UNITED STATES DISTRICT COURT

IN THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER - NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., Plaintiffs, vs. ST. LUKE'S HEALTH SYSTEM, LTD., and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., Defendants.	Case No. 1:12-cv-00560-BLW Bench Trial **Witnesses:** **Christopher W. Roth** **Scott Huerd** **John R. Kaiser** **Steven W. Williams**
FEDERAL TRADE COMMISSION; STATE OF IDAHO, Plaintiffs, vs. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A., Defendants.	Case No. 1:13-cv-00116-BLW

*** * * SEALED * * ***

REPORTER'S TRANSCRIPT OF PROCEEDINGS

before B. Lynn Winmill, Chief District Judge

Held on October 11, 2013

Volume 13, Pages 2301 to 2539

Tamara I. Hohenleitner
Idaho Certified Shorthand Reporter No. 619
Registered Professional Reporter
Certified Realtime Reporter
Federal Certified Realtime Reporter

United States Courts, District of Idaho
550 West Fort Street, Boise, Idaho 83724 (208) 334-1500

A P P E A R A N C E S

FOR PLAINTIFFS SAINT ALPHONSUS MEDICAL CENTER-NAMPA, INC., SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.

Keely E. Duke
DUKE SCANLAN & HALL, PLLC
1087 W. River Street, Suite 300
Boise, ID 83707

David A. Ettinger
HONIGMAN MILLER SCHWARTZ AND COHN LLP
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226

FOR PLAINTIFF U.S. FEDERAL TRADE COMMISSION

Peter C. Herrick
U.S. FEDERAL TRADE COMMISSION
500 Pennsylvania Ave., N.W.
Washington, DC 20580

J. Thomas Greene
U.S. FEDERAL TRADE COMMISSION
600 Pennsylvania Ave N.W.
Washington, DC 20580

Henry Chao-Lon Su
U.S. FEDERAL TRADE COMMISSION
601 New Jersey Ave., N.W.
Washington, DC 20001

A P P E A R A N C E S (Continued)

FOR PLAINTIFF STATE OF IDAHO

Eric J. Wilson
GODFREY & KAHN, S.C.
One East Main Street
Suite 500
PO Box 2719
Madison, WI 53701

Brett T. DeLange
OFFICE OF ATTORNEY GENERAL, STATE OF IDAHO
954 W. Jefferson, 2nd Floor
Boise, ID 83720-0010

FOR PLAINTIFF TREASURE VALLEY HOSPITAL

Raymond D. Powers
POWERS TOLMAN FARLEY, PLLC
PO Box 9756
Boise, ID 83707

FOR DEFENDANTS ST. LUKE'S HEALTH SYSTEM, LTD. AND ST. LUKE'S REGIONAL MEDICAL CENTER, LTD.

Jack R. Bierig
Ben J. Keith
Scott Stein
SIDLEY AUSTIN
One South Dearborn
Chicago, IL 60603

J. Walter Sinclair
Charles Schafer
STOEL RIVES
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702

FOR DEFENDANT SALTZER MEDICAL GROUP

Brian Kenneth Julian
ANDERSON JULIAN & HULL, LLP
PO Box 7426
Boise, ID 83707

I N D E X

		PAGE:
	Courtroom open to the public.....	2306

PLAINTIFFS

W I T N E S S E S

		PAGE:
WILLIAMS, Steven W.		
	Direct Examination by Mr. Powers.....	**2471**
	Cross-Examination by Mr. Schafer.....	**2498**
	Redirect Examination by Mr. Powers.....	**2536**

DEFENSE ST. LUKE'S HEALTH SYSTEM

W I T N E S S E S

		PAGE:
HUERD, Steven S.		
	Direct Examination by Mr. Sinclair.....	**2349**
	Cross-Examination by Ms. Duke.....	**2362**
KAISER, John Rhyan		
	Direct Examination by Mr. Keith.....	**2366**
	Cross-Examination by Mr. Wilson.....	**2410**
	Cross-Examination by Mr. Ettinger.....	**2444**
	Redirect Examination by Mr. Keith.....	**2454**
	Recross Examination by Mr. Ettinger.....	**2469**
ROTH, Christopher W.		
	Cross-Examination by Mr. Ettinger.....	**2306**
	Redirect Examination by Mr. Schafer.....	**2337**
	Recross-Examination by Mr. Ettinger.....	**2344**
	Recross-Examination by Mr. Ettinger.....	**2344**
	Further Redirect Examination by Mr. Schafer...	**2347**

* * * * *

PLAINTIFFS

E X H I B I T S

		ADMITTED
1972	Letter from Eric Gonzaga and Bill Hopkins .. to Joni Stright re: Fair Market Value Analysis of Proposed Compensation Arrangements (PLTs' Dep. Ex. 054; SLHS0000001243-SLHS0000001256)	**2326**
1977	Letter from Eric Gonzaga and Bill Hopkins .. to Joni Stright re: Analysis of Proposed Compensation Arrangement-Saltzer Medical Group Family Practice Physician (PLTs' Dep. Ex. 331--SLHS0000003782--SLHS0000003808)	**2325**

DEFENDANTS

E X H I B I T S

		ADMITTED
2016	Email exchange between S. Jeffcoat and A. . Reimers re Dr. Beasley, Dr. Williams, and Dr. Curran (Def. Dep. Exh. 22; ALPH00015364)	**2527**
2020	Curran texts with Williams (Def. Dep. ..... Exh. 26; ARC 00335-42)	**2533**
2558	Email exchange re WISE network contract ... (SMG000297851-53)	**2529**
2639	Letter from M. Roach to Black Canyon ..... Family Medicine re request for proposal (Def. Dep. Exh. 73, ALPH00696750)	**2349**

* * * * *

PROCEEDINGS

October 11, 2013

*****COURTROOM OPEN TO THE PUBLIC*****

THE CLERK: The court will now hear Civil Case 12-560-S-BLW, Saint Alphonsus Medical Center Nampa, Inc., versus St. Luke's Health System for Day 13 of a bench trial.

THE COURT: Good morning, Counsel. My apologies for a late start. I had literally an emergency that had to be attended to before we started.

Mr. Roth, I'll remind you you are still under oath.

Mr. Ettinger, you may cross-examine the witness.

MR. ETTINGER: Thank you, Your Honor.

THE COURT: And let me thank you, sir, for agreeing to defer cross-examination for scheduling purposes.

MR. ETTINGER: Thank you, Your Honor. I can't claim it was exactly a hardship, but I appreciate it.

CHRISTOPHER WILLIAM ROTH,

having been previously duly sworn to tell the whole truth, testified as follows:

CROSS-EXAMINATION

BY MR. ETTINGER:

Q. Good morning, Mr. Roth.

A. Good morning.

Q. Do you recall yesterday that you said that the Saltzer transaction was not undertaken in order to gain

market power?

A. Yes.

Q. Isn't it the case that the Saltzer transaction was undertaken, at least in part, in order to gain market share?

A. How would you define "market share"?

Q. You don't know what market share means, Mr. Roth?

A. Well, I do. There are different definitions of market share.

Q. In order to have a greater share of primary care providers in the Nampa area.

A. No. That wasn't an intent of the integration with Saltzer. Market share -- my point about market share is there is Medicare market share. There is commercial market share. There is clinic market share. There is inpatient market share.

Q. Well, I'm kind of intrigued by your answer. Is there some definition of market share that was a purpose of the transaction?

A. No. There was no purpose of the transaction to gain market share.

Q. Let's go to -- Keely, if we could call up 1473. Your Honor, this is AEO, but I think I can do this without any --

THE COURT: Can we turn off the --

MR. ETTINGER: Well, the initial slides just

identify what the document is, so I think we can leave those, and then we'll see about the third slide.

BY MR. ETTINGER:

Q. 1473, Mr. Roth, can you see that okay?

A. Yes.

Q. Actually, Keely, could you go to the cover page of the document.

Is this a memo from Mr. Taylor, the CFO of St. Luke's, to you and others attaching revised slides?

A. Yes.

Q. And it says, "Saltzer PowerPoint"; is that right?

A. Yes.

Q. And now going to the second slide, Keely, if you could.

And were these revised slides a transaction update for the St. Luke's Treasure Valley board on the Saltzer transaction?

A. It says, "transaction update." I don't know if it was for the board.

Q. Who else would you have been updating with these slides?

A. I don't know. It just says, "transaction update."

MR. ETTINGER: Why don't we -- Keely, turn to page 6.

And, Your Honor, why don't we -- it's a little too

fast. Maybe we need to screen this unless the St. Luke's people say that there's not a need. I'm not sure it's all that sensitive, but it's their call.

MR. BIERIG: I think we better screen it. I'm not sure.

THE COURT: All right. Just to be safe, I'll leave it off. But, again, Counsel, as we discussed, you are reviewing these exhibits and will make a proffer to the court, and then I'll make a separate determination and make them publicly available if we determine any of these are truly not trade secret information.

BY MR. ETTINGER:

Q. Now, Mr. Roth, when presentations were made to the St. Luke's Treasure Valley board about the Saltzer transaction, like all your presentations, you tried to provide the most relevant information to the board; right?

A. Correct.

Q. And the slide that's on the screen, page 6 of Exhibit 1473, has figures for Nampa physician market share for, among others, Saltzer and the Mercy Group, and then Saltzer and the Mercy Group put together; correct?

A. The slide that's up now? It has -- it has the percentage of affiliated physicians by group and specialty.

Q. And those percentages involve a combination of the Saltzer numbers and the Mercy Group numbers; correct?

A. Yes. Yes.
Q. And the Mercy Group, of course, is the seven physicians who are now St. Luke's Family Medicine; correct?
A. Correct.
Q. And this document highlights, at the bottom, that Saltzer and Mercy Group physicians represent the majority of primary care and surgical providers in Nampa; correct?
A. Correct.
Q. This was certainly relevant information in the view of management in deciding whether to do the Saltzer transaction; correct?
A. It was relevant information. I can't say whether it was a -- a major factor in deciding whether to do the transaction. The reason we did the transaction was to accomplish our respective visions.
Q. Well, if this was in a PowerPoint presentation on the Saltzer transaction that Mr. Taylor and you were involved in, you thought it was relevant information to the decision; correct?
A. It is relevant information, yes.
Q. Okay. Now, isn't it true that you told Dr. Steve Williams -- let me back up.
You talked about your conversations with Dr. Williams on direct yesterday, did you not?
A. I did.

Q. And I'm going to ask you about that a few times. But first of all, you told Dr. Williams, did you not, that St. Luke's needed Saltzer to expand its market share in Nampa?
A. I don't recall saying that.
Q. You deny saying that?
A. I don't deny saying it. I don't recall saying it.
Q. Okay. And you also intended, you and your colleagues, that the Saltzer -- that acquiring Saltzer would help you to pressure payors; isn't that right?
A. Are you saying -- can you repeat? Can you repeat that?
Q. You and your colleagues and St. Luke's top management also intended that the Saltzer transaction would aid you to pressure payors, health plans; correct?
A. No, that's not correct.
Q. Why don't we put up Exhibit 1093, first the cover sheet, Keely.
The cover sheet I think we can show, Your Honor. After that, we may need to turn the screen off.
So is Exhibit 1093, Mr. Roth, notes that you prepared and sent to Mr. Taylor and Mr. Fletcher?
A. Well, what's on the screen is an email that says -- just a summary of the notes I had.
Q. Right. And that went from you to the CFO of the

St. Luke's Health System and the COO of the St. Luke's Health System; correct?
A. It went from me, as the chief operating officer, to our CFO and our chief executive officer at the time, Gary Fletcher.
Q. I'm sorry. At that point, Mr. Fletcher was CEO of Treasure Valley --
A. Correct.
Q. -- and later became CEO of the whole system; correct?
A. Correct. Actually, I need to correct that. It looks like it was December 29th, so I was the CEO at that time. So you're right.
Q. Okay. I don't claim to have the dates perfect, but that never hurts.
MR. ETTINGER: Why don't we go to the third page, Keely.
And, Your Honor, we better blank the screen on this.
THE COURT: Thank you.
BY MR. ETTINGER:
Q. And you see under No. 4, the second bullet you wrote, Mr. Roth?
A. Yes.
MR. STEIN: Do you have the whole document for the witness to look at?

MR. ETTINGER: Yeah, we do have a binder. I'm sorry. Your Honor, may we approach and give the witness the bind?
THE COURT: Yes.
THE WITNESS: There is another binder up here, too. I don't know if this is for me.
MR. ETTINGER: I don't think that's ours.
Your Honor, to avoid the AEO and clearing the court issues, I'm not going to read him the second bullet. I have asked him to look at it. I think the court has had a chance to look at it. I'm just going to move on.
THE COURT: Yes.
THE WITNESS: This didn't reference Saltzer, though.
BY MR. ETTINGER:
Q. But this was -- that second bullet was, indeed, a strategy that you were suggesting, as CEO of St. Luke's Treasure Valley, to the COO of the system and the CFO of the system; correct?
A. It was a strategy to partner with payors so that we could have more directed focus in the care and services that we provide.
MR. ETTINGER: Well, Your Honor, I need to now get into the words. If no one has objection, I'll just do it in the open courtroom.

THE COURT: Counsel?
MR. SCHAFER: I'm fine with that.
THE COURT: Go ahead and proceed.
MR. BIERIG: You can put this up.
MR. ETTINGER: Okay. Why don't we put it up.
BY MR. ETTINGER:
Q. So those words, "pressure payors for new directed agreements." Your interpretation of the word "pressure" when you use it, Mr. Roth, is partner?
A. Well, I wrote this, so I can interpret what I was thinking. Above that it says, "strategic increases on specific services," then "pressure payors for new and directed agreements." And we've had a long history of successes in children's and oncology and in spine center outcomes and improvements, and when I'm talking about this, I mean let's engage with the payors and, basically, demonstrate that we're providing superior outcomes and ask them, work with them, to direct patients to St. Luke's because we're providing a better service.
Q. So your --
A. That's what I meant.
Q. So your interpretation of the word "pressure," the ordinary, simple English word "pressure," is it means work with, persuade, convince; is that correct?
A. It can. Pressure can mean a lot of different

things.
Q. Ever look it up in the dictionary?
A. Can't say I have.
Q. Okay.
A. But if our patient satisfaction scores --
Q. You've answered my question. Thank you.
A. If our patient satisfaction scores --
MR. ETTINGER: Your Honor.
THE COURT: Just a moment. Let's put a question before the witness.
And, again, try to answer the question directly as best you can, and we'll rely upon counsel to give you a chance to explain.
Go ahead.
BY MR. ETTINGER:
Q. Now, you and your colleagues -- let's just stick to you. You told Saltzer, in substance, that St. Luke's would like to acquire Saltzer and then staff the new hospital, the new St. Luke's hospital in Nampa, with Saltzer doctors; correct? Yes or no, please.
A. Correct.
Q. Now, you described the progress of the Saltzer transaction on direct. In fact, isn't it the case that Saltzer rejected St. Luke's initial offer?
A. Initial offer? Do you have a date or a -- any

specifics?
Q. Sure. Why don't we put up Plaintiffs' Exhibit 1088 -- which I believe is not AEO, Your Honor.
1088 is a letter to you from Max Reiboldt of the Coker Group. Do you recall this letter?
A. Yes, I do.
Q. Mr. Reiboldt was the consultant working on behalf of Saltzer?
A. Yes.
Q. And he informed you that the Saltzer Group had taken a ballot and rejected the St. Luke's offer; isn't that right?
A. I believe that's correct. I -- I can't read the letter if that's supposed to be in here.
Q. You've got it in your binder if you want to take a look at it, if that helps?
A. Which exhibit is it again?
THE COURT: It's 1088, it looks like.
BY MR. ETTINGER:
Q. 1088.
THE COURT: It's now blown up, or at least the top of it is.
THE WITNESS: Yes, that's correct.
BY MR. ETTINGER:
Q. Going to the second page of the document, the

little box on top.
A. Yes.
Q. And that indicates that there were three reasons given by Saltzer doctors as to why they rejected the deal; isn't that right?
A. That's correct.
Q. And one of them was the economic terms of the current St. Luke's proposal are not sufficient; correct?
A. Correct.
Q. Why don't we go on to another topic, but still on Saltzer.
Now, you talked about the exclusivity provision of the professional services agreement with Saltzer on direct, did you not?
A. I did.
Q. Keely could we bring that up? It's Joint Exhibit 24, page 5. Actually Section 2.2(a) is on the bottom of page 5, top of page 6. We can start with bottom of page 5.
Do you recall this exclusivity provision as something that you addressed; correct?
A. Correct.
Q. And you said on direct -- and I looked at the transcript overnight -- that "exclusivity means dedication toward the group and St. Luke's." Is that your definition of exclusivity?

2318

A. Well, the definition of exclusivity is what's written here in 2.2, but I was using my words.
Q. Okay. Your words were "dedication toward the group and St. Luke's"; correct?
A. I believe that's what I said; correct.
Q. Okay. Why don't we go to 2. -- the second page, the rest of 2.2(a). And that refers to nonexclusive providers; isn't that right? In part? Do you see that bold language, "Non-Exclusive Providers"?
A. Yes.
Q. So my question is if exclusive providers are dedicated toward the group and St. Luke's, are nonexclusive providers not dedicated toward the group and St. Luke's?
A. They may not be 100 percent dedicated.
Q. So by "exclusive" you meant 100 percent dedicated; correct?
A. Relative to administrative leadership responsibilities, medical direction, as I referenced yesterday.
Q. Now, there's -- you said several things yesterday, but you also said "dedication toward the group and St. Luke's." Are you saying it only applies to administrative responsibilities?
A. Well, the definition is written here in 2.2, so I think it speaks for itself. We define "exclusivity."

2319

Q. The definition says -- let's look at 2.2(a). The second line -- first and second line, "Saltzer and Saltzer Physicians shall only provide Services and related administrative activities on behalf of St. Luke's"; correct?
A. Correct.
Q. And the requirement is that for services and related administrative activities, to use your words, the doctors have to be 100 percent dedicated to St. Luke's; correct? Those were your words a minute ago.
A. That's -- that's what I said, yes. The definition is here.
Q. Now, you talked about -- let's talk some more about your discussions with Dr. Williams. You said yesterday that you told Dr. Williams that you needed the surgeons to cover the new Nampa hospital; correct?
A. Correct.
Q. And by "cover" you mean do the surgeries that are needed at the new Nampa hospital; correct?
A. I mean beyond the medical staff of the new hospital.
Q. Now, wait a minute. Let's take a look at this testimony. Page -- I think we can put it up on the ELMO, page 2248.
THE COURT: This is Mr. Roth's testimony from yesterday?

2320

MR. ETTINGER: Yes, Your Honor.
MS. DUKE: Your Honor, can we switch over to the --
THE COURT: Yes. Ms. Gearhart.
BY MR. ETTINGER:
Q. You said, "In the event that they couldn't cover it, we needed to be able to have the option to recruit physicians that could cover it."
A. Yes.
Q. Are you saying that you thought they would resign from the medical staff? That was your concern?
A. No. What I mean is we need a medical staff to support a hospital. Surgeons need to meet beyond the medical staff to support the hospital, and they have to work in the hospital in order to be on the medical staff. We anticipate having a separate medical staff in that facility.
Q. And so by "support the hospital," by "cover the hospital," you meant perform the surgeries needed at the hospital; correct?
A. Any physician on a medical staff needs to -- needs to --
Q. Please answer my question "yes" or "no."
A. Correct. Correct. Thank you.
Q. And you told Dr. Williams, did you not -- I think that covers it -- you told Dr. Williams, did you not, that

2321

St. Luke's expected that the surgeons commit to the new Nampa facility; correct?
A. Yes.
Q. And you told him, in fact, that you needed a commitment of full volume to that facility; isn't that right?
A. I don't recall saying that.
Q. You don't deny saying that, do you?
A. It wouldn't make sense for me to make a comment like that. He practiced at Treasure Valley Hospital in Meridian at the time.
Q. So you do deny it? You deny saying that you needed a full-volume commitment out of the surgeons at the new facility?
A. I can't deny it, but it makes no sense that I would ever make a comment like that.
Q. In fact, in your deposition you said you do not deny it; correct?
A. I -- I don't know what -- I'd need to see my deposition.
MR. ETTINGER: Keely, let's play Roth cross 28. Your Honor, this is page 193, lines 4 through 25, from Mr. Roth's deposition.
THE COURT: I don't recall if we published the deposition previously.

