There was not a requirement, but there was generally a
23 practice for us to share various meeting requests. One was a
24 task that the special assistants had was to coordinate the
25 different meeting requests that came to me or to our senior

I43PBLA7

Blum - Cross

1 staff.

2 Q. Now, there's people below you, though, like, for example,
3 Mr. Wilson and Mr. Hartstein that headed some of these policy
4 groups, correct?

5 A. Correct.

6 Q. And they didn't have to come to you every time they wanted
7 to meet with somebody on the outside before a proposed rule
8 came out, correct?

9 A. Correct.

10 Q. Now, among the people that would meet with CMS were people
11 who I think you described as political intelligence, within the
12 political intelligence area, correct?

13 A. It was very much strongly discouraged.

14 Q. I understand that, Mr. Blum. You discouraged that. Is
15 that what you testified on direct?

16 A. Yes.

17 Q. Now, I take it that the reason you felt the need to
18 discourage it is because it was happening, right?

19 A. Correct.

20 Q. It came to your attention that political intelligence
21 people would frequently come in and meet with people at CMS,
22 right?

23 A. I don't think it was frequently, but it did happen.

24 Q. It was frequent enough that you felt the need to give some
25 direction on that?

I43PBLA7

Blum - Cross

1 A. I was aware of meetings that took place before I started at
2 CMS about concerns that staff had regarding those meetings, and
3 I took steps to discourage those meetings from happening during
4 my time at CMS.

5 Q. By "those meetings," you mean meetings between CMS staff
6 and political intelligence people who represented or did work
7 for Wall Street, correct?

8 A. That's right.

9 Q. Now, I think you mentioned that you -- one of the ways that
10 you discouraged people is that you sent e-mails?

11 A. Yes.

12 Q. And I mean, can you identify any particular e-mail?

13 A. I recall sending an e-mail to a gentleman that ran the
14 office that communicated to the OMS community before my time at
15 CMS. There were many people that were copied on that e-mail,
16 where I said do not have a certain conversation.

17 Q. And you met with the government before you testified in
18 this case, correct?

19 A. Yes.

20 Q. Did they show you that e-mail?

21 A. No.

22 Q. Did you ever send an e-mail to Chris Worrall telling him
23 that he should not meet with political intelligence people?

24 A. Not that I recall.

25 Q. And did you ever have a conversation with Chris Worrall

I43PBLA7

Blum - Cross

1 where you told him not to meet with political intelligence
2 people?

3 A. I had many conversations with many staff. I don't recall
4 one with Chris Worrall.

5 Q. And I think you said you discouraged it, but there was no
6 rule against it within CMS, correct?

7 A. Correct, but generally when I discourage something, that
8 didn't happen.

9 Q. But you did, on your direct, you showed us or you were
10 asked about a number of CMS policies, internal policies,
11 written policies. Do you recall that?

12 A. Yes.

13 Q. About market-sensitive information and nonpublic
14 information?

15 A. Yes.

16 Q. Do you remember those?

17 A. Yes.

18 Q. Those were written policies distributed to everybody at
19 CMS, correct?

20 A. Correct.

21 Q. And so if CMS wanted people to behave in a certain way,
22 they certainly could send a blast policy like that, correct?

23 A. Correct.

24 Q. And there was no blast policy like that on the subject of
25 meeting with political intelligence people, correct?

I43PBLA7

Blum - Cross

1 A. Not that I sent, but I clearly communicated to the staff
2 that they should use their time differently.

3 Q. CMS had, I think you said on direct as well, had public
4 meetings to discuss its activities, correct?

5 A. Yes, some meetings were required by the statute and some
6 meetings were just general practice.

7 Q. Now, in Baltimore, CMS had an auditorium; is that right?

8 A. Correct.

9 Q. And where was that auditorium based?

10 A. On the first floor of the building.

11 Q. So it was on the first floor. What size was it, generally?

12 A. There was a conference area that the room could be adjusted
13 for size, but I think the maximum capacity was 500 people
14 roughly, that could be adjusted for -- walls could be created
15 to have multiple meetings at the same time.

16 Q. And that auditorium was used for CMS to have meetings with
17 the public, correct?

18 A. Generally, yes.

19 Q. And is it correct that that auditorium was booked five days
20 a week throughout the year for public meetings that CMS had
21 with the public about its activities?

