

## **APPENDIX**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

## OPINION

**McKEAGUE, Circuit Judge.** This case is about a get-rich-quick pyramid scheme. Five defendant drug marketers extracted \$35 million in two years from public and private insurers by convincing friends and family to order prescription creams and wellness tablets that they didn't need, and then pocketing a cut of the insurance reimbursement for themselves. The government caught on, and the defendants were

charged with and convicted of various counts of healthcare fraud, conspiracy to commit healthcare fraud, wire fraud, mail fraud, paying and receiving illegal kickbacks, and money laundering. Despite carefully targeting insurance companies that would reimburse without scrutiny, hiring a nurse practitioner to sign prescriptions without asking questions, inducing people to order creams by giving them a cut of the commission, and charging insurance companies thousands of dollars for creams with ingredients that could be purchased over the counter for a fraction of the price, the defendants claim that their convictions should be vacated because of their belief that all of this was perfectly legal. In the alternative, they argue that even if what they did was fraudulent, they should not be held accountable at sentencing for the total loss because at least some prescriptions were legitimate, though they don't identify which ones or explain why.

Because a rational factfinder could infer intent to defraud from the defendants' actions, and because the defendants did not establish the legitimacy of any part of their operation, we affirm the convictions and sentences of all defendants.

## I.

### A.

The scheme perpetrated here was built to exploit a prescription drug insurance system dependent upon intermediary gatekeepers. Generally, health insurance pays for prescription medications needed by those covered under their plans. Typically, a patient meets with their doctor, the doctor assesses their medical needs, and the doctor prescribes medication if

necessary. The doctor then sends that prescription to a pharmacy, and the pharmacy fills the prescription. The patient often pays a co-payment when picking up the prescription. The pharmacy then submits a reimbursement claim for the remaining cost to the insurer through an intermediary called a pharmacy benefit manager. Reimbursements are often approved automatically, although expensive or uncommon medications may require preauthorization.

Before the passage of the Affordable Care Act, insurers reimbursed pharmacies for only one ingredient per prescription to keep costs down. Compound drugs—drugs with multiple ingredients that are prescribed when a standard medication can't meet a patient's specialized medical needs—often required preauthorization. After the passage of the Act, some insurers changed their coverage to include reimbursement for compound medications without preauthorization. One of those insurers was Tricare, a health benefit program for military personnel.

## **B.**

With some insurers adapting their coverage to reimburse for compound medications without prior scrutiny, the defendants saw an opportunity. At the front end, they negotiated agreements with several pharmacies to receive a 30–40% cut of the insurance reimbursement for compound drugs they marketed. Then they paid a pharmacist, Jared Schwab, to help them devise compound drug formulas that used the most expensive ingredients to maximize their reimbursement. They took those pre-set formulas and made pre-printed pads of order forms—even though

compound drugs are meant to be tailored to a patient's individual needs.

In the next stage, they identified family, friends, coworkers, and military service members whom they knew had insurance that would reimburse for compound medications without preauthorization and encouraged those people to order compound creams and pills whether or not they needed or wanted them. They did so primarily by offering to pay customers. The defendants told customers that they were being paid for evaluating the creams as part of a clinical trial. But no clinical trial or survey about the products was ever conducted. And there is no evidence that the defendants planned or intended to conduct a survey. Any such clinical trial would have required approval by the insurance company prior to any benefits being paid. The defendants also persuaded people to order creams they didn't need by assuring them that they would pay nothing for the medications, and then ensuring that outcome by either paying co-pays for them or seeking waivers. To increase their sales, the defendants added medications to customers' order forms that they did not request and sought refills for customers without their consent.

Once the prescription order forms were completed, they gave them to a nurse practitioner, Candace Michele Craven. The defendants paid Craven to sign prescriptions without evaluating patients, or they simply stamped her signature without her knowledge. Then they faxed the prescriptions to the pharmacies, who in turn sought reimbursement from the insurers. The compound medications were very expensive, ranging from \$4,000 to \$15,000 per cream. Some customers' insurance providers were billed hundreds

of thousands of dollars for the unnecessary medications. When the defendants received their commissions from the pharmacies, they gave a cut of those commissions to the lower-level marketers whom they had recruited to sell the creams on their behalf. In total, the scheme extracted approximately \$35 million from government and private insurers.

**C.**

Jerry Wayne Wilkerson was at the top of the pyramid scheme. He negotiated with the compounding pharmacies to be paid a 30–40% commission of the insurance reimbursement for each prescription they marketed. On the next step down were Wilkerson’s recruits: Michael Chatfield, Billy Hindmon, and Kasey Nicholson, whom Wilkerson in turn paid approximately half of the commission he received. On the next step was Hindmon’s recruit, Jayson Montgomery, whom Hindmon paid approximately half of his commissions. The group set up LLCs to receive the commission payments and make the enterprise appear legitimate. Each of the defendants recruited their own subordinate marketers, referred to as “downlinks,” by offering them a cut of their commissions. The defendants advised and helped downlinks set up LLCs to receive the commissions via wire transfer.

**D.**

Jerry Wayne Wilkerson

As the instigator and leader of the scheme, Wilkerson negotiated the commission arrangement with the pharmacies. He set up Top Tier, LLC to receive the commission and paid his downlinks via wire transfer from Top Tier. Working with his

downlinks, he identified insurers covering compound medications and targeted customers who had such insurance. In an email to Chatfield, Hindmon, Nicholson, and others, Wilkerson shared the news that Tricare would continue paying for compound medication and wrote, “It’s money making time. Saddle up.” R. 374, P. 6190–91.

Wilkerson paid Schwab, the pharmacist, to consult on creating a pre-printed prescription pad with pre-set formulas for the compound creams. They chose the formulas by “put[ting] the most expensive ingredients in the medication[,]” rather than by considering medical efficacy. R. 313, P. 2750–51.

Wilkerson also paid Craven, the nurse practitioner, to sign prescriptions without evaluating patients. Craven was working at a facility called Balanced Life at the time and was not Wilkerson’s employee when he began paying her for these services. Wilkerson eventually hired Craven to work at the spa he opened, Karma Wellness. Craven estimated that she signed prescriptions without seeing patients on ten occasions; writing multiple prescriptions each time. Wilkerson instructed his downlinks to make a stamp with Craven’s signature and directed employees to stamp prescriptions without her consent. When Craven confronted him about this, Wilkerson said, “It’s okay. Everything’s under control.” R. 313, P. 2804. Craven testified that it was not typical practice for a medical provider to prescribe medications for patients referred directly by marketers, and this arrangement was the only time she had done so.

Hunter Magnuson worked the front desk at Balanced Life when Wilkerson established his

arrangement with Craven. Although he didn't work there, Wilkerson frequently visited Balanced Life to speak with Craven. After the visits, he left stacks of prescriptions with Magnuson to be faxed to the pharmacy. Magnuson remembers faxing stacks of prescriptions that were an inch to an inch-and-a-half thick on multiple occasions. Sometimes Wilkerson brought stamped prescriptions to Magnuson to be faxed without visiting with Craven first.

Heather Fryar worked the front desk at Karma Wellness, owned by Wilkerson. While she was working there, Wilkerson discussed the nonexistent clinical trial. He directed Fryar to stamp Craven's signature on a stack of prescriptions, and when she asked why, he said it was her "job" to do so. R. 361, P. 4639–40. Fryar also marketed creams as a downlink, earning \$33,000 in commission for sales she made to one person in just half an hour.

Wilkerson's downlinks included Rich and Kim Terry, Wilkerson's cousin, and his wife. Together, Rich and Kim Terry received over \$120,000 in commission from Wilkerson for creams they ordered for themselves and creams they sold to family members and co-workers. Just before receiving a \$93,649 payment from Wilkerson, Rich Terry opened a bank account under the name "Terry Transport." The Terrys paid a cut of those commissions to the relatives and friends who were their customers. Dawn Steele, who ordered creams from the Terrys, testified that she did not need the creams and simply ordered them to "help [Wilkerson] get his company going." R. 361, P. 4328. Her husband, Nelson Steele, believed that they were being compensated because they would be participating in the clinical trial.

Although Craven signed the prescriptions, Nelson never spoke to her about the medications before receiving them. The Steeles were signed up for refills of the medications without requesting them.

Another of Wilkerson's downlinks was a longtime friend and retired Marine, Josh Linz (also downlinked from Hindmon). Wilkerson advised him to open an LLC, and he did so under the name AFA Consulting. His purpose in establishing the LLC was "to receive payment for [him]self for the topical creams." R. 369, P. 5710–11. In total, he received approximately \$99,000 for ordering his own creams, and selling creams to his roommate.

Wilkerson opened an LLC for one of his downlinks, Amanda Booker. Although Wilkerson set it up, the name of the LLC was Booker's initials. He told her that she "had to have an LLC to receive the wire transfers." R. 370, P. 5813.

When one of Chatfield's downlinks, Ryan McGowan, found out he had a co-pay on the medications, Chatfield assured him that "Wayne" "would pay it." R. 370, P. 5911–12. Wilkerson met McGowan in a post office parking lot and gave him \$2,000 cash; McGowan took the money inside, purchased money orders, and mailed the co-pays to the pharmacy.

In text messages with Kirtis Green (who was prosecuted in a separate case for his involvement), Wilkerson said, "We will just set up an online fax account and feed scripts to Michelle [Craven] constantly," to which Green responded, "Perfect. She said she will sign 500 a time once Karma opens." R. 375, P. 6444. Two days later Wilkerson texted Green

again: “Hey forgot about what I had to pay for Michelle [Craven] and Jared [Schwab] and I am splitting that up between me, you, and Beaver [Chatfield] . . . [s]o it’s 4k apiece. We can settle that up in Florida.” R. 375, P. 6445. Wilkerson later deducted \$4,000 from the May commission checks he paid to Green, Chatfield, Hindmon, and Nicholson. On June 3, 2014, just days after Blue Cross Blue Shield of Tennessee stopped covering compound medications without preauthorization, Wilkerson texted Green and said, “Talked to Jared. He’s gonna . . . backdate the scripts from yesterday and Christi added some refills to May.” R. 375, P. 6446. A few months later, Wilkerson texted Green asking for a map of military bases for marketing to those with Tricare insurance, and Green responded with a map and said, “[a]ll I see is \$\$\$,” to which Wilkerson replied, “Damn straight.” R. 375, P. 6446.

Wilkerson earned \$13 million from the approximately two-year enterprise.

#### Michael Chatfield

Chatfield worked directly under Wilkerson. His family business, Diversified Printing, printed the pre-set compound formula prescription pads the marketers used. He also acquired the stamp of Craven’s signature. Craven and Schwab were paid out of funds from Chatfield’s commission.

Chatfield recruited his own customers and downlinks. When recruiting downlinks, he informed them that the “process” of selling these creams involved telling people that they would be paid for “[t]heir participation in a survey regarding the creams.” R. 368, P. 5292. His customers included his

aunt, uncle, and cousin. His uncle testified that he had no need for the creams, and he couldn't recall speaking to a medical provider before ordering the creams. Chatfield gave his uncle a \$6,200 check, which seemed strange to him because he hadn't done anything.

Chatfield also sold the medications to friends of his brother, the Bowling family. He pitched the sale to them as a "business opportunity, which was filling out this form with [their] insurance information, and that it was basically kind of like a survey type thing where [they] would get some creams to try, and [they] would be sent a survey, then [they] would be paid for that survey." R. 361, P. 4446–47. Chatfield said that "if [they] signed up more people in [their] family that [they] would receive a larger sum of money." R. 361, P. 4453–54. The Bowlings ordered creams for other family members as well and testified later that they did not need the creams, did not request the creams, and did not speak to a medical provider before receiving them. Emma Bowling testified that she received scar, wound, antiaging, wrinkle, and stretch mark creams even though she was a teenager with no need for those creams and had not requested them.

Chatfield also ordered medications in the names of his wife's parents without them requesting the medications or giving him permission to do so. In fact, his wife's parents never spoke to Craven about the creams. The creams were shipped to Chatfield's address and the order listed his wife's phone number.

One of Chatfield's downlinks was former Marine Josh Morgan. Chatfield promised Morgan \$300 for ordering creams for himself and told him to offer the

same deal to fellow Marines to get them to order creams. Morgan testified that the purpose of the fabricated clinical trial was “[b]asically, to get [customers] to sign up for the cream.” R. 369, P. 5649. Chatfield told Morgan not to bother with people who didn’t have Tricare insurance. He also told Morgan to form an LLC to receive the commissions Chatfield was paying him. Morgan received \$314,000 from Chatfield despite never meeting him in person.

Another of Chatfield’s downlinks was George Striker. Chatfield advised Striker that his “role would be to approach people, to ask them to sign up for these creams, to participate in a study, and that they would be paid \$100 per person that signed up.” R. 368, P. 5283. He said that those ordering creams “wouldn’t have to pay anything out of pocket.” R. 368, P. 5284. Striker ordered creams for himself, his wife, daughter, stepchildren, ex-wife, father, uncle, cousins, and cousins’ kids. Like the others, Striker repeatedly cut corners. Striker’s stepdaughter, for example, never spoke to a medical provider. Instead, Chatfield joked that “every kid has scars from growing up and things like that, so, [they] just added the scar cream” to the stepdaughter’s order. R. 368, P. 5305. Chatfield informed Striker that they could not order a medication with fluticasone in it because of his stepson’s age, so they “put him down for something else.” R. 368, P. 5307–08. Striker testified that he understood the purpose for ordering the creams was “Commission. Revenue.” R. 331, P. 3413.

In a series of text messages between Chatfield and Striker, the two discussed how much each family member’s orders would net and which medications would bring the highest returns. For example, one

text said that the “wound creams” could get them “17 to 20k.” R. 368, P. 5313–14. He told Striker that he “made 17k total for August and as long as you don’t lose anyone and refills keep going through . . . you’re over 21k.” R. 368, P. 5335. Chatfield also texted Striker that “at least we got Hamby to get his wound and wellness come Monday that’s 20k in revenue.” R. 368, P. 5337–38. Chatfield asked Striker if the “Walter family [would] be okay with wellness tablets?” and when he said they would, Chatfield responded, “[s]end all four of them wellness tablets. 25k in revenue extra.” R. 368, P. 5343. Chatfield explained that Striker would be getting “a total of 40–42k revenue from your family at Central [pharmacy].” R. 368, P. 5349–50.

When the cream scheme came under investigation, Striker surreptitiously recorded a February 10, 2015, phone conversation between himself, Chatfield, and another marketer, regarding what to say if contacted by law enforcement. In that call, they discussed why there was no clinical trial or survey in place although they had been telling people they were being paid for evaluating the products. Chatfield said they could tell customers, “[H]ey, we got an approved evaluation now. Go back and fill it out” because they “would have to cover [their] butt to have them do an evaluation after the fact.” R. 368, P. 5388, 5399. Striker told Chatfield that the agent asked who referred him for the creams, and Chatfield said, “[S]ay someone from work told you. Say I can’t remember. Say one of my customers told me. It’s been months ago. I don’t remember.” R. 368, P. 5391. When they discussed reimbursing customers for co-pays, Chatfield said, “That’s not—that’s not how you word it though.” R.

368, P. 5396. Insurers were billed for over \$7.6 million for prescriptions sold by Chatfield through Striker. In the conversation, Chatfield referred to activity happening at the Willow pharmacy—the pharmacy where their consultant Jared Schwab was employed—as “fraud.” R. 368, P. 5392.