2322

MS. DUKE: We did.
THE COURT: If not, please provide the original at the conclusion, and we'll publish it at that time.
Go ahead and proceed.
(Video clip played as follows:)
Q. "Do you recall saying that, you know, you would need full-volume commitment out of the surgeons at the new facility?
A. "No, I don't recall talking about full-volume commitment.
Q. "Do you deny saying that?
A. "I don't deny saying it. I don't recall saying that we would need full-volume commitment. I was very clear to Steve Williams and consistently with other surgeons if they want to continue to remain invested in Treasure Valley Hospital, they have every right to do that.
"And -- but at the same time, we have plans and we intend to build services in Nampa, inpatient services, surgical services. And as time passes, I predicted that it would be more difficult for them to commit and serve a growing facility and also Treasure Valley Hospital.

2323

"Now, Dr. Williams disagreed with me. We had a philosophical disagreement on how that future may play out. But that was -- we had a very -- very lengthy discussion around that."
(Video clip concluded.)
BY MR. ETTINGER:
Q. Was that your testimony, Mr. Roth?
A. Yes.
Q. Now, you also discussed yesterday on direct compensation for the Saltzer physicians. Isn't it true that the family practice, internal medicine, and pediatric physicians received 30 to 40 percent increases in compensation?
A. I don't know if that was the exact percentage, but it was an increase.
Q. Was that the approximate percentage, 30 to 40 percent?
A. I don't know for sure, but it -- it sounds reasonable.
Q. And you had consultants from Grant Thornton who evaluated these proposals for fair market value; correct?
A. We -- we had consultants. I don't know if it was Grant Thornton or --
Q. They found that these proposals for the primary care physicians were above market norms; correct?

2324

A. I don't recall that.
Q. Did you receive the -- the fair market valuations by Grant Thornton, yourself?
A. I -- I don't remember if they were from Grant Thornton. We had a valuation performed for the group that I know I've seen.
Q. Well, why don't we go through them, then.
I don't believe they're AEO. Why don't we put up 1977.
MR. SCHAFER: I think they're probably --
MR. ETTINGER: You think they are? Okay.
MR. SCHAFER: I mean, identify the document so we can -- yeah, they are.
THE COURT: They are?
MR. SCHAFER: Yes.
THE COURT: I'll turn off the monitor to start with and then see. If we need to clear the courtroom, we'll do so.
BY MR. ETTINGER:
Q. So why don't we -- the first page -- I'm just going to do the first page first, Your Honor. It's just the cover page. I don't think that's a problem, but however you want to do it.
So this is the Grant Thornton evaluation of fair market value for the Saltzer family practice physicians; is that correct?

2325

THE COURT: This is just the cover page that you think is not AEO?
MR. ETTINGER: Right. I'm just using this to identify it, Your Honor.
THE COURT: And the exhibit number is 1977?
MR. ETTINGER: 1977.
THE COURT: Counsel, there was an objection that it was untimely. Is that withdrawn?
MR. SCHAFER: Yes, Your Honor.
THE COURT: All right. So the exhibit will be admitted.
(Plaintiffs' Exhibit No. 1977 admitted.)
THE COURT: Proceed.
BY MR. ETTINGER:
Q. So Mr. Roth, have you seen this evaluation by Grant Thornton of the compensation for offers for the family practice physicians?
A. I don't remember seeing this. I was confused because I think we had KPMG do the valuation on the whole group. I don't recall seeing a specific valuation for just this group of physicians. I may have. I just don't recall.
Q. Since you talked about compensation today, why don't we look at one more page.
And this one I guess we better cover the screen on, Your Honor. And that's page 10 of the document.

Are you there, Mr. Roth?
A. Yes, page 10.
Q. Do you see in the third paragraph the reference to the average increase in compensation?
A. Yes.
Q. And you see that Grant Thornton said this is above the typical market norms?
A. Yes. It says, "but is warranted in this case."
Q. So let's go on to Exhibit 1269. Actually, I'm sorry. Let's go on to Exhibit 1972.
Again, I think we can put the first page, Your Honor, on the screen, and then we'll go to the page in question.
So it was 1972. Tell me when you're there, Mr. Roth.
A. Is that one supposed to be in my book?
Q. I certainly hope so. It's not?
THE COURT: Let me also, again, there was an untimely objection. Is that withdrawn?
MR. SCHAFER: Yes, Your Honor.
THE COURT: 1972 will be admitted.
(Plaintiffs' Exhibit No. 1972 admitted.)
THE WITNESS: I don't see it tabbed here in the book. There's a --
BY MR. ETTINGER:
Q. If you could look at the screen, and if you have a problem, we'll try to get you one quickly. Does this appear

to be the Grant Thornton evaluation for the Saltzer internal medicine physicians compensation offer?
A. This is a cover letter that's on the screen --
Q. Right.
A. -- that's blown up.
Q. With regard to the internal medicine physicians?
A. Yes.
Q. And why don't we go to page 7, and we ought to keep this one off the screen, Your Honor.
And you see there that the increase is in the -- the proposed increase is in the range that we discussed earlier? The 30 to 40 percent?
A. Yes. And it says it's justified.
Q. We'll get to that. And it says it's above typical market norms; correct?
A. Yes.
MS. DUKE: Your Honor, we have a full copy if the witness would like that.
THE COURT: Are you comfortable using this or would you prefer the full copy?
THE WITNESS: If we're almost done, I don't need it.
MR. ETTINGER: We're almost done.
THE COURT: All right.
BY MR. ETTINGER:

Q. It says it's justified, and then it lists some reasons why it's justified; isn't that right?
A. I have three bullet points. If there are more, I do need the document.
Q. I'm just going to ask you about the first one. I think the next page is not bullet points, but, you know, if you want to see it, of course, we can show it to you.
The first bullet point, the first justification is that rates are going to go up after the deal; correct?
A. It says "physician charge rates," yes. It says "being adjusted." It doesn't say "going up."
Q. Well, if this is -- if this is a justification for raising the physician compensation, simple math would suggest that the rates have to go up in order to justify paying out more money; isn't that right?
A. That's not what it says here.
Q. It says "adjusted"; right?
A. It says "adjusted"; it doesn't say "up."
Q. Well, Mr. Roth, as a matter of simple math, isn't it true that if you want to pay out more and you think that the money coming in is going to justify it, logic suggests you're going to get more in in order to justify paying more out; correct?
A. It may, but we're relying on the -- this is a Grant Thornton work. They just say "adjusted."

Q. It does say, "results in a corresponding increase in the rates collected," doesn't it?
A. It does.
Q. So it's pretty clear we're talking about an increase; right?
A. It would seem that way. It just says "adjusted," though.
Q. And the rest of the sentence says "increased," doesn't it?
A. Yes.
Q. Okay. Let's go to one more of these documents. Why don't we put up 1269.
And, again, the cover page I think can be on the screen, Your Honor.
And this is the Grant Thornton offer with regard to the orthopedic surgeons, is it not?
A. That's correct. Cover letter.
Q. I'm sorry. This is the Grant Thornton evaluation with regard to the offer to the orthopedic surgeons; correct?
A. Yeah. It's analysis of their proposed compensation.
Q. Okay. And why don't we go to page 9, which I think we probably want to blank out, Your Honor.
And the second bullet point on page 9 says that "the

2330

proposed increases for the surgeons are below market norms"; correct?

A. Correct.

Q. That's all I've got on that.

Now, do you recall a conversation about the specialists at Saltzer with Dr. Buersmeyer?

A. Do I recall a specific conversation.

Q. Yeah, that you had with Dr. Buersmeyer.

A. Individually or?

Q. Right, right.

A. I don't recall meeting with Dr. Buersmeyer individually.

Q. Actually, I'm sorry. Do you recall a conference call with the negotiating team members that included Dr. Buersmeyer, at least one?

A. I don't recall a conference call. We had a lot of meetings. I don't remember any being over the phone, but they may have.

Q. Okay. Do you recall Dr. Buersmeyer saying, "We could lose all of our specialists over this deal if we're not careful"?

A. I don't recall her saying that.

Q. Do you recall words to that effect?

A. No.

Q. Do you recall telling her in response, "That would

2331

be just fine with us"?

A. I don't recall saying that, but it's not inconsistent with what I've said regarding physicians that don't want to stay with the group or work with us.

Q. Now, you were asked questions about referrals policy generally as relating to Saltzer, and I want to show you one document that I believe is not AEO. It's 1094. I'm raising it in case anyone in the St. Luke's group wants to tell me I got this one wrong before we put it up.

THE COURT: I can darken the screen if you want.

MR. SCHAFER: That's fine. It's not AEO.

MR. ETTINGER: Great. So let's put up 1094.

BY MR. ETTINGER:

Q. And this is some emails, an email from you to John Kee and Greg Orr responding ultimately to an email from Greg Orr; isn't that right?

A. That's right.

Q. And Greg Orr worked in physician services at that time, did he not?

A. He did.

Q. And Greg Orr was talking about how to handle referrals for imaging cases from the employed Ortho Joint Orthopedic Committee group; correct?

A. "How to handle"?

Q. This was the Intermountain Orthopaedics group

2332

employed by St. Luke's; correct?

A. Correct.

Q. Well, let's just go to the last bullet, and we don't need to worry about my characterization. Mr. Orr said there, did he not, that the group "approved changes to their imaging order screens that eliminates the ability to easily choose from several imaging centers."

Do you see that?

A. Yes. This was the result of our work to improve service for those physicians.

Q. And he says, "The only options will be 'St. Luke's' and 'Others.'" Did I read that correctly?

A. Yes.

Q. And he says, "The 'other' category requires manual entry and a stated reason for the outside referral." Did I read that correctly?

A. That's correct.

Q. And you said Mr. Kee said "great work," didn't he?

A. He did.

Q. And you were slightly more reserved. You said, "Thanks. Good work," didn't you?

A. Yes. It was a culmination of a lot of work to get to the point to improve our services.

Q. Thank you. You answered my question.

Let's move on to just a couple quick topics. You

2333

mentioned West Valley on direct. You've used the phrase "coopetitian" to describe the relationship between St. Luke's and West Valley; isn't that right?

A. I believed I used the phrase coopetitian in my deposition.

Q. You used the term in your deposition; correct?

A. Yes. Yes, I used it.

Q. Combination of half cooperation half competition; correct?

A. I didn't say half and half.

Q. Now, you're not aware of any initiatives St. Luke's has undertaken to take business away from West Valley, are you?

A. I'm not aware of any initiatives we have that specifically designed to take business away from anybody. We don't -- we don't measure -- we don't measure that as an outcome. But we compete and we cooperate.

Q. Now, we talked about clinical alignment on direct?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. And there is a group called Women's Health Associates, an independent group?

A. Yes.

Q. Another one called -- I think you called it "OGA"

in your deposition?
A. That's another OB group, yes.
Q. And these are independent groups that, in your view, are as clinically aligned with St. Luke's as its employed groups except for the fact that as of now they're not participating in Epic; correct?
A. Yes. They're not as clinically aligned now.
Q. And the only way in which they're not as clinically aligned now is participation in Epic; correct?
A. I think that's fair, yes.
Q. And when the affiliate EMR program is up and running, they will be as clinically aligned as St. Luke's employed groups; correct?
A. They could be. They may not be as strategically or financially aligned, but clinically, yes, they will be getting closer.
Q. Well, they will be as clinically aligned as the employed groups; correct?
A. Yeah, they should be.
Q. And has Women's Health already indicated they want to participate in the affiliate EMR program?
A. Yes.
Q. And by the way, the Epic -- Epic today is not up on the inpatient side for St. Luke's, is it?
A. It's not yet.

Q. Is there a date set for when it will be up on the inpatient side?
A. We're targeting one year to start the implementation, and it's -- I don't recall the specific date, if it's 2015 time frame. I just don't recall the date when we will go live, but we're actively working on it today.
Q. So is it the case that today, on the inpatient side, St. Luke's is still using paper records?
A. No. We have a combination of records throughout the health system that's somewhat fragmented, which is why we need to get on a consistent system. It's not all paper.
Q. How much of it is paper, would you say, on the inpatient side?
A. The critical -- a couple of the critical care units are on paper. Everything else is on electronics, some form of electronic documentation system.
Q. What are the systems?
A. We have Centricity -- and I'm talking Treasure Valley right now -- we have Centricity system for OB. We have Soarian system for most other areas. We've got electronic medication management. We've got electronic radiology systems. We've got electronic laboratory systems. We've got electronic health record in the emergency department and in the cancer program. We have paper in some

of our critical care units -- I think I may have mentioned that. They are all kind of different systems that need to try to communicate with one another, which is why we are moving to a single common system that can integrate with the physician practices.
Q. Now, critical care, you said, is a paper record?
A. Yes.
Q. That's where Dr. Souza, who was here the other day, practices?
A. Yes. He practices on electronic health record in his clinic, and he practices --
Q. On the inpatient side, which was my question, where Dr. Souza practices, it's a paper record?
A. Yes.
Q. Would you call that a "horse-and-buggy system"?
A. No, I wouldn't call it that.
Q. Okay. Let me ask you a little bit about compensation. Isn't it true that more than 80 percent of the physicians in St. Luke's clinics are today compensated based on wRVUs, productivity?
A. I don't know the exact percentage, but I think it's fair to say it would be more than 80 percent.
Q. And under that system, the more patients the doctor sees, the more work the doctor performs, the more the doctor gets paid?

A. Yes. That's the world of healthcare reimbursement in this country.
Q. And you mentioned on direct that in Saltzer's case, it's 100 percent based on wRVUs as of today; correct?
A. It is today, as it has been in the past.
Q. And as of today, there is no -- while there is an aspiration to try to work out some quality measures, there is nothing specific that's been agreed to with Saltzer; correct?
A. Correct. We have been kind of standing still for the last many months, so correct.
Q. Now -- and you don't know of any contracts with physicians at St. Luke's that are either in place or even being developed that compensates physicians primarily based on quality outcomes or utilization; correct?
A. "Primarily" meaning more than 50 percent?
Q. Right.
A. No, I'm not aware of any.
MR. ETTINGER: Thank you very much.
THE COURT: Mr. Schafer, redirect.
MR. SCHAFER: Thank you, Your Honor.
REDIRECT EXAMINATION
BY MR. SCHAFER:
Q. Mr. Roth, plaintiffs' counsel asked you some questions regarding market share and whether the purpose of

2338

the Saltzer transaction was to increase market share. Do you remember those questions?

A. Yes.

Q. And I think you testified yesterday that one of the goals of St. Luke's transaction with Saltzer was to increase St. Luke's presence in Canyon County; is that right?

A. That's right.

Q. And would increasing St. Luke's presence in Canyon County result in what Mr. Ettinger termed a "market share increase" there?

A. It could.

Q. But was that St. Luke's goal in entering the transaction with Saltzer to increase market share for market share's sake?

A. No, it wasn't. And I'll just elaborate that in the state of Idaho when we talk about market share, we have publicly available data for market share for Medicare inpatient discharges. That's a sliver of healthcare. We have no meaningful market share for all the other services provided.

Q. Mr. Ettinger also asked you some questions about a comment in a document where there was a phrase "pressure payors." Do you remember that document?

A. I do.

2339

Q. I think plaintiffs' counsel's original question to you said -- implied that that had something to do with the Saltzer transaction. And I think you were trying to answer, but can you elaborate on whether or not that document had anything to do with the Saltzer transaction?

A. It had nothing to do with the Saltzer transaction. I was talking about what was -- what we were seeing globally. And I was trying to elaborate relative to pressure; for example, if our patient satisfaction scores go down, I feel pressure to improve them. That's not a bad thing. But pressure comes in many forms.

Q. And the statement that was shown to you, I believe it said, "pressure payors to enter new directed contracts"; correct?

A. Correct.

Q. What did that mean, "new" and "directed contracts"?

A. Well, I'll use our spine center as an example. If we can demonstrate that we have lower costs, better outcomes, then the payors, employers, others should want to partner with us and work with us to essentially direct patients to that service that's delivering lowering costs and better outcomes.

Q. And that document didn't say anything about pressuring payors to increase reimbursement rates, did it?

2340

A. No.

Q. Plaintiffs' counsel also asked you some questions regarding whether or not St. Luke's goal with respect to the Saltzer transaction and a proposed hospital at some point in the future in Nampa would be to have the Saltzer physicians staff that facility; is that correct?

A. That's correct.

Q. By staffing that facility, was it your expectation that St. Luke's -- or that Saltzer physicians wouldn't be able to be on staff at any other facility, like Saint Alphonsus Nampa?

A. Not at all, and I think it's demonstrated in the fact that we said you can continue to have an investment in Treasure Valley Hospital, work in Treasure Valley Hospital, work at the Meridian facility, work wherever, but we needed physicians that would be on staff and that would cover that facility.

Q. You were also asked some questions about two documents that I would like to pull back up, if possible.

The first document you were asked about -- and, Judge, I think we might need to blank the screen for this one. This is one of the AEO documents.

I believe it was page 10 of this document, Exhibit 1977.

A. Okay.

2341

Q. You were asked about the phrase, in the third paragraph on this page, "this is above typical market norms." Tellingly, the question stopped with that portion of the sentence. Would you read the rest of that paragraph?

A. "This is above the typical market norms, but is warranted in this case as the compensation model results in reasonable compensation, and is in line with the compensation model offered to other St. Luke's Health System family practice physicians."

Q. And with respect to that issue, isn't that -- did you discuss that issue yesterday with respect to the equity of physician salaries across the Treasure Valley?

A. Yes, that's what I was referencing.

Q. If you could pull up Exhibit 1972.

It's another document you were asked about.

And page 7 of this document.

Down at the bottom of the page you were asked about a sentence here: "Saltzer physician charge rates are being adjusted to the SLHS rate which results in corresponding increase in the rates collected." Do you remember looking at that sentence?

A. Yes.

Q. Mr. Roth, are you aware that as part of the proposed transaction with Saltzer part of the plan would be to provider-base bill Saltzer's services for Medicare

purposes?
A. Yes.
Q. And would provider-based billing those services result in increased collection from Medicare?
A. Increased collection, but not necessarily any change in charges.
Q. You were also asked some questions regarding an email that referenced an Intermountain Imaging issue.
A. Yes.
Q. And I believe you were starting to say, and you were cut off, that -- that that email and what's reflected in that email was the result of a lot of hard work. Could you elaborate on what you meant by that?
A. Yeah. I remember a physician, Dr. Howard King, coming to me on at least one occasion, it may have been in a larger meeting, and said that -- he expressed dissatisfaction with our imaging service and his ability or inability to get paid --
MR. ETTINGER: Your Honor, hearsay.
THE COURT: Sustained.
BY MR. SCHAFER:
Q. Mr. Roth, did you have an understanding from Intermountain that Intermountain was sending its imaging studies to some other facility?
MR. ETTINGER: Your Honor, this is asking for the

same hearsay with the word "understanding" grafted in the front of it.
MR. SCHAFER: Your Honor, if I may, Mr. Ettinger was asking what Mr. Roth's view in this document, as far as what he meant by "good work" in response to a series of emails.
THE COURT: I'll allow the witness to indicate the meaning -- how -- where he derived that from. Just referring to the source of the information, limited in that fashion. Although it's probably still hearsay, it's probably necessary to allow the witness to explain a subject matter that was covered on cross.
You may answer.
THE WITNESS: A physician told me directly that he was not satisfied with our service. I asked our teams to work with the physicians to figure out how to improve our service. Over a course of time, we improved our service, and the outcome was that the physicians felt comfortable enough sending their studies to St. Luke's imaging because we were successful in improving that.
BY MR. SCHAFER:
Q. Did you or, to your knowledge, anybody else at St. Luke's ever tell Intermountain that they couldn't send their imaging studies anywhere other than St. Luke's facility?