22 A. It was booked continuously. I would have a hard time
23 getting any time on the calendar to use the auditorium.

24 Q. There were that many?

25 A. There was that many meetings.

I43PBLA7

Blum - Cross

1 Q. With the public. And can you just give us an idea of the
2 different types of meetings with the public that were occurring
3 five days a week at CMS?

4 A. There were meetings that would happen after rulings were
5 proposed. I've explained those meetings. There were some
6 statutory required meetings. CMS had several public advisory
7 commissions that would meet from time to time. CMS let
8 community groups use the space from time to time for their own
9 purposes. There were all-staff meetings. There were meetings
10 for the major centers or staff meetings. It was just a
11 resource that was continuously used by multiple offices and
12 different government agencies sometimes.

13 Q. Now you just mentioned that there were meetings after
14 proposed rules came out, right?

15 A. Sure.

16 Q. There were also meetings before proposed rules came out,
17 right?

18 A. Sometimes, yes.

19 Q. I mean, if you're saying that it was booked five days a
20 week throughout the year, there were months that led up to a
21 proposed rule and the auditorium was used, right?

22 A. There were some new payment systems that were authorized by
23 the Affordable Care Act, for example, that were brand new
24 concepts to CMS, where the agency felt it was important to have
25 listening sessions before rules were even proposed, where broad

I43PBLA7

Blum - Cross

1 groups of stakeholders were invited to present concepts, ideas
2 for those new proposals.

3 Q. So this would be in advance of a proposed rule?

4 A. Sometimes, yes.

5 Q. And a listening session, you're describing it for the
6 public to come and CMS to listen about their concerns; is that
7 right?

8 A. Sometimes, yes.

9 Q. And these and other meetings would be attended by the
10 public and by CMS personnel, correct?

11 A. Yes.

12 Q. And there was no restriction on what members of the public
13 could go to those, right?

14 A. No.

15 Q. So political intelligence, Wall Street, anybody could go?

16 A. Yes.

17 Q. Now, was there also a cafeteria on the first floor?

18 A. No, in the basement.

19 Q. Okay. How did you get to from the auditorium to the
20 cafeteria?

21 A. There is a staircase, and there were elevators.

22 Q. And the cafeteria was also open to the public, right?

23 A. Correct.

24 Q. And so there was this auditorium, where public meetings
25 were occurring, right?

I43PBLA7

Blum - Cross

1 A. Yes.

2 Q. And there was a cafeteria and the public would go to the
3 cafeteria, right?

4 A. Yes.

5 Q. And so there was a lot of mingling between CMS people and
6 the public, fair to say?

7 THE COURT: Define mingling.

8 Q. There was an interaction between the public and CMS.

9 THE COURT: Were there members of the public and CMS
10 employees in the building at the same time? I'm sure there
11 were. Could we --

12 Q. In the building at the same time and the same place is my
13 question. In the cafeteria together, for example?

14 A. I didn't use the CMS cafeteria that often. I couldn't tell
15 you.

16 THE COURT: Probably a wise man, if it's like the
17 courthouse one.

18 How much longer do you expect to be, Mr. Fishbein?

19 MR. FISHBEIN: 45 minutes.

20 THE COURT: We're going to break here for the jury.
21 I'll do some business with counsel, and I'll see you at 9:00
22 tomorrow morning, ladies and gentlemen. You can step down for
23 the time being, Mr. Blum.

24 (Jury not present)

25 (Witness temporarily excused)

1 THE COURT: Be seated, folks. Well, now that we've
2 been here for two days, I have no idea whether we're ahead of
3 schedule or behind schedule.

4 MS. CUCINELLA: We're behind schedule, Judge.

5 THE COURT: I feared so. Badly or not badly?

6 MS. CUCINELLA: We're edging close to badly.

7 MR. FISHBEIN: Your Honor, I can tell you, from the
8 defense perspective, Mr. Blum is the most important CMS
9 witness. I mean, I would not expect to have nearly as long on
10 with the other witnesses. Whatever that's worth.

11 THE COURT: Thank you. Okay. I wanted to take a
12 minute on Mr. Huber's motion of April 2. I've now read it and
13 the government's response. My first take on this is the
14 government didn't respond at all with respect to the first
15 group of exhibits, to which this is directed, which are
16 Government Exhibits 1046 through 1048, and so --

17 MS. CUCINELLA: Judge, I believe there's a footnote
18 that says we're not offering those.

19 THE COURT: Bless you. So it's moot as to them.

20 As to the rest of them, it struck me that the
21 untimeliness argument, untimeliness of the 404B, is of no
22 merit. These documents were just turned over to the
23 government, right? Defense disagree with that?