In a series of text messages with Kirtis Green, Chatfield said, “I’m having 16 script pads made up of the Karma Wellness Spa with the corrections that Jared told me to make. That includes giving .05 Fluticasone to antiaging and age spots . . . . I figured that would be the best way to make money and we can ignore Billy’s dermatologist, if she doesn’t want Fluticasone, we will give her her own pad.” R. 375, P. 6420–21. He went on to say that “if antiaging bills out [\$]2,000 and age spots [\$]2500 or [\$]7,000, I’ll take the second all day . . . . It was billing out [\$]4800 with .025 then when Billy changed it, it went down to [\$]2000[,] now Jared said to go to .05 so it should be around [\$]7,000. I have too many people getting those creams for them to be billing out at [\$]2,000.” R. 375, P. 6422. When Green asked Chatfield what the insurers would be billed for the creams, he said, “Stretch [\$]10, Scar [\$]11, Wound [\$]12–14, Acne—[\$]6500, Psoriasis [\$]5500, Wrinkle and age spots [\$]4800.” R. 375, P. 6437. He said that “[w]ellness is [\$]6K,” and “antifungal is [\$]13 and eczema is [\$]10.” R. 375, P. 6404. Chatfield joked about adjusting the formula on the prescription pads to 10 percent fluticasone which would make the cream cost \$60,000. In discussing one of the creams, Chatfield said, “One of my patient’s kids got a burn from it. Luckily I knew him.” Green responded, “[g]otcha. LOL. No more [\$]8K haha,” and Chatfield said, “nope, even Jared

admitted he shouldn't have done that." R. 375, P. 6402.

When Blue Cross Blue Shield insurance set a June 2, 2014, deadline to stop covering compound medications, Chatfield texted Green about backdating prescriptions saying, "[d]o you see all of those refills they are doing 10 days early for our Blue Cross Blue Shield people LOL . . . . Yeah. Jared said he was going to put lost or stolen and override LOL." R. 375, P. 6426–27. Around the same timeframe, Chatfield also asked Green, "[a]ny word from our e-mails and refills?" and Green said, "[y]es, both are solid. Jared is backdating and fixing today." R. 375, P. 6434.

In February 2015, because the scheme was being investigated, Chatfield sold his "book of business" to Jimmy Collins for \$1.5 million. Overall, Chatfield earned approximately \$5.4 million from the scheme.

#### Billy Hindmon

Hindmon worked directly under Wilkerson, and he, too, recruited customers and downlinks, including Jayson Montgomery. Hindmon started out trying to market to doctors, but soon began marketing directly to patients because Wilkerson had "a nurse on staff" who would sign prescriptions, allowing them to "bypass the gatekeeper so to speak." R. 360, P. 4079, 4081. Wilkerson withheld \$4,000 from Hindmon's commission check to cover payments to Craven and Schwab.

Hindmon also recruited Adam Staten as a downlink, advised him to form an LLC, and helped him do so. He sent Staten a "consent form" that stated marketers would not receive commissions for sales to customers whose insurance did not cover compound

medications and those customers would not receive their “participation compensation.” R. 360, P. 4136–38. Hindmon knew Staten was paying his customers, numbering at least twenty, to order creams and loaned him money on at least one occasion to do so. Both Hindmon and Staten told customers they would be paid as part of a clinical trial. And when customers complained about not being paid for their participation in the trial, Hindmon paid them. Hindmon and Staten tried to recruit additional nurse practitioners to join the scheme.

One of Staten’s customers was Rachel Franklin, who ordered scar cream; Staten added eczema, stretch mark, wart, and wound creams to her order as well, although she hadn’t requested them and was never contacted by a medical provider. Franklin contacted Staten crying because her healthcare savings account had been depleted from cream orders. Staten called Hindmon who assured him that he would “get it fixed.” R. 360, P. 4128–29. Franklin called Hindmon directly, and Hindmon said he would pay her in cash if he couldn’t get it taken care of.

Hindmon earned over \$1 million from the scheme.

Kasey Nicholson

Nicholson worked directly under Wilkerson and was also his girlfriend. Her commission money was used to pay Craven and Schwab. But Nicholson also recruited her own customers and downlinks. Heather Fryar testified that, like the others, Nicholson was encouraging customers to order creams by telling them they’d be paid as part of a (nonexistent) clinical trial. One of her customers was her close friend, Sydney Patterson. Nicholson offered Patterson part

of her commission to order creams. Patterson didn't want to order refills because she "didn't think they worked," but Nicholson persuaded her to order more before the June 2, 2014, Blue Cross Blue Shield deadline. R. 313, P. 2764–66. Nicholson's payments to Patterson included \$1,000 that she used to go to a music festival and a \$1,000 "birthday" check.

Nicholson also recruited Navy sailor Matthew Perkins as a downlink. Nicholson contacted Perkins to see if he wanted "to sign up for the medication to get money." R. 313, P. 2672, 2680. They discussed how "they just put the most expensive ingredients in the medication" to make more money. R. 313, P. 2750–51. She told him how she "paid somebody's insurance for the year and gave them \$10,000 in cash because she would make that money back" in two months' commission. R. 313, P. 2719. Perkins ordered wellness pills, scar cream, stretch mark cream, and pain cream for himself and for his wife. Perkins was unaware of the cost of the medications until he received his Explanation of Benefits (EOB) from his insurer, which showed that Tricare was billed \$67,000 for his medications in December alone, and an additional \$60,000 for his wife's creams that month. Upset, he called Nicholson, and she assured him, "that's how much the insurance company pays for the creams, that it's not a big deal." R. 313, P. 2700. Perkins's EOB showed that Tricare paid \$6,038.20 for the wellness pills alone, and the defendants' expert agreed that the ingredients in those pills could be purchased at Walmart for "[§]10 to \$20, \$30 each." R. 380, P. 7544–45.

Nicholson informed Perkins that she would pay him \$4,000 to \$5,000 for each person he could get to sign

up to order compound medications, but she later lowered the commission to \$1,000. Perkins recruited approximately 30 fellow shipmates to order creams by paying them or taking them out for drinks. Nicholson instructed Perkins to “do whatever [he] ha[s] to do to get people to sign up” for the creams and encouraged him to sell the creams that garnered the highest reimbursement. R. 313, P. 2678, 2742. She advised Perkins to set up an LLC because “the bank wires were going to be so large and [he] was banking with Navy Federal, so it just wouldn’t look good.” R. 313, P. 2703. Nicholson paid Perkins approximately \$40,000 a month for several months. When the scheme came under investigation, Nicholson contacted Perkins via Snapchat and told him not to speak to law enforcement. Perkins testified that he thought things were legal in the beginning, but later knew it was a fraud.

Nicholson earned nearly \$1 million from the scheme.

Jayson Montgomery

Montgomery was a downlink of Hindmon. His commission money was used to pay Craven and Schwab. His first customer and downlink of his own was his mother, Dawn Montgomery. She testified that Jayson knew she had Blue Cross Blue Shield insurance that covered compound medications. He told her that she would be paid \$200–\$300 for each cream she ordered and that she would not have to pay any co-pays. He also told her that she would be paid \$100 for every person she signed up to order creams. She ordered creams for herself and her grandchildren. She was never contacted by a medical professional

until she was asked if she wanted to refill her prescriptions. Jayson paid her the commissions.

Dawn sold the creams to her supervisor, Maria Valdez, telling her that she would get \$100 per order. Valdez ordered creams for herself and six of her family members. She was never contacted by a doctor before receiving the medications. When Valdez received bills for co-pays and complained, Dawn contacted Jayson, who went with Hindmon to get money orders and came to their workplace to pay Valdez back. When Valdez complained that she also had not received her \$100 per order that she was promised, Hindmon paid her \$700 cash on the spot. Valdez's insurance company was billed more than \$230,000 for the creams.

When Jayson asked his mother if she wanted to be a marketer of the creams herself, she declined because "[t]hey were making a lot of money quickly" and she didn't have a good feeling about it. R. 363, P. 5086.

Montgomery ordered creams for an acquaintance, Katie Callaway, who mentioned once in a group of friends that she had a scar from a car accident. Montgomery offered her a "free sample" of a scar cream, and she allowed him to take a picture of her insurance card. Montgomery ordered scar cream, antiaging cream, and stretch cream for her, although she did not request those medicines and had no need for them at 24 years old. She did not know the creams were prescription medications and was not contacted by a medical provider. Montgomery ordered her 12 months of automatic refills that she did not request. Later, a federal agent who was investigating the scheme contacted Callaway, and Montgomery told

her not to meet with him and tried to convince her that she had spoken with a doctor before receiving the medications.

Montgomery also targeted service members, including Zac Rice. He induced Rice to order the creams by telling him he would receive payment as part of a clinical trial, but he never received a survey to evaluate the product. Montgomery added wellness tablets to Rice's order form even though he did not request them. When confronted, Montgomery said they were "just part of the order." R. 362, P. 4601. Montgomery offered Rice commission to sell creams to other service members. Montgomery and Hindmon advised Rice to form an LLC and paid the setup cost. Because service members' family would have to pay co-pays, Montgomery instructed Rice to order the medications in the service member's name.

Rice sold creams to 23 people and was paid more than \$80,000 in commissions. Some of the service members Rice sold to had agreed to order the creams because they felt they had no choice, as Rice was their superior. No medical provider had contacted them, and creams and wellness pills that they had not requested were ordered in their name. Tricare insurance paid \$1,345,812 for these medically unnecessary prescriptions. Rice was discharged from the Army for his participation in the scheme.

Montgomery earned nearly \$340,000 overall from the scheme.

### **E.**

The government charged the five defendants with healthcare fraud, mail fraud, wire fraud, conspiracy to commit healthcare fraud, and paying and receiving

illegal kickbacks. Wilkerson and Chatfield were also charged with money laundering. The parties agreed to a bench trial and did not request that the court make specific findings of fact. Before rendering a verdict, the court held a hearing to discuss the legal standards that should be applied. The court agreed to consider a good faith defense to all charges and declined to consider fraud solely through the lens of a strict standard of fraud by omission.

After an eleven-week trial, the court found Wilkerson, Chatfield, Hindmon, and Nicholson guilty of healthcare fraud, mail and/or wire fraud, and paying and receiving illegal kickbacks. The court also found Wilkerson, Chatfield, and Hindmon guilty of conspiracy to commit healthcare fraud, and found Wilkerson and Chatfield guilty of money laundering. Montgomery was found guilty on two counts of receiving illegal kickbacks and acquitted on all other counts.

#### **F.**

When setting the defendants' Sentencing Guidelines ranges, the court applied enhancements for their respective roles in the scheme, number of victims, and loss caused. The court calculated loss amounts using the amount paid by insurers that was attributable to each defendant's conduct. The defendants objected to this method of calculating loss. Nicholson and Montgomery reached an agreement with the government regarding loss amount, and the court overruled the remaining objections on that issue. Ultimately, the court imposed below-Guidelines sentences for all defendants: Wilkerson was sentenced to a 165-month term of imprisonment,

Chatfield to a 108-month term, Hindmon to a 51-month term, Nicholson to a 30-month term, and Montgomery to a 24-month term.

The defendants timely appealed their convictions. Wilkerson, Chatfield, and Hindmon also appealed the method used to calculate loss amounts for sentencing. The court granted the defendants bond pending appeal.

## II.

The posture of this case means that our review is highly deferential. The parties waived a jury trial and did not request that the district court make specific findings of fact under Federal Rule of Criminal Procedure 23(a) and (c). We therefore review the district court's verdict for sufficiency of the evidence alone, inferring from the record the "facts which are relevant to the issues here" that the trial court "could have found." *United States v. Beckley*, 335 F.2d 86, 87 (6th Cir. 1964); *United States v. Vance*, 956 F.3d 846, 853 (6th Cir. 2020) ("[I]f, from the facts found, other facts may be inferred which will support the judgment, such inferences should be deemed to have been drawn by the District Court.") (quoting *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 793 (6th Cir. 1984)).

What's more, defendants seeking to overturn their convictions for insufficient evidence already face a "high bar." *United States v. Persaud*, 866 F.3d 371, 379–80 (6th Cir. 2017). Reviewing de novo, we ask if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Alebbini*, 979 F.3d

537, 543 (6th Cir. 2020) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, we cannot “weigh the evidence, assess the credibility of witnesses, or substitute our judgment for that of the [trier of fact].” *Id.* (alterations in original). “We must resolve all conflicts in the testimony in the government’s favor and draw every reasonable inference from the evidence in favor of the government.” *United States v. Bashaw*, 982 F.2d 168, 171 (6th Cir. 1992). “Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.” *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999) (quoting *United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir. 1986)).

All five defendants challenge their convictions for sufficiency of the evidence as to the mens rea element of their offenses. They argue that they lacked criminal intent because they thought their actions were legal. Our task, then, is to determine whether, after viewing the evidence in the light most favorable to the prosecution and accepting all reasonable inferences that would support the judgment, *any* rational factfinder could evaluate the defendants’ actions and decide that they knew their actions were unlawful. Under this deferential standard, we affirm the defendants’ convictions.

### III.

All defendants except Montgomery were convicted of healthcare fraud, along with mail and/or wire fraud. Healthcare fraud requires proof of three elements: “(1) the defendant knowingly and willfully executed a scheme to defraud a health-care benefit program or to

obtain its money or property by fraudulent pretenses, representations, or promises; (2) the scheme related to or included a material misrepresentation or concealment of material fact; and (3) the defendant had the intent to defraud.” *United States v. Sosa-Baladron*, 800 F. App’x 313, 318 (6th Cir. 2020); Sixth Circuit Pattern Jury Instruction 10.05(1).

Similarly, mail and wire fraud “each comprise three elements: first, ‘that the defendant devised or willfully participated in a scheme to defraud’; second, that ‘he used or caused to be used’ an ‘interstate wire communication’ or the United States mail in furtherance of the scheme; and third, ‘that he intended to deprive a victim of money or property.’” *United States v. Maddux*, 917 F.3d 437, 443 (6th Cir. 2019) (quoting *United States v. Faulkenberry*, 614 F.3d 573, 580–81 (6th Cir. 2010)).

The defendants’ fraud convictions rise or fall based on whether they had intent to defraud. Fraud “is not defined according to a technical standard.” *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979); *United States v. Moore*, 29 F. App’x 222, 225 (6th Cir. 2002). Instead, fraud is measured by its departure from “moral uprightness, [ ] fundamental honesty, fair play and right dealing in the general and business life of members of society.” *Van Dyke*, 605 F.2d at 225 (quoting *United States v. Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973)). Direct evidence of fraud can be scarce, so a factfinder “may consider circumstantial evidence of fraudulent intent and draw reasonable inferences therefrom.” *United States v. Davis*, 490 F.3d 541, 549 (6th Cir. 2007) (quoting *United States v. Cooper*, No. 02-40069, 2004 WL 432236, at \*4 (D. Kan. Feb. 10, 2004)). For example, fraudulent intent “can

be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.” *Id.* (quoting *Cooper*, 2004 WL 432236, at \*4); *United States v. Bailey*, 973 F.3d 548, 565 (6th Cir. 2020); *see, e.g., United States v. Bertram*, 900 F.3d 743, 748–51 (6th Cir. 2018). Importantly, “the question of intent is generally considered to be one of fact to be resolved by the trier of the facts . . . and the determination thereof should not be lightly overturned.” *United States v. White*, 492 F.3d 380, 394 (6th Cir. 2007) (quoting *United States v. Wagner*, 382 F.3d 598, 612 (6th Cir. 2004)).

At every turn, these defendants demonstrated their intent to defraud. They targeted family, friends, coworkers, and service members who had insurance that wouldn’t scrutinize compound drug prescriptions; they paid customers to order the creams and pills by misrepresenting that they were part of a nonexistent clinical trial, paying direct commissions, or paying the customers’ co-pays; they created pre-set order pads with drug formulas tailored to maximize profit rather than medical efficiency; they persuaded customers to order unneeded and unwanted creams; they ordered extra creams and refills for customers without their knowledge or consent; they paid medical providers to sign prescriptions without seeing patients and stamped the providers’ signature without consent; they directed pharmacists to backdate prescriptions to fall within the period before insurers stopped covering compound drugs; and these drugs were excessively expensive relative to their demonstrated benefit, netting the defendants millions of dollars in just two years. A reasonable factfinder could easily conclude that these actions constitute an

intentional, comprehensive scheme to defraud and establish the defendants' guilt beyond a reasonable doubt.