A. No.
MR. SCHAFER: No further questions.
THE COURT: Redirect -- I mean, recross.
MR. ETTINGER: Yes, Your Honor, briefly.
RECROSS-EXAMINATION
BY MR. ETTINGER:
Q. So, first of all, very briefly, Mr. Roth, on Exhibit 1473, the market share figures on page 9 -- I'm not sure we need to put them up, and, of course, we blanked the screen for this anyhow.
These are not Medicare numbers. Somebody had to go out and count physicians to come up with share figures; correct? Isn't that correct?
A. I think that would be -- that would be correct, percentage of affiliated physicians.
Q. Okay. Now, Mr. Schafer asked you about the "pressure payors" phrase. Let me just -- yes or no, I want to understand your definition of pressure is demonstrate lower costs and better outcomes; is that correct? Yes or no?
A. That's not my full definition of pressure.
Q. Is that what you meant by pressure in this document?
A. That's what I meant when I wrote that in this document, yes.

Q. Okay. And did you testify a minute ago that that phrase had nothing to do with price increases? That's what I thought I heard you say in response to Mr. Schafer's question; is that right?
A. That the phrase had nothing to do with price increases?
Q. Right.
A. I think his question was: Is the intent of that to pressure payors to increase prices? I don't recall his specific question.
Q. And your answer was "no"?
A. Yeah. I said no to his question. I don't recall exactly what his question was.
Q. Let's go back to the document and see if we can help you.
1093, the third page, which I think we need to keep the screen blank on. You see the heading under which the phrase "pressure payors" is placed?
A. Yes.
Q. And the heading says "price increase," does it not?
A. Yes.
Q. Okay. Now, two other quick things. Do you know whether St. Luke's other family practice physicians outside of Saltzer are also paid above market norms?

A. I don't know.

Q. Okay. Why don't we go real quickly to Plaintiffs' Exhibit 1977 again, page 10. I think this needs to be blanked.

Do you see that same paragraph that Mr. Schafer and I have asked you about? Let's go back to that, the third paragraph on page 10. And you see the last sentence provides a further reason why Grant Thornton thought that the competition increases were justified; correct?

A. Do you want me to read it or -- what's your question?

Q. Well, I just -- given the page is blank, I'm trying to avoid an improper disclosure. But is it fair to say -- we can all read it, those of us who have it -- that one of the reasons why Grant Thornton thought that the compensation was reasonable though above market norms was its characterization of the substantial business case for acquiring Saltzer that it provides in that last sentence?

A. It says that we have a substantial business case, yes.

Q. For the reasons in that sentence; correct?

A. The sentence speaks for itself. I don't know if it -- it says "also has."

Q. Now, finally, Mr. Schafer asked you about imaging, and I want to call up that document again very quickly.

We'll see if Keely is better than me, because I'm forgetting the exhibit number. The reference to the imaging screens.

Let me just ask you: If it were the case that St. Luke's -- that what Mr. Orr really did was improve service in imaging so that the physicians were satisfied, isn't it true that there would have been no need to eliminate the ability to easily choose other people on the electronic system?

A. I can't say that or not.

Q. Why would there have been a need to eliminate that choice?

A. I don't know.

MR. ETTINGER: No further questions. Thank you.

THE COURT: Anything else, Mr. Schafer?

MR. SCHAFER: Just one question.

THE COURT: One question.

FURTHER REDIRECT EXAMINATION

BY MR. SCHAFER:

Q. If you can blow up that same paragraph, that would be great.

I just want to clarify one thing from plaintiff counsel's questions, Mr. Roth. Plaintiffs' counsel asked you questions seemingly stating that -- that this opinion states that compensation was above market norms. Could you

read the first two sentences?

A. First two sentences of the blocked? Starting with --

Q. Does this -- do these sentences relate to compensation being above market norms or do these sentences relate to the increase being above market norms?

A. It starts out "the increases," so it references the increase.

MR. SCHAFER: Thank you. No further questions.

THE COURT: Anything else, Counsel? Mr. Ettinger?

MR. ETTINGER: No, Your Honor. We can save it for findings later.

THE COURT: All right. Mr. Roth, you may step down. Thank you, sir.

Call your next witness, Mr. Sinclair.

MR. SINCLAIR: Call Dr. Huerd.

THE COURT: Dr. Huerd, would you please step before the clerk here -- you will have to step over that cord -- I think this is the fall test that we were --

STEVEN SCOTT HUERD,

having been first duly sworn to tell the whole truth, testified as follows:

THE CLERK: Please take a seat in the witness stand.

MR. SINCLAIR: Your Honor, while he is approaching

the witness stand, yesterday we used Exhibit 2639, and we played the Roach video clip, and I cleared with plaintiffs' counsel, they have no objection, so we would move its admission at this point in time. 2639.

THE COURT: Is that correct, Counsel? No objection?

MS. DUKE: Yes, Your Honor.

THE COURT: All right. 2639 will be admitted.

(Defendants' Exhibit No. 2639 admitted.)

THE CLERK: Please state your complete name and spell your name for the record.

THE WITNESS: Steven Scott Huerd, S-T-E-V-E-N S-C-O-T-T H-U-E-R-D.

THE COURT: You may inquire, Mr. Sinclair.

MR. SINCLAIR: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SINCLAIR:

Q. Good morning, Dr. Huerd.

A. Good morning.

Q. Where you currently employed?

A. St. Luke's.

Q. What is your area of medical specialty?

A. Cardiothoracic surgery.

Q. Would you explain your educational background?

A. I finished medical school at the University of

2350

Washington in Seattle in '95. I then went to the University of Colorado in Denver from '95 to 2000 and completed my general surgical training and then went on for fellowship to specialize in cardiothoracic surgery at the University of Minnesota from 2000 to 2003, and my wife and I came in July of '03 to Boise.

Q. From the time you came to Boise, what have you been doing?

A. I've been in practice with Cardiothoracic & Vascular Associates since July of 2003 and then in 2010 became employed with St. Luke's.

Q. And how many doctors were in -- is it commonly referred to as "CVA"?

A. CVA. We didn't intentionally make it sound like a stroke, but that's how it landed when we named our practice. But there were eight physicians when I arrived, one has retired, Dr. Olson, and there are eight physicians currently.

Q. Okay. How did the discussions regarding a potential affiliation between your group and St. Luke's originate?

A. Well, it took many months of group-based discussions to make the decision, but --

Q. What caused you to even discuss it, though? How did it come about?

2351

A. Well, approximately 12 to 15 months prior to our discussion with the hospital or our transition to the hospital, we came across an advertisement for a vascular surgeon at Saint Al's in the *Journal of Vascular Surgery*, which is a common place for vascular surgeons to submit recruitment ads. It was discovered by one of our PAs in our practice, delivered to my vascular partners, who then during one of our Monday night group practice meetings showed us the ad, which began a discussion about what that impact would have upon our practice over time.

Q. At that point in time, you were an independent medical group; correct?

A. Yes. We all had privileges equally at both Saint Alphonsus and St. Luke's and practiced at both facilities regularly. I would say that I covered 30 percent of my practice at Saint Al's and approximately 70 percent at St. Luke's. We all had slightly different ratios of that practice, based upon our direct referrals.

Q. Okay. When this -- when this ad came to your attention, why did that cause you concern?

A. Well, it didn't cause me personally a tremendous concern because I'm a cardiac surgeon and it didn't have a direct impact, but I have partners who are vascular surgeons. This was their competition. We were upset, as a group, because we were unaware it was happening. We did not

2352

like the idea that vascular surgeons were being recruited, and we didn't really know about it. We didn't find that to be professionally appropriate for us.

Q. So Saint Al's had not come to you and told you in advance that they intended to do this?

A. No. One of my partners, Dr. Masser, called our -- one of his associates, Dr. Simmons, and asked about it. And Dr. Simmons then notified us shortly after we noticed the ad that he had become employed in the last two to three months, unbeknownst to us, and that ad was to seek his future partner.

Q. How did the discussions within CVA develop after you became aware of that?

A. Well, that was the time when my vascular partners began to challenge all of us regarding the future of our practice, the future of recruitment at Saint Al's, and the impact of that recruitment upon our practice. They were making the point that they felt that their call dynamic and coverage dynamic and practice dynamic was changing abruptly with recruitment. They challenged us that that could happen for us at any moment, unbeknownst to us, and it was upsetting because they had a call relationship with both hospitals, and they felt that it would be more appropriate to have discussed it.

Q. So in the discussions that ensued, were there

2353

other actors that you considered in deciding whether or not to affiliate with one of the hospitals?

A. Well, I think there were multiple factors. I think that as a group and running a practice for the last eight or nine years and doing all the details of running it, we constantly commented on many things, the nature of our reimbursement, our patient profiles, the impact of healthcare changes as we could forecast it in the future, the costs and inconveniences, at times, of running a practice. It was challenging having 25 to 30 employees and satisfying their needs. We also thought of the politics of hospitals that are recruiting our competition, the effect of our practice value, per se, if our competition arrives with or without our knowledge.

There was also a lot of the discussion in the personal. As a surgeon doing cardiac surgery, I was on call every third night. I was covering two health systems, two emergency rooms, and working hundred-hour weeks, which was very similar to my residency training, eight years -- seven, eight years out. And there was a lot of personal reasons for -- it wasn't just about economics. It wasn't just about politics. What played a role -- we were all in a similar age group. We all -- some of us had young children. We had lifestyles we weren't that happy with. And so all of that played a role in our discussions as a practice.

2354

Q. So what was -- what happened after you had these discussions?

A. Well, after -- after probably, I would guesstimate, two to four months of internal debate, formal debates at our meetings, informal debates in our locker room, hallways, you name it, eventually, after everybody had a chance to debate and say their piece -- we are a one-man/one-vote practice, and we put it to a vote, and there were four vascular surgeons, three cardiac surgeons, and we had a majority vote to enter a discussion with St. Luke's.

Q. So who approached whom in regards to an official affiliation?

A. We approached St. Luke's. Our group tasked two of us, one vascular surgeon and one cardiac surgeon, myself, asked us to go over and start the conversation.

Q. So once you had made that decision, did you advise Saint Al's?

A. I didn't formally, but I know that my -- one of my vascular partners, one of my cardiac surgical partners discussed it with one of their vice presidents and let her know that we were starting the conversation. And then I think it very rapidly got out that the conversation had started. I know that the cardiologists were well aware of the situation probably within two weeks of the time we

2355

formally approached the hospital.

Q. Did you sit down with the hospital and discuss call coverage while you were going through this process and later affiliating?

A. Absolutely. I mean, during our initial experience with Gary Fletcher, who we approached personally about the conversation, we made it very clear that our practice dynamic would be unchanged and our call coverage would, for the time being, stay as it was. And our policy within our group at all times was to operate on patients where they preferred to be operated on, number one, and number two where their workup occurred. So we did not ever stray from that, and we planned to cover the hospital, callwise, for professional reasons, as long as needed, until they had surgeons that were credentialed and on staff ready to fill in.

Q. Did you offer to assist in recruiting surgeons for Saint Al's?

A. We did. We did. It was an informal discussion, but at the same time, we -- we as a group have recruited surgeons in the past. We know what it's like to have to sift through CVs of many, many applicants and trying to figure out, you know, the best quality applicants we could find, and so we did, informally, offer to review anybody they recruited, make calls to other colleagues to make sure

2356

that their recruits were, you know, high quality and make sure that whoever joined was outstanding.

Q. What was Saint Al's response to your offer?

A. That they -- I wasn't present for the conversation, but I was told that they're happy to recruit on their own.

Q. Okay. And what occurred in regards to your call coverage?

A. Well, my group continued to take call as we always had. The call schedule didn't change. We reassured the cardiologists that the cardiac surgeons would be there every third night, 24/7, to cover their cases for the foreseeable future. I don't think we left it open-ended forever, but we did imply we would be there.

Q. Was the transition more abrupt than you had expected?

A. A little bit, yes. As months went on, they had decided to recruit a surgeon from Alaska, and the surgeon, we were told, had committed, and they had committed to him. We had met with him locally and talked with him briefly once he got to Boise. He was not yet credentialed. And we met with him right at 6th and Idaho at Java to have coffee. And we talked with him about what his plans were when he finally reached his credentials, and he planned on taking call by himself.

2357

Once he had his privileges, he felt he didn't need any further assistance.

At that time, you know, informally, we just thought that that was a little much with the abrupt transfer. We were willing to stay there and do cases, you know, even if we were in the room adjacent, to make sure that he had had time to do cases, even not taking call, just doing some cases, getting his feet wet, getting used to the cardiologists, the ICU, the ORs. It's a huge adjustment in an operating room to go from one surgeon to a completely new style of operating, and we wanted some more lengthy transition for him.

Q. Did that --

A. I just felt it was professionally appropriate to give him that breathing room.

Q. And did they take you up on the offer to assist?

A. No. No. When -- when he reached his privileges within -- I think it was within eight hours of him receiving his privileges, I had a text that we were free to leave Saint Al's and our services weren't needed.

Q. Okay. Doctor, was it important to you that you were able to continue to refer patients wherever you thought it was best for the patient?

A. Absolutely. We -- as we negotiated with the hospital over the course of a few months, it was made very

2358

clear to us that the hospital had zero interest in getting involved with clinical decision-making with our group. You know, we were very adamant that that not play a role in our future.

Q. And was St. Luke's agreeable that that would not play a role, and you would have autonomy in making referrals?

A. Yeah. The language that I agreed to in our contract was very clear to me that we were free to do what we think is appropriate clinically with any one of our patients at any time.

Q. So do you continue to make referrals outside of the St. Luke's system?

A. I wouldn't say -- I wouldn't say I do it often because there's not often a need, but I would say that I feel completely free to do so. I refer patients to Salt Lake City for minimally invasive procedures that cannot be done locally that we are on the cusp of doing but they're head of us in the technology. They're a study center site, so I refer patients to the cardiologists and cardiac surgeons at Intermountain once in a while. I have referred patients to Stanford University, referred patients to the Mayo Clinic, Vanderbilt, heart surgical patients that I'm fully capable of operating on, but the patient might express to me that they were reading about something that they

2359

really want done that I'm not particularly comfortable doing or in agreement that might be the best for me to do, so I refer them out. But I think I've referred a couple of patients in the last three, four months.

Q. And would those referrals include Saint Al's?

A. They would include Saint Al's if there was a -- a particular -- if a patient requested it, absolutely. There is not a -- I don't have a clinical programmatical reason to make that referral, in terms of what they do that we do not. At the same time, that's really driven by my patients.

On a weekly basis when I see patients in clinic, if they express to me that they -- based on their location and where they live, based upon where they want to have their follow-up, it can be as insignificant as a family member who works at Saint Al's. I've had patients ask if they could have their doctor there. I'm great with that. I just don't have any problem with it.

Q. Doctor, this court has heard testimony from the plaintiffs' expert, the hospital plaintiffs' expert Dr. Haas-Wilson regarding the decrease in admissions to Saint Al's from CVA, from your group. I would like to explore that a little bit with you. What has happened to the referrals you used to get from Saint Al's in your practice?

A. Well, for many years after I relocated to Boise,

2360

my practice has developed where I did approximately 30 percent of my cardiac cases at Saint Al's. That was just the dynamic that developed, based upon direct referrals to me from Saint Al's. So I did approximately 240 to 250 heart cases, cardiac cases per year, and I'd say 60 to 80 of those per year were done at Saint Al's.

After -- after it came out that we were in discussions with St. Luke's, based on the feedback I had from the cardiologists at Saint Al's, I think they felt very negatively that we were having the discussion, and I believe just with the discussion with the cardiologists on a person-to-person basis, they felt that somehow this was my idea. And because it was my idea that I think I saw a marked drop in my referrals. So my volumes went down from maybe three, maybe four cases a week, to three to four cases per month after the information was out.

And so for the last nine to ten months at Saint Al's, I was doing basically call cases, you know, emergencies, urgencies, people that couldn't go home, people that were being flighted in that needed emergency surgery. But my elective cases went away.

Q. Now, what was your volume at St. Luke's before you decided to affiliate?

A. Roughly 150 cases a year.

Q. And what's your volume at St. Luke's after you

2361

affiliated?

A. The same, 150 cases a year.

Q. So the Saint Al's cases dwindled down to the few you mentioned.

A. Yeah. Yes.

Q. Did you transition any of the Saint Al's work over to St. Luke's?

A. No. The entity that lost volume in it was me. I believe that the cases at Saint Al's since -- in my absence have gone up higher than their normal average. During our -- just prior to our transition, I think some of my elective cases went to my colleagues. They decided to refer them away from me. But since I we went to Saint Al's, the only time I will see an Al's referral is a direct referral from a patient who -- or a self-referral, I guess I would put it.

Q. So the only patient from Saint Al's you see now would be a self-referral?

A. Pretty much. It's pretty rare to get a -- if I have -- I have received a call from a cardiologist to see one of their patients maybe once a year. But it's -- the conversation is driven by the patient. The patient may say, "I would like a second opinion. Can I go see Dr. Huerd?" And, graciously, they've allowed that. And so the doctors I have spoken with have been -- you know, we all try to stay

above the fray there and just let the patient decide, and that's what I try to do every day.

Q. So it's your understanding that the volume you were doing at Saint Al's before you affiliated with St. Luke's is still there at Saint Al's?

A. Right. My understanding is they did 240 heart cases the year we left and 240 the second year we left --

MS. DUKE: I'll object to this. I mean, I should have objected probably two answers ago. He has a lack of foundation as to what Saint Alphonsus is doing with respect to its surgical practices after he left.

MR. SINCLAIR: Your Honor, we have some foundation through other witnesses as to what the volumes are, so I don't need to belabor this.

MS. DUKE: Then, I would move to strike any of his testimony related to that.

THE COURT: I will sustain the objection and strike the response, and we'll allow that to be presented through a witness that would have firsthand information.

MR. SINCLAIR: Sally Jeffcoat can provide that information. Thank you.

Thank you, Doctor. No more questions.

THE COURT: Ms. Duke, cross?

CROSS-EXAMINATION

BY MS. DUKE:

Q. Good morning, Dr. Huerd.

A. Good morning.

Q. My name is Keely Duke, and I am one of the attorneys who represents Saint Alphonsus, the entities that are the plaintiffs in this matter.

A. Good morning.

Q. You and I have not had a chance to meet yet.

So as I understand it, you have been brought here today, obviously, to provide the testimony that you have; correct?

A. Correct.

Q. And none of that testimony has involved anything related to quality at St. Luke's; correct?

A. Correct.

Q. Or any change in quality at St. Luke's since you became employed there; is that correct?

A. Correct.

Q. And you haven't been called here to testify related to utilization at St. Luke's when you became employed; correct?

A. I'm not sure what you mean by "utilization."

Q. Utilization of services.

A. You mean like ancillary services?

Q. Correct.

A. No.

Q. What your testimony has been very narrowly limited to is, really, why you left Saint Al's and went to St. Luke's. That's one aspect; correct?

A. Correct.

Q. And your patient volumes that you had at Saint Al's and then at St. Luke's?

A. Correct.

Q. And then how those volumes have changed for you?

A. Correct.

Q. Now, as I understand it, your Saint Al's volume prior to the time you left, you thought, was about one-third Saint Al's and two-thirds St. Luke's; correct?

A. Prior to our transition?

Q. Prior to the transition.

A. In the years leading to that, yes.

Q. And the overall groups, as I understand it, volume at Saint Al's versus St. Luke's was around 23 percent prior to the transition?

A. Yeah. We would normally just say about two-thirds, one-third. But that's just the rough guess within our practice.

Q. And after the acquisition by St. Luke's, your volume of inpatient admissions at Saint Alphonsus decreased significantly; correct?

A. I admitted all of my patients after the transition

to St. Luke's.

Q. And you are no longer performing any procedures at Saint Al's; correct?

A. Correct.

Q. And you stopped doing procedures at Saint Al's right around that time of the transition; correct?

A. Yeah. Roughly, the end of October of '010.

Q. And that included call and referral work; correct?

A. Call.

MS. DUKE: Just one moment.

All right. Given your very narrow testimony, I have no further questions. Thank you very much.

THE COURT: Thank you.

Mr. Sinclair, anything else?

MR. SINCLAIR: No, sir. Thank you.

THE COURT: All right. Dr. -- is it Huerd?

THE WITNESS: Huerd.