24 MS. JAMES: I don't disagree that the government is
25 doing the best it can to turn over materials as quickly as they

1 can. I think, from our perspective, the point is there's still
2 substantial prejudice to this defendant, and it would be on
3 that basis that we would ask your Honor to disallow the
4 applications.

5 THE COURT: You're fading in and out. It's like a bad
6 cell phone.

7 MS. JAMES: I'm sorry.

8 THE COURT: Maybe the lectern.

9 MS. JAMES: Very well, your Honor. As we said in our
10 letter, your Honor, we're not quarreling with the government.
11 I appreciate they're doing the best that they can, giving us
12 these materials as they get it. Nevertheless, because I do
13 believe the documents, which now relate to an even earlier time
14 period, are now, notwithstanding their ability to get them to
15 us as quickly as they can, they're putting the defense in a
16 very difficult position, which rule 404B is designed to
17 mitigate.

18 And such that now, on the eve of trial, there are new
19 allegations that require investigation for us to be able to put
20 some of these communications, should the government decide to
21 offer them, into context. I think we spelled out in our letter
22 with respect to 1051, for example, we have to figure out what
23 KCI is, what the proposed CMS decision was at that point in
24 time. There's no information as to what the purported draft
25 document might be.

1 I note from the 3500 of the government's cooperator,
2 there's no indication there of what the document is or what it
3 might be, and if it even exists. And on this particular
4 exhibit, it's not even clear that it involves Mr. Huber or
5 Mr. Olan. And I believe the government's cooperator says he
6 doesn't know if he got it.

7 But our concern is that by injecting these materials
8 into the trial at this late date, when I respectfully submit I
9 don't think they actually know what they mean either, it puts
10 us in a position of sort of having to prove a negative without
11 enough time to be able to do the necessary investigation.

12 THE COURT: Look, I'm told this will be at least a
13 three-week and maybe a five-week trial. We are dealing here
14 with five e-mails involving some of the defendants and their
15 former employer. It is their former employer who stands, as
16 the government says, to gain as much as anybody, except for the
17 two former employees, by an acquittal in this case, who is
18 about a year late producing these documents.

19 So I'm not terribly impressed by the argument that
20 you're going to be horribly prejudiced by the fact that you
21 only got them essentially simultaneously with the government.
22 It sure isn't the government's fault. It's probably the fault
23 of the people who are paying for the defense in this case, but
24 I'm not going to press that point unless I have to.

25 And putting all that to one side, I think you can

1 figure out what's going on on these five pieces of paper in
2 three to five weeks from now. Unless you have some good
3 argument why that's not true, that's my view on that.

4 MS. JAMES: If I may, your Honor, if you'll indulge me
5 for one moment.

6 THE COURT: Of course. I'm emphatic, but not hostile.

7 MS. JAMES: I appreciate that the government and
8 perhaps your Honor is frustrated with Deerfield. I don't
9 represent Deerfield. I represent Mr. Huber, and this is not a
10 problem that Mr. Huber created. It is something that could
11 result in prejudice to him, and that's why we raised the issue.

12 THE COURT: You told me you don't know who KCI is.
13 Here's an e-mail from Ted Flynn, the head of Deerfield, to Ted
14 Huber, saying: We own a chunk of KCI now. Now, I could think
15 of a few ways you could find out who KCI is. You could ask
16 your client, you could call up Mr. Flynn or talk to his lawyer.

17 MS. JAMES: Your Honor, it's the point we raised when
18 we were concerned about the superseder that was expanding the
19 date of this conspiracy by three weeks, that every time there
20 is a new purported piece of information related to some CMS
21 issue and some stock, we have to understand what the CMS issue
22 is, what was publicly available about that issue, and what all
23 the communications around those issues are.

24 And to have a one-off document where there isn't any
25 context, and there's not really substantial context in the

1 government's production, to try to create that context and put
2 this document in context so it won't just be thrown before the
3 jury without our being able to rebut it, requires work. And,
4 in fact, might require additional collection of document from
5 other sources. That's the type of work that we're concerned we
6 won't be able to do, given the late production.