The defendants try to hide behind the complexity of the healthcare system, arguing that they were “merely advertising prescriptions,” and so the healthcare providers and pharmacies are responsible for any wrongdoing as gatekeepers between marketers and insurance companies. But potential wrongdoing by other parties does not excuse the defendants from the consequences of their actions here. *See, e.g., United States v. Grow*, 977 F.3d 1310, 1321 (11th Cir. 2020) (“A doctor’s prescription is not a get-out-of-jail-free card.”); *United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (“A perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence.”). And the evidence shows that these gatekeepers were deliberately commandeered by the marketers’ scheme. The defendants co-opted the role of the healthcare provider by paying Craven to sign prescriptions without creating any doctor/patient relationship and in many cases without evaluating the patients whatsoever. In some instances, the defendants circumvented the role of the healthcare provider altogether by obtaining a stamp of Craven’s signature and using it to approve prescriptions without her knowledge. The defendants also undermined the role of the pharmacy by paying a pharmacist, Jared Schwab, to consult with them to create pre-set drug formulas designed for maximum profit rather than medical efficacy and to backdate prescriptions. They did all these things knowing that the insurers of their targeted customers would cover compound drugs

without preauthorization. These actions were the essence of a scheme by which the defendants intended to—and in fact did—extract massive profits from the marketing of medically unnecessary drugs. Even if these actions taken in isolation could have a plausible innocent explanation, when taken together, a reasonable factfinder could easily conclude that they establish an intentional scheme to defraud. *See United States v. Jones*, 641 F.3d 706, 710 (6th Cir. 2011); *Davis*, 490 F.3d at 547 (referring to “the paradigm health care fraud case” as one “consisting of claims for pharmaceuticals or supplies in the obvious absence of medical need”).

It is true that the defendants engaged in the various actions comprising the scheme in differing degrees, and some of these actions were accomplished indirectly through downlinks. Yet there is more than sufficient evidence from which a rational trier of fact could infer that each defendant understood the essence of the scheme; that they either knew the actions their downlinks were taking or even directed the downlinks to take those actions. Seeing as the myriad of downlinks engaged in substantially similar conduct, a rational factfinder could infer that these actions were in fact part of the “process” of marketing these creams and were the essence of the scheme itself. *See Grow*, 977 F.3d at 1321 (holding that evidence of healthcare fraud was sufficient where marketers recruited people to order prescriptions and insurance was billed for pain creams, scar creams, and vitamins that were not medically necessary).

Nicholson argues that because she was not found guilty of conspiracy, that necessarily means that she wasn’t part of the scheme to defraud. Not so. The

crimes require proof of different elements: a person can perpetrate a scheme to defraud without being part of a conspiracy. *See, e.g., United States v. Myint*, 455 F. App'x 596, 603 (6th Cir. 2012) (affirming defendant's conviction for conspiracy to commit healthcare fraud despite acquittal for substantive healthcare fraud). A court could have a myriad of reasons for not convicting on the conspiracy charge aside from lack of sufficient evidence. And on Nicholson's challenge to her fraud conviction, we ask only whether the evidence was sufficient to support a conviction on that charge.

The defendants' half-hearted assertion that they consulted attorneys does not prove that they thought their actions were legal, as they did not assert a formal advice of counsel defense and offered no evidence of what they told their attorneys in those conversations. *United States v. Lindo*, 18 F.3d 353, 356–57 (6th Cir. 1994) (without providing evidence of full disclosure of all pertinent facts to counsel, defendant could not rely on advice of counsel defense).

In a final effort to undermine their fraud convictions, the defendants attempt to recast the evidence of affirmative misrepresentations detailed above as omissions, and then dismiss them by arguing that they had no duty to disclose. But this argument does not absolve them because a defendant can be guilty of fraud through the concealment of material information in the absence of a positive legal duty to disclose that information. *Bertram*, 900 F.3d at 748–51; *Maddux*, 917 F.3d at 443–44; *United States v. Colton*, 231 F.3d 890, 898–99 (4th Cir. 2000); *see also United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985) (“[O]missions or concealment of material

information can constitute fraud . . . without proof of a duty to disclose the information pursuant to a specific statute or regulation.”) (collecting cases).

The defendants attempted to conceal the nature of their scheme from insurers. By paying a medical provider to sign the prescriptions without seeing patients, they concealed that they were the ones soliciting the cream orders rather than the prescriptions originating out of the typical doctor/patient consultation process. By creating a pre-set compound formula order form, they concealed that the formulas were created to maximize profit rather than tailored by a doctor for unique patient needs. And by fabricating a clinical trial, paying customers commissions to order creams, and paying customers’ co-pays, they concealed that they were inducing customers to order creams rather than the prescriptions originating from medical necessity and consultation with a doctor. These concealments are material because insurers testified that if they knew any of this information, they would not have approved payment for the creams. But even without this concealment, the affirmative misrepresentations alone can sustain the defendants’ fraud convictions. The bottom line is that these customers would not have ordered these medically unnecessary prescription medications without the fraudulent actions of the defendants, and the defendants reaped substantial profits from convincing them to do so.

In short, there is ample evidence for a rational factfinder to infer intent to defraud.

#### IV.

Next, Wilkerson, Chatfield, and Hindmon challenge their convictions for conspiracy to commit healthcare fraud on evidence sufficiency grounds. To establish a conspiracy to commit healthcare fraud, the government must prove “(1) the existence of an agreement to violate the law; [and] (2) knowledge and intent to join the conspiracy.” *Bailey*, 973 F.3d at 564–65 (quoting *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007)).

The defendants do not challenge the existence of an agreement itself or that they individually joined such an agreement. Instead, they argue only that their underlying actions were not unlawful and so they never agreed to violate the law. But, as discussed above, there is sufficient evidence for a rational factfinder to determine that the defendants engaged in a scheme by which they intended to defraud insurers. And the evidence shows that Wilkerson, Chatfield, and Hindmon were working together to carry out that scheme. They coordinated to figure out which insurers were covering the compound creams, they used the same pre-set order forms to maximize their profits, their process of recruiting customers by telling them they would be paid for participating in a clinical trial was the same, their orders were often signed by the same healthcare provider, and they were all getting paid commissions from the same source. Because their underlying scheme was intentionally fraudulent and they agreed together to accomplish that scheme, there is sufficient evidence to support the defendants’ conspiracy convictions. See *United States v. Bryant*, 849 F. App’x 565, 570–71 (6th Cir. 2021).

## V.

Wilkerson and Chatfield next challenge their money laundering convictions for sufficiency of the evidence. A person is guilty of money laundering if they “[1] knowingly engage[] or attempt[] to engage in a monetary transaction [2] in criminally derived property [3] of a value greater than \$10,000 and [4] is derived from specified unlawful activity.” 18 U.S.C. § 1957.

Neither defendant challenges that they knowingly derived more than \$10,000 from transactions involving their drug marketing activities. The only argument they advance is, again, that their underlying conduct was not criminal. Thus, as with conspiracy, the money laundering convictions rise or fall based on the fraud convictions. *See United States v. Whitfield*, 663 F. App’x 400, 406–07 (6th Cir. 2016). Because there is sufficient evidence that Wilkerson and Chatfield intentionally defrauded insurers, there is sufficient evidence to support their convictions for money laundering.

## VI.

Wilkerson, Chatfield, Hindmon, and Nicholson were convicted of paying and receiving illegal kickbacks, and Montgomery was convicted of receiving illegal kickbacks. Again, they challenge their convictions on sufficiency of the evidence grounds. Nicholson also argues that her kickback payment conviction and wire fraud conviction are multiplicitous.

To establish a violation of the anti-kickback statute, the government must prove that a defendant (1) knowingly and willfully offered or paid remuneration

(2) to induce that person to refer an individual (3) for the furnishing of any item or service for which payment may be made under a federal healthcare program, 42 U.S.C. § 1320a-7b(b)(2), or that a defendant (1) knowingly and willfully solicited or received remuneration (2) in return for referring an individual to a person (3) for the furnishing or arranging for the furnishing of any item or service for which payment may be made under a federal healthcare program, 42 U.S.C. § 1320a-7b(b)(1).

*Wilkerson, Chatfield, Hindmon, and Nicholson.* Here, again, the defendants argue that their conduct was not fraudulent and so they did not knowingly and willfully do something the law forbids. They assert that commission arrangements like the ones they had were standard for the industry, and so they did not believe their conduct was unlawful. Because there is sufficient evidence that Wilkerson, Chatfield, Hindmon, and Nicholson participated in a scheme with intent to defraud, the intent requirement is satisfied here as well.

*Montgomery.* More needs to be said about Montgomery, since he was not convicted of fraud. In evaluating the sufficiency of the evidence of Montgomery's convictions, we ask only whether there is sufficient evidence for a rational factfinder to find him guilty of the crimes for which he was convicted: receipt of illegal kickbacks. We do not inquire why the district court didn't find him guilty on the fraud counts. The evidence shows that Montgomery engaged in many of the same activities the court deemed fraudulent. He recruited his own downlinks by promising them commissions. He told his downlinks to offer commissions to customers to order

creams. And he instructed them to say the customers were being paid as part of a clinical trial that was nonexistent. He helped pay customers' co-payments. He encouraged people to order creams they did not want or need. He also ordered creams for customers without their knowledge or consent and instructed his downlinks to do the same. According to the government, Montgomery made \$338,391 from the scheme. And he set up an LLC to receive those payments. A rational factfinder could infer from those actions that he knew his conduct was unlawful, and therefore he had the requisite mens rea in that he knowingly and willfully received unlawful kickbacks. *See Bailey*, 973 F.3d at 566–67.

*Nicholson*. In addition to contesting mens rea, Nicholson argues that her convictions for receiving illegal kickbacks and wire fraud are multiplicitous. We review such claims de novo. *United States v. Vichitvongsa*, 819 F.3d 260, 273 (6th Cir. 2016). Multiplicity is “charging a single offense in more than one count in an indictment” in violation of double jeopardy. *United States v. Swafford*, 512 F.3d 833, 844 (6th Cir. 2008) (quoting *United States v. Lemons*, 941 F.2d 309, 317 (5th Cir.1991)). To assess multiplicity, we use the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), asking “whether each charge requires proof of a fact that the other charge does not; if each charge does, then the charges accuse different crimes and are therefore not multiplicitous.” *United States v. Myers*, 854 F.3d 341, 355 (6th Cir. 2017).

The two convictions at issue here are based on a single monetary transaction—a 12/5/14 check to Matthews Consulting LLC. But the question is not

whether the charges are based on the same conduct, but whether the charges each require proof of an element the other does not. A kickback violation does not require proof of using the wires; a kickback could be paid in cash, could be an exchange of goods or services in person, or could be accomplished by various other non-wire means. *See, e.g., United States v. Martinez*, 921 F.3d 452, 467 (5th Cir. 2019) (kickback payment made via envelopes of cash). Meanwhile, wire fraud does not require proof that a payment was intended to induce someone to refer another person for federal healthcare services. *See, e.g., United States v. Kozerski*, 969 F.3d 310, 312 (6th Cir. 2020) (wire fraud based on obtaining government contracts by impersonating a disabled veteran). So both offenses require proof of an element the other does not, and the charges are not multiplicitous. *See United States v. Tahir*, No. 15-20351, 2016 WL 795884, at \*6–7 (E.D. Mich. Feb. 29, 2016).

## VII.

Wilkerson, Chatfield, and Hindmon argue that even if their convictions are affirmed, the district court erred in calculating the loss amount for sentencing. The district court calculated loss as the total amount paid by insurers for creams sold by each defendant and their downlinks. The defendants argue that the cost of “legitimate” claims should have been subtracted from that amount.

We review de novo the district court’s method of calculating loss and review any related factual findings for clear error. *United States v. Chaney*, 921 F.3d 572, 579 (6th Cir. 2019). The Guidelines instruct courts to calculate the loss amount as “the greater of

actual loss or intended loss.” U.S.S.G. § 2B1.1, cmt. n.3(A). The court “does not have to ‘establish the value of the loss with precision,’” *United States v. Poulsen*, 655 F.3d 492, 513 (6th Cir. 2011) (quoting *United States v. Nelson*, 356 F.3d 719, 723 (6th Cir. 2004)), but rather, “a reasonable estimate” will suffice, U.S.S.G. § 2B1.1 cmt. n. 3(C)). The loss amount need only be proven by a preponderance of the evidence. *United States v. Washington*, 715 F.3d 975, 984 (6th Cir. 2013). Because the district court is in a “unique position to assess the evidence and estimate the loss based on that evidence,” the “loss determination is entitled to appropriate deference.” U.S.S.G. § 2B1.1 cmt. n. 3(C).

When healthcare fraud is perpetrated against a government program, “the aggregate dollar amount of fraudulent bills submitted to the Government health care program . . . is evidence sufficient to establish the amount of the intended loss, if not rebutted.” U.S.S.G. § 2B1.1, cmt. n.3(F)(viii); *see, e.g., Bryant*, 849 F. App’x at 571–72 (defendants failed to rebut loss amount because they didn’t “meet their burden in providing the specific value by which the loss amount should be reduced”). In cases of fraud against private insurers as well, it is permissible for a court to “conclude[ ] that the intended loss amount was best represented by the amount billed.” *Bertram*, 900 F.3d at 752. This is especially true where “[t]he Government proved that the defendants engaged in a pervasive health care fraud conspiracy” and the defendants do not present evidence “to distinguish legitimate claims from fraudulent ones.” *United States v. Lovett*, 764 F. App’x 450, 460 (6th Cir. 2019); *Bryant*, 849 F. App’x at 572; *Washington*, 715 F.3d at 985; *United States v.*

*Mahmud*, 541 F. App'x 630, 635–36 (6th Cir. 2013). This reflects a court's "modest requirement" to make a reasonable estimate of the loss. *Bertram*, 900 F.3d at 752–53.

The defendants assert that *United States v. Mehmood* establishes that legitimate claims should be subtracted from the aggregate amount. 742 F. App'x 928, 941 (6th Cir. 2018). But that unpublished case only holds that legitimate claims should be offset "if established." *Id.* Here, the court found that the entire pervasive scheme was fraudulent by a preponderance of the evidence. Once the court made its reasonable estimate of the loss, it was up to the defendants to establish the legitimacy of the prescriptions they claim weren't fraudulent and to present the court with a valuation of those legitimate prescriptions. See *Bertram*, 900 F.3d at 752–53. But the defendants presented no contrary evidence to set apart or establish the legitimacy of any claims here, much less a valuation of such claims. Instead, they argue that the district court didn't allow them to offer such evidence, but nothing in the record indicates that the defendants were precluded from doing so, only that they chose not to. In response to the court's request for such evidence, the defendants' only contention was that there was no fraudulent scheme in the first place. Because we affirm the defendants' fraud convictions, this argument is unavailing.

### VIII.

For these reasons, we affirm the convictions and sentences of all defendants.

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**APPENDIX B**

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Nos. 20-5891/5897/5920/5946/6010  
 UNITED STATES COURT OF APPEALS  
 FOR THE SIXTH CIRCUIT

UNITED STATES OF	)	<b>FILED</b> Aug 25, 2022 DEBORAH S. HUNT, Clerk
AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
JAYSON MONTGOMERY,	)	O R D E R
ET AL.,	)	
	)	
Defendants-Appellants.	)	
	)	

**BEFORE:** McKEAGUE, STRANCH, and BUSH,  
 Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.\* No judge has

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\* Judges Readler and Murphy recused themselves from participation in this ruling.

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requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

**Deborah S. Hunt, Clerk**

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**APPENDIX C**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

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Chattanooga, Tennessee  
September 11, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
FRANKLIN PEARSON CLARK  
Assistant United States Attorneys  
1110 Market Street, Suite 301  
Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

MARK STEPHEN THOMAS, of  
Thomas Health Law Group, PA

5200 SW 91st Terrace, Suite 101-B  
Gainesville, Florida 32608

-and-

SETH A. SCHWARTZ, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

BENCH TRIAL  
TESTIMONY OF ADAM STATEN

\* \* \*

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Q Okay. Now, when you were doing private insurance, and we're talking Blue Cross here and things like that?

A Yeah. Blue Cross, Cigna, like —

Q Okay. And this is all what time frame are we talking about here?

A Like —

Q 2014?

A Yes.

Q All right.

A Still, yes.

Q Okay. And the point is that, is that at some point did it morph from private insurance into something else?

A Yes.

Q And tell us about how that happened, how you understood that happened.

A They would go on and off, like Billy would tell me like, you know, right now we're not on meaning

don't send anything, you know, insurance companies aren't paying or something, basically, that they would not pay out if we were to send any in. And then he — I don't know who, what person, they had Tricare. And they said that Tricare, he told me that Tricare had paid out, so if you know anybody that has Tricare, they would pay out.