THE COURT: Thank you very much for being here.

THE WITNESS: You're welcome.

THE COURT: Call your next witness.

MR. SCHAFER: Call Dr. John Kaiser.

THE COURT: Dr. -- is it Peck?

MR. SCHAFER: Kaiser.

THE COURT: Oh, Dr. Kaiser. I'm sorry, I missed that completely.

Dr. Kaiser, please get through our mine field there, and then we'll place you under oath.

JOHN RHYAN KAISER,

having been first duly sworn to tell the whole truth, testified as follows:

THE CLERK: Please take a seat in the witness stand.

Please state your complete name and spell your name for the record.

THE WITNESS: John Rhyan Kaiser, John, J-O-H-N; Rhyan, R-H-Y-A-N; Kaiser, K-A-I-S-E-R.

THE COURT: You may inquire of the witness.

DIRECT EXAMINATION

BY MR. KEITH:

Q. Dr. Kaiser, by whom are you currently employed?

A. I'm currently employed by Saltzer Medical Group.

Q. And do you hold a position with Saltzer Medical Group?

A. Yes. I'm the president.

Q. And how long have you been president?

A. A little over five years.

Q. Could you describe for the court the nature of your medical practice?

A. So I'm in obstetrics and gynecology.

Q. And where do you practice -- hospitals, clinics,

or both?

A. So I have full privileges at St. Luke's Meridian, and I have courtesy privileges at Saint Al's Nampa.

Q. And why do you have the privileges that you do, courtesy privileges, at Saint Al's Nampa and full privileges at St. Luke's Meridian?

A. So I used to have full privileges at both hospitals. Several years ago as my patient preference -- my patient population expressed a preference for St. Luke's Meridian, I switched my obstetrics practice primarily to St. Luke's Meridian.

Second is the aspect of what's called "on-call." With full privileges is the requirement to participate in call for the hospitals.

And it is a somewhat onerous task to provide call for two different hospitals and difficult to meet the time requirements, depending on where you live and how much activity you have at two hospitals.

Q. So obviously a lot of the folks here are lawyers, not doctors. So can you describe on a personal level what the -- what taking call means?

A. Yeah. So there is several levels of call. You take call for your own patients, which means -- I'm not really referring to just the phone calls that you receive outside of the normal business hours. That's something that

you can take. There is a second aspect of call, which is called "unclaimed call" or "call for the hospital." So you would take care of patients that presented there for emergency, for patients who presented to the hospital who did not have a care provider who had full privileges at that hospital, and then you would be required to take care of those patients.

Often that requires presenting to the hospital and caring for them in person.

Q. Let's step back for a moment. Can you describe to the court your educational background since high school?

A. Yes. I have a bachelor's of science in electrical engineering; and then I have a master's of science in industrial engineering, an MBA; and finally an M.D. degree.

Q. Could you provide the court a high-level overview of the Saltzer Medical Group, let's say the time early 2012, before the surgeons who we've heard left the group, in fact, left?

A. Yes. So we had a group of fluctuating between 40 and 50 physicians, a multispecialty group that provided care in various areas, organized under what's called a C-corporation and managed through an executive committee and various other subcommittees.

Q. And where did Saltzer Medical Group provide services?

A. So we actually have nine locations. The primary locations currently are in Meridian at a location called "Portico"; at our main campus, which is right next to the Saint Al's Nampa facility; and then also another location which has been opened in North Nampa at the location that St. Luke's has the emergency room, called "Ventana."

Q. What sort of services does Saltzer Medical Group provide?

A. So we are a multispecialty group. We provide physician care across a primary care base, pediatrics, obstetrics. We have surgical specialties, orthopedics, general surgery, dermatology, pulmonology, rheumatology, neurology. Then we also have ancillary services, which included labs, an imaging center, sleep, physical therapy, and some others I'm sure I'm forgetting.

Q. And at a high level, can you describe how the Saltzer Medical Group physicians were compensated under the model prior to the transaction with St. Luke's?

A. So it was a somewhat complex model of payment. At least it seemed complex. We received a revenue stream based on all of those different generating sources, the ancillary, et cetera. The individual physicians were compensated based on what their revenue was, subtracted out in overhead costs, subtracted out of a direct department cost. Then, they also received a portion that was defined as an ancillary revenue

2370

stream after the cost for those different ancillary services were taken out. And there was some variation on how much ancillary revenue was received by different departments based on their portion of contribution.

THE COURT: Dr. Kaiser, I might ask you to slow down just a little bit.

THE WITNESS: Sorry.

THE COURT: You are probably pretty quick. And the court reporter, I'm sure, is struggling just a bit.

All right. Mr. Keith.

BY MR. KEITH:

Q. Did the -- did the compensation structure that Saltzer had in place prior to this transaction lead the group to manage the types of patients that its physicians saw on a regular basis?

A. Yes.

Q. Can you describe how?

A. So -- I'm sorry. So the -- the methodology of payment was based totally on fee-for-service. So in order to increase or maximize your compensation, what was typically done was when a new partner would come into the practice, it was a requirement by the group that they see all patients who were presented to them. As that practice matured, it was common for the physicians to start to limit their new patients who are in certain lower reimbursement

2371

rate insurances. By that I mean Medicare, Medicaid, TRICARE.

Q. And what about patients who lacked insurance?

A. We did not typically see those patients unless the patient was referred to us from an emergency room when that physician was on call for that emergency room, then they would take care of those patients for a set period of time, and after that they would typically not be cared for.

Q. I would like to turn now to discuss the transaction that's at the heart of this case, the transaction, the entering into of the professional services agreement between Saltzer and St. Luke's. Can you provide the court some background on how Saltzer -- how it came to be that Saltzer became interested in affiliating with St. Luke's?

A. So it was actually a very long process. And I'll go back, that the genesis of the thought for why we should -- why we thought it was important to look at alignment strategies with larger healthcare systems goes all the way back into the 2000s. You know, there was a lot of medical literature, press that talked about how healthcare had to change for the future, how there needed to be more integrated services, how costs had be to taken into consideration. So it was a mindset that was present in many of the individual partners.

2372

Even as far back as 2005, there was even an instance that Saint Al's approached our group asking if they wanted to -- if we wanted to join them in an employed relationship, and then we continued -- we declined for various reasons. And then that mindset continued. We worked -- started working with some of the hospital systems on what things we could do together.

Q. And did any of those efforts to work together with other systems bear fruit?

A. So some of the early work that we did was with -- tried to look at things we might be able to do with what was then Mercy Medical Center. None of the projects that we had contemplated came to fruition. We didn't proceed down any of those. With St. Luke's -- and we had no other interactions with Saint Al's.

With St. Luke's, we had started meetings with them that date back a long ways -- I'm not exactly sure when they started -- where we would have meetings quarterly, something to that effect, to kind of talk about what was Canyon County like, what were the needs, what were we doing, what were they doing, just as an information sharing.

Then, we actually advanced some of those, said we probably should formalize some of these relations. And they did finally end up with a memorandum of understanding in the 2008 time frame.

2373

Q. What were the projects that were envisioned to take place under that memorandum of understanding?

A. So there were several areas that we thought were an opportunity for us to work together, that we had needs in the community for. And some of the areas that I recall that we talked about were cardiovascular, urology, and a couple others, occupational medicine. I can't remember the others.

Q. And were those efforts successful?

A. So successful from the standpoint of, yes, we were finally talking about it, and how we could work together. No, from getting a whole lot of things accomplished. We did work on cardiovascular. I think that was a success. We had cardiovascular services provided within our clinic, had left, it was an area of need for our patients, and we were able to work out an arrangement with St. Luke's to provide those services within our clinic.

Q. So ultimately, since we're here now, Saltzer -- you know, it was determined that a tighter affiliation should -- that the parties should enter into a tighter affiliation than under the memorandum of understanding. Can you help the court understand how Saltzer Medical Group came to the decision that a tighter affiliation was necessary?

A. Yes. So the -- the rate of acceleration of the information on what should be done for the future, what the

potential changes in healthcare were going to be for the future accelerated. We saw that we didn't think we were in a position to be able to participate in that arena without combining with a larger healthcare entity, a more comprehensive entity. So we said, I think we need to take some more formalized steps to actually -- to actually move in that direction.

And so we requested -- we sat back, and we said, who can we do this with? One, we didn't think that going outside of our group, going outside of our community would be a feasible thing to do. We had some experience with Mercy Medical Center and its owner, which is CHI. And whenever we would try to go down the path of trying to do something, it never worked. It was always the answer of CHI won't allow us to do that. So we thought it had been to a local partner that we were going to work with.

We had no working relationship with Saint Al's, which was one of the two options. The other was St. Luke's. And we had had a working relationship with St. Luke's, so we reached out to St. Luke's to say, What can we do? What opportunities do we have?

Q. And you mentioned that one of the factors that led Saltzer Medical Group to seek a tighter affiliation was the belief that Saltzer was not in a position to really effectively participate in -- the new healthcare model. Can

you speak to the -- provide more detail on that?

A. Yeah. So a lot of these models, at least from our limited perspective, required additional resources that we didn't have. For example, looking at pay-for-performance, looking at risk-based contracting, our group has no reserves. Our corporate structure is that we distribute all funds by the end of the fiscal year. We don't retain reserves because they get taxed at a significant rate.

We didn't think we had the breadth of a group. While we are a group of independent physicians together, a group of multispecialty physicians who work together, it's not really a very big group in the grand scheme of things, and it certainly doesn't offer the full breadth of things that we thought you would have to have to provide those kind of contracts, those kind of arrangements to look forward to.

Those are some of the reasons.

Q. And you mentioned that you and Saltzer Medical Group approached St. Luke's about the possibility of a tighter integration. What happened next?

A. So I can't remember exactly who placed a call to St. Luke's administration -- it would be Gary Fletcher as the contact point that I remember -- asking for us to set up a meeting where we could simply kick this off, simply kick off the aspect of let's try and look at what opportunities we might have together, what things we can do, and -- and

that -- that meeting was arranged subsequent to that initial call. As a part of that discussion, we had said, you know, we would kind of like to know how this is working in other areas. And as an outcome of that, there was an invitation to visit with the Twin Falls area.

Q. And did you, in fact, visit Twin Falls?

A. Yes, we did. There was Bill Savage, Nancy Powell, myself went to Twin Falls for a day to talk to some of their physicians and leaders.

Q. And what did you learn from those meetings?

A. Actually, I'll say I went there very skeptical and was actually quite impressed with the organization. In fact, the line of questioning from us, from myself, from a physician was, so how does this work? Do you really trust each other? Do you like the arrangement? And the answer was unequivocally yes.

And then we were very impressed with the -- the information that was provided of continually talking about we have to move from silos of healthcare, which is, frankly, what Saltzer is, to an integrated healthcare system. And the progress that they had made working in a team approach was quite impressive.

Q. I want to take a step back to something you said earlier about risk-based contracts and Saltzer's size and scope, capacity to take those types of contracts on. There

was some testimony earlier in this trial that Saltzer actually already has or has entered into risk-based contracts. I'm wondering if you have any understanding of what that might refer to.

A. Well, the only contract that I'm familiar with that Saltzer has had and has is really just a gain-sharing contract, and I believe it's with Treasure Valley Health Network, if I recall the name properly. And that's the only one that -- that we have. It's not really a true risk contract. It's a gain-sharing contract.

Q. What is the Treasure Valley Health Network?

A. So it's a group of physicians, and there is only three partners that I'm aware of. It was originally Mercy Medical Center physicians, Saltzer, and Terry Reilly Health clinic. When Saint Al's took over the Mercy Medical Center physicians, it became Saint Al's physicians.

Q. And so if I understand correctly, it's your understanding that there is not significant downside risk in the contract between Treasure Valley Health Network and -- well, let me take a step back. With whom is the agreement with Treasure Valley Health Network that has the gain-sharing aspect you had mentioned?

A. It's Medicare Advantage program. And so the way the program works is there is a pool of money, and if there is excess funds at the end of the year for where that

contract runs, those funds are distributed back to those three entities. And that's the extent of the gain-sharing.

Q. And is it a Blue Cross Medicare Advantage plan?

A. Yes, it is. I'm sorry. Blue Cross.

Q. What efforts, if any, are there within the Treasure Valley Health Network to address opportunities to lower costs or better coordinate care?

A. There is really not any sharing of data or management protocols. There may have been some set up in the early -- when it originally was set up. But as far as practically, how it's managed by the physicians in the primary care area, there really isn't any management of patients. It's simply at the end of the year we never know what we're going to get, if we're going to get anything or not, and then when the funds come in, we distribute them.

Q. And to the point you made about having the infrastructure necessary to take on pay-for-performance or risk-based contracts, can you tell the court what electronic health record you're using and how that relates to your ability to really achieve the goals of transforming the healthcare model?

A. So we use eClinicalWorks as our electronic health record. And eClinicalWorks is a good system for -- for our business. It is only -- it only encompasses, I'll say, the walls of Saltzer. So the information provided within the

system is what tests we request, what tests we order, what visits we see for patients. So it's good for sharing information across our partners. It doesn't -- it only has access to a data outside of the system by way of those records being either brought into the system by some electronic method and being a document that you can look at or simply by scanned documents that come into the system.

Q. Are you familiar with the Idaho Health Data Exchange?

A. Limited.

Q. And does Saltzer participate in IHDE?

A. We do not.

Q. How does the current functionality of the eClinicalWorks system you used impact, say, Saltzer's ability to identify best clinical practices?

A. So --

MR. ETTINGER: Objection, Your Honor, I don't think we've laid a foundation for this witness to -- that this witness has knowledge in this particular area of Saltzer's operations.

THE COURT: Well, he is the CEO of Saltzer.

THE WITNESS: The president.

THE COURT: The president.

MR. ETTINGER: He is the president and a practicing physician, and we all know that CEOs don't know

the details of lots of areas of their businesses.

THE COURT: Well, I'm assuming as a practicing physician, he can certainly indicate how, as an obstetrician, that affects his ability to use best clinic practices.

But perhaps some further foundation that he actually was involved in some of the discussions about the pros and cons of the eClinicalWorks program within the Saltzer structure, would be in order if we're going to go beyond Dr. Kaiser's actual use and familiarity with the system, limited to his own practice.

Counsel, we're probably should break in the next five minutes, so you can pick your spot.

MR. KEITH: Great.

BY MR. KEITH:

Q. Dr. Kaiser, are you personally involved in working with the eClinicalWorks system and what functionalities might be built into the system at Saltzer?

A. Yes. So when we decided to select eClinicalWorks, I was part of the committee that reviewed the options for us of what system to select because we were moving from a different electronic medical record. I also have participated in one or two of the eClinicalWorks shops that are presented for users, user group workshops, where they try to identify what features the clinical has and what

aspects. I also, as president, have responsibility for upgrades, cost of those upgrades and what they can and can't do. And then as a practicing physician, I use the system on a daily basis.

Q. In light of that background, what are -- in what ways, if any, does the current functionality of the Saltzer eClinicalWorks system impact the ability to identify best practices within Saltzer?

A. So the system allows us to track data, so we can extract out of the system lab data or other things that could be used to help identify where patients are at.

The system doesn't have a way of prompting providers for what's the pathway to get to that best practice, what's the way to get -- what's the protocol to use to get to the point where you've managed the patient properly, taking into consideration the best steps, lowest cost, most efficacious steps to get to the point where you want to get to for managing that patient.

Q. So the court has heard some testimony that another group that also uses eClinicalWorks has been able to analyze the quality of care it provides and implement best practices. Why can't Saltzer do the same?

A. So I'm not familiar with exactly what aspects of eClinical they're using to do that or the scope that they're using to perform that task. I know that eClinical has

multiple modules that you can purchase, and they do different functions. And perhaps -- and there are some other functions that we could purchase that we haven't purchased, but the level of the system that we have won't allow us to go to the next step of managing patients outside of our walls.

Q. And does Saltzer's eClinicalWorks program platform currently interoperate with any other electronic health records?

A. No. We collect data from other sources, but we do not, to the best of my knowledge, export our data on a regular routine basis to any other systems.

MR. KEITH: Your Honor, that's a pretty good stopping point for me.

THE COURT: Counsel, let's try to hold this, again, to a 15-minute recess.

I'm just trying to recall if there were any depositions we needed to publish. I'll let Ms. Gearhart check on that, and, if so, we'll take care of that after we return from the 15-minute recess.

We'll be in recess.

(Recess.)

****** COURTROOM REMAINS OPEN TO THE PUBLIC ******

THE COURT: Dr. Kaiser, I'll remind you you are still under oath.

Mr. Keith, you may resume your examination.

BY MR. KEITH:

Q. Dr. Kaiser, before the break, you mentioned that there may be opportunities to purchase upgrades to eClinicalWorks. Do you recall that testimony?

A. I do.

Q. And how does Saltzer go about determining whether or not to invest in additional functionality for eClinicalWorks or how -- how did it prior to the transaction with St. Luke's?

A. So whenever we look at -- whenever we did look at upgrades or enhancements to the system, it was always an evaluation of what's the cost for that enhancement, what's the benefit, and what's the long-term implications of it.

Q. And by "benefit," what do you mean?

A. Financial benefit.

Q. I'm sorry, say that again.

A. Financial benefit.

Q. And are you aware of any module or improvement to eClinicalWorks that would allow full integration of ECW, eClinicalWorks, into Epic, St. Luke's system?

A. Not that I'm aware of.

Q. And if you were in independent practice or if Saltzer were back operating as it had been, if there were such a module, do you think that Saltzer would invest in it?

A. So the problem with a -- from our -- from a perspective of an independent group is, if you're looking to manage the whole cost of the system, it could be a very expensive and complex process. So you would have to figure out, are you going to collect data from payors from all the hospital systems and try to manage that information and integrate it into your information? And the answer is most likely not. That's just too expensive of a proposition and too big of a proposition for a group like ourselves ever to pursue.

Q. I would like to turn to a slightly different topic and talk about what motivated Saltzer Medical Group to enter into the transaction with St. Luke's. Was the -- was an interest in raising prices to commercial insurance payors a factor in Saltzer's determination to enter into an agreement with St. Luke's?

A. So I think that I probably sat through as many, if not more, conversations with St. Luke's, our partners, and this discussion was never a topic that we ever pursued or was ever addressed.

Q. What about the desire to increase physician compensation? Was that a factor that drove Saltzer to seek a tighter integration with St. Luke's?

A. So compensation is a part of the evaluation when you look at integration with another system. It is not the

prime driver. It was never the prime driver. The -- there were many other aspects to the transaction that we kept pointing out throughout the negotiations. What was the goals of Saltzer Medical Group in aligning with another healthcare entity, St. Luke's, and our compensation was an important part, but it wasn't the main driver of the transaction.

Q. The court has seen an email that I will parathise -- paraphrase for you as coming from Nancy Powell and asking, generally speaking, what it would take to get the Saltzer physicians to give up their independence. Would it be a compensation increase of X, Y, or Z percentage points? Do you recall that -- that email?

A. Actually, I do. So -- and I recall my response to it. Nancy Powell sent out an email. I don't remember if I responded to her via email or talked to her, but I remember discussing with her and the -- the response I gave her is, Nancy, I have no idea. I don't know if there is a number that we need to get or want to get to make the transaction move forward.

What I said is, I think we need to use benchmarks. I think we need to use -- establish standards like MGMA, which is Medical Group Management Association, has surveys of physicians and what are their compensations. St. Luke's has within their system physicians who are in employed or

2386

PSA arrangements. I said we should be included in that market. We should get fair compensation for our services.

Q. There has also been testimony about whether the Saltzer physicians truly wanted to remain independent and had to be convinced to enter into a transaction with St. Luke's. And are you familiar with -- with those discussions within Saltzer; that is, whether folks wanted to stay independent or enter into an agreement with St. Luke's?

A. I am. So I remember a discussion that we had with -- after a survey done by Coker. And that survey indicated one of the reasons -- actually, I don't think it was the number one reason why physicians voted not to proceed with the proposal that was on the table at that point in time. But it indicated independence was a concern.

And so I said in an executive committee meeting that was well-attended by most of the partners that if this is truly the sentiment of the group that we do not -- that we want to stay independent and not align, then we should stop. We should stop wasting our money, our time, St. Luke's money, St. Luke's time. And I think that really brought it to a point where the group said, let's talk about this.