7 THE COURT: I have so much respect for all of you that
8 I don't find that persuasive, particularly, but I'll hear from
9 the government on it.

10 MS. CUCINELLA: Your Honor, we agree with your
11 Honor's -- what you just said in terms of Mr. Huber's own
12 knowledge about his involvement in these. He, and everyone in
13 the defense side of this case, has said repeatedly, has touted
14 their presence in the morning meetings. They were intricately
15 involved in the decisions to purchase these stocks. They were
16 involved in conversations with James Flynn.

17 I think each of these e-mails reflect conversations or
18 meetings that they were individually personally involved in.
19 So to the extent that this creates some sort of prejudice, the
20 government would disagree.

21 We also agree with your Honor's point that this is a
22 long trial. They have plenty of time at this point. The
23 government is in the same boat. We are also working to
24 understand these. Quite frankly, most of them are
25 understandable on their face and don't require much, but I

1 don't think that there is any argument that the prejudice here
2 outweighs the probative value of each of those five e-mails.

3 MR. PATTON: Your Honor, may we also be heard?

4 THE COURT: Briefly.

5 MR. PATTON: We join the application.

6 THE COURT: The lectern.

7 MR. PATTON: Sorry.

8 THE COURT: My hearing is not up to the acoustics in
9 this room.

10 MR. PATTON: Understood. We join the application. To
11 the extent that the Court is concerned about the documents
12 being turned over by Deerfield, I mean, certainly Mr. Blaszcak
13 has nothing to do with that, and they're certainly not paying
14 for his defense.

15 It really -- it is hard to express how difficult it is
16 to drill down on these things. Frankly, I think the Court
17 probably got a taste of it with Mr. Blum today. These are not
18 discrete incidents. You have to figure out how many people on
19 earth had whatever piece of information it is that the
20 government is saying is somehow illicit, and we don't even know
21 what document they're talking about. It's just -- it really is
22 impossible to defend, and it puts us in an untenable position.

23 THE COURT: It is certainly not impossible to defend,
24 and I'm not persuaded it puts you in an untenable position.

25 I'm looking for one particular document. Okay.

I43PBLA7

Blum - Cross

1 You've got two groups of documents out of a total of five
2 documents, two in one group and one in another. And I may be
3 wrong about grouping them this way, but I've done it
4 temporally.

5 The first group are government's 1051 and 1062, dated
6 in December of 2007 and April 2008. They may not actually go
7 together, but it just seemed temporally that they might. And,
8 obviously, what the government wants there and what the defense
9 is excited about, unless I misunderstand something or don't
10 perceive something, is that one of the December 17th e-mails
11 contains a statement by Alexander Karnal, who I'm informed by
12 the government in the letter that you've all seen, is now the
13 No. 2 person at Deerfield, that Blaszczyk's comments about a
14 subject, and I'm not clear what the subject is, pre-news
15 suggests he had a read of draft documents.

16 Okay. Now, I can see why everybody is excited about
17 that one. I don't know whether the April 10th document fits
18 together with that, and maybe somebody will enlighten me.

19 The other three documents span a period of four weeks;
20 is that right? No, that's not right. There were two in
21 January 2007 and one in February 2008, which really is another
22 time period. The two in the 2007 period are, one is 1055, and
23 1066. They don't strike me as particularly fabulous documents
24 for anybody. And then the one that I had in the wrong file,
25 1067, which is dated in February of '08, I'm not sure what it

1 proves to begin with. So maybe somebody can enlighten me.

2 MS. CUCINELLA: Your Honor, I apologize. I don't have
3 them in front of me right now. The one thing I do want to add
4 is there's another document from December of 2007 that was an
5 attachment to the government's letter filed last night, which
6 is another --

7 THE COURT: So you're adding to the pile?

8 MS. CUCINELLA: Just the one. It's the same e-mail
9 from Alexander Karnal. It just is going to James Flynn.

10 THE COURT: All right. The substance is the same?

11 MS. CUCINELLA: The substance is the same.

12 THE COURT: And, you know, I can understand. I can
13 imagine why you want to have this put on Mr. Flynn's desk. I
14 guess that was prompted by the opening.

15 MS. CUCINELLA: Correct.

16 THE COURT: But the substance is the same.

17 MS. CUCINELLA: Correct, your Honor.

18 THE COURT: Okay. So enlighten me. I understand 1051
19 and 1062, if they, in fact, go together. I sure understand
20 1051, but what's going on here?