Q So, prior to that, Mr. Hindmon saying that, was it your impression that Tricare wasn't paying or you just didn't

\* \* \*

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A Insurance card.

Q Okay. It's an identification and privilege card?

A Yes.

Q Got both sides of that I believe. And then right here, let me show you this. Do you know what this is right here?

A It's a form, I mean.

Q Have you seen this before?

A Yes.

Q All right. And, what — tell the Court what this is, Mr. Staten.

A It's just basically a form for whoever wants to pick what creams they want, that's —

Q And who is this one for right here specifically?

A Jillian Lynn.

Q All right. And I'm going to zoom in here a little bit. Do you see what creams or medication Ms. Lynn is asking for?

A Yes.

Q And what's that?

A Antiaging, acne, stretch marks and wound management gel.

Q All right. And if I go back to the front exhibit there, 2608. Do you see what the attachments — if you see the creams, do you see that bottom line?

\* \* \*

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Q Kirtis somebody. Did you know who Kirtis was?

A No, I never met Kirtis.

Q Did you know Kasey?

A I knew of her.

Q You didn't —

A I didn't know her.

Q Good. You weren't in business with Kasey or anything like that?

A No, sir.

Q Okay. But this is from Wayne. Is that correct?

A Yes, sir.

Q Date on this is July 13th?

A 2014, yes.

Q Okay. And let's talk about this here. Again, what is this right here?

A Just a patient form, you know, which with their information and which creams they want.

Q Who is filling out this stuff up here when you're — who's filling all of this out right up there?

A Jillian would fill out all of the people from Tricare.

Q Okay. If it weren't Tricare, if it were you and somebody that was doing private insurance, who would fill it out?

A I'd fill it out or whoever would fill it out.

\* \* \*

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Q Okay. And then C talks about an EOB?

A Yes.

Q It says the patient should not do what?

A "Patients should not be alarmed if they see an EOB (explanation of benefits) from their insurance company for what they reimbursed for the prescription. An EOB may look like a bill but it is not. They are just explaining to the patient what the insurance company paid for the patient's prescriptions."

Q "Process"?

A "The process starts with our order form. This form is designed for the patient to choose for what conditions they want treatment."

Q Okay. And that order form is that same thing that we've seen the check boxes on?

A Yes.

Q Next, A.

A "The next form is the evaluation form. This form gives us the ability to use the patient's evaluation of our product if we wanted to conduct a study."

Q Okay. Are you ever aware of a study being conducted?

A No.

MR. PIPER: Judge, I move 2613 into evidence.

THE COURT: Conditionally admitted.

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(Government's Exhibit 2613 was received into evidence.)

BY MR. PIPER:

Q 2614. Again, who's this from?

A Billy Hindmon to undisclosed recipients. Me.

Q You're bcc'd on this?

A Yes.

Q That's blind carbon copy?

A Right.

Q This is the consent form. Is that correct?

A Yes.

Q All right. And okay. Let's talk about what Mr. Hindmon says here. Paragraph 1 says what?

A "The first thing everyone needs to know is that the creams work for the majority of people. That is why we are doing this trial. Many insurance companies want to say they do not so they do not have to pay anymore."

Q Okay. Number two?

A "Be sure the patient knows that their insurance may or may not cover. This all depends upon the plan. If their insurance does not cover the prescription, they will have the option to pay a discounted price for the

cream, but there will not be any revenue to cover their participation compensation or your referral fee.”

Q Stop right there. What does that mean if they’re

\* \* \*

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terms of how those were to be done. I believe that some of the exhibits that we saw where you submitted the prescriptions from Ms. Lynn, did Mr. Hindmon ever respond to you and say that there were issues like, for example, he would give you feedback on this person hasn’t been in touch with a nurse practitioner so the prescription hasn’t been filled, or, you know, they haven’t been able, the nurse practitioner hasn’t been able to reach this person?

A Yes.

Q And so, therefore, what — so you recall receiving those kind of notifications?

A Yes.

Q And your understanding from that was that people that you were referring, for example, Ms. Lynn’s prospective patient?

A Uh-huh.

Q Your understanding of the process was that those people once you submitted the forms to Mr. Hindmon would be contacted by a nurse practitioner?

A Yes.

Q Okay. And your understanding was that even though you weren’t directly involved in that process, that if the nurse practitioner was not in communication with that patient, that the prescription was not filled?

45a

A      Right.

\* \* \*

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**APPENDIX D**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

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Chattanooga, Tennessee  
September 17, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT WILKERSON:

MARK STEPHEN THOMAS, of  
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-and-

SETH A. SCHWARTZ, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

BENCH TRIAL  
TESTIMONY OF ZACHARY RICE

\* \* \*

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that you came into contact with Jayson Montgomery at the Electric Cowboy?

A Jason approached me at the Electric Cowboy bar one evening, and we just struck up a friendly conversation. And that eventually evolved into talking about topical pain creams.

Q Was Mr. Montgomery in the military at the time?

A No, he was not, sir.

Q Did you make it known that you were?

A Yes, sir.

Q Did you make it known that you were a staff sergeant with people under your command that you supervised?

A I don't recall talking about the people I supervised, but I made it known I was a staff sergeant.

Q Tell us about the conversation you had with Jayson Montgomery when it got to the point of discussing topical creams.

A Generally just talked to him about pain, you know, a lot of military guys we take Ibuprofen like it's candy. And we just kind of talked about the benefits of the topical cream, and, you know, different pains and illness that I have.

Q So, did you express an interest in ordering some creams for yourself?

A Yes, I did.

Q Who was your health insurance and prescription drug

\* \* \*

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approached or did you and Mr. Montgomery discuss the prospect of you recruiting other individuals to order creams through you?

A Yes, sir.

Q Tell the Court about that, please.

A Jayson Montgomery asked me to just market and sell or sign people up. And when I signed the people up, I received a commission. It just -- it started with here's a couple of sign-up sheets, if you refer people, you know, you get a commission. It was paid like per person. And then after a little while as I started signing people up, because it was pretty easy because I was surrounded by guys looking for alternatives to Ibuprofen, and so, it started developing, started signing up a lot of people pretty quick. And then it started just being paid on a commission basis.

Q Do you remember what the commission was, what your percentage was?

A I don't remember the entire commission. I never really paid attention. It was just a lot of money coming in. But I'm sure it was a small amount compared to what I saw on a couple of spreadsheets that I was cc'd on.

Q Did you ever at any point set out the pieces of paper side by side to make sure you were getting paid the proper percentage based upon the amount you were bringing in to Mr. Montgomery?

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**APPENDIX E**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

---

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

---

Chattanooga, Tennessee  
September 17, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
FRANKLIN PEARSON CLARK  
Assistant United States Attorneys  
1110 Market Street, Suite 301  
Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

MARK STEPHEN THOMAS, of  
Thomas Health Law Group, PA

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Gainesville, Florida 32608

-and-

SETH A. SCHWARTZ, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

BENCH TRIAL

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yeah, Kettering, Ohio, and we moved during high school here to Chattanooga.

Q Where did you go to high school?

A Ooltewah High School.

Q Okay. And, I'm sorry, how long have you been with the Horry County Sheriff's Office, Police Department?

A The police department. Right at 29 years.

Q All right. What's your job title there now?

A I'm a sergeant of the special victims unit.

Q Special victims unit, is that sex crimes?

A Yes, sir. Sex crimes, home invasions, bank robberies, missing persons, elder abuse, so forth.

Q Okay. Do you know one of the defendants in this case? Are you related to one of the defendants in this case?

A Yes, sir.

Q And who is that, please?

A Mike Chatfield.

Q Mike Chatfield. And I'm going to invite your attention back to a time where you all met over in North Carolina. Do you recall this?

A Yes, sir.

Q And tell the Court, tell Judge Mattice, if you would, what happened.

A We went over to Cherokee with my parents, Mike, and I believe his father —

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Q His Dad's name is?

A Hal Chatfield.

Q H-a-l?

A Yes, sir.

Q Okay.

A We went over there to lose a little bit of money in the casino, and after the casino playing, I was talking to Mike about some creams he was selling.

Q Okay. Now, who was with you?

A My wife, Dena Chatfield, D-e-n-a, Chatfield.

Q D-e-n-a. Do you have a son?

A Yes, sir. Matt Chatfield.

MR. PIPER: Okay. Hold on one second.

(Brief pause.)

BY MR. PIPER:

Q Matt Chatfield is your son?

A That's correct.

Q And at the time, was Matt with you at the casino in Cherokee, North Carolina?

A No, he wasn't.

Q He was not?

A He was not.

Q All right. Was Matt on your insurance?

A At this time, yes.

Q Okay. He since has gone into the Army. Is that

Page 280

right?

A Yes, sir.

Q He is now out of the Army. Is that correct?

A Yeah. He did a tour over in Mosul, Iraq, and he's now in the Army Reserves.

Q Okay. Good. So, back — tell Judge Mattice what happened. You're at Cherokee, you all are finished losing your money. You start talking to your nephew about what?

A It's been a long time, Your Honor. We were talking about some creams that he was selling. And I believe that I gave him my insurance information.

Q Okay. And do you know if you got signed up for creams?

A I believe so, yes, sir.

Q Did you receive some creams ultimately?

A Oh, yes, sir.

Q Okay. Good. Good. And, also, in addition to you signing up, who else — did you also give him information on Dena or Matt?

A Both Dena and Matt.

Q Okay. And Matt was not with you. Is that correct?

54a

A     That's correct.

Q     All right. Now, ultimately — I'm going to show you some documents here, Government's Exhibit 119, see if you can see that. Do you see that?

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**APPENDIX F**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

---

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

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Chattanooga, Tennessee  
September 25, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
FRANKLIN PEARSON CLARK  
Assistant United States Attorneys  
1110 Market Street, Suite 301  
Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

MARK STEPHEN THOMAS, of  
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Jacksonville, Florida 32257

BENCH TRIAL

\* \* \*

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and Michael. Michael — I believed Michael. I mean, he was convinced that everything that we were doing was legal. That he had spoken to an attorney and because of the Obamacare Act, all of this was completely legal and legit, yes, sir.

THE COURT: And so, you partly at least relied on that in getting involved in this. Right?

THE WITNESS: Absolutely.

THE COURT: And I presume, am I correct in presuming, and I haven't heard enough about how long you were involved in this, but for a good period of time, you were convinced that this was legitimate, legal. Right?

THE WITNESS: My thought process, sir, was with an attorney involved, doctors prescribing these drugs and pharmacies, they wouldn't risk their careers and their license and everything on something that was illegal.

THE COURT: I think we all in our society rely on that sort of information to make judgments. Now, let's fast forward to this two days ago. You,

apparently, I haven't even read your plea agreement or anything, you pled guilty to a federal crime?

THE WITNESS: Yes, sir.

THE COURT: I'm going to be fascinated to hear where along the way and under what the circumstances are that you decided that what you were doing went from perfectly legal, legitimate, you know, lucrative, to, you know, wow, I

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**APPENDIX G**

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**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA**

---

UNITED STATES OF AMERICA,	:
Plaintiff,	:
vs.	:
JERRY WAYNE WILKERSON,	: NO. CR-1-18-11
MICHAEL CHATFIELD, KASEY	:
NICHOLSON, BILLY HINDMON	:
and JAYSON MONTGOMERY,	:
Defendants	:

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**Thursday, September 26, 2019**

**BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE**

**TRANSCRIPT OF THE EVIDENCE**

**APPEARANCES:**

**FOR THE PLAINTIFF:**

Perry H. Piper, and  
Franklin Pearson Clark  
Assistant United States Attorneys  
1110 Market Street, Suite 301  
Chattanooga, Tennessee 37402

**FOR THE DEFENDANT WILKERSON:**

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Seth A. Schwartz, of  
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10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

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what with respect to the compounded medications?

A Call them and ask them questions according to what creams they had requested.

Q And how long would these conversations take place?

A How much time would it take?

Q Yes, ma'am.

A Somewhere from two minutes to ten to twenty.

Q Okay. Did you ever decline after you called somebody to write a script or sign a script?

A I don't think I did unless it was somebody that was pregnant and I was concerned about the — what was in the compounded creams, but it was very rarely.

Q When you got — when you would call them, explain — let me go back a little bit. Were you aware that documents would be faxed to the pharmacy?

A Yes.

Q And, for example, Exhibit 1331 is a document that's —

A Correct.

Q It says, patient — upon patient request, up there?

A Uh-huh.

Q And what do you call this document right

\* \* \*

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Q And then at that point you would feel comfortable in either prescribing or not prescribing medication; right?

A Yes, sir.

Q And you had the ability to adjust that formula if you wanted to; correct?

A I imagine I did. I never did.

Q But you had the ability to? Whether you did or didn't, you had the authority to; right?

A Yes.

Q And, in fact, the pharmacies would call you from time to time and ask you if it was okay to substitute something else in place of one of the items that you had prescribed; right?

A Yes.

Q And you would give them authority to do that?

A Yes.

Q And you talked to them pretty regularly; right?

A Probably, yeah.

Q Let me show you one of the prescriptions that may have been put into evidence. And you're familiar with these prescriptions that were preprinted?

A Yes.

Q And it's full of different suggested formulas; right?

A Correct.

Q And then these different formulas have a label on them such as pain, scar, stretch; correct?

A Yes.

Q And you'll agree that the prescription is for the formula and not the label; right?

A Correct.

Q So the label is more for marketing just so you can tell a layperson this is kind of what we suggest it's used for or we believe it's used for?

A Yes, sir.

Q So the actual product is not called scar cream, that's just a title on it; right?

A It was referred to that — to the layperson, yeah, but I don't know that there was a specific title to the formula.

Q But it's the formula that you were prescribing, not a title?

A Correct.

Q And just because that formula is titled a certain way doesn't mean that it can't be used for other things; correct?

A Correct.

Q So there can be some movement between the two, so like, for instance, if something says, eczema cream?

A Uh-huh.

Q That's not limited just to eczema; right?

A Correct.

Q It could have other uses?

A Correct.

Q The same thing with psoriasis cream; right?

A Yes.

Q And then there's — at one point there was an acne cream; right?

A Yes, there was.

Q And then there was a wound gel?

A Uh-huh. Yes, sir.

Q And the items are — the formula and the wound gel could be used to help treat acne or those acne sores when they're open or cysts or whatever; right?

A Yes.

Q And your responsibility was to talk to the patients and verify that there was a need for these creams and that they understood what the proper use was and things like that; right?

A Yes, sir.

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Q And you did that?

A Yes, sir.

Q I want to show you a document that's been marked. I'm not sure if it's actually admitted, but it was marked as Government's Exhibit 2318.

A Uh-huh.

Q All right. What is that?

A It looks like an authorization to change some formulas on creams.

Q And it's got your DEA number on it and your signature and all that; right?

A It's got my MPI number. It doesn't have my DEA number.

Q Oh, I'm sorry. I'm going to switch gears real quick. Let me show you this one. This is 2318. I apologize. So on this prescription you had prescribed these different formulas to Skylar White; correct?

A Sure.

Q And that's your signature?

A It is.

Q And then there's an overlay on this. Do you know what that is?

A There's a what?

Q This little overlay that's here.

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**APPENDIX H**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

---

UNITED STATES OF AMERICA,	:
Plaintiff,	:
vs.	:
JERRY WAYNE WILKERSON,	: NO. CR-1-18-11
MICHAEL CHATFIELD, KASEY	:
NICHOLSON, BILLY HINDMON	:
and JAYSON MONTGOMERY,	:
Defendants	:

---

**Thursday, September 26, 2019**

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

**TRANSCRIPT OF TESTIMONY OF  
MICHELE CRAVEN**

**APPEARANCES:**

**FOR THE PLAINTIFF:**

Perry H. Piper, and  
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Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

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5200 SW 91st Terrace, Suite 101-B  
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Seth A. Schwartz, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

\* \* \*

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THE COURT: Blank prescriptions really? I mean, just —

A They'd have the name of the person and what I was prescribing.

THE COURT: Oh, okay. But just without seeing this person?

THE WITNESS: Correct. Yes, sir.