And the answer that came back is, no, we didn't mean that we didn't want to align. There were other reasons that we put forward as why we didn't think this proposal was

2387

the best proposal that we were going to go forward with. And they said -- and we voted and we said let's proceed on. We want to continue an integration plan.

Q. The plaintiffs have made a point of arguing that there is an unspoken or unwritten quid pro quo within the -- the agreement -- in the agreement between Saltzer Medical Group and St. Luke's that Saltzer Medical Group physicians will refer or -- and admit all of their patients at St. Luke's facilities. Do you have a reaction to that argument?

A. Yeah. This has been a topic that we brought up and discussed with St. Luke's from the very earliest phases of this -- this alignment strategy. And it was well understood we had providers who were currently taking care of patients at Saint Al's Nampa who were going to continue to provide care for patients at Saint Al's Nampa and would refer patients to Saint Al's Nampa. And that was totally acceptable and understood by St. Luke's throughout the transaction.

Q. And was that understanding made part of the written professional services agreement?

A. We asked that. We made sure that it was incorporated into the PSA agreement that we can refer to wherever we wish.

Q. There has also been discussion at some length

2388

about what exclusivity meant within the context of the negotiations leading up to the Saltzer/St. Luke's transaction. Can you provide the court your recollection, your understanding of what exclusivity meant between the two parties?

A. Yeah. I think it's -- it came up in a couple different areas, and so you always have to know which part of exclusivity you are talking about. So I think the base level was that as of -- with a PSA signed with St. Luke's, that we would be -- I'll use the term "agent." Maybe it's not the correct term, but agent of St. Luke's when we provide our professional services. So that's one aspect of exclusivity.

The second was the area of Canyon County. We had asked for the ability to influence working with St. Luke's, the providing healthcare to Canyon County. And by that I mean, as services were expanded, as we offered more things, we wanted to be at the table for that discussion and to use Saltzer to the best of our ability to provide those services and to agree where we couldn't provide those services and agree on what mode would be taken.

The last was the area of ownership. There was a couple entities that we had or we had partners that were invested in that were competing entities with St. Luke's, and those were in the sleep lab business. There is an ASC

2389

that one of our physicians is an owner of that deals with pain medication or pain treatment.

THE COURT: What's an ASC?

THE WITNESS: A surgical center.

And then the last one was we had investors in Treasure Valley Hospital. And so those are the three areas that we got agreement that ownership could be maintained in those entities.

And did I say the sleep -- there is a sleep lab. Did I say that.

BY MR. KEITH:

Q. I believe you did, yeah.

A. Thank you.

Q. There has been suggestion that, in fact, exclusivity as was used during the negotiations meant that the Saltzer Medical Group physicians would use St. Luke's facilities exclusively for their patients. Is that your recollection?

A. Absolutely not. Again, as I stated before, it was known from the beginning. It was part of our understanding that we were going to provide patients care at whatever hospital we wished, we could have privileges wherever we wished, and that we would continue to have physicians who worked out of Saint Al's Nampa.

Q. And in the -- the final offer that St. Luke's made

2390

to the physicians who eventually departed Saltzer, is it your understanding that exclusivity is that offer used the term or concept meant -- well, let me just ask you what you understand the exclusivity terms of the offers were to the surgeons who departed.

A. That they could continue to have their ownership interest at Treasure Valley Hospital and could continue to perform cases.

Q. So there has been -- there has also been argument that -- or assertion that deep within the -- and perhaps unwritten in the professional services agreement, the deal between Saltzer and St. Luke's is a quid pro quo whereby Saltzer Medical Group physicians will agree to take all of their patients to a St. Luke's Nampa hospital if and when one is built. What is your reaction to that assertion?

A. So the only discussions we had about any future developments of facilities within Nampa was that we would commit to providing support. And by "support," we meant when there is emergency room call requirements, that we would provide support for those requirements or we would agree to a plan for how that support would be provided for Canyon County.

Q. Let's turn to talk about the benefits as you see them of the transaction that -- or the professional services agreement that St. Luke's and Saltzer Medical Group entered

2391

into, you know, understanding that it's -- it's only been nine-plus months. What, in your mind, have been the advantages of that relationship?

A. So I think the one that first comes to my mind is -- which I'm not sure we talked about before but was -- so we are trying to recruit additional physicians into our group, and without the support of St. Luke's and being in the St. Luke's Health System, we would not be able to recruit those professionals.

I have been involved in those discussions with -- with physicians who we have tried to bring into our group, and always the question comes up, so who are you affiliated with? Is it a part of a healthcare system? We can now say yes, and that's the understanding that we have been providing those physicians with.

The second would be the area of since we have aligned with St. Luke's, we have gone through the process of looking at how our practice is run in multiple levels. One that I can think of that has -- I think is a benefit to our patients is that we went through all of our nursing protocols with St. Luke's, identified what we were doing, what we should be doing to be best practices, made changes.

Examples of dispensing of or utilization of medication that is used within the clinic practice, expiration dates, how to monitor, how to inventory, how to

2392

track those. We didn't have a good process for that. We have now implemented that.

Discussion on sampling of medication and what are the real requirements that you should have in place for patient safety in case there is a recall on those medications and how that needs to be done. We didn't have that in place before.

Services to our patients. We have a -- a lot -- a lot of need for translation services within Saltzer. We had translation services that was a somewhat informal process. All of our translation services now are certified translators that provides a level of quality to our patients that I think they appreciate.

We also have had patients who have come in, personal experience we -- I have two -- had two deaf patients that came in that I would not have ever been able to afford to hire somebody to come in and do signing for those patients through their care. St. Luke's had a system in place. We made arrangements; they would come for every visit throughout that pregnancy care for those patients and provide that care for them.

Data analytics. So we have started down the process of looking at something called clinical integration scorecard and what are the data measures and how can we see where we're at. How can we mine that data and what -- how

2393

can it be used in our management of our physicians and our patients?

We have -- with the assistance of St. Luke's, we have been able to extract a lot of those data elements. Some of it requires manual extraction, going through patients' charts. With St. Luke's help, we figured out how to do a registry of some disease states, which we had never done before, so that we can look at our patient populations that have certain diseases like diabetes and then look at where we're at. Then the next step needs to be trying to develop protocols for how to manage those patients best, how to change our protocols to get that data incorporated into it.

I think the other area that I think has been a significant advantage for our patients is in that diabetic care. There is a diabetic education and management program that we have participated in at St. Luke's at their assistance. They have provided significant resources for us.

Included in that is they have brought on diabetes educators, which is a tremendous asset for a patient to figure out what they are doing, what they should be doing for management, where they're falling short, and what changes they can make to their lifestyle. We actually had a diabetic educator in our practice years back. We had to let

2394

them go because it just wasn't a profitable business.
Q. In terms of -- you had mentioned earlier in your testimony that as an independent practice operating a fee-for-service environment, Saltzer Medical Group had -- had had to actively manage the mix of its patients by who they were insured by or whether they were insured. And can you describe to the court whether and how that has changed since the integration of Saltzer and St. Luke's?
A. Yeah. So the great thing about our arrangement now is we are -- we call it payor blind. We open our practices to patients that come to see us. We don't have to worry about how many Medicare, how many Medicaid, how many TRICARE patients, how many uninsured patients we see. We can simply provide them with care. We are freed from the constraints of worrying about what's the revenue stream that's associated with this.
Q. I forgot to ask you, but did -- did Saltzer Medical Group accept Oregon Medicaid as an independent practice?
A. No, we did not.
Q. And was -- do you have any reason to believe that patients covered by Oregon Medicaid would have wanted to use Saltzer?
A. Actually, yeah. I had -- in obstetrics in my own practice, I had patients that would come to Nampa and ask to

2395

be cared for at -- at a facility, and we would have to turn them away because we didn't accept Oregon Medicaid.
Q. And is that true today?
A. No. We, again, are payor blind.
Q. And since we're talking now about the compensation being payor blind, why don't we talk a little bit just in general about how compensation is set under the professional services agreement. What is the metric? What's the -- the design of the compensation structure?
A. So it's a pretty simple structure at this point. We simply have what are called work wRVUs that are assigned to all visits and procedures based on a set standard, and those values get rolled up and we get reimbursed at a fixed rate for them. There may be tiers of rates that we receive, but that's how our compensation is determined.
Q. And so do I take it, then, that an uninsured patient would generate the same number of wRVUs for the same service as a Medicaid patient as a Blue Cross patient?
A. There would be no difference. And the other thing that that has allowed us to do is, because we now take those patients who are uninsured, we also now have access to St. Luke's Charity Care program, which we never, frankly, were ever considering before, and now we can offer them that opportunity and the avenue to pursue that for their own assistance too.

2396

Q. Does the compensation system that is part of the professional services agreement provide for any payment to Saltzer Medical Group for laboratory imaging or other ancillary services that the Saltzer physicians order during the term of the agreement?
A. No. We have no -- there is no incentive plan. There is no bonuses. There is nothing tied to any ancillary services that might be provided.
Q. And you -- you explained that the compensation structure is a wRVU compensation structure. Can you explain to us why it is, under that structure, the wRVU structure, that there is no compensation to Saltzer for ordering tests, labs, and ancillary services?
A. So the only way that you generate work wRVU is if it's something that you do. So when you order a test, order an imaging study, there is no trigger to generate a work wRVU for that ordering physician. So there is no compensation driven back to the provider based on what they order for ancillary services.
Q. Prior to the transaction with St. Luke's, were Saltzer physicians compensated in some form based on the volume of laboratory imaging and ancillary services that ran through the group's facilities?
A. Yeah. As I was mentioning earlier, we had quite a few ancillary services, and that was part of our revenue

2397

stream. The ancillary service revenue generated after paying for the costs associated with that ancillary service would then be distributed across the partners. One level would be kind of a fixed base amount that those physicians would receive or that all physicians would receive based on that profit. And then there were some other carve out areas for certain specialties for certain ancillary services that they would get.
Q. So if I understand correctly, the Saltzer Medical Group physicians have gone from having a financial incentive of some kind to generate volume in ancillary services to not having an incentive to do so. Do you have any reason to believe that the change in incentive structure may affect the volume of services that are sent through into ancillary services?
A. I don't have data to know exactly if there have been any changes. I will just simply talk to the human nature of if you know an ancillary service is going to generate more money for you, you may be more prone to order that service. You may not; you may. But the whole program was set up -- our reimbursement was fee-for-service. That's what it was.
Q. And was there any requirement or process in place at Saltzer Medical Group when it was -- prior to the transaction with St. Luke's that required physicians to

balance the costs of the -- a test ordered versus the benefit to the patient versus the revenue that was generated to the group?

A. All we tracked was what was our revenue -- how many imaging studies did we do, how much lab did we do, what was the revenue generated by those and how did that get distributed to the partners. That's all we tracked.

Q. You mentioned that one benefit of the transaction thus far has been to open up the Saltzer Medical Group to new Medicaid, Medicare, TRICARE, and uninsured patients. Do you have any reason to believe that the volume of those patients coming to Saltzer has, in fact, increased?

A. I'll tell you from my own practice, I used to restrict the number of new obstetrics patients who were insured under Medicaid. I no longer do that. And I know I see more Medicaid patients, more obstetrics Medicaid patients than I did before.

I also used to not see Medicare patients for annual exams, et cetera, just because it was not very well-reimbursed. I now take all patients, so my practice has changed. Talking to my partners, their practice has changed. They now are open.

Q. I would like to talk a little bit about the efforts that have been undertaken since the transaction closed to extract data from eClinicalWorks to the WhiteCloud

and the clinical integration scorecard. Will you please just describe the work that's been done to try to improve the -- try to extract data from ECW to WhiteCloud.

A. Yes. So when we started down this adventure, St. Luke's came out and they had some significant resources along with WhiteCloud that came to look at our data set, look at eClinical, try to tell us what those measures were, because we didn't actually know all the measures, and then start to go through the process of, through eClinical, where can that data be extracted.

When it couldn't be extracted electronically, they assign resources to go mine the data through looking through patients' charts and then worked with us on identifying what kind of protocols might be done to try to increase the number of data elements that they could get and track automatically through eClinical.

Q. And if Saltzer had remained independent rather than joining St. Luke's, would it have invested the time and resources to provide data to WhiteCloud?

A. I do not believe we would have. It's not an easy process. It takes resources, and we always kind of prioritize our -- our resources on what we think we need to do.

Q. And what about sharing the data from eClinicalWorks with WhiteCloud? If you had been an

independent, would -- would that have made sense to you to provide full disclosure on the -- from your electronic health records?

A. I'll say that as an independent group, you're always a bit skeptical about providing data and how much data you provide and what it looks like. So I do not believe we would have been very -- we would have been all gung ho about trying to provide all the data elements as much as we could if we were staying independent.

Q. Since the time of the preliminary injunction hearing, my understanding is Saltzer has been trying to do what it can to track referral statistics and, you know, monitor where referrals are going. Are you familiar with that process?

A. Yes.

Q. And has it -- has it -- as one part of that process, are there a set of surveys that are done with patients on their preferences for where they would like to have hospital or specialty care provided?

A. Yeah. We do two surveys. We do a survey on new patients that come to the clinic that are registered at the clinic and ask them kind of a -- just a blanket question, so do you have a hospital preference? That's all it says. And then it lists several options. And then that data is recorded.

Then there is a second survey that's done that is when a patient, usually in a primary care, but it can be others -- in primary care or another type of physician's office, and is going to be referred for a procedure or something that requires -- that will most likely require them to be hospitalized and what is their preference for where that care is provided.

So they are two different populations and two different questions.

Q. If the court were to order Saltzer to be unwound and Saltzer were to go back to being in independent practice, what -- what do you think would happen?

A. Unfortunately, you know -- so if we're forced to unwind, we're being put back to a model that we have made a decision we don't think is the right model to move forward with where we think healthcare is going.

As a result of that, through conversations with partners, I believe that we would have partners, perhaps even departments, that would simply say, I don't think this is right, I don't wish to stay in this model, and I'm going to leave. And the group would be at a significant financial harm.

MR. WILSON: Your Honor?

THE COURT: Yes.

MR. WILSON: May I interpose? This past summer,

there was a teleconference with the court where the government plaintiffs raised the possibility of filing a motion for summary judgment on a failing or flailing firm defense, and defendants represented the court and to plaintiffs that they would not be asserting any such arguments here. And we think that this is getting dangerously close to asserting that defense which has no legal or factual basis in this case.

Mr. -- Dr. Kaiser's testimony is talking about the financial impact of Saltzer if it's divested. And we think that given the representations that the defendants have made about they're not raising that defense, they are precluded from doing so here.

THE COURT: Mr. Keith.

MR. BIERIG: Your Honor, I'll address this.

THE COURT: All right.

MR. BIERIG: What we said is that we would not say that the reason that St. Luke's was affiliating with Saltzer was that Saltzer was failing or flailing, but we made it very clear that we would point out that there would be significant problems for Saltzer in the event of a divestiture. And I think that's exactly what this witness is talking to. There is absolutely nothing inconsistent with this testimony with what we represented to the plaintiffs in this case.

THE COURT: Well, Counsel, that kind of raises another problem which is that, you know, we agreed at the time of the preliminary injunction hearing that problems with divestiture as opposed to problems -- in other words, things that happen from the date of the court's denial of the motion for preliminary injunction through today's date would not be raised as an issue. The way you phrased that, that there would be problems from divestiture, kind of raises that issue, and I'm assuming you are not making that argument either.

MR. BIERIG: I am not making that argument.

THE COURT: All right. Now, as I understand it, what you're really arguing is that there was some economic reasons for -- from Saltzer's point of views, challenges they were facing which encouraged them to enter into the arrangement, not that they were going to fail or that they were flailing, as perhaps use the term, nor are you arguing that the situation has now become -- I guess, the relationship has become so intertwined that now divestiture or unwinding the arrangement is problematic.

MR. BIERIG: That is correct. We are talking about problems that occurred -- that -- that were in existence prior to the affiliation that would be exacerbated by divestiture. Now, we're not talking about anything that's occurred in the last nine months, and we're talking

about a remedy and why we think that remedy was, at the -- at the time of the preliminary injunction hearing and now, totally inappropriate.

THE COURT: Okay.

Mr. Wilson.

MR. WILSON: Your Honor, we think that that's just a flailing or failing firm defense wrapped up in remedy clothing, and that is not the question that Mr. Keith posed to the witness. The question that Mr. Keith posed to the witness was, quote, If the court were to order Saltzer to be unwound and Saltzer were to go back to being in independent practice, what do you think would happen? And that's what led to the testimony that we found objectionable.

THE COURT: Well, all right. But it's not absolutely obvious to me that that question would have resulted in a response that would have raised the failing or flailing firm defense.

MR. KEITH: If I may, Your Honor, my next question -- sorry, my next question was going to be: Were those circumstances the same at the time of the preliminary injunction hearing?

THE COURT: The objection is noted. I'm going to give counsel the leeway here but with clearly the understanding that is not a defense. It was raised pretrial, and it was agreed that it was not going to be

asserted as a defense. But I think an issue still in the case is the potential procompetitive effects of the merger and perhaps strengthening of Saltzer Medical Group, and its position may be part of that. So I think it may have some relevance but not considered by the court as part of an affirmative defense.

MR. WILSON: Well, respectfully, Your Honor, considering it as part of Saltzer's motivation or St. Luke's motivation for doing the deal is sort of asserting the flailing or failing firm defense --

THE COURT: Well, Counsel --

MR. WILSON: -- and that defense has very, very strict legal requirements.

THE COURT: Well -- well, I understand that. But let me -- let me put your mind at ease. I have sat and listened, you know, to the testimony now for, what, three weeks, and that is not something that's been factored into my mind at all. I do have some very specific concerns, and I may even ask Dr. Kaiser about a couple of those. And I think it is on the back end, the back door of the issue, and that is the procompetitive effect.

I am intensely interested in that and the extent to which the type of integration and the electronic health records that have been discussed, whether those can be achieved without this type of consolidation of medical

practices. But they're not concerned with the survivability of Saltzer Medical Group. That's just not an issue in my mind, and it won't be. I will just have to put your mind at ease, and that's the best I can do.

Now, Counsel, Mr. Bierig, was there anything else you wanted to offer?

MR. BIERIG: No, except that we think the propriety of the remedy is a very important issue.

THE COURT: No. I think that is the other huge issue in my mind is -- is what -- assuming that we get to a remedy, and I'm obviously -- the jury is still out on that issue, but assuming we do, that's another issue that is very much weighing on my mind as to what, if any, remedy would be appropriate. And so I'm -- I'm acutely aware of that as an issue. What I am not concerned about is that St. Luke's was a knight in shining armor coming to rescue the damsel in distress.

MR. BIERIG: And that is --

MR. KEITH: No offense.

MR. BIERIG: -- we are not asserting a knight-in-shining armor or damsel-in-distress defense.

THE COURT: I don't see a shining armor here and -- I guess, damsel in distress.

MR. BIERIG: Right. And we are not asserting that.

THE COURT: And I hope that's not regarded as a sexist comment; it's just simply something we say. My apologies. I guess I could figure out a way to reverse those roles, but somehow it wouldn't come out the same.

All right. Mr. Keith, let's go ahead and proceed.

BY MR. KEITH:

Q. And in -- in the circumstances in which Saltzer were unwound and independent, would Saltzer invest in the -- in upgrading its electronic health record systems to interoperate with St. Luke's?

A. I can tell you that the situation that we were in as of November of last year with high revenue producers being gone, we will be looking at every penny that is spent, and we will not invest -- we will not invest in anything that we do not think increases our revenue stream. And so the answer is, no, we would most likely not invest in anything.

Q. And just to be clear, the contracts that you had, that Saltzer Medical Group had prior to the St. Luke's transactions, those were overwhelmingly fee-for-service contracts. Is that fair?

A. Yep.

Q. And so when you say if Saltzer is unwound, it would be doing everything it could to increase reimbursements, that's under a fee-for-service system?