21 MS. CUCINELLA: Well, your Honor, I think that these
22 are -- it's our belief that all of these e-mails go to show the
23 defendant's knowledge as to what Mr. Blaszcak was doing in
24 order to cultivate information and to get the edge that the
25 defendants were paying for. So each of these e-mails goes to

1 that in different ways.

2 THE COURT: Well, all right. So 1051 is an opinion by
3 Mr. Karnal, who I guess you're not going to call, right?

4 MS. CUCINELLA: Not at this time. And to be clear,
5 your Honor, these are notes from the morning meeting.

6 THE COURT: Yes, I know what they are. Thank you. I
7 appreciate it, but I know what they are. And I understand that
8 you would probably say this really comes under the ruling I
9 made earlier today, right?

10 MS. CUCINELLA: Umm...

11 THE COURT: Going to somebody's knowledge?

12 MS. CUCINELLA: Correct, your Honor.

13 THE COURT: Okay. Now, but it's different, and it's
14 different because even the subject -- well, the gist of it is
15 the same. It's somebody's opinion.

16 MS. CUCINELLA: Someone in the morning meeting.

17 THE COURT: Yes.

18 MS. CUCINELLA: And it's shared among the morning
19 meeting, where they defend their investment strategies and
20 their input as to why they're making certain investments. So
21 here, one of the reasons for why they're giving -- so it's
22 something that was said in a morning meeting in a
23 contemporaneous note.

24 THE COURT: Well, we don't know that either, right?

25 MS. CUCINELLA: This is the structure, and when a

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Blum - Cross

1 Deerfield witness testifies, you'll see that these morning
2 meeting notes and notes of these meetings are circulated in
3 this format regularly at Deerfield.

4 THE COURT: Right, but what I'm getting at is, is
5 there going to be proof that they are, in fact, efforts to
6 record the gist of what somebody said in a meeting, or are they
7 some of that and some of the author of this memo's personal
8 thoughts that were never voiced at the meeting?

9 MS. CUCINELLA: Our understanding is that they are not
10 that. We have not met with Mr. Karnal on this document. My
11 understanding is that Deerfield counsel is doing that at this
12 point. This is something that my understanding is they also
13 just discovered. So at this point, we believe that this is a
14 recorded recollection of -- or a memorialization --

15 THE COURT: Of statements at the meeting.

16 MS. CUCINELLA: -- of statements at the meeting.

17 THE COURT: So now we're back to this is Karnal's
18 recording of what some unidentified person at the meeting said
19 was what he concluded from comments Blaszcak made.

20 MS. CUCINELLA: Correct.

21 THE COURT: And so that, you say, whether it's true or
22 false, if the statement was made, it goes to the intent of the
23 people who heard it. That's your argument, I take it?

24 MS. CUCINELLA: Yes.

25 THE COURT: Okay. That one, I get. 1062, how about

1 that?

2 MS. CUCINELLA: Give me one moment, your Honor. Your
3 Honor, this is -- and a document that shows the value of David
4 Blaszczyk's firm's research to Deerfield. It talks about, in
5 the e-mail from Mr. Kaplan, Deerfield has set a 2008 budget for
6 Stanford of triple our 2007 commission level. So this goes to
7 the funds that are paid to Mr. Blaszczyk's firm, how he's
8 viewed by Deerfield and the facts that the edge that Blaszczyk
9 provided to the firm was valued by the firm.

10 THE COURT: Yes, but edge doesn't get you there.

11 MS. CUCINELLA: I'm sorry?

12 THE COURT: As a generality, edge doesn't get you
13 there. Maybe he's a genius and he goes out to every Wal-Mart
14 parking lot in the country and counts cars, or goes to every
15 manufacturing plant and sees how many shifts they're working.
16 I mean, that's perfectly legit, right?

17 MS. CUCINELLA: It is, your Honor. I think one of the
18 things that defendants opened on is the fact that Blaszczyk was
19 not any different than other political intelligence consultant
20 or research consultant.

21 THE COURT: No different in the function he performs
22 in the role or in the scheme of things, but that doesn't say
23 either that they're all crooks or that they're not all crooks.