Q (By Mr. Piper) And did you agree to do that?

A Yes.

Q And that was a prescription; is that correct?

A Yes, sir.

Q And do you know what happened to those prescriptions after you signed them?

A They were sent to a pharmacy.

Q Do you know which pharmacy it was?

A At the time I believe it was Willow.

Q How many of those did you do for Mr. Wilkerson where you signed the script and didn't see the patient?

A I honestly couldn't tell you the amount.

THE COURT: And when we're saying didn't see the patient, you mean never saw the patient?

THE WITNESS: Correct.

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THE COURT: I mean, this is just an unknown person to you?

THE WITNESS: Yes, sir.

THE COURT: Which I presume is illegal; right?

THE WITNESS: Correct.

Q (By Mr. Piper) And you just signed — I'm going to ask you again, you can't say how many. Can you give us an estimate of how many times you did this?

A Probably ten times.

Q Ten times you signed for people?

A Uh-huh.

Q Well, let me ask you this question: Did Mr. Wilkerson pay you while you were working at Top Tier? I'm sorry. While you were working at Balanced Life?

A Did he pay me?

Q Yes, ma'am.

A He gave me money, yes.

Q Is there any difference between paying you and giving you money?

A I guess not.

Q I'm going to show you some documents here. On top of these documents, look at this right here. And, by the way, when you say ten times, was that for

Q November of 2014?

A Yes.

Q Roughly around there?

A Yes, sir.

Q Who did you go to work for after you left Karma?

A Jimmy Collins.

Q And Jimmy Collins is what you were doing out in San Diego?

A Yes, sir.

Q That was in 2015; is that correct?

A Correct.

Q Inviting your attention back to July, the summer of 2014; is that right?

A Yes, sir.

Q Now, did you — when you went to work for Karma what was your understanding of what you were going to be doing?

A Botox and Juvederm, cosmetics, and I would also be calling people about the prescriptions.

Q Good. About these compounding cream prescriptions?

A Compound cream prescriptions, yes, sir.

Q And, in fact, did you do Botox and Juvederm?

what with respect to the compounded medications?

A Call them and ask them questions according to what creams they had requested.

Q And how long would these conversations take place?

A How much time would it take?

Q Yes, ma'am.

A Somewhere from two minutes to ten to twenty.

Q Okay. Did you ever decline after you called somebody to write a script or sign a script?

A I don't think I did unless it was somebody that was pregnant and I was concerned about the — what was in the compounded creams, but it was very rarely.

Q When you got — when you would call them, explain — let me go back a little bit. Were you aware that documents would be faxed to the pharmacy?

A Yes.

Q And, for example, Exhibit 1331 is a document that's —

A Correct.

Q It says, patient — upon patient request, up there?

A Uh-huh.

Q And what do you call this document right

Page 33

here?

A The prescription.

Q Okay. Good. In addition to the prescription, are you aware that anything else would be faxed to the pharmacy?

A Their insurance information and, at a later date, their insurance cards.

Q So you would — that would be printed out and that would also be faxed in addition to this —

A Yes, sir.

Q — prescription information?

A Yes, sir.

Q Now, when you were talking to the folks was this the document, a document similar to this that you were using?

A It was more of a typed-out question where I could write in answers.

Q Okay. If I can find one of those, ma'am. And that was a patient information sheet; is that right? I'm going to find one for you here in a second.

A Yes, sir.

Q And that was what you had and you typed it out?

A Uh-huh.

Q Who would then have completed something

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like this, this form right here? You would have as well?

A Yes, sir.

Q And, again, that's your stamp down there; is that right?

A Yes, sir.

Q Let me show you one here that's been marked Exhibit 112, if I might. Do you see that down there at the bottom?

A Yes, sir.

Q Is that a stamped signature or is that your signature?

A My signature.

Q Let me show the difference here. 112 is your signature and this is the stamp?

A Yes, sir.

Q And do you see the difference there?

A Yes, sir.

Q All right. Patient information sheet, let me show you this right here. Do you see that?

A Uh-huh.

Q Is that what you're talking about?

A No. I had a questionnaire.

Q This is the insurance information.

A That's the insurance information, yes, sir.

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Q And that's what would be faxed in addition to say this document here in 1331?

A Correct.

Q To the pharmacy?

A Yes.

MR. PIPER: Judge, I'm going to move 112 into evidence if it pleases the Court.

THE COURT: All right. Without objection, admitted.

(Thereupon, marked for identification purposes and received into evidence, Government's Exhibit No. 112.)

Q (By Mr. Piper) And 1331 and I want to make this — 112, Mr. Hobbs, is Mr. Chatfield's prescription that I just showed Ms. Craven and 1331 is Mr. Hindmon's prescription.

MR. HOBBS: Thank you.

MR. PIPER: And in addition to that I'm going to make this 1331A, Your Honor, which is a insurance information card that I've shown. I have a different one that I pulled up here. Is this what we're talking about, something like the patient information sheet?

A Yes, sir.

\* \* \*

Page 90

your stamp?

A I may have gotten a phone call. I can't recall. I may have gotten a phone call and they asked if they could do refills and was given the patient's name, but I did not — don't recall who it would have been.

Q You didn't give blanket authorization to somebody?

A Did not.

Q They would have to contact you and then you would approve it; right?

A Correct. Yes, sir.

Q And that is what happened from time to time?

A Yes.

Q You indicated it would take anywhere between two and 20 minutes to talk to the average patient about their needs and these creams; right?

A Yes, sir.

Q And what kind of things would you ask?

A Where their pain was, what kind of rash they had, what they were going to use a specific cream for.

Q Allergies, things like that; right?

A Yes, sir.

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Q And then at that point you would feel comfortable in either prescribing or not prescribing medication; right?

A Yes, sir.

Q And you had the ability to adjust that formula if you wanted to; correct?

A I imagine I did. I never did.

Q But you had the ability to? Whether you did or didn't, you had the authority to; right?

A Yes.

Q And, in fact, the pharmacies would call you from time to time and ask you if it was okay to substitute something else in place of one of the items that you had prescribed; right?

A Yes.

Q And you would give them authority to do that?

A Yes.

Q And you talked to them pretty regularly; right?

A Probably, yeah.

Q Let me show you one of the prescriptions that may have been put into evidence. And you're familiar with these prescriptions that were preprinted?

A Yes.

Q And it's full of different suggested formulas; right?

A Correct.

Q And then these different formulas have a label on them such as pain, scar, stretch; correct?

A Yes.

Q And you'll agree that the prescription is for the formula and not the label; right?

A Correct.

Q So the label is more for marketing just so you can tell a layperson this is kind of what we suggest it's used for or we believe it's used for?

A Yes, sir.

Q So the actual product is not called scar cream, that's just a title on it; right?

A It was referred to that — to the layperson, yeah, but I don't know that there was a specific title to the formula.

Q But it's the formula that you were prescribing, not a title?

A Correct.

Q And just because that formula is titled a certain way doesn't mean that it can't be used for other things; correct?

A Correct.

Q So there can be some movement between the two, so like, for instance, if something says, eczema cream?

A Uh-huh.

Q That's not limited just to eczema; right?

A Correct.

Q It could have other uses?

A Correct.

Q The same thing with psoriasis cream; right?

A Yes.

Q And then there's — at one point there was an acne cream; right?

A Yes, there was.

Q And then there was a wound gel?

A Uh-huh. Yes, sir.

Q And the items are — the formula and the wound gel could be used to help treat acne or those acne sores when they're open or cysts or whatever; right?

A Yes.

Q And your responsibility was to talk to the patients and verify that there was a need for these creams and that they understood what the proper use was and things like that; right?

A Yes, sir.

Page 94

Q And you did that?

A Yes, sir.

Q I want to show you a document that's been marked. I'm not sure if it's actually admitted, but it was marked as Government's Exhibit 2318.

A Uh-huh.

Q All right. What is that?

A It looks like an authorization to change some formulas on creams.

Q And it's got your DEA number on it and your signature and all that; right?

A It's got my MPI number. It doesn't have my DEA number.

Q Oh, I'm sorry. I'm going to switch gears real quick. Let me show you this one. This is 2318. I apologize. So on this prescription you had prescribed these different formulas to Skylar White; correct?

A Sure.

Q And that's your signature?

A It is.

Q And then there's an overlay on this. Do you know what that is?

A There's a what?

Q This little overlay that's here.

\* \* \*

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Karma?

A Yes.

Q When did that stop?

A In September.

Q Why were you working for both locations until September?

A Because I didn't have enough hours at either place to consider full-time.

Q And when you were at Karma the time you were working on the compound medications you were actually calling people and doing everything you were supposed to do; right?

A Yes.

Q Now, you talked briefly on direct about not knowing what your — strike that. I'll ask you. Do you know whether Karma was billing for any of the patient encounters that you had related to the compound medication?

A I do not know. I don't think that they were.

Q And let's say for a minute that they weren't, there's no legal requirement that they bill for those visits; right?

A Right.

Q That's a choice that a business can make,

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**APPENDIX I**

---

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

---

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

---

Chattanooga, Tennessee  
October 3, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
FRANKLIN PEARSON CLARK  
Assistant United States Attorneys  
1110 Market Street, Suite 301  
Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

MARK STEPHEN THOMAS, of  
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SETH A. SCHWARTZ, of  
Schwartz Law Group  
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Jacksonville, Florida 32257

BENCH TRIAL  
TESTIMONY OF STEVEN McCALL

\* \* \*

Page 8

my previous role, so I have the audit department. In addition, I now have a performance network group, a larger analytics group that does different things. And I also have the pharmacy enrollment group that allows pharmacies coming into the network.

Q Can you tell us what CVS Caremark is and what it does?

A Sure. So, overarching for the company, CVS Health has a lot of different branches. There is the CVS retail pharmacies, which I believe you may see around here. There is the Minute Clinic, which is kind of the nurse practitioner, doc in a box. And the division I work for is CVS Caremark. We're a pharmacy benefits manager. Basically, what we do is we help insurance plans go ahead and set up prescription benefits where they may not have the expertise to do that. We also have an adjudication system, basically, a big football field type of servers in our office over in Scottsdale, Arizona where the claim comes in and in about a second goes back to the pharmacy saying, you know, what's happened with that claim.

THE COURT: And, by the way, maybe, you know, since I'm the tryer of fact, I should go ahead and make this disclosure. For a number of years, I think that my personal health insurance was, of course, with the federal government, I do — my pharmacy benefit is through CVS Caremark. And I'll

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we pay the pharmacy based upon our contracted rate with the pharmacy, and then we negotiate the rate with the clients.

THE COURT: I see.

THE WITNESS: Yes.

THE COURT: So, okay. So, I think I understand. And I presume this happens occasionally, but if it happened 100 percent of the time, that's an unsustainable business model. Right?

THE WITNESS: Absolutely.

THE COURT: All right. Go ahead.

BY MR. CLARK:

Q While we're on it, you say monies that your clients paid, that's the insurance companies are paying?

A That's correct.

Q Let me — just kind of on a granular, little more granular level, let's talk about how this works. This is the amount 2.98 that is paid to the pharmacy by CVS Caremark?

A That's correct.

Q This is the amount that the insurance companies paid. How does it work, does the insurance company pay the money directly to the pharmacy after you approve the claim or do you pay the money once the claim is approved, then you're reimbursed by the insurance company?

A I pay the money based upon prompt pay laws so it's anywhere within 10 to 30 days, usually closer to about 14 that

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we have to get a check to the client or to the pharmacy. And in exchange within about 30 days those plan sponsors bring the money back to us. So, that 2.98 million flows out first, then within about 30 days they go ahead and make us whole or close to it in this case.

Q Roughly how many claims for prescription drugs come into CVS Caremark on any given day?

A It was about two million claims a day. It may be a little bit higher at this point.

Q When you say it was, is that back in the 2014/2015?

A Correct.

Q It may be more than that now?

A We were about 80 million lives that we were covering at the time and I think we may be at 100 or 120 million now.

Q So, it is safe to assume then there is not an individual who looks and signs off physically on every single prescription as it comes in?

A That's true. It goes into an electronic system and in less than a second goes back to the pharmacy.

Q Are there things that the electronic system is programmed to look for before it sends a message back to the pharmacy?

A Yeah.

Q Can you tell the judge what those things are?

A Yes, sir. Our computer system actually goes through

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an electronic checklist. So, look at the member, so when you submit your claims to the insurance company, it will say, is the, is the judge covered, yes, no. Is the doctor, are they debarred from submitting claims, yes, no. Is the drug covered. Is the quantity covered. Is it within the parameters of the plan per day supply. And then we actually send back, if any of those things fail, we'll send back something to the pharmacy saying it didn't work, it rejected, this is what you need to go ahead and do to fix.

THE COURT: And is the computer, I mean, I just use my own personal knowledge, I've got notices sometimes say, hey, you got to get a prior authorization, it looks like a computer-generated thing.

THE WITNESS: Yes, it is.

THE COURT: That's one, that's one of the parameters, too?

THE WITNESS: It is. And if it actually goes through all of those checks and it's okay, it goes back to the pharmacy and says charge the member \$100, charge the member 10 bucks, whatever it is.

BY MR. CLARK:

Q Those are what we call — do you call those hard stops if any of those are no?

A Yeah, we would call it a hard reject.

Q Hard reject. Okay. In other words, if the member

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doing that.

BY MR. WALDEN:

Q Thank you. We talked a little bit about confidential and proprietary information. The manual that Mr. Schwartz shared with you, that is proprietary information from CVS Caremark. Correct?

A That is correct.

Q The formulary would also be proprietary. Right?

A I don't know if the formulary is. So, most of the insurance companies, like state of Tennessee, FAP, they post their formulary on line that says what's covered. And they might even post it in the tiers, so I don't know if that would be proprietary and confidential, although, they probably put it behind like a website just for the members.

Q Okay. There was something that you told Mr. Schwartz that I found interesting. You said that the pharmacy cannot tell a patient what Caremark paid for their prescription. Is that correct?

A That is correct.

Q And you told Mr. Clark, was it Mr. Clark, it's been a long morning, you told Mr. Clark all of the things that you believe to be material or at least many things. You would not expect a patient to know what Caremark is going to pay for a prescription when they get prescribed medication. Is that correct?

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**APPENDIX J**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

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Chattanooga, Tennessee  
October 9, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
FRANKLIN PEARSON CLARK  
Assistant United States Attorneys  
1110 Market Street, Suite 301  
Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

MARK STEPHEN THOMAS, of  
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Gainesville, Florida 32608

-and-

SETH A. SCHWARTZ, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

BENCH TRIAL

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A Wayne Wilkerson to dirty green money, which is Kirtis Green, Michael Chatfield, Billy Hindmon and Kooty, which is Kasey Nicholson.

Q What's he say, what's Mr. Wilkerson say here?

A Again he's forwarding the April Top Tier reports and he says, "Here you go guys. Start adding up commission. Also I need you all to follow up on scripts that still need ins info," which would be insurance info. "We need to get these to bill out ASAP and Willow will backdate them for the month of April. Best regards, Wayne Wilkerson, president Top Tier Medical."

MR. PIPER: Now, the backdating here — hold on one second.

(Brief pause.)

BY MR. PIPER:

Q The backdating here is actually about the commission that they get. After a certain period they get more money for a month. Is that right?

A Yes. Top Tier's commission structure with Willow was one such that it was based upon volume,

so, once you exceeded, let's say, for example, two million, you were getting 30 percent, if you exceeded four million, 35 percent. So this backdating would be so they could get more sales in that month to get them over that percentage threshold.

Q This actually though is — they have actually done

\* \* \*

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Q Outgoing wire. I'm sorry.

MR. PIPER: Move 402 into evidence if it hadn't already been.

THE COURT: Admitted.

(Government's Exhibit 402 was received into evidence.)

THE WITNESS: I believe that total is at the bottom as well.

BY MR. PIPER:

Q Hold on one second. That's 744. Let me pull 744. Do you see that?

A Yes, I do.

Q And the wire is only for 740. Is that right?

A Correct. Exactly \$4,000 less.

Q And that's this previously admitted 504 talks about splitting 4K apiece. Is that right?

A Correct, which Mr. Wilkerson withheld from their commissions.

Q Okay. That's what he texted Kirtis Green?