A. Yeah. Our approach would have to be -- again, assuming that we had a nucleus of physicians that stayed within the group, our focus would be cutting costs. We would have to do everything we could, probably releasing employees. We would have to emphasize fee-for-service. That means we're not going to take -- we are good physicians, and we are compassionate physicians. We also are realistic physicians. And we will not focus on Medicaid, Medicare, TRICARE patients. We will focus on fee-for-service, increasing that revenue stream, cutting costs, cutting services that aren't profitable. That would be the strategy that we will have to take going forward.

Q. I want to take you back to the point where Saltzer Medical Group was deciding how it wanted to move forward to address what it saw on the horizon in terms of changes in the healthcare system. And, obviously, again, we're here today because Saltzer took one particular path, tight integration financially.

Why -- why was it that Saltzer Medical Group -- or did -- did Saltzer consider whether a looser affiliation, say, through something like the Select Medical Network could achieve the same ends as the transaction that's now at issue?

A. Well, you know, there -- there is -- when you look at Select Medical Network or other types of networks, you

have to put risk out there, risk for yourself as far as what services you provide, what data you can share, and what you're willing to accomplish. And if those goals aren't reflected in financial terms, revenue stream, then we're not going to pursue those. We would not want to pursue that avenue.

The second is that when we looked at the alignment strategy, we thought that we had to be very integrated because you need to have trust with the partner that you're intending on working with. That partner has to have strength, has to have the same goals that you have for where you are moving forward to, and we saw all that within the St. Luke's Health System. I don't really see that in a Select network or any other network that's out there to any significant extent.

MR. KEITH: No further questions, Your Honor.

THE COURT: Thank you.

MR. KEITH: I'm sorry. Now I'm being asked to consult for one second.

THE COURT: Yes.

BY MR. KEITH:

Q. During the negotiations that Saltzer Medical Group had with St. Luke's that led up to the agreement that's at issue today, did there come a time when Saint Alphonsus submitted its own bid to integrate with the group?

2410

A. Yes. After we had gone through negotiations, there was a quest -- request from some of our partners to open the negotiations to Saint Al's for them to provide an offer to us, and they put together an offer and presented it to us.

Q. And were the financial terms of that offer the same, different than the St. Luke's offer?

A. The -- the financial terms were essentially the same, very, very similar. There were some other aspects of the offer that were different, but the financial terms were essentially the same.

MR. KEITH: Thank you.

THE COURT: Cross, Mr. Wilson.

MR. WILSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WILSON:

Q. Good morning, Dr. Kaiser.

A. Good morning.

Q. If I have understood your testimony correctly, you just testified that Saltzer wanted to do the deal with St. Luke's essentially because Saltzer required additional resources to compete in this new arena of healthcare coming on the horizon; correct?

A. No. I don't think that -- that wasn't the only reason. We thought that we could move forward the

2411

healthcare system with needing additional resources but looking to the future for how we could change healthcare, because that's what I was talking about the whole horizon from the 2000s, the -- the system is broken. We need to figure out how to fix it. We wanted to be part of that solution.

Q. And Saltzer thought that the additional resources from St. Luke's would help accomplish that; correct?

A. A healthcare system. We didn't think we had the resources within our walls to be able to do that and that we needed another entity that was much more far-reaching than us to do that. And with the options presented to us, we thought St. Luke's was the best.

Q. So the answer is yes?

A. Yes.

Q. And I believe you also testified that in your discussions with St. Luke's, you never talked about increasing prices; is that right? Is that your testimony?

A. I -- as I -- as I said in my testimony, I do not -- there was never a point of our discussions that we were going to go out and try to increase costs, raise premiums for third-party payors; correct.

Q. Isn't it true, Dr. Kaiser, that Saltzer's motivation, in part, for the deal with St. Luke's was to control market share?

2412

A. Not market share. It was to control where the future of healthcare was headed in Canyon County, not that we were going to get more patients necessarily. We may; we may not.

Q. But you wanted to control that?

A. We wanted to control or be involved in the services that were expanded in Canyon County.

Q. But you weren't interested in controlling market share per se --

A. No.

Q. -- is that your testimony?

A. That's my testimony.

Q. And isn't it true that one of the motivations for Saltzer doing the deal with St. Luke's was being able to reap the financial benefit of receiving St. Luke's hospital facility fees for Medicare?

A. So the discussion about Medicare payments and how those payments are -- are distributed based on what your organization is came up and were presented. We made it clear that if hospital-based billing went away, that should have no impact on us either way. Because there was just as many discussions that that -- that method of payment may not exist in the future. And so we said it's off for us. It may be there; it may not. That is not part of our concern.

Q. But isn't it true that the financial benefit from

2413

those facility fees was how you expected that Saltzer would pay for your increased compensation?

A. That was, you know, so not in my -- not in our mind. That wasn't our responsibility, so, no.

Q. And isn't it true, Dr. Kaiser, that part of the motivation for Saltzer aligning with St. Luke's was that so Saltzer would really only face one competitor in the marketplace instead of two?

A. No. I don't think there was -- we never decided that there was going to be multiple competitors that -- that we were eliminating any competitors or adding any competitors.

Q. So your answer is, no, that wasn't a consideration?

A. That wasn't our goal.

Q. Nancy Powell used to be the CFO of Saltzer; correct?

A. That's correct.

Q. And she was heavily involved with the negotiations with St. Luke's up until the time she left Saltzer in the fall of 2011 -- or I'm -- right, fall of 2011?

A. She was involved.

Q. And, in fact, it's fair to say she was kind of the scribe for a lot of the work that the Saltzer negotiating committee did while she was at Saltzer; correct?

A. I don't know that to be a fact.

MR. WILSON: Mr. Beilein, can you please play clip 7, which is page 115, line 25 through page 116, line 3 of Ms. Powell's deposition.

MR. KEITH: Your Honor, of Nancy Powell's deposition?

MR. WILSON: Nancy Powell's -- I mean -- I'm sorry, of Dr. Kaiser's deposition. I apologize. Thank you, Mr. Keith.

THE COURT: Yes. I was going to suggest that's an odd impeachment, but I have seen odder forms of impeachment.

(Video clip played as follows.)

Q. "So who -- who was with her, somebody who intended to be the scribe for the negotiating committee?

A. "Nancy Powell did a lot of it."

(Video clip concluded.)

BY MR. WILSON:

Q. It's a small point, but it's fair to say she was the one who did a lot of the recording of what was going on during discussions going on with St. Luke's prior to her departure from Saltzer; correct?

A. Yes. But the negotiating committee dissolved also, so it didn't remain as an entity. And to be quite honest, I'm not sure that I recall a whole lot of documents

that she produced, but maybe I'm just forgetting. I don't know.

Q. Okay.

MR. WILSON: Mr. Beilein, if you could provide Dr. Kaiser with -- and the court with a copy of the binders we have prepared. Appreciate it.

THE COURT: Counsel, you might just provide one. I tend not to use them, and they just start cluttering up my desk. And if I feel the need, I'll ask for it. But otherwise, I'll just look at the electronic version.

MR. KEITH: Do you have an extra binder?

THE COURT: If I have an extra one, give it to St. Luke's.

MR. WILSON: I would prefer, Your Honor, and I will provide a copy to defense counsel of the document before I produce it to the witness.

THE COURT: All right.

MR. WILSON: I -- I'd prefer, if the court would allow me, not to preview the documents that are coming down the road in cross-examination.

THE COURT: Well, I'm not sure I suggested otherwise.

MR. WILSON: No. It's just that if I gave them a binder, there would be a preview of the documents. And I -- I promise to provide him a copy prior to showing it --

MR. KEITH: He has been doing that in the past, but if you want to change practice, that's fine.

THE COURT: Let's go ahead and proceed.

MR. WILSON: Sorry for being difficult.

BY MR. WILSON:

Q. Dr. Kaiser, if you could please turn in your binder to Exhibit 1369. These are a series of handwritten notes from Nancy Powell which have been admitted in evidence. Are you there?

A. I am.

Q. And if you see down at the lower right corner of these documents, there is a number that bears a prefix "SMG" and then some numbers. If you could turn to page 393.

MR. SCHAFER: This document is AEO. I don't know -- I mean, obviously, there is like a hundred pages, so you may not be showing any AEO sections but --

MR. WILSON: Your Honor, perhaps we can proceed this way. If you could blank the screen, please, and I'll ask Mr. Beilein to highlight the portion that I intend to ask the witness about. But I do intend to ask about the specific contents, so I'll leave it to St. Luke's counsel to decide whether or not --

THE COURT: Let -- let's do it question by question.

MR. WILSON: That's fine.

THE COURT: And then if we get to that point where we need to clear the courtroom, we'll do so.

BY MR. WILSON:

Q. Could you please turn, Dr. Kaiser, to page 39311. Are you there?

A. Not yet.

Okay.

Q. These appear to be notes of a meeting related to the St. Luke's integration; correct? See that up there at the top?

A. Yeah. I'm trying to figure out where the start of this is. Okay. Yep. Go ahead.

Q. And the people attending that meeting appear to all be people from Saltzer; correct?

A. Yes.

Q. And these notes, in fact, indicate that you were at this meeting; correct?

A. Correct.

Q. So this appears to be an internal meeting within Saltzer to talk about the St. Luke's deal; correct?

A. Yes.

Q. Okay. If you could turn, sir, to the next page, which is numbered 39312, and look at point 5.

MR. WILSON: If I can ask Mr. Beilein to bring that up on the monitors, please. And I would just indicate

to defense counsel that I do intend to ask Dr. Kaiser about specific points in this list on the record.

MR. SCHAFER: I think it's fine to put this on the screen.

THE COURT: I'm sorry, I couldn't hear you.

MR. SCHAFER: You can put this on the screen, Your Honor.

THE COURT: All right.

BY MR. WILSON:

Q. Point No. 5 in the notes about this meeting regarding the St. Luke's integration is "fundamental reasons for why we should do this." Do you see that?

A. I do.

MR. KEITH: Your Honor, if I may, I just have an objection on form. I would like a little time -- I don't know what -- when these notes relate to. If we can find a date, that might be helpful.

THE COURT: If -- if we could or if the witness knows, he can lay the foundation for --

BY MR. WILSON:

Q. Dr. -- Dr. Kaiser, can you turn to the next page in the notebook, which is numbered 39313. See that?

A. Yeah.

Q. And there is a notation of the date at the top of that of December 16th, 2009. And then if you turn to the

page -- the pages before these notes, specifically page 39309, there's a date November 10th, 2009. So is it fair to say that these notes, presumably, are from sometime in late 2009?

A. Yes.

Q. Turning back to page 39312, and what's listed here is the fundamental reasons for why we should do this. The first reason listed is, quote, Competition, control market share; correct?

A. Yeah. Can I --

Q. Is it -- yes or no, Dr. Kaiser? Is that what's listed?

A. Well, let me explain.

THE COURT: Dr. Kaiser, Mr. Keith is going to give you a chance to explain this, so it's -- it's better to just answer the questions yes or no if you can. It will help us move more quickly through the proceeding.

THE WITNESS: I was going to ask a question about I may need to change my answer on who was at this meeting, because I'm not sure that the consultants weren't a part of this meeting. So I don't know the -- I may need to correct that answer.

THE COURT: I think that's fair.

BY MR. WILSON:

Q. Regardless if the consultants were there or not,

the third reason that Ms. Powell lists as one of the fundamental reasons for why Saltzer should do the deal with St. Luke's is, quote, facility fee for Medicare; correct?

A. Correct.

Q. And the fourth reason listed is, quote, Align with Luke's, one competition compared to two; correct?

A. Correct.

Q. And getting back to the first reason, it is true that the reason listed there is, quote, Compensation, control market share, end quote; correct?

A. Correct.

Q. And did I read all of those reasons accurately?

A. You did. I don't know who said them, but you did.

Q. With respect to that facility fee issue that's listed there, if you could turn in the exhibit you have in front of you --

MR. WILSON: And, Your Honor, if we could block out the screen, please.

THE COURT: Yes.

BY MR. WILSON:

Q. -- to page 39338. It's quite a ways back in the document, Doctor. Please tell me when you're there. It's notes from a meeting on July 27th, 2010.

Do you see that?

A. So what was that reference number?

Q. Yeah. The number is 39338.

A. Okay.

Q. These notes reflect what appear to be a meeting between some folks from Saltzer and some people representing St. Luke's; correct?

A. Appears to be.

Q. And, in fact, you mentioned consultants. One of the people at this meeting appears to be one of St. Luke's consultants, Peter LaFleur; correct?

A. Yep -- yes.

MR. SCHAFER: This is not AEO, so if you want to put this on the screen.

THE COURT: Thank you, Mr. Schafer.

BY MR. WILSON:

Q. And these notes reflect that you were at this meeting; correct?

A. Yes.

Q. And at No. 3, Ms. Powell writes, quote, Expectations of group in terms of comp, and the first point listed is "Financial benefit facility fee share."

Did I read that accurately?

A. You did.

Q. And the second point she lists under No. 3 is, quote, RVU basis, how is it done for other groups?

And the answer is "Same"; correct?

A. Correct. Well, I guess that's the answer. I don't know that.
Q. Well, that's what it says; correct?
A. It says "Same." I don't know what "same" means.
Q. With regard to this notion of securing market share being part of the internal discussions at Saltzer, are you saying that was or was not a part of the discussions within Saltzer internally about why to do the deal with St. Luke's?
A. The discussions within -- within Saltzer were not being excluded from the market. That was our discussions.
Q. Okay. It had nothing to do with securing market share. Is that your testimony?
A. So depending on how you define market share. So it can be simply preserving your market share or it can be expanding it. So our concern was always that we were going to be excluded.
Q. You wanted to secure your market share; isn't that accurate?
A. Yes. Sure.
Q. For much of the time that Saltzer was negotiating its deal with St. Luke's, Saltzer used -- you mentioned consultants. I think the consultant that Saltzer used was a consultant named the Coker Group. Is that right?
A. That was one of them, yes.

Q. You used the Camden Group first, and they were dismissed and then Coker came on; correct?
A. That's correct.
Q. And they were your primary consultant for the bulk of the negotiations; correct?
A. That's correct.
Q. And Max Reiboldt was your primary contact at the Coker Group?
A. He was the lead guy, yes.
Q. And in speaking with St. Luke's, Mr. Reiboldt was speaking on behalf of Saltzer, was he not?
A. He was representing us. Whether he was always speaking for us, I would have to say I'm not sure we always agreed.
Q. Well, you were generally pleased with the work that the Coker Group did on behalf of Saltzer; correct?
A. Yes and no.
Q. Well, isn't it true that you were not at all displeased with how Mr. Reiboldt represented Saltzer's position?
A. At times I was.
Q. Isn't it true that you were not at all displeased with how Mr. Reiboldt represented Saltzer's position, not at all?
A. At times I was disappointed.

MR. WILSON: Mr. Beilein, could you please play dep video clip 3 from Dr. Kaiser's deposition. Mr. Beilein, what's the -- the page and line number of that?
I apologize, Your Honor, if you could just give me one moment.
THE COURT: As long as we have it for the record.
MR. WILSON: Yeah. This is from page 124 of Dr. Kaiser's deposition, lines 7 through 20.
(Video clip played as follows.)
Q. "When Mr. Reiboldt sent letters to St. Luke's stating physician on behalf of Saltzer, were those letters approved in advance by -- by people at Saltzer before they went out?
A. "By and large, yes.
Q. "And -- and whether the letter itself was approved, was the position that Mr. Reiboldt took always approved before the letter went out?
A. "Yes. I will add a caveat, perhaps not in finite detail to all of the points that Mr. Reiboldt was making, but in general, yes.
Q. "And were you displeased with how Mr. Reiboldt was representing Saltzer's position?

A. "No. No. Not at all."
(Video clip concluded.)
MR. KEITH: Objection, Your Honor. I think that was a pretty narrow scope of testimony, not commensurate with the question that -- that Mr. Wilson asked was, Were you ever displeased with the --
THE COURT: I'll allow you to cover that on cross -- on redirect, excuse me.
BY MR. WILSON:
Q. Was that your testimony, Dr. Kaiser?
A. Yes.
Q. He did a good job, didn't he?
A. He did some things very well for us.
Q. If you could please turn in your binder, Dr. Kaiser, to Exhibit 1143 and let me know when you're there.
A. I'm here.
Q. Okay.
MR. WILSON: Your Honor, if we could black out the screen, please?
BY MR. WILSON:
Q. This is a letter from the Coker Group to you, Bill Savage, and Nancy Powell dated December 17th, 2010; correct?
A. That's correct.

2426

Q. So this is shortly after Saltzer engaged Coker as its consultant to help with the St. Luke's deal; correct?
A. **That sounds about right.**
Q. And at the outset of that engagement, Coker representatives met with the executive committee of Saltzer; correct?
A. **Yes, they did.**
Q. And you were on the executive committee?
A. **Yes.**
Q. And so you personally met with Coker representatives when they came out to interview people at Saltzer?
A. **I met with Coker, yes.**
Q. At the outset of their engagement?
A. **Yes.**
Q. About how large was the executive committee at the time? This is December 2010.
A. **So I'm going to say somewhere around 10 to 12 is the number I'm thinking.**
Q. So if Coker, when they came, met with the executive committee to get their input, they would have met with approximately 10 to 12 individuals?
A. **Well, not all members of the executive committee are always present, so I don't know for sure how many they met with.**

2427

Q. They met with the executive committee; correct?
A. **Yes.**
Q. And, in fact, this letter indicates that when Coker came to speak with Saltzer doctors and employees, that they also conducted several one-on-one interviews with Saltzer doctors; correct?
A. **That's correct.**
Q. After those interviews, Coker compiled a summary of what they had learned from the interviews; correct?
A. **Correct.**
Q. And is it fair to say that this letter essentially contains that summary?
A. **For that point in time, yes.**
Q. Okay. And in this summary, if you just page through it, Dr. Kaiser, at various points, there is numerous, what Coker has characterized as issues, concerns, and comments that Saltzer doctors told them about a potential deal with the hospital system like St. Luke's; correct?
A. **Yes.**
Q. And there are both positive and negative comments here; correct?
A. **It appears so.**
Q. Isn't it true, Dr. Kaiser, that no one from Saltzer mentioned to Coker that Saltzer's electronic health

2428

record system was a concern whatsoever?
A. **Throughout the discussion -- at this point in time, I don't recall. We did mention it later on in the negotiations about electronic health record.**
Q. So your answer is you don't recall whether it was mentioned when Coker first came to speak to Saltzer?
A. **No, I don't recall.**
Q. And isn't it true, sir, that when Coker first came to gather input from Saltzer in late 2010 that no one from Saltzer told Coker that gaining access to Epic was a reason to do a deal with a large hospital system; correct?
A. **I don't know that we even knew the name of Epic at that time. We talked about infrastructure access, and so it may not be mentioned in specific detail as far as Epic, but as far as access to infrastructure would have implied an electronic medical record or enhancement of electronic medical record.**
Q. No one complained that Saltzer's EMR was antiquated, did they?
A. **You mean to Coker or --**
Q. Correct.
A. **So I don't know. I don't know if anyone did --**
Q. Your answer is you don't know?
A. **I don't know.**
Q. And isn't it true, sir, that in all these folks

2429

that spoke with Coker, not one of them told your consultants that treating more Medicaid patients was a reason to do a deal with a large hospital system?
A. **I don't know if anyone mentioned it or not. I don't -- I couldn't answer the question, I guess.**
Q. And isn't it true, Dr. Kaiser, that -- that no one from Saltzer told your consultants that the quality at the Saltzer Medical Group was a concern?
A. **I don't know.**
Q. You mentioned during your direct testimony that you personally did not accept Medicare patients before being acquired by St. Luke's?
A. **Not true. I said I didn't take Medicare patients for annual exams.**
Q. Oh, I'm sorry. So you did not take Medicare patients for annual exams, but you did accept them for other parts of your practice?
A. **Yes.**
Q. And was there any legal impediment that prevented you from accepting Medicare patients for annual exams?
A. **Not that I know of.**
Q. That was essentially a business decision you made; correct?
A. **Correct.**
Q. And you also mentioned that Saltzer did not accept

2430

Oregon Medicaid patients; correct?
A. Correct.
Q. Or Oregon, I should say. Sorry.
A. I don't know which --
Q. I'm from the Midwest.
And was there any legal impediment to Saltzer accepting Oregon Medicaid patients?
A. I'm not an expert in the field, but I thought they wouldn't get reimbursed -- that we wouldn't get paid for them.
Q. So it was a business decision?
A. Business decision.
Q. And you also testified about the benefits of sharing data that have come to Saltzer after its acquisition by St. Luke's; correct?
A. Correct.
Q. And I believe you testified that you said you wouldn't have shared this sort of electronic health data if Saltzer had remained independent. Is that your testimony?
A. I said I'm not sure of the extent of data that we would share.
Q. Even though you just testified about all of the benefits that it would inure to the patients at Saltzer; correct?
A. Correct.