24 MS. CUCINELLA: It doesn't, but it goes to show that
25 they had set a 2008 budget for Stanford of triple our 2007

1 commission. It goes to show that the appreciation of his
2 unique flow of information, which is a term that we'll hear
3 later in the trial about why Blaszczyk was valuable to them.
4 So it goes to support, again, with respect to these individuals
5 and the firm --

6 THE COURT: Maybe he's good at what he does and maybe
7 it's legit.

8 MS. CUCINELLA: That's an argument that they can make.

9 THE COURT: Yes, but this is pretty inconclusive, this
10 one. I mean, the Yankees are paying a lot for John Carlos
11 Stanton, and I have a feeling because he gets better
12 information on the Cleveland Indian signals.

13 MS. CUCINELLA: That's fair, your Honor, but there is
14 going to be proof here that that is what Blaszczyk is doing.
15 So the fact that he's paid more than other consultants and gets
16 inside first from CMS, we think goes together. And given the
17 burden and what the government has to prove here, we believe
18 this is relevant, and it's certainly not more prejudicial than
19 it is probative.

20 THE COURT: 1067, I guess you're just offering that
21 one to prove he hangs out there.

22 MS. CUCINELLA: And Mr. Huber's knowledge of it. The
23 fact that he was actually going to CMS and hanging out there.

24 THE COURT: Okay. I get that. 1065.

25 MS. CUCINELLA: This is, again, Huber to Jim Flynn.

1 No Blaszczak at Stanford is way better plugged in to CMS, and
2 then he talks about a particular call that Blaszczak makes.
3 That's different. So Huber is invoking Blaszczak to defend an
4 investment decision, and given his reason why, because of his
5 connections at CMS.

6 THE COURT: Okay. And 1066.

7 MS. CUCINELLA: The e-mail with respect to Huber, to
8 the devices team, KCI's latest thought. And it says: Rob and
9 I collaborated on this. If Blaszczak is right -- and again,
10 it's invoking Blaszczak as the reason for an investment
11 decision that Mr. Huber and Mr. Olan are recommending together.

12 THE COURT: Okay. Now, if Ms. James wants to leap
13 into the lion's den again and respond?

14 MS. JAMES: Well, since you've given me the
15 invitation, your Honor.

16 THE COURT: No, I'm serious. I want to get it right.

17 MS. JAMES: I appreciate that, your Honor. And
18 actually, Ms. Cucinella's comments about 1051, I think,
19 actually show the problem. They don't know whether this was
20 something that was said at the morning meeting or whether it
21 was somebody's opinion. They said they think, we don't know,
22 we haven't talked to Karnal. I don't know whether they're
23 going to call Mr. Karnal. He hasn't been named as a
24 co-conspirator in this case; so I don't know how this is coming
25 in, in the absence of calling him.

1 But they're offering it to suggest that there was some
2 comment that Blaszczak made to suggest that he had a read of a
3 draft document. We don't know, and I don't think they have any
4 evidence of what the comment was, what it relates to.

5 Although, I assume it relates to something CMS related. I
6 don't contest that, but the specific CMS issue is obviously
7 something that's important to understand so that we can figure
8 out what information was out there about it in the public.

9 And even the note, just trying to put before the jury
10 this idea of a draft document, they obviously want the jury to
11 draw the worst possible conclusion. And the concern is,
12 without the time, and even if we can, given how I'm not sure
13 that we can sort of get to the way-back 12 years ago at this
14 point in time, to sort of piece together what happens around
15 this. I'll tell your Honor, I learned in preparation for this
16 case, that there are certain draft documents by CMS that are
17 public.

18 So I understand what they want to do with it, but I
19 don't think it's fair, and I don't think there's a foundation.
20 And we would effectively have to prove a negative, and there's
21 just not going to be the time to do it. And I'm not sure,
22 given how old it is, that we would be able to collect the
23 requisite documents to try and put this e-mail in some sort of
24 context.

25 THE COURT: Okay. I appreciate hearing from you, and

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1 I will think about it further and advise you in due course.
2 Anything else this evening before.

3 MR. FISHBEIN: Yes. Could we get the standard
4 admonishment that the government should not talk to the
5 witness?

6 THE COURT: Of course. It should go without saying.

7 MR. ESSEKS: Your Honor, a couple of housekeeping
8 matters. First, with respect to a dosing juror, No. 16, just
9 soliciting the Court's --

10 THE COURT: No. 16?

11 MR. ESSEKS: Holeness, the second to last in the row.

12 THE COURT: Okay. I didn't notice anybody dosing.

13 MR. ESSEKS: I noticed a little bit of closed eyes on
14 occasion, and I just ask the Court's assistance with that
15 issue.