A Correct.

MR. PIPER: Okay. 504 is already in, Judge. I think 402 is already in, but if it's not, I move it in.

THE COURT: Admitted.

BY MR. PIPER:

Q And this is just 801, this is just the duplicate way

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to show that it went out of Top Tier and into whose account?

A Top Shelf, Inc., is Mr. Chatfield's account.

Q And amount right here is what?

A \$740,518.

Q A bit of redundancy here, is it not?

A Yes.

MR. PIPER: All right. Move 801 into evidence, Your Honor.

THE COURT: Admitted.

(Government's Exhibit 801 was received into evidence.)

THE WITNESS: Just to go back on that commission report for Mr. Chatfield, I think we may have overlooked that it included Debra Foster, the Bowlings in his commission report.

BY MR. PIPER:

Q I think that's the commission report for Chatfield?

A No, not that, the next exhibit. His commission report. The one that has the \$740,000 total at the bottom.

Q Exhibit 402. Is that right? Right here.

A Yes, that's it.

Q Okay. And it shows? Brandon Chatfield.

A George F is George Foster.

Q Debra F?

A Debra F, Debra Foster.

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Q All right. Couple of the McGowans. Is that right?

A Yes.

Q Michael C.?

A Michael Chatfield.

Q It's his own commission?

A He is getting commissions for his own prescriptions.

Q Count 8. Again, is going to be similar this time with Ms. Nicholson. Is that correct? Exhibit 305.

A Yes. This reflects, excuse me, a wire out on June 17, 2014, from Top Tier Medical to KLN Consulting, which is Ms. Nicholson's account.

MR. PIPER: Okay. Move 305 into evidence, Your Honor.

THE COURT: Admitted.

(Government's Exhibit 305 was received into evidence.)

BY MR. PIPER:

Q Exhibit 403, what are we looking at here?

A That's Kasey Nicholson commission report for the month of May.

Q Okay. And down here we've got some numbers. Is that right? Shows her percentage. Is that correct?

A Yes. That's her commission percentage.

Q Okay.

A Based upon the amount the insurance pays.

\* \* \*

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(Government's Exhibit 409 was received into evidence.)

THE COURT: Why don't we start looking for a breaking point, Mr. Piper, to break for lunch.

MR. PIPER: It might be a good time now, it's just —

THE COURT: Fine. Okay. All right. We'll be in recess until 2:30 p.m.

(Luncheon recess.)

THE COURT: Welcome back, everyone. Mr. Piper, are you ready to proceed?

MR. PIPER: We are, Your Honor.

THE COURT: Okay. Agent Kriplean, I'll remind you, you're still under oath, of course.

THE WITNESS: Yes, Your Honor.

BY MR. PIPER:

Q Judge, we're going to start on Count 25. Agent Kriplean, before we do that, Judge Mattice asked a question prior to the break about the doctors who were prescribing. Do you recall that question?

A Yes.

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Q And you said that the only three doctors involved were Vergot, Candace Craven and Toni Dobson. Is that right?

A Correct.

Q Have you, have you had a chance to reflect upon

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**APPENDIX K**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

---

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

---

Chattanooga, Tennessee  
November 7, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
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BENCH TRIAL

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it's not covered, so.

BY MR. THOMAS:

Q Mr. Tabor, do you utilize any software applications to assist you in your process in dealing with determining what's covered and what's not covered underneath patient insurance plans?

A Yes.

Q Does that software have a name?

A The acronym is MMIT which is what our company has provided for us, it's Managed Markets Information and Technology. So, there is an app on my iPad where I can pull up a drug, zip code, and it will tell me, you know, certain plans within that zip code that cover the medication that I choose, yeah.

Q And you utilize this MMIT software application in your business in marketing to physicians. Correct?

A Yes.

Q In order to better understand the physician's patients insurance plan coverage. Correct?

A Correct.

Q And this is a proprietary third party software that you bought. Right?

A Correct. That's my understanding, you know, Arbor Pharmaceuticals would buy this data to have access to be able to market to those insurance companies, yes.

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Q You have to pay for it?

A Correct.

Q It's not internal to Arbor, it's something that Arbor bought from a third party?

A That's my understanding, yes.

Q Are we safe in assuming that you're not the only pharmaceutical sales rep in the country that uses MMIT?

A Yes, that is safe to assume. It's standard for the industry.

Q Standard for the industry?

A Yes.

THE COURT: When you say its standard for the industry, here's what I'm imagining about what you're describing to me. This MMIT is developed by, is created by a software developer. And the software developer and their company have gone to the trouble of developing a massive, would have to be pretty massive database, and then the fruits of their labor in en massing this database and reducing it to an app, software, okay, now, we're going to be compensated for the leg work, the hard leg work we've done by providing this to people who need this data on a pretty instantaneous basis. And I would imagine it's the sort

of software that's going to have to be continuously updated. Is that accurate?

THE WITNESS: That would be my assumption, yes.

THE COURT: And the question was is it standard.

\* \* \*

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role at Arbor Pharmaceuticals. I do know Arbor has a team that deals with —

THE COURT: Okay. They have other people on staff that do what I'm describing?

THE WITNESS: Correct. You know, working with these PBMs and the managed care to try and get our products, you know, on formulary to be covered, yes.

THE COURT: Okay.

THE WITNESS: They deal directly with the pharmacy benefit managers on that.

THE COURT: Okay. And let me just — look, the lawyers are in charge of putting on their proof I want to know, but it seems to me that this, a large part of what I've heard thus far in this case describes medications, that, you know, somebody thought were somewhat efficacious, but it seems to me that the cost charged at least to the insurance company far outweighed or the government would contend far outweighed any efficacy. Okay. And that's — so, I'm just being transparent. That's the basis of my question.

MR. THOMAS: Your Honor, I'll be happy to explore that with this witness.

THE COURT: Okay. Okay.

BY MR. THOMAS:

Q Mr. Tabor, please describe the extent to which FPS had control over the Express Scripts/Tricare formulary. Did

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FPS tell Express Scripts and Tricare what it is that would be covered under the program or was it the other way around?

A It was the other way around, yeah.

Q So, Tricare and Express Scripts set their own formulary?

A Correct.

Q And is there any opportunity for a pharmacy, such as FPS, to tell Tricare or Express Scripts what it is that they would like to see covered or is this just a unilateral top down approach to say this is what's on our formulary, take it or leave it?

A It's more like this is what's on our formulary, take it or leave it.

Q And who sets the prices for that formulary?

A The insurance company, yeah. There is a contracted amount as far as what can be billed and adjudicated.

THE COURT: Now, let me just say this is what I'm hearing from this witness' testimony is that what I just finished describing, which is the process by which an insurance company or their pharmacy benefit manager goes about deciding whether the efficacy of, as I'm referring to it, a medication is worth the price, is the insurance company and/or the pharmacy benefit manager on almost a unilateral basis. That's what I'm

hearing from this witness. Am I incorrect about what I'm hearing?

\* \* \*

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A Correct.

Q Theoretically, there could be no limit on the cost?

A Theoretically, yes, there was that many —

Q Clinically, there is going to be?

A Right.

Q Theoretically, from a claims perspective, it could go to infinity?

A Potentially, yes.

Q How difficult was it to get an override for the \$1,000 cap?

A It wasn't difficult at all, simply just —

Q I'm sorry. I didn't mean to cut you off. Please finish.

A Just a simple call into Express Scripts, talk to one of the representatives, and they would provide that override.

Q Was that routine, the override process?

A Yes, it was very routine.

Q Which generated claims in excess of \$1,000 for the Tricare compounds. Correct?

A Correct. Correct.

Q Do you have any idea if Tricare program was aware that Express Scripts was waiving this \$1,000 cap?

A I don't. No. I'm unaware of that.

Q Describe for the Court, if you would, please, how would Helix know what amount to bill for in submitting a claim

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market the services that the pharmacy provided.

Q In your experience, was FPS required to disclose their third party sales teams to Express Scripts?

A Not to my knowledge.

Q To any other PBM?

A Not to my knowledge, no.

Q To your knowledge, did Express Scripts or any other PBM ever express a concern to FPS that they were utilizing third party sales teams?

A Not that I know of.

Q Do you know if there is any requirement for the third party sales teams to reach out to Express Scripts or some other PBM to tell the PBM they've got a sales relationship with an in-network pharmacy, such as FPS?

A No.

Q Is that in the contract?

A Not that I'm aware of, no.

Q Do you have any idea if that were a requirement how that could have been done, was there like a 1-800 number that the sales people could have called to say I just want to let you know I'm selling compounds on behalf of FPS for Tricare

patients. I mean, do you know of any way that there could have been contact?

A I do not. No.

Q Mr. Tabor, the various topical compounds, who

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THE COURT: You know, I don't know what it says, but at any rate.

MR. THOMAS: Yes, sir. I am going to move on. That is really difficult to read.

(Brief pause.)

THE COURT: I just — I can't, you know, it looks redacted to me, so.

(Brief pause.)

MR. THOMAS: Your Honor, I don't think it was that dark initially but after it's been reproduced a few times. I think we have another copy, but I'll move on while we're waiting.

MR. SCHWARTZ: Mark, he's got it. This is a lot lighter.

THE COURT: Okay.

BY MR. THOMAS:

Q Same thing. More legible. Now, Mr. Tabor, I'll give you just a moment to look at that.

(Brief pause.)

BY MR. THOMAS:

Q And I'll read it into the record. And I'm just going to ask you if I read it accurately. It's Section 5.2. "Service consultant shall not make any representation or warranty to any provider or

prospective provider concerning the cost, availability, suitability, or fitness for a

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particular purpose, capabilities of any other aspect of products which are beyond the representations contained in the company's then current pricing and sales literature as provided to the service consultant by the company."

Mr. Tabor, does that mean that a third party sales rep is not authorized to talk about pricing?

A Correct.

Q Because it's confidential. Correct?

A Correct.

MR. PIPER: Judge, may we move that version into evidence, please, or mark it?

THE COURT: Any problem with that?

MR. THOMAS: Not at all, sir.

THE COURT: Let's make that an exhibit, if it needs to be labeled, take care of that and tell Ms. Capetz how it's —

MR. THOMAS: Because the illegible one is the one I've got in.

THE COURT: Take care of that with Ms. Capetz —

MR. THOMAS: Yes, sir.

THE COURT: — at the appropriate time. By the way, Mr. Thomas, I don't know how much longer you expect your direct to go, but I'm looking, you know, within the next 15 to 20 minutes at least for a logical breaking time.

MR. THOMAS: Five minutes, Your Honor.

business?

A Yeah. So, basically, you know, Wayne and I kind of felt like brothers early on, so, you know, when we decided to go into this, it was, you know, a hand shake deal 50/50, whatever, you know, we make at the end of the month, we just make sure we always make the same, that way it was — we just felt like that we were a team, so. Yeah.

Q So, and then jumping back into your timeline. At a certain point, did you leave Brainlab to start doing something else?

A Yeah. So, when Wayne brought me the opportunity, you know, I was making fantastic money. I was, you know, probably making a quarter million dollars a year, senior sales rep for Brainlab, youngest one in the company doing very, very well. And when he brought it to me, I was like not really that interested, but let's try it on my mom. My mom had had three level cervical, three level lumbar —

Q Can you slow down a little bit?

A I'm sorry.

Q Okay.

A My mom had had a lot of surgery. So, neck surgery, back surgery, total knee, total hip. She was seeing pain management doctors. She was taking three Vicodin a day, two Mobic a day, just on a lot of pills. And I said if it can make an impact on her, you know, I'll consider it. And after

when, you know, in Tennessee Wayne was forced to —

MR. PIPER: Judge, I'm going to object to why it happened. I think he can say he knew when it happened. Why would be a hearsay response and certainly —

THE COURT: Okay. I guess.

MR. PIPER: Unless he may be part of it.

THE COURT: I don't know whether it's, you know, hearsay. I'm going to have to find out what the source of his knowledge was, I guess.

BY MR. SCHWARTZ:

Q I'll rephrase. So, let's talk about when it happened. You said roughly 2014?

A Yes.

Q All right. At that time, were you partners with Mr. Wilkerson?

A Yes.

Q All right. And you were partners in the Top Tier?

A Unofficially. I mean, we were financial partners, but, I mean, I wasn't an equity partner in the company.

Q Okay. Do you have direct knowledge of why there was a shift from the attempt to market directly to providers versus direct to patient marketing in Tennessee?

THE COURT: And what he means by direct knowledge, do you know, do you know why that is

from a personal standpoint or is it something that you learned vicariously

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Q And not just from statements from Mr. Wilkerson or you, but also information regarding, you know, what's being paid, the pharmacies, like all of the administrative side?

A Correct.

Q Okay. So, the fact that you received money from Mr. Wilkerson or he received money from you, those weren't gifts that went back and forth, was that based upon working with each other and trying to help each other's business increase?

A The goal at the end of the month was for us to make the same amount of money. So, if my corporation made more money than his corporation, we would make it right, make it even. It was just two guys on their own hand shake deal at the end of month and we had complete transparency. We had very expensive accountants trying to make sure that that was the case.

Q And when the issues were going on with changing or with Mr. Wilkerson changing the business model some based upon what was going on in Tennessee, was that something that you were aware of in realtime as it was happening?

A We were aware of both of our businesses because we were always working together with lawyers to try to make sure that everything was above board. So, I was aware of his model. I was aware of — he was aware of my model. I mean, its, you know,

there was, there was no reason not to talk about everything. We were trying to build a big company.

\* \* \*

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A What do you mean?

Q How did you — like, for instance, if a rep started, they were given a package of information, and I just asked if you knew what that information was. Did you know what that information was that they were given?

A Yeah.

Q How did you know that? Did you help create it? Did Wayne share it with you? What was your base of knowledge on that?

A Wayne shared it with me, part of it was stuff that I created and was used at Pro Script. Some of it was, you know, things that were introduced by other parties that, you know, to try to continuously have a clean process.

THE COURT: Let me ask you this. At what point in time did your businesses grow so much that you permitted, it permitted you and Mr. Wilkerson to hire other, I mean, I'm presuming — I think in gathering from your testimony at first it was just you two, you were the only two marketers there were and that over time, you developed, the business was growing and you developed the idea or capacity to hire others to market, is that —

THE WITNESS: Well, in this industry not just compounding but, basically, small business, medical business, it's common for 1099 contractors to

negotiate a percentage with the company, and then but it's all commission only. So,

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if I'm getting 30 percent, and I can find other reps that are willing to work for 20 percent and I can train them, you know, properly, now, I can make money off of, obviously, what I'm doing and them. So, it was — it's basically building a tiered structure, so —

THE COURT: And you say that's just, that historically is common in the medical, in the pharmaceutical —

THE WITNESS: Yeah, not just pharmaceutical but —

THE COURT: Medical.

THE WITNESS: Yeah, urine tox, pathology, across the board, basically, even for the big Biomet and Zimmers, it's less common at that level, but if this person has a great relationship with this doctor, a senior sales rep will commonly try to get that person on his team. I mean, it's really trying to develop relationships and to expand your company by having as many boots on the ground as possible.

THE COURT: So, you say even big pharmaceutical companies sometimes engage, probably less so, because they just got big teams —

THE WITNESS: Well, yeah.

THE COURT: — employees, but for smaller companies —

THE WITNESS: When I say Biomet, Zimmer, that's orthopedic, that's, you know, Allergan, those big companies,

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first time, but after awhile, if you're getting prescriptions, you learn. Right?

THE WITNESS: Absolutely, I mean —

THE COURT: You'd get a check?

THE WITNESS: You know a range. But, you know, in Indiana it was more difficult just because you — I think that the question is is did we become aware of what they were paid, what they're paying. Yes. Did we disclose that to doctors and patients? Yes.

THE COURT: I thought you testified you didn't disclose it?

THE WITNESS: We were not required to.

THE COURT: But you did?

THE WITNESS: We did.

THE COURT: Okay.

BY MR. SCHWARTZ:

Q Do you know what an EOB is?

A Yes.

Q What is it?

A It's an explanation of benefits. Insurance companies send it to their patients after they've had some sort of treatment or whether it be from the hospital or a drug, you know, kind of looks like a bill, but it just says this is what we paid for your treatment.