2431

Q. During your direct examination, you testified that Saltzer did not want a looser affiliation with St. Luke's; correct?
A. I think I said I didn't think it was going to achieve our goals, a looser arrangement.
Q. Well, isn't it true that the proposal that Saltzer put on the table initially to St. Luke's was a looser affiliation; correct?
A. The proposal we put on the table initially was an arrangement that we came to believe was not legal.
Q. Because it wouldn't allow St. Luke's to charge provider-based billing; correct?
A. I'm not sure if that's the only reason. We had multiple attorneys that reviewed this and gave us recommendations on what needed to be done in the transaction to move forward into a alignment with a healthcare system.
Q. But one of the reasons for not pursuing a looser affiliation was because it didn't allow St. Luke's to do provider-based billing; correct?
A. I don't know that that was the only reason or that --
Q. That wasn't my question, Doctor. My question was: Was it a reason?
A. Again, I'm going to have to say I don't know because I don't know enough of the ramifications of CMS

2432

rules and what's required when you hold yourself out as being part of a health system.
Q. Well, when you first proposed this looser alignment that turned out not to be achievable for some legal reason, apparently you thought that you could trust St. Luke's under a looser arrangement; correct?
A. Yes.
Q. And you thought -- Saltzer thought that it could achieve the same goals as St. Luke's with a looser alignment; correct?
A. I'm not sure we had pursued all the goals, but we thought we could achieve goals with St. Luke's.
Q. You thought you could clinically integrate with a looser affiliation; correct?
A. Yes.
Q. And you mentioned in your direct testimony that there was -- there is no incentive plan currently that incentivizes Saltzer doctors to send -- to incur more ancillary services; is that right?
A. That's correct.
Q. Okay. Whether there is an incentive in place or not, St. Luke's derives the revenue from those ancillary services; correct?
A. As far as I know.
Q. And the agreed-upon compensation for the doctors

2433

with St. Luke's is based on RVUs; correct?
A. That's correct.
Q. And that, in fact, provides an incentive of some sort, does it not?
A. No. There is no -- we don't get a work RVU for ordering a lab.
Q. The more doctors work, the more they get paid under that system; correct?
A. Yes.
Q. It's the fee-for-service model?
A. It is.
Q. And it was important to Saltzer to negotiate a guaranteed rate on an RVU basis for the entire five-year term of its deal with St. Luke's; right?
A. Yes, it was.
Q. And that's still the compensation structure in place today; correct?
A. Well --
Q. Is that correct, Your Honor --
A. No.
Q. -- Dr. Kaiser? You have received a promotion, Doctor.
THE COURT: I'm going to take the Fifth Amendment on that.
BY MR. WILSON:

Q. That is the compensation structure in place today; correct, Doctor?

A. Yes.

Q. Isn't it true, Dr. Kaiser, that one of the reasons that Saltzer wanted to do the deal was that it wanted the clout of combining with St. Luke's in negotiating contracts with third-party payors?

A. I'm not sure how to answer that question. I don't know. It -- the -- the -- at what point in the transaction are you talking about?

Q. Are you denying that Saltzer -- one of the reasons that Saltzer wanted to do this deal with St. Luke's is that Saltzer wanted the clout of combining with St. Luke's in negotiating contracts with third-party payors?

A. The desire of Saltzer was to not be excluded from contracts. If that's equated to clout, then the answer is yes.

Q. In fact, combined contracting was one of the reasons that Saltzer did the deal; correct?

A. It was -- I don't know that it was a reason to do the deal. It was an outcome of the deal and how it was structured.

Q. If you could please turn, Dr. Kaiser, to Exhibit 1375 in your binder. Are you there, Doctor?

A. I am.

Q. These are your handwritten notes; correct?

A. They are.

Q. And in the lower part of the page under the word "why," you list several reasons why doing the deal with St. Luke's was a good idea; correct?

A. Correct.

Q. And if we could focus just on No. 6, it lists "combined contracting"; correct?

A. Yeah.

Q. And so it's fair to say that this combined contracting with a large hospital system was one of the factors that led Saltzer to pursue an acquisition by St. Luke's; correct?

A. Do you have a date on this?

Q. I have a question pending, Doctor.

A. I'm sorry, could you repeat the question?

THE COURT: If the witness wants to see the date on the --

MR. WILSON: There is no date on the document, Your Honor. And I believe you have answered the question that was pending.

BY MR. WILSON:

Q. My question now is: So it's true that one of the factors that led Saltzer to pursue a deal with a large hospital system was the combined contracting clout it would

get from combining with that hospital system; correct?

A. At this point in time, it was one of the issues that was brought forward as a reason to pursue.

Q. By Saltzer?

A. By Saltzer.

Q. But to improve its posture in negotiations with health insurers, Saltzer didn't want to align with just any hospital system; correct?

A. I don't -- I don't think that -- I don't know how to answer that -- that that was a reason to -- did you ask is that the reason we selected St. Luke's? Is that what you're asking?

Q. Well, Saltzer had a preference for one hospital system over another; correct?

A. Correct.

Q. And isn't it true, Dr. Kaiser, that Saltzer pursued a deal with St. Luke's because Saltzer believed that St. Luke's was the dominant provider and would give Saltzer an opportunity to control services in Canyon County?

A. The reason we -- I think I stated earlier the reasons that we pursued working with St. Luke's, and they are multifactorial and -- and again the term "dominant" -- they were an important part of Canyon County and patients, so, yes, we thought they were the right partner to -- to work with.

Q. Do you have some discomfort with the term "dominant"?

A. It seems to be thrown around the court and have multiple meanings.

Q. Could you please turn to Exhibit 1367 in your binder, Dr. Kaiser.

A. Okay.

Q. This is an email from Dr. Randell Page to you and Bill Savage; correct?

A. Correct.

Q. Dated January 3rd, 2012?

A. Yes.

Q. Dr. Page was and is the head of the contracting committee at Saltzer?

A. That's correct.

Q. And Bill Savage was and is the CEO of Saltzer; correct?

A. That's correct.

Q. This appears to be a draft of an email that Dr. Page composed trying to convince his fellow physicians to go with a deal with St. Luke's rather than Saint Al's; correct?

A. Yes.

Q. And Dr. Page sent this to you and asked for your thoughts, additions, and corrections before he distributed

it; correct?
A. Correct.
Q. And if we could go down to the bottom, towards the bottom of the page. Dr. Page writes, "We have to be concerned with aligning, if appropriate, with the strongest partner. No one would disagree that Saint Al's is not the dominant provider in the Valley."
Did I read that correctly?
A. You did.
Q. Dr. Kaiser, you didn't correct that statement, did you?
A. I had a conversation with him about multiple aspects of this.
Q. Did you correct that statement?
A. I don't know. I don't know what the final form of it was.
Q. Well, we'll get to that. Let's go on to the next statement. Right after that, Dr. Page writes, "We are already linked in many ways to St. Luke's because we all know that they are and will likely remain the dominant provider."
Did I read that correctly?
A. You did.
Q. And did you correct that statement?
A. I don't recall.

Q. If you could turn the page, Dr. Kaiser. And here Dr. Page writes, quote, They are offering a wonderful opportunity to control and codevelop services in Canyon County.
Did I read that correctly? It's highlighted on your screen, if that makes it easier, Doctor.
A. Yeah. I was just trying to look at the context, if that's okay.
Q. Sure.
A. Yes.
Q. And the "they" that Dr. Page refers to there is St. Luke's; correct?
A. Yes.
Q. In fact, I believe in your direct examination today, you mentioned that you wanted to influence services in Canyon County; correct?
A. Yes.
Q. And, incidentally, on the page you're looking at there, the second page of this exhibit, it states right after the sentence we just highlighted: "There is logic to that. Compensation for primary care and nonprocedural specialties is based on the hospital system maintaining access to patients. Via these providers, they control the input to outpatient services, diagnostics and referral to proceduralists who then use the hospital."

Do you see that?
A. I do.
Q. Did I read that accurately?
A. You did.
Q. Did you correct that statement?
A. I don't recall.
Q. Let's see if we can refresh your recollection. If you would turn to Exhibit 1366, please, sir.
Are you there?
A. Yes.
Q. This is, in fact, the final version of the letter that Dr. Page ended up sending to the Saltzer doctors; correct?
A. It appears to be.
Q. And isn't it true, sir, that none of the language that I just read to you from his email was altered in any way in the final version of this letter?
MR. KEITH: Are you asking him to go through the entire email?
MR. WILSON: I asked him a question; he can answer it.
THE WITNESS: Let me read it.
BY MR. WILSON:
Q. Sure.
A. Could you repeat your question?

Q. Sure.
Isn't it true that none of the language I just read to you from his email to you was altered in any way in the final version of this letter?
A. That doesn't answer the question of whether I asked him or recommended any changes, but the answer is yes.
THE COURT: Just a moment. Well, rephrase the question. Listen carefully to counsel's question. If you can answer it directly, please do so.
Go ahead. Mr. Wilson, would you rephrase.
MR. WILSON: Sure.
THE COURT: Or restate.
MR. WILSON: I will restate to make it more straightforward.
BY MR. WILSON:
Q. If you look at this letter, Dr. Kaiser -- if you look at the second bullet from the bottom, Dr. Kaiser, it says, "We have to be concerned with aligning, if appropriate, with the strongest partner. No one would disagree that Saint Al's is not the dominant provider in the Valley."
Do you see that?
A. Yes.
Q. That's the exact same language from the email that Dr. Page sent to you asking for your thoughts or

corrections; correct?
A. I can go compare it to the other one.
Q. Is that true?
A. I need to look back at the other one to give you a yes or no.
Q. Well, it's right there in your binder.
A. Yeah. What was the number -- I don't know if you could tell me the reference number.
Q. The number is 1367. It's directly behind the document you're looking at now.
A. It's the same.
Q. Okay. And in the last bullet point at the bottom of Exhibit 1366, it says, "We are already linked in many ways to St. Luke's because we all know they are and will likely remain the dominant provider."
And that's the exact same language that Dr. Page used in his email to you asking for your input, comment, and corrections; correct?
A. Correct.
Q. And if you turn to the second page of the letter marked Exhibit 1366, in the middle of the page it states, "They are offering a wonderful opportunity to control and codevelop services in Canyon County." Correct?
A. Yes.
Q. And that's the exact same language from his email

that he sent to you asking for your input and corrections; correct?
A. Correct.
Q. And, in fact, if you turn to the last page of Exhibit 1366, Dr. Page's letter, you signed this letter; correct?
A. That's correct.
Q. That's your signature there (indicating)?
A. Yes. I said that's correct.
Q. And by signing the letter, you were indicating that you agreed with Dr. Page; correct?
A. Correct.
Q. And, in fact, on the bottom of the second page, Dr. Page ends his letter by saying, "Please sign if you agree with me."
Isn't that right?
A. That's correct.
Q. And many other Saltzer doctors also signed the letter, didn't they?
A. They did.
Q. And it would appear that Dr. Page did not change the wording of the letter in any way after sending you that email; correct?
A. That appears to be correct.
MR. WILSON: I have nothing further, Your Honor.

MR. ETTINGER: Your Honor, I have a few questions.
THE COURT: Yes, Mr. Ettinger.
CROSS-EXAMINATION
BY MR. ETTINGER:
Q. Dr. Kaiser, isn't it true that under Saltzer's agreement with St. Luke's, if the court were to unwind this transaction and Saltzer were to remain independent, Saltzer and its physicians get to keep almost $9 million in payments?
A. They get to keep the goodwill money, which I believe is the $9 million category.
Q. Okay. Let's talk a little bit about risk, which you talked about on direct. Saltzer is part of the BrightPath Network; correct?
A. Correct.
Q. And it was before this acquisition; correct?
A. To the best of my knowledge.
Q. And the plan for the BrightPath Network with SelectHealth is to ultimately have a risk arrangement; isn't that right?
A. As far as I understand.
Q. And so if Saltzer were unwound and continued to participate in the BrightPath Network, it could participate in full risk as part of the larger BrightPath Network; correct?

A. If it decided to do that.
Q. Yeah. And Saltzer today is part of the Saint Alphonsus Health Alliance; correct?
A. We are.
Q. And the Saint Alphonsus Health Alliance plans to enter into risk-based contracts; correct?
A. That I don't know.
Q. If Saint Alphonsus Health Alliance did enter into risk-based contracts, Saltzer, even if it was separate from St. Luke's, could be part of that; correct?
A. Could be, correct.
Q. So whether or not you think Saltzer can enter into risk-based contracts on its own, there were things going on in this marketplace that would give it the option to do so as part of a larger network even if not acquired; correct?
A. That's correct.
Q. Now, you -- Mr. Keith asked you some questions which referred to but did not identify Exhibit 1380. So why don't we go to 1380, which we have a notebook if it's not in Mr. Wilson's. I think it may be in Mr. Wilson's.
A. It is.
THE COURT: Thirteen - yeah.
BY MR. ETTINGER:
Q. So this is the email --
MR. ETTINGER: Is this AEO?

MR. SCHAFER: Yes.
MR. ETTINGER: Okay.
BY MR. ETTINGER:
Q. This is the email from Ms. Powell asking --
MR. ETTINGER: And by the way, Your Honor, on direct in open court, all the substance was revealed, but I'll still observe the AEO distinction if St. Luke's wants me to.
THE COURT: Do you want this, Counsel?
MR. KEITH: I purposely omitted the percentages. I said X, Y, Z.
THE COURT: Well, I guess we will -- all right. Let's go ahead and proceed.
BY MR. ETTINGER:
Q. So this is the email where Ms. Powell, your CFO, said, "Should my target for compensation be X, Y, or Z percent more, how much is enough to get the physicians to say this deal might be worth it in substance"; correct?
A. That's correct.
Q. Yeah. And I'm not going to go over your testimony with Mr. Keith again, but why don't we go right away to -- the date of that is June 15, 2011?
A. That's correct.
Q. Now, isn't it true that the response Ms. Powell got was that the middle number on this email is the number

that St. Luke's ought to shoot for -- that Saltzer ought to shoot for?
A. I don't know the answer to that.
Q. Well, maybe we can help you. Why don't we go to Exhibit 1384. And 1384 is another email from Ms. Powell to you six days later; isn't that right?
A. That's correct.
Q. And she's reporting on conversations with Peter LaFleur, the St. Luke's consultant; isn't that right?
A. That's correct.
Q. And in the third paragraph, she talks about --
MR. SCHAFER: Do you have the document --
MR. ETTINGER: I'm sorry?
MR. SCHAFER: We weren't given the binders. Do you have this document?
MR. ETTINGER: Oh, sure. I'm sorry, you should have it.
I think that was in -- oh, Eric didn't give it to you because he was doing it individually. Sorry. You referred to it, you must know about it, but we're happy to give it to you.
BY MR. ETTINGER:
Q. So in paragraph 3, Ms. Powell reports that Mr. LaFleur said that St. Luke's is building the Y percent compensation model; correct?

A. That's correct.
Q. And that was the middle number of the three that she asked you about in her email six days earlier; isn't that right?
A. That's correct.
Q. So that -- doesn't that indicate to you -- doesn't that refresh your recollection that Saltzer said that's the number we want and St. Luke's was going to work with it?
A. No.
Q. You don't remember?
A. I don't recall that.
Q. Okay. Now, if we go to paragraph 5 of 13, Exhibit 1384, Ms. Powell reports that "Peter LaFleur is working on a compensation model that would provide additional compensation for exclusivity; i.e., working out of St. Luke's facilities only"; correct?
A. That's what it says.
Q. Yep. Now, why don't we go to Exhibit 1143, which Mr. Wilson showed you, the Coker letter. And I'm going to ask you about some different language on it on page 5 of the letter.
MR. ETTINGER: Why don't we pull up the second checkmarked paragraph under No. 8, "key need."
Your Honor, I'm going to refer to one sentence which is -- you know, the subject was discussed in substance in

open court on direct. Let me just ask St. Luke's; I want to read the last sentence of that paragraph.
THE COURT: Any objection in terms of privilege or --
MR. SCHAFER: No. That's fine.
MR. KEITH: No, Your Honor.
THE COURT: All right. Go ahead.
BY MR. ETTINGER:
Q. And -- and Mr. Reiboldt, in this letter after the investigation that you described to Mr. Wilson, says, quote, Saltzer cannot commit to leave Mercy until they have the assurance of a new hospital-related facility in Nampa, close quote.
Did I read that correctly?
A. You did.
Q. By "Mercy," that refers to Mercy Medical Center?
A. I would assume so.
Q. And today that's Saint Alphonsus Nampa?
A. That is correct.
Q. And this is Mr. Coker -- Mr. Reiboldt reporting after he met with the executive committee, met with other doctors, reviewed data and documents from Saltzer; correct?
A. Correct.
Q. Now, you, in response to Mr. Keith, said -- and I want to be sure I've got it right -- he asked you what you

2450

meant when you said that Saltzer would support the new St. Luke's Nampa hospital.

And, yes or no, did I hear correctly that you said when the word "support" is used, it means only cover emergency room call requirements?

A. In the context of the question, yes, it means that we were talking about support for the hospital.

Q. Well, let's -- let's put it in the context of my question. I'll ask a different question just to be real clear.

You have said, Saltzer has said in documents, other people from Saltzer have said in testimony that Saltzer agreed to support the new St. Luke's Nampa hospital; correct?

Yes?

A. Correct.

Q. And by that, do you mean only that Saltzer agreed to provide emergency room call requirements for that hospital?

A. The major portion of our -- the answer is yes.

Q. Is there a single document anywhere that says that --

A. I don't know.

Q. -- that you're aware of?

A. I don't know.

2451

Q. Now, you testified in response to Mr. Keith's question about some survey data prepared in response to the attorney general's request?

A. Yes.

Q. And the request was for data on the actual referrals to hospitals by Saltzer; correct?

A. You know, I'm going to have to say I don't recall the exact wording of the request from the FTC/AG.

Q. And, in fact, what you provided was: Number one, patient responses to questions about which hospitals they referred; and, number two, data on the actual referral patterns by Saltzer to those hospitals; correct?

A. No.

Q. Well, you -- you had no role with regard to that survey, did you, Doctor?

A. Yes.

Q. What was your personal role with regard to that survey?

A. So when we had made a decision, when we were requested to provide that, we had to discuss how we were going to do it, how the questions were going to be asked, where the data was going to be collected. And so that was the discussion in the executive committee.

Q. Was Mr. Savage more directly involved with that survey than you?

2452

A. Yes, he was.

Q. So we can rely on his testimony on that subject?

A. I don't know -- yes, you can rely on his testimony.

Q. Thank you. You -- you mentioned in response to direct that the subject of raising prices to commercial payors was never addressed by St. Luke's at any time during the discussions; is that correct?

A. That I recall.

Q. That you recall.

Did you ever see any -- any of Mr. LaFleur's analyses about raising reimbursement rates to commercial payors?

A. Not that I recall.

Q. He didn't share those with you?

A. Not that I recall seeing.

Q. Did Mr. LaFleur work more directly with Nancy Powell, with Bill Savage than with you?

A. Yes, he did.

MR. ETTINGER: Nothing further. Thank you.

THE COURT: Redirect, Mr. Keith.

MR. KEITH: Your Honor, I think it may be time for our break. I don't know if you --

THE COURT: We're just a little bit early, but is --

MR. KEITH: I may have more than ten minutes.

2453

THE COURT: All right. We'll take a short -- well, we'll take a 15-minute break. That's probably going to be more like a 20-minute break so that the second -- our last session of the day doesn't get to be too long.