16 THE COURT: Well, we will both pay attention, and
17 we'll see. Counsel have a responsibility to nod off too.

18 MR. ESSEKS: Yes, Judge.

19 THE COURT: That can be discharged in various ways,
20 not least of them brevity, but I'm not faulting anybody for
21 that today. This is hard stuff that we've been through today.
22 Okay. That's it for this evening.

23 MR. ESSEKS: One other housekeeping matter, your
24 Honor. With respect to exhibit books for government witnesses,
25 earlier today at the sidebar your Honor directed that the

1 government make copies available. I just wanted to make clear
2 that there are four defendants, and we were hoping for four
3 sets of exhibits for the witnesses that are coming. And I'm
4 not asking for them beforehand but on the day. Today, I think
5 there was one, and we just want to make sure that there are
6 going to be four.

7 MS. CUCINELLA: And we've agreed to that, your Honor.

8 THE COURT: I'm sorry?

9 MS. CUCINELLA: We've agreed to do that.

10 MR. ESSEKS: Thank you very much.

11 MS. CUCINELLA: Can I just raise two more points?

12 THE COURT: Yes.

13 MS. CUCINELLA: First, with respect to these e-mails
14 that we were just discussing, Deerfield made an additional
15 production last night that we have not yet been able to review.
16 Based on the review of that and these, we may be updating our
17 co-conspirator list. I just wanted to flag it for the Court,
18 but we will notify everyone as soon as possible.

19 THE COURT: Okay.

20 MS. CUCINELLA: And second, the defendants produced to
21 the government last night 600 exhibits. We requested an
22 exhibit list. They have declined to give us one. We're happy
23 to give them one, and we just ask for reciprocity at this
24 point.

25 THE COURT: Exchange exhibit lists, and I want your

1 witness list a few days out, at least.

2 MS. CUCINELLA: Certainly, your Honor.

3 MR. BERKE: Your Honor, can I just say one thing about
4 it. I don't know if your Honor wants to hear it today. You
5 may recall we had lengthy discussions and debates about the
6 co-conspirator lists, and when the government would have a
7 deadline for identifying coconspirators. And I'm not sure
8 about these documents, we'll see. But again, if your Honor
9 remembers, this was in the context early on, on December 20th,
10 when we argued bill of particulars, the government gave the
11 list of co-conspirators by that deadline.

12 They have not changed that list. We have relied on
13 that list. That covered the period that was now 2009 to 2014,
14 the length of the conspiracy. We've opened based on that list.
15 We've planned on it. As I understand, now there are a handful
16 of new documents that were discovered for some reason, through
17 some glitch, as I understand from the government's explanation
18 of it, and that cannot now open the door for the government to
19 change, after hearing our openings, who they're going to call
20 and identify as a co-conspirator, given the indictment in this
21 case.

22 I understand, Judge, we haven't seen it. Maybe it
23 doesn't happen. I just felt the need to put it on the record
24 based on Mr. Cucinella comments.

25 THE COURT: You have made such an abundant record on

1 this point, in general, not in specific in the last 24 hours.
2 I understand where your coming from. Okay? But the government
3 is not a wrongdoer, as far as I can see here, on this. They
4 are the victim of the belated production pursuant to a subpoena
5 by your client's former employer.

6 MR. BERKE: But, your Honor, the only thing I want to
7 say is this is a different issue than the document and the
8 like, but to use that as an opportunity, after hearing our
9 openings and defense strategies, to change the co-conspirators
10 list, I think is just a different matter.

11 THE COURT: Until you're ready to produce evidence
12 that what's going on is not a response to Deerfield's belated
13 production of documents, but rather some malevolent attempt to
14 sandbag you, I don't think we have to go here. I mean, I'll
15 hear merits arguments, and I'll hear prejudice arguments, of
16 course, always. But the harping about it, of whether there's
17 not anything to back up a claim of misconduct by the
18 government, and I know you haven't made one yet, is unnecessary
19 and unhealthy. Okay? All right. Good night.

20 (Adjourned April 4, 2018, at 9:00 a.m.)
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