Q And in your business, did you ever hear from doctors

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**APPENDIX L**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

---

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

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Chattanooga, Tennessee  
November 13, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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-and-

SETH A. SCHWARTZ, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
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BENCH TRIAL

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Page 4

THE COURT: All right. Welcome back, everyone.  
Are there any matters we need to take up before we  
call the first witness?

MR. PIPER: Briefly, Your Honor.

THE COURT: Come to the podium.

MR. PIPER: Brandon Chatfield testified last week,  
Your Honor may recall, Mr. Clark cross-examined him  
as to his prescriptions, and we neglected — we showed  
them to him and we neglected to move them into  
evidence as Exhibit 109.

THE COURT: Any objection? Admitted.

(Government's Exhibit 109 was received into  
evidence.)

MR. PIPER: Thank you.

THE COURT: All right. All right. Who's going to  
call the next witness?

Mr. Thomas.

MR. THOMAS: Thank you, Your Honor. Mark  
Thomas on behalf of Wayne Wilkerson. We have one  
witness today, an expert, Mr. Mark Newkirk. I'll have  
a very, very brief opening, Your Honor. He's a

Pharm.D, Doctor of Pharmacy. He specializes in compounding pharmacy compliance and auditing.

THE COURT: Okay.

MR. THOMAS: He has literally been on thousands of audits, that's pretty much his job to make determinations as to discrepancies in claims —

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bulk ingredient, Omeprazole bulk powder, so they are available in multiple ways.

Q And, Mr. Newkirk, could you spell that medication?

A Omeprazole?

Q Yes.

A O-m-e-p-r-a-z-o-l-e.

Q Okay. Let's talk briefly about pricing. Who sets the prices for the bulk ingredients for compounded medication?

A The manufacturer does or whoever the labeler is of the particular drug. They set the price.

Q And is that, is that per compound or per bulk cost go into an average, a nationwide average, to calculate the average wholesale price for that bulk?

A No. The average —

Q How is the AWP calculated?

A They just, the manufacturer selects it.

THE COURT: All right. And the manufacturer of, for instance, you know, an FDA approved drug, a pharmaceutical company, hey, let's call it Pfizer.

THE WITNESS: Pfizer.

THE COURT: Okay. The manufacturer of a compound is going to be the pharmacy that does the compounding. Right?

THE WITNESS: Well, the pharmacy compounds the drug. But the way that the drug ends up being priced is the different AWP's, the average wholesale price of each

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ingredient. So, when you transmit a compound claim after 2011, you could bill for up to 25 ingredients. That was the big change. And you would enter each NDC, and the average wholesale price of each one and the quantity, it's a completely 100 percent transparent transaction with the PBM. They have every single ingredient, the quantity, the AWP, it adds all up, and whatever it adds up to, it gets transmitted to the insurance company.

THE COURT: Okay.

BY MR. THOMAS:

Q So, Mr. Newkirk, if I understand your testimony, effective as of 2011, the software change that you had mentioned, up to 25 individual bulk ingredients could be added into a single compound. Right? A single script.

A Correct. Correct.

Q And the pricing would be based upon the manufacturer's AWP, what the manufacturer suggests. Correct?

A Correct.

Q And then it's multiplied by the amount of that compound. Right? Whether it's one grams or 20 grams or 30 grams. Correct?

A. Correct.

Q And then once you have a per ingredient total, you total all of the 25. Correct?

A Correct.

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A Not the manufacturer. The contract is — there is really two contracts, you know, a pharmacy will have a contract with the PBM and the PBM will have a contract with the insurance company or the plan sponsor and those will lay out the terms.

Q Is there a third contract as well where the pharmacy has a contract with the manufacturer to actually buy the products that they ultimately utilize for the compounding?

A The pharmacy will have a contract — if you're going to purchase bulk chemicals or drugs from a manufacturer or from a wholesaler, you're going to have to have a contract in order to purchase those. You can't just call up and order drugs without executing a contract. They're going to want to vet you as a pharmacy.

Q Because the pharmacy has got to buy the raw materials from someone. Correct?

A Correct.

Q And I don't mean to oversimplify, but my basic understanding, and I'm not a pharmacist by any means, so keep it simple for me, please, the pharmacies buy low and sell high. Right? They buy at a discount from AWP from a manufacturer or a distributor or a wholesale or repackager, then they do the compounding, and then they send a claim in for

the compound that they made, right, they're the professional entity with a license to a PBM with whom they

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have a contract and say I just compounded a pharmaceutical for your patient, she is an insured, here is the bill. Right? After 2011, it's all laid out as to exactly everything that's in there. And it is a payment rate, a reimbursement rate based upon some portion of AWP higher than what it is the pharmacy paid. Correct?

A Correct. And you're going to have —

THE COURT: It has to be just, again, free market economics, you know, in the long run, if they're not doing that, they will soon be out of business.

THE WITNESS: Correct. And as a pharmacy, you have a choice if you're buying a drug, there may be 10 different suppliers you could purchase it from. And they could have for the same exact drug, they could have 10 different average wholesale prices.

THE COURT: Okay. Yeah.

BY MR. THOMAS:

Q Am I correct in assuming that the pharmacies do that to make a profit. Correct?

A Absolutely.

Q And I'm assuming that the manufacturers do it to make a profit. Correct? They set the AWP at a rate that allows them to be able to make the drugs in, literally, in their factories and sell it to pharmacies. They make a profit. Right?

\* \* \*

dispense a compounded medication to a patient without a prescription. Correct?

A Correct. You have to have a prescription.

Q Prescription is written by the, by a physician. Right?

A A physician, nurse practitioner, anybody in a state who has prescribing authority according to the state medical board.

Q A patient can't simply go into a pharmacy or order any kind of medication that requires a prescription. Correct?

A They can go into a pharmacy and request something but the pharmacist is going to have to call their physician to get a prescription. Correct.

Q Because without essentially an order or prescription from a doctor, the pharmacist isn't authorized, correct, to dispense to the patient?

A Except in very limited instances like flu shots, you can do collaborative agreements and you're allowed to dispense flu shots without a prescription.

Q That's probably subject to individual specific state law?

A Correct. Correct.

Q As to what authority a pharmacist has?

A And it's very limited.

Q Under what circumstances would a pharmacist check

\* \* \*

an elementary scale.

THE COURT: Okay.

BY MR. THOMAS:

Q So, preprinted compounding pads are common for compounding pharmacies. Correct?

A Yes. Very common.

Q That's not in any manner restricted or prohibited by the PBMs, is it?

A During that time, they were not prohibited at all except for Express Scripts, they had a caveat. You couldn't have a controlled drug also preprinted on the compound pad. And if they saw — if you had Ketamine somewhere written on the pad that was preprinted, it was a full recoupment of anything filled off of that. And, to me, it was, it was a made up rule that they put in their manual, but they enforced it. So, the pharmacies learned of this rule when they faced recoupments and they removed all controlled substances from the preprinted pads.

Q And that's just that one PBM?

A That's just that one PBM that had a rule on preprinted.

Q And any other PBMs did not even have that restriction as to controlled substances on the preprinted pad?

A They did not. And they audited thousands of these preprinted pads.

\* \* \*

Q Does that mean that a larger company would have a more expansive formulary?

A It could be either way.

Q Okay.

A They could have a more expansive or a more restrictive, you know, depending upon how involved they're in, you know, in the formulary management.

Q Who sets the prices for those formularies?

A Well, prices are still — it's always, it's still based off of average wholesale price set by the manufacturer. And, you know, how the claim pays is determined by the insurance company AWP minus X.

Q For the benefit of the Court, I'd like to ask a couple of questions about the relationship between PBMs and the insurance companies. My rough understanding, and correct me if I'm wrong because it's probably rough, is that PBMs essentially act as a contracted agent for the insurance companies. Is that accurate?

A Yes. I mean, they're hired by the insurance company or the company in order to administer the prescription benefit. I view it as an outsourced, you know what I mean, you hire someone to do this because they're experts and you work with them to develop, you know, the best formulary you can.

Q Is that because the insurance companies have all

\* \* \*

A Yes. There was — it was called — the actual reject code they got was a cost exceeds max edit. It wasn't a hard cap, obviously, because pharmacies were able to call and get the claim overridden. It's, to me, it was very bizarre how this was happening, you know. Cost exceeds max to me is a hard edit. What the pharmacies found out is that, you know, if you bill a compounded claim to Tricare at \$999, it would shoot right through. If you billed it at \$1,000 or over, it's going to reject, cost exceeds max. And then the pharmacies in the beginning, you know, they would just lower the price to \$999. Somebody figured out all they had to do, if I bill a \$2,000 compound to Tricare, I make a phone call to Express Scripts for the cost exceeds the max. They're going to ask you what's in it. They would read off the ingredients, which to me is nonsensical because they already have what the ingredients are, they would generate the, what would you call it, the authorization to fill it, the override. And then the override would be in my understanding is for that particular claim for the next year.

Q So, am I correct in understanding that without the cost exceeds max override in the Tricare program that all compounds would have been reimbursed underneath the Tricare program at \$999 or less. Correct?

A Correct. If Express Scripts would have had that as a hard cap, there would have been no claims over \$1,000.

\* \* \*

A I have.

Q Okay. As an expert in compounding compliance, Mr. Newkirk, do you believe that the professional judgment and conduct language that you see before you applies to marketing provisions?

A I don't see how you could make that stretch.

Q Is it compliant for pharmacies to market their compounding services?

A It apparently was because, you know, pretty much everybody, all of the compounding pharmacies in the country were using — if you were billing any amount, you were, you know, in essence, you were utilizing, you know, marketers. And the insurance companies including CVS could readily tell.

Q And there are, are there not, independent third party marketing entities, correct, like not W-2 employees of pharmacies but 1099 independent contractors who just do marketing. Correct?

A Correct.

Q Is it compliant for pharmacies to utilize third party 1099 independent contractors to market their compounding services?

A You know, the compliance, the legal side, I'm not an attorney. I do know that, you know, this is how they were reimbursed across the country across the board at that time. That's how they were paid.

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collection of copay, the PBM is basically just verifying that the copay was collected.

Q Do the PBM manuals specify that only the patient can pay the patient's copay?

A Not explicitly. I mean, there is language, you know, that leads that way, but there is no restriction that, you know, if I go in and my son has an antibiotic, can I pay his copay? Absolutely.

THE COURT: Let's say, but, if there is language that could be accurately interpreted to, you know, in a PBM manual to prohibit a third party from paying a patient's copay, well, if someone were to run afoul, if a pharmacy were to run afoul of that provision, the proper legal remedy, I believe, would be breach of contract. Right?

THE WITNESS: For the particular individual claim, yes, upon audit.

THE COURT: Yeah. I mean, it's a breach of contract?

THE WITNESS: Right. But then, also, you know, manufacturer coupons are used every single day to reduce copays.

THE COURT: Yeah. Well, yeah. Okay.

BY MR. THOMAS:

Q Manufacturers reduce copays. Correct?

A Every day all day long.

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Q Organizations reduce copays?

A There are many pharmacies out there that work with the local church and say somebody can't afford their medications, you know, the church will step up and pay those.

Q Patient assistance programs can be approved by the Medicare program. Correct?

THE COURT: Well, I mean, how many times have I heard if you can't afford your medication AstraZeneca may be able to help, you know.

THE WITNESS: They're designed that way in order to, you know, sustain the business model.

THE COURT: Okay. Well, it creates public good will. Hey, this is not just, this is maybe primarily but not just a greedy pharmaceutical company, you know.

THE WITNESS: We're willing to pay for a couple of these people who can't afford it in order to allow the processing of these drugs, and, you know, you know, if you don't have the means, we'll help, and if not, we have the manufacturer's coupon to take your \$1,000 copay down to 20 bucks.

THE COURT: Yeah. Right.

BY MR. THOMAS:

Q Mr. Newkirk, have you ever seen a claims discrepancy where a marketer paid for a patient's copay?

A I have not.

\* \* \*

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determine where they can send this medication.

Q Have you ever seen a claims denial based upon a marketer directing a compound prescription to any given pharmacy?

A No, I have not.

Q Okay. And we've covered this, but I'm going to ask you again. Have you ever seen a claims

discrepancy based upon the use of a compound pharmacy pad because Mr. McCall stated that he believed it would be material to a CVS Caremark determination? Discrepancy or no?

A No, there is no discrepancy. And I don't understand that testimony because, you know, all of the PBMs were well aware of compounding pads, preprinted prescription pads because they audited thousands and thousands of them and never wrote them up as a discrepancy for being a prescription pad.

Q It's my understanding that Mr. McCall had testified that it would certainly be a material matter for CVS Caremark to pay a claim if it appeared that multiple members of a single family were receiving what appeared to be relatively similar or the same compounds? Would you find that event to be discrepant? Would you have a claims denial concern?

A Well, the claim would have to be audited, you know, for the family members and then it's still going to rest on the prescriber prescribing the drug. If the doctor is writing for it, they're determining the medical necessity of the

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MR. WALDEN: Your Honor, if I was good at chemistry, I probably wouldn't have gone to law school.

THE COURT: Yeah.

BY MR. WALDEN:

Q While we're on that subject, I'm going to jump around just a little bit. We were talking about — so, we were talking about how these forms can be edited.

So, a prescriber could remove one of these ingredients from the formula. Correct?

A Correct. They could cross it out. They could change a strength. A pharmacy could bill, you know, say a physician in the pharmacy, they pick a neuropathic transdermal cream, they pick neuro one, they bill that off to the insurance company and say Gabapentin is not covered, so, it's blocked. The pharmacy then could say, all right, let's see if we can get something else that is covered. And they would go ahead and, you know, talk to the doctor and swap it out. The pharmacy could also just accept payment for what is covered and not be paid for the Gabapentin, then it becomes more of, you know, a financial decision and does it makes sense.

THE COURT: Okay.

BY MR. WALDEN:

Q Are there any reasons why these preprinted pads might actually be beneficial for a pharmacy to use as opposed to a regular handwritten script?

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A Clarity. You know, cut down on errors, medication errors, which with handwritten prescriptions are notorious. They spell out an ingredient and, you know, Ketamine looks like Ketapropen sort of, so they fill the wrong chemical. They write one percent and the physician writes 1.0 percent, which is an absolute do not do that in the pharmaceutical world. You never have a zero after a decimal point because you won't see the decimal point and you'll fill 10 percent could, be dangerous.

THE COURT: Deadly?

THE WITNESS: Absolutely.

BY MR. WALDEN:

Q Is it more likely for those errors to occur — I'm going to call them handwriting errors because the issue is the pharmacist can't read the doctor's handwriting, is that essentially what you're saying?

A Essentially, yes. I mean, it's a long standing joke, you know, doctor's handwriting.

Q Is that more likely to occur when there is a customizable medication such as a compound versus something that's more common like Lipitor which —

A Well, yeah, it's more likely because you have to, you know, there might be six ingredients that a physician has to write, you know. Now, you're writing instead of one drug, you're writing six drugs.

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**APPENDIX M**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	CR-1-18-11
JAYSON MONTGOMERY,	:	
Defendants.	:	

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Winchester, Tennessee  
July 15, 2020

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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FRANKLIN PEARSON CLARK  
Assistant United States Attorneys  
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Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

R. DEE HOBBS, of  
Hamilton County Attorneys Office  
204 County Courthouse  
625 Georgia Avenue  
Chattanooga, Tennessee 37402

JUDGMENT PROCEEDINGS

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You heard what I said about the poor kid who has no one. So, all right. Go ahead.

THE DEFENDANT: First off, I just want to thank the Court and the government for allowing me to go to Mexico for a wedding. On behalf of a lot of people, I say thank you.

I also want to thank the Court for taking the monumental task of not only a joint trial but one without a jury. I mean, I'm sure —

THE COURT: Thank you. They pay me for this, Mr. Montgomery.

THE DEFENDANT: I'm sure the amount of time that you spent on the case was what I spent times five with five other, four other defendants.

THE COURT: Well, it's an important case just like every other case I hear, so. Thank you.

THE DEFENDANT: So, obviously, I wrote this letter hoping for probation, home confinement.

THE COURT: Yeah.

THE DEFENDANT: So, that's kind of the tone of it.

THE COURT: Yeah.

THE DEFENDANT: I do want to say that I respect, accept and respect your decision regarding both my guilt and my innocence in this case.

THE COURT: Thank you. But let me say this on your behalf, but I presume that you do not agree with it, and

that's why you and your lawyer need to talk about this, but I believe not because I think I've made — I've done my best, but I think it's a case that needs to be appealed. Okay? I mean, I just — but at any rate.

THE DEFENDANT: Yeah. I mean, you know —

THE COURT: But that's up to you. That's up to you and your lawyer, you know.

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: Although, I did not know at the time that receiving the two payments from Defendant Hindmon violated the anti-kickback statute, I understand that now, and I accept responsibility for that. I realize that, therefore, that I must be punished. And I was asking — you know, I'm sorry —

THE COURT: Yeah.

THE DEFENDANT: I'm scared. I was just asking for a fair chance to repay the debt that I no doubt was one way or the other going to get as a form of punishment today. I didn't know what form it was going to come in. I didn't know what the amount was going to be, but the purpose of my letter was to ask for a fair chance to repay it because I do want to repay the debt. I know, obviously —

THE COURT: You know, let me just say this, Mr. Montgomery. If you want to do that voluntarily, you're free

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**APPENDIX N**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	CR-1-18-11
BILLY HINDMON,	:	
Defendants.	:	

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Winchester, Tennessee  
July 17, 2020

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT WILKERSON:

GIANNA MAIO, of  
Federal Defender Services of  
Eastern Tennessee  
One Central Plaza, Suite 600

835 Georgia Avenue  
Chattanooga, Tennessee 37402

## JUDGMENT PROCEEDINGS

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despite the fact I understand what the notes say about federal health care programs and the fact we've conceded that they've at least made a prima facie case. But I still think that what the case law under this *Clymond* decision and under *Medina*, which is a Fifth Circuit opinion that we cited in our briefing going back early in the case, still requires as part of this loss analysis, still requires the government to prove not just that a small handful of claims may have in fact been fraudulent, but it holds them to a higher burden to establish that everything being used to support the loss amount was in fact fraudulent. And I don't think that the inference is sufficient for the government to carry its burden.

THE COURT: Okay. And you were sort of focusing, I guess, on medical necessity here and so forth. Okay. I think what we've got here is sort of — I think we have a misunderstanding of what was found to be fraudulent in this case. Who wants to take a crack at summarizing what they think was found fraudulent in this case. I'm not sure in my mind it deals so much with medical necessity. I mean, the ingredients for these creams that I heard, I mean, there is no question they were legitimate ingredients. They're used in other FDA approved medications. The problem — and, I mean, I don't think that I heard any proof that the particular ingredients weren't included in the

creams that were distributed through this scheme.  
The problem and what I

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believe — well, I know what I was thinking when I rendered the verdict, and, you know, I don't want to get too far into getting behind the verdict, it's that the prices that were being charged for these creams were in my mind extraordinarily exorbitant for any legitimate medical use that they may have conferred and could have been obtained on an open market at a very tiny fraction of the cost which was charged to the insurance companies.

And that — and I think implicit in the Court's verdict had to be that, and this is where this whole case becomes difficult, that somehow the defendants were under an obligation, even though the Court will probably concede that obligation is not as explicit as the government might hope it was, to disclose what was being provided to the patients and to their insurance companies and what the relative value of medical necessity was being served by these compounds versus what could be bought over the counter in any corner, any corner pharmacy. I think that that's the fraud in this case.

And, by the way, let me say this. I said this on Wednesday for Mr. Montgomery. The Court is absolutely confident in its verdict. The Court thought a long time. But when you're talking about fraud and when you, particularly, a conspiracy to commit fraud, which was present in this case, whether or not that something is "fraudulent," I believe, and this runs throughout the lawsuit, is very much in the eye of

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the beholder, you know. It just is. I mean, particularly, view this as complex fraud, so I think that the fraud and the conspiracy is complex, to commit fraud is very much in the eye of the beholder.

In this case, by virtue of agreements of the parties, there was one beholder, and that was me. There could have been — any party could have been insisted there be 12 beholders. Okay? Any party could have insisted there be 12 beholders. Instead, they chose it to be one. If there is an appeal in this case, they'll be at least three more beholders of this fraud. Okay? That's the way I would put this. So, I don't know that I'm going to even ask the government to try to characterize that. If this goes to appeal that's something that the government will undoubtedly have to address both as to the conviction, and, perhaps, to the sentencing, but that's what I found fraudulent.

So, I guess I don't know where that leaves you, Ms. Maio. I mean, you know, I'm going to let you do whatever you want to. You've made your point. I think you've preserved it for appeal if there is an appeal. I don't know how you go any further than what you've said and what I've said here. Okay. Do you think that there is anything else to be said?

MS. MAIO: I certainly understand the Court's point as to where it sees the fraud. And because of the fact that it's driven primarily by the cost of the ingredients, which is

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pervasive throughout all of the claims, I understand that, you know, it —

THE COURT: Well, it's the cost, and, really, I guess, ultimately there has got to be either an active misrepresentation or a failure to disclose, you know, for a fraud. And I guess that where I'm hanging my hat in terms of the verdict is the failure to disclose or the failure to notify. Okay? Is that fair, you know? That's how —

MS. MAIO: Yes, sir.

THE COURT: That's how — again, you know, it's odd, I mean, in a jury verdict you never go behind the verdict, what the jurors were thinking. I've just stated on the record what I was thinking when I found that the acts here were fraudulent. And I think what I just stated was my, I don't know if it was consistent with what the government thought was fraudulent or not, but, you know, I held the way I held. If other judges get to look at it, they'll get to see if they think the same thing.

MS. MAIO: Yes, sir.

THE COURT: I guess what I'm going to do then, you tell me if you think I haven't analyzed it far enough, is rule against you on your objection, as I understand it, on objection number two, Ms. Maio, for the reasons that I've stated. That really, I hear what you're saying, I think you're focusing on the wrong thing, you know. That's, you

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know, that's the way I guess I would put it. Okay?

MS. MAIO: Yes, sir.

THE COURT: Okay. Then that's my ruling on objection number two.

All right. Mr. Clark, do you have any objection to that based upon my ruling and going to objection three?

MR. CLARK: No, sir, Your Honor.

THE COURT: Okay. Objection three deals with Mr. Hindmon's role in the offense. And I believe that Mr. Hindmon objected to the two level enhancement for the offense having 10 or more victims. The government says that there are 10 or more victims in this case. Under the relevant — let's see. United States Sentencing Guidelines Section 2B1.1(b)(2)(A)(i). The burden is on the government. Right, Mr. Clark?

MR. CLARK: It is, Your Honor. I think that — can Ms. Maio — if we can have just a few moments to discuss this out in the hallway, we may be able to resolve this one.

THE COURT: Okay. Why don't we take about a five, 10-minute recess. I want to move on, but, I mean, go ahead and see if you can — and, by the way, I don't know if there is anything else that you can resolve. I'm just going — we got the role in the offense. There is also an objection to the three level enhancement for, aggravating role enhancement, Mr. Hindmon is a manager or director. And then the final objection, I think that the factual inaccuracies, I don't

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**APPENDIX O**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	CR-1-18-11
MICHAEL CHATFIELD,	:	
Defendants.	:	

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Winchester, Tennessee  
July 23, 2020

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
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Chattanooga, Tennessee 37402

FOR THE DEFENDANT WILKERSON:

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ZACHARY R. WALDEN, of  
Eldridge & Blakney PC  
400 West Church Avenue, Suite 101  
Knoxville, Tennessee 37902

## JUDGMENT PROCEEDINGS

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that invokes a question, well, what was the fraud that was found. Right? So, what was in your — I should know, but you tell me what you think the fraud that the Court found was.

MR. ELDRIDGE: Well, with all respect, we, of course, disagree —

THE COURT: Of course.

MR. ELDRIDGE: — with the Court's conclusion.

THE COURT: By the way, and that's noted. You say it as many times as you want to, but I take it as an article of faith that Mr. Chatfield continues to vehemently take issue with the Court's verdict in the case.

MR. ELDRIDGE: Your Honor, to be very —

THE COURT: You don't know? Is that fair? You don't know what the Court —

MR. ELDRIDGE: In fairness, I think that's accurate.

THE COURT: Okay. Then that may be — that's fair, and that throws the burden back on me. I believe, and there were nuances in the verdict and so forth, but I believe that the overall fraud that the Court found, okay, and I should be and I'm in a pretty good position to know, was that given the way that this, I'm going to refer to it as the scheme, played out, there was, in fact, some duty on the part of the defendants in the case or at least, at least Mr. Chatfield and others who may have been convicted in

similar, to disclose to someone, either the insurance company or the patient or

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someone the cost of these creams, okay, that would be charged to the insurance company. And I feel further that there was probably some duty to disclose the relationship of that cost to be charged to the insurance company to the medical efficacy of the creams themselves.

Now, I'm not going to get into an argument with you what was the source of that duty because I would be the first to admit that the source was not as clear as I certainly would have liked, although, I felt comfortable finding beyond a reasonable doubt that it was a material fact that needed to be disclosed in this. So, that's, to me, the fraud, broadly stated, of which Mr. Chatfield was convicted. Okay? And you may have been able to, I mean, you know — well, I don't believe reasonable minds can differ, but my verdict is what it is .

So, I guess if that were the fraud, in other words, the failure to disclose a material fact, okay, the underlying failure to disclose a material fact, it only leaves a few options available to say, well, this claim did not have it. For instance, if it can be demonstrated that some of the, some of the claims against the insurance company which Mr. Chatfield caused to be submitted were not in fact for what I'm going to refer to the exorbitant prices that were, or if there is proof from, perhaps, an expert or someone that somehow the cost that was being charged to the insurance company was

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**APPENDIX P**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	CR-1-18-11
JERRY WAYNE WILKERSON,	:	
Defendants.	:	

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Winchester, Tennessee  
July 28, 2020

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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-and-

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10365 Hood Road South, Number 104  
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look, it's general health care fraud. And I understand from their position —

THE COURT: That I think you have just crystalized in my mind what to me as the trier of fact this whole trial was about. Because I will tell you that is the one thing that I pondered over more, most carefully I hope. I tried to be as careful as I can and most seriously. And it does — where is the fraud and where is the duty, and I have said this in another sentencing, at the end of the day, it would have been much better if the law had been clear about exactly where the duty was, but at the end of the day what I found is that there is somehow this overarching duty to disclose, you know, a material fact that may have a bearing on that. And that's what I decided that, what I've described as is the failure to disclose the extent to which the cost that were being charged was commensurate with any medical efficacy of the creams, that's what had to be disclosed.

Now, hey, I've admitted it, and I'll admit it for the fifth time, yes, it would certainly be better if the law were clearer about the source of that duty, but, see, what I've also said, I think that's the nature of fraud. What I've said at an earlier hearing, fraud, and, in particular, a conspiracy to commit a fraud is often times probably most of the time just in the eye of the

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beholder, okay? And as I said here, by the election of  
the parties, there was one beholder

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**APPENDIX Q**

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-versus-	:	
JERRY WAYNE WILKERSON,	:	CR-1-18-11
MICHAEL CHATFIELD, KASEY	:	
NICHOLSON, BILLY HINDMON	:	
and JAYSON MONTGOMERY,	:	
Defendants.	:	

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Chattanooga, Tennessee  
October 1, 2019

BEFORE: THE HONORABLE HARRY S.  
MATTICE, JR.,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER, and  
FRANKLIN PEARSON CLARK  
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-and-

SETH A. SCHWARTZ, of  
Schwartz Law Group  
10365 Hood Road South, Number 104  
Jacksonville, Florida 32257

BENCH TRIAL  
TESTIMONY OF JAMES GOGUE

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A We do.

Q Okay. And explain to the Court what happened in or around April of 2015 that changed.

A In April of 2015, in collusion with our PBM, Express Scripts, required pharmacies and the affiliated prescriber for each prescription to sign and put down the reasoning of why a compound drug would be issued. And so —

Q Is that called a prior authorization?

A You can call it that. And as well it's an attestation by the prescriber and the pharmacy that the compound drug prescription was medically necessary.

Q And that's what changed in April of 2015. Is that correct?

A Yes, sir.

Q This attestation?

A Yes.

Q And that was who — who required that; Tricare?

A Yes.

Q All right.

THE COURT: While you're reading that. Ms. Capetz, I may be the only one in here because I've got this robe on that thinks it's a little bit warm in here. Does anybody else think that — got to be careful when we crank up the AC now, we can quickly go below zero. But let's see if we can sort of try to get it a little bit more cool in here. Go ahead.

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who you represent.

BY MR. THOMAS:

Q I'm Mark Thomas. I represent defendant Wayne Wilkerson in this case.

A Morning, Mr. Thomas.

Q Mr. Gogue, you'll recall that Mr. Piper had asked you regarding any concerns that you might have regarding Tricare being a backward looking system. Correct?

A Yes.

Q That pays claims and then has the opportunity only later to investigate whether the payment of the claims was adequate or proper?

A Yes. In our industry, we call that pay and chase. And —

THE COURT: Call it what?

THE WITNESS: Pay and chase.

THE COURT: Pay and chase?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: The federal health care programs have a mandate given any extenuating circumstances, Tricare together with all of the other federal health care agencies are required to pay a claim within 30 days. And so, because of the exorbitant amount of claims that we receive on a daily, monthly basis, our mission up front is to pay those claims.

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MS. MAIO: 1,000 percent.

THE COURT: 1,000 percent.

BY MS. MAIO:

Q There are some drugs, I think, according to that GAO report, such as Gabapentin which saw a 5,000 percent from 2011 to 2014?

A Again, may I caveat your statement. That's with respect to ingredients —

Q Yes.

A — in a compound drug. Gabapentin or any other type drug in and of itself, if it were to be issued as an individual drug, the cost would be significantly lower, but because the federal programs don't have defined formularies for compound drugs, again, the only way that the federal programs will base their payments is on what is being dictated by the market as far as the submission of ingredient costs.

Q Okay. So, if the market is dictating a 1,000 percent increase or a 5,000 percent increase, Tricare is going to pay that increased cost —

A It was paying.

Q — for the compounded drug? It was prior to 2015?

A Yes.

Q Okay.

THE COURT: Ms. Maio, look, I apologize. Can you hold your train of thought about where you're going with this

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Tricare would continue to pay for compounded medications. Are you aware of that meeting?

A I have knowledge of the meeting.

Q Okay.

A Because that was at a very senior level. But my understanding of what transpired, and I believe it was a group of meetings, I believe that they were called town halls, but the agency together with the ESI and pharmacy representatives from around the nation met to discuss the fact that Tricare was about to implement this attestation form or some sort of control to bring about the control of the costs that were transpiring with compound drugs submissions. And even though the agency did not blatantly say it, what they were implying was, hey, we're going to make the industry, the pharmacy industry accountable by requiring all players, including prescribers, pharmacies, to attest to the fact that the claims that they were submitting for compound drugs were medically necessary.

Q Okay. Now, let me stop you there, because what my understanding, part of that meeting, part of what was discussed in January of 2015 was a

recognition that prior to that pharmacies were not being held accountable to the degree to which they should have been perhaps?

A That — I don't know the specifics of what was discussed —

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A No. The pharmacy is responsible for collecting the copays.

Q For collecting the copays?

A Yes.

Q Okay. That's their sole responsibility, the pharmacies?

A And to submit the claim and assure that as well the claim is correct and true.

Q Now, in terms of the cost of the medication, I know we talked a little bit about what can drive the cost higher, but I also want to be clear about to whom the cost of the medication is disclosed. Because my understanding is that the contracts between the pharmacies and the PBM expressly prohibit the pharmacies or any agent of the pharmacy from disclosing the cost of the medication to anyone?

A That's not my understanding. There is a mechanism in place for both federal health insurers as well as private insurers that provide what is called, I think I referenced it earlier, an explanation of benefits. So, there is full disclosure by the providers as to what they're providing and what they're charging that should be available to the beneficiary.

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Q     Okay. But in terms of the — and I think that you said you are, you are not familiar with the manual, the PBM manual. Did you testify to that on direct?

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