Was there something else, Mr. Wilson?

MR. WILSON: Just, of course, there be no conferring with the witness during that time.

THE COURT: No.

All right. We'll be in recess, then, or until further call.

Oh, just a moment. Counsel, just a moment. I apologize. Counsel, a scheduling matter just came to my attention that next Tuesday I'm supposed to be at a luncheon meeting, and I -- we just didn't factor it into it. It's a meeting we have twice a year with the state Supreme Court, and I miss it more often than I make it because of my trial calendar. I was toying with the idea of going 8:30 to 3:30 with an hour break in the middle. I would like you just to see, would that be a problem? If not, that may be what we do. I have a 3:30 calendar, but we'll -- I'll just go directly from the trial into that calendar and just move my hour break that I normally would take up through the lunch hour.

MR. SINCLAIR: We can discuss it by email with Mr. Metcalf.

THE COURT: Yes, if you would, and then we can decide. The problem is Monday is a holiday, so we have to decide today, and I want you to be aware of that.

MR. SINCLAIR: That's fine. That's fine from our perspective.

THE COURT: All right. We'll be in recess.

(Recess.)

****** COURTROOM REMAINS OPEN TO THE PUBLIC ******

THE COURT: Dr. Kaiser, I'll remind you that you are still under oath.

Mr. Keith, you may conduct your redirect.

MR. KEITH: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. KEITH:

Q. Dr. Kaiser, just a few follow-up questions from cross-examination.

With respect to -- you talked about a survey that Saltzer is conducting of patient preferences for hospitals and specialty care. And I think you indicated that Bill Savage is the most knowledgeable person about that survey as a whole; is that right?

A. That's correct.

Q. And -- but you do participate in the survey in the sense that if one of your patients needs a referral, you would need to ask that person where they wanted to go?

A. That's correct.

Q. And is it your understanding that that's the same survey or the same point in the same population that you're asking where they want to go as in the larger set, the folks who come initially into the clinic?

A. No. There are two different populations. So the first population is simply everyone that presents as a new patient to Saltzer. That question is asked at the time that they take their demographic information.

And then the second is when a patient is going to need a referral for a procedure or something else, and then the question is asked where would they like to go.

So there can be two very different populations.

Q. But I guess to put a fine point on it, one could not conclude from comparing those two sets that Saltzer had taken folks who expressed an interest in going to a particular hospital and then sent them somewhere else?

A. No. The two populations are very different, different set of circumstances where they're asked the question.

Q. You were asked a question about the consequences to Saltzer and the Saltzer physicians if the transaction at issue here was unwound and, in particular, about goodwill payments and whether those would need to be repaid under the contract.

Would you agree that Bill Savage is the person most knowledgeable about what would a -- what would need to be repaid or what could be kept following an unwind?

A. Absolutely.

Q. I would like to go back to a topic that I wasn't sure I fully understood. Counsel for the state asked you about a proposal that was initially floated during discussions with St. Luke's and described that proposal as a, quote/unquote, looser affiliation. But I'm not sure I understand exactly what that proposal was. So can you describe it to the court. What was the initial proposal?

A. Yeah. So the initial proposal that Coker came up with was called a "global PSA." And I'm not sure it's actually looser from an alignment standpoint compared to the final one.

The parameters of the global PSA were paid at a -- again, we never got to the final levels of detail of what that would really be, but it was a reimbursement system that was at kind of a top level with all the overhead still being there and then us apportioning it down and getting several other fees.

The problem with the plan is we started to pursue that plan and tried to look for where that model had been used and could not find any.

Q. And can you compare the initial proposal in the

Saltzer-St. Luke's discussions that came from Coker with what we have described elsewhere, you and I in your direct testimony, as looser affiliation through, for example, Select Medical Network?

A. Yeah. They are very different. So the global PSA still was an alignment, an integration strategy, just where different responsibilities were. When I typically talk about looser affiliations, I'm talking about joint venture activities, just participating in networks, or those type of alignments.

Q. But in the -- in answering counsel for the state's questions about whether Saltzer considered a looser affiliation, whether there was the chance that that might be successful in achieving the goals that Saltzer had, you were speaking of the looser affiliation proposed by Coker; right?

A. That's correct. We were talking about the global PSA, not the other types of affiliations of joint ventures or anything else.

MR. KEITH: I would like -- if possible, if I could ask that Exhibit 1369 be presented. And I believe the screen is off. I'm not sure now where we ended up with, what portions were shown, if they were AEO or not.

THE COURT: What portion --

MR. KEITH: The portions -- I'm just going to go the same -- mainly the same portions.

THE COURT: That's a St. Luke's decision, so you all need to -- or Saltzer decision, I guess, actually.

MR. KEITH: Did we not show that?

MR. SCHAFER: I think we decided they're not AEO.

MR. KEITH: Okay. I just didn't want to do anything differently. So these can be published.

BY MR. KEITH:

Q. Dr. Kaiser, a few questions on this document. I think you said you recognized these as potentially notes written by Nancy Powell. Is that fair?

A. That appears to be her handwriting.

Q. Okay. Other than this litigation, did you ever review the set of notes that Nancy put together?

A. Never.

Q. Do you make it a habit to review her notes?

A. No.

Q. And so if she had something maybe wrong or she misunderstood a point that someone was making and it got into her notes, you wouldn't have had an opportunity to correct her; right?

A. I would not.

Q. Now, if you look at the first page of the notes that's 39297, you see a date that appears at the top. What's that date?

A. 9/24 -- 9/24/2009.

Q. And then if you -- if we could go to the third-to-last page, 39367.

What's the -- can you tell us the date there?

THE COURT: It's on the screen.

THE WITNESS: Oh, sorry. 9/22/2011.

BY MR. KEITH:

Q. So these notes cover -- we can take that down -- these notes cover a period of roughly two years?

A. Yes.

Q. And these were two years of fairly intensive negotiation with St. Luke's?

A. That's correct.

Q. And plaintiffs' counsel pointed you to a couple of portions of this document and the text within that document suggesting what the purposes of the Saltzer transaction was. So I have a couple of general questions, and then we'll go look at the pages.

But, as a general matter, over the long course of these intensive negotiations, did views and priorities change, get articulated differently over time?

A. There was a significant change, both in understanding of what -- where we were, what we needed, and what could be done in the beginning versus where we ended at the end.

So there was a lot of -- a significant amount of change that occurred through this long time frame.

Q. If you go to page 39312 of Exhibit 1369 -- and you can put this up on the screen. I have got 39312 if I'm not mistaken. And if we could highlight No. 5, the whole set there, that would be great.

Do you remember seeing this when you were asked questions by counsel for the state?

A. I do.

Q. And I notice that -- and I think this was pointed out to you -- that under subpart C, there appears to read "facility fee for Medicare."

A. That's correct.

Q. And what's your understanding of the meaning of that phrase?

A. That there is a -- within the payment allowed for Medicare, when you meet certain criteria under CMS rules, that there is a facility that can also be paid for.

Q. And is that something that Saltzer or St. Luke's would have to negotiate with CMS to achieve?

A. No. It's just part of the protocol that's available.

Q. And are you familiar with the term "provider-based billing"?

A. Yes, to some extent.

Q. And when you use that term, do you mean the change in reimbursement associated with the facility fee under Medicare?

A. That's what it usually includes.

Q. So in your answers today, if you used those terms or someone else used those terms, that's how you're using the word?

A. Yes.

Q. Let's turn to 39338 in the same document. And if we can just highlight or enlarge 3a -- I'm sorry. Not that one. 3a. Maybe it was right. Okay.

So counsel for the state also showed you this page, and I wanted to follow up because here you'll see "financial benefit - facility fee share," doesn't indicate whether this relates to Medicare or some other payor.

But to the best of your understanding, in the discussions that you were involved in during negotiations between St. Luke's and Saltzer, were the discussions, if any, of the facility fee share related to Medicare, to commercial payors, or both?

A. This topic came up periodically, and it always was associated with Medicare and nothing else.

Q. I believe you testified during your direct examination that, you know, one of the benefits that you've seen through the transaction already is that you're able to focus your attention on providing the highest quality care

to any patient who wants to see you, and you no longer have to focus on the sort of business side of the practice. Do you recall that?

A. Yes.

Q. And can you just expand on that somewhat? What is it that you feel is the advantage?

MR. ETTINGER: Your Honor, asking the witness to expand on his testimony on direct is a little beyond the scope of redirect.

THE COURT: I was kind of coming to that same conclusion, Mr. Keith. It's almost inherently -- you need to focus specifically on something covered, I think, by Mr. Wilson or Mr. Ettinger.

MR. KEITH: Fair enough.

If we could bring up 1375, please.

BY MR. KEITH:

Q. Counsel for the state asked you about this email and pointed out that you had identified combined contracting as one of the advantages of the transaction, and I wanted to ask you what you meant by that.

What's the advantage to you or to Saltzer of the combined contracting?

A. So this was taking down notes that was occurring in a meeting. The combined contracting, I don't know exactly what was -- what was meant by that phrase.

In my mind, it would be that contracting -- as the PSA -- as the PSA rolled out as we got through all the details, what happened with contracting is initially it was thought to be something that we would participate in or that we would do. And then it became clear under the PSA that it would be St. Luke's who would be providing the contracts for us, for our services.

So I'm not real sure what we intended to mean by this particular statement of combined contracting, unfortunately, at this point in time.

Q. And do you recall, just generally speaking, the idea of combining the contracting of Saltzer and St. Luke's being a significant factor in the discussions because it would allow the two to raise prices to payors?

A. There was no discussion about anything to do with us being able to influence the contracting, raising prices, or any other stipulation. It was simply mostly a question of how would contracting be done in the future, where were we going to go with it, and not knowing exactly how it would be done because it's going to be different than what we had been doing all along.

Q. So I would like to turn your attention to the email at Exhibit 1367, and this is -- this is the document that you were shown in which Randy Page sends out a draft -- Dr. Page sends out a draft of a letter that he is planning

to circulate and have signed. And I wanted to ask you a couple of questions about this document.

First of all, it sounded like you had -- although, apparently, Dr. Page didn't change the language in the final agreement or at least the language we have looked at. Did you have discussions -- it sounds like you had had discussions with Dr. Page about what he meant by terms like "dominant" in describing St. Luke's and "control" in terms of controlling the Canyon County market.

So, first of all, is that correct? Had you had those discussions?

A. Yes.

Q. And what -- sorry.

THE COURT: Is there an objection?

MR. WILSON: To the next question. We would object that this calls for hearsay, Your Honor.

THE COURT: Well, let's perhaps keep that in mind as you formulate your next question, Mr. Keith.

MR. KEITH: Sure.

BY MR. KEITH:

Q. And in -- counsel for the state, I believe, or counsel for the private plaintiffs asked you in particular whether you would sign this letter; correct?

A. Correct.

Q. And in signing the letter, did you have in mind

the understanding you gained from discussions with Dr. Page?

A. Yes. So what -- what the intent of this letter was was simply to express the view that Saint Al's was not our preferred partner, mostly based on the relationship, which it identifies here as the big problems that we had with pursuing Saint Al's.

And this came at a time where there was some partners, most who had interest in Treasure Valley Hospital and in working in alignment with Saint Al's to bring Saint Al's into the negotiation. And this was a discussion in the group about is that the right thing to do.

Q. And what was your understanding of the language -- maybe we can switch then here to the final letter, Exhibit 1366.

MR. SCHAFER: There are some AEO from Saltzer, so we may want to blank the screen.

MR. KEITH: Let's blank the screen until we can talk to --

Mr. Julian, do we -- do we need to blank the screen?

MR. JULIAN: No. That's fine.

MR. KEITH: Okay. We can put that back up. If we can highlight the second bullet from the bottom of the first page.

BY MR. KEITH:

Q. You will see there is the language there that you

2466

were asked about in terms of what -- whether Saint Al's was the dominant provider or whether that was St. Luke's.

What did you have in your mind when you signed this letter as to the meaning of dominance as it's used here?

A. What's our patient preference? I mean, who -- who do we believe is the preferred provider based on patient preference and working relationship with physicians.

Q. And similarly, on the second page of that document, if you'll turn there, the -- I guess the second full paragraph, four lines down: "They are offering a wonderful opportunity to control and codevelop services in Canyon County."

In your mind, was -- did you understand this to mean that St. Luke's was offering a wonderful opportunity to keep all its competitors out of Canyon County?

A. No. We had this discussion multiple times. We understood that any competitor can come into any market and provide any services they wish. This was simply talking about what services can we help to enhance and to provide with St. Luke's to the patients in Canyon County.

Q. If we could pull up the letter from Coker -- the number of which, unfortunately, is failing me -- that was used on cross, the long letter.

A. 1143.

Q. 1143? You were asked a number of questions about

2467

this document, Dr. Kaiser, in terms of why certain things -- certain factors that you've articulated as important in driving the St. Luke's-Saltzer transaction are not represented here in this document.

A. Right.

Q. And I wanted to ask you, you know, did you -- or had you asked Coker to put down in writing all of the, you know, important or possible factors that could support a transaction with St. Luke's?

A. No. We didn't -- I did not ask that question, and this was a work product from Coker.

Q. And did you review this document at the time to make sure that it included all of the very important benefits that you thought could be achieved through the transaction with St. Luke's?

A. No.

Q. And I believe you indicated in your cross-examination testimony that you were not always pleased with the work of the Coker Group. Did I get that correct?

A. Yes. I think there were -- you know, there were times in the negotiations that we were using Coker that I think it was difficult for Coker to come in on just short episodes. We were slotted with a bunch of other customers that they had, and to understand what was our market, what was our physicians' desires.

2468

So he did good things, and I think other times he kind of missed the mark on certain aspects of what we should be doing in looking at how this alignment might work out.

Q. And if we could get that document back up. I just wanted to clarify something. If we page down, there will be some handwritten notes. I just wanted to ask whose they are. So if we can stop up there and pull up the handwriting.

Do you recognize that handwriting?

A. Actually, I don't. I'm sorry.

Q. Okay. Well, let's page down another page, another one. Okay. Stop there and highlight the note.

Could you read that to the best of your ability.

A. It says, "St. Luke's would pay to replace eClinicalWorks."

Q. And so -- and that reflects that, at the time that discussions kicked off with St. Luke's, that there was already thought to replacing ECW with something more unified?

A. Yes. When we originally made the decision to go with eClinicalWorks, part of the decision was that St. Luke's was using that system in some of their clinics.

As the change in strategy that the Epic would be the product that would be used to best integrate across the system, we realized that, well, we would need to do

2469

something in that arena; otherwise, we're going to be not in the best position to be able to participate in that data.

So, yes, it was identified.

Q. Let's go back to the very first page of this document and highlight the date.

When was this letter sent, or when does it appear to have been sent?

A. December 17, 2010.

Q. And do you know if, by this point, St. Luke's had even decided on which system it wanted to use for unified medical record?

A. I do not recall. I was trying to recall when the announcement was made, but I don't know.

MR. KEITH: No further questions, Your Honor.

THE COURT: Any recross?

MR. ETTINGER: Just a couple, Your Honor.

THE COURT: Mr. Wilson, you have none?

MR. WILSON: No, thank you, Your Honor.

THE COURT: Mr. Ettinger.

MR. ETTINGER: We exchanged glances so we would know. Your Honor, I was trying to jump the gun.

RECROSS EXAMINATION

BY MR. ETTINGER:

Q. Dr. Kaiser, is it your view that the words, quote, "control services," close quote, are synonymous with the

words, quote, "enhanced services," close quote?
A. Provide and enhance.
Q. So "control" means the same thing as "provide and enhance"; is that right?
A. I think in the context of what we were discussing, yes.
Q. Now, Mr. Keith asked you -- and you said yes -- views changed over time as this transaction went forward. And, in fact, the documents that plaintiffs' counsel have showed you, myself included, have tended to be in the 2011 period; isn't that right?
A. They have extended from 2009 through 2011.
Q. And in early 2012, you became aware that the FTC and attorney general were investigating your transaction, didn't you?
A. We were informed by the FTC that they were looking into the transaction.
Q. And that was in early 2012, was it not?
A. Yeah. I believe it was January 2012.
MR. ETTINGER: Nothing further. Thank you.
THE COURT: Anything else?
MR. KEITH: Nothing further.
THE COURT: All right. Dr. Kaiser, you may step down. Thank you.
Call your next witness.

MR. ETTINGER: Your Honor, I think Mr. Powers is going to be calling Dr. Williams, and we will grab him. Sorry.
THE COURT: Dr. Williams, is it?
THE WITNESS: Yes.
THE COURT: Would you step before the clerk, be sworn as a witness, and follow Ms. Gearhart's directions from there.
STEVEN WAYNE WILLIAMS,
having been first duly sworn to tell the whole truth, testified as follows:
THE CLERK: Please state your complete name and spell your name for the record.
THE WITNESS: Steven Wayne Williams. S-T-E-V-E-N, W-A-Y-N-E, W-I-L-L-I-A-M-S.
THE COURT: You may inquire, Mr. Powers.
MR. POWERS: Thank you, Your Honor.
DIRECT EXAMINATION
BY MR. POWERS:
Q. Would you state your profession, please, sir.
A. I'm a physician, general surgeon.
Q. All right. Give us a brief outline of your medical education, if you would.
A. I attended medical school at the University of Texas Medical Branch in Galveston, Texas. I did residency

at the same institution from the years '97 to 2002.
Q. When did you arrive in the Treasure Valley?
A. 2002. I finished residency in June, got here in late June, started work with Saltzer in August.
Q. Okay. Now, when you joined Saltzer Medical Group, did you eventually become a partner?
A. I did.
Q. What year?
A. 2004. It was a two-year partnership track.
Q. And as an owner, I take it you had the opportunity to serve on various committees?
A. Yes.
Q. What committee were you a part of at Saltzer?
A. I was a part of the executive committee from around 2005 until the time of my resignation in November of last year.
Q. And help us understand the responsibilities of the executive committee while you were part of it.
A. The main responsibility of the executive committee was to serve the members by consolidating any data and making decisions. A lot of those -- a lot of the data would come from the smaller committees, such as the finance committee or the contracts committee or the quality assurance committee. And the executive committee would assimilate all the data and make the large decisions for the

group.
Q. In the course of practicing at Saltzer, give us an idea, if you would, Dr. Williams, about how Saltzer surgeons would communicate with Saltzer PCP surgeons -- PCP physicians about the care of your patients.
A. We practice in one main location in Nampa. We had a large building in Nampa. There were other outposts that we had, other satellite clinics, but the main building is where probably 85 percent of the physicians practice. And so you would see people in the hallways. We had an intranet phone system where we knew each others' extensions that was posted. We knew each others' nurses.
We also had eClinicalWorks as the EMR in the last few years I was at Saltzer, and we could enter messages in eClinicalWorks. So that's probably the main way that I used to communicate because you could -- you could tie the message to the patient's chart. And so if it was a specific request or question that you had to the other doctor, you could just send it in eClinicalWorks, and then they could open up the chart when they got the message.
Q. Was eClinicalWorks, at the time you were with Saltzer, an adequate system for EMR in caring for patients? Excuse me.
A. Sure.
Q. Had you researched an EMR system before choosing

2474

eClinicalWorks?
A. Yes. We had actually -- eClinicalWorks was our second EMR. Saltzer had adopted EMR early, and we had chosen a product called Amicore. And we had had Amicore for at least a couple years and weren't completely happy with everything that Amicore was able to do for us. And so we had shopped along with -- in fact, there was a specific committee -- and along with the information technology department at Saltzer, we shopped for quite a -- quite a while before we found eClinicalWorks. And we were very happy with it. It's a nationally recognized product.
Q. In 2010-2011, was there any concern expressed by your partners at Saltzer over the ability of eClinicalWorks to help you deliver good, quality care to your patients?
A. No. There is -- there is problems with every EHR, but we were very happy with it compared to what we had had before.
Q. Okay. Now, I want to talk about the time period from 2008 through July of 2012, and I want to ask you a few questions about where your cases originated from.
As a surgeon, is it correct that you receive referrals of patients, and then you go ahead and perform surgery on those patients? Is that the way it works?
A. Correct.
Q. All right. So the time period 2008 through July

2475

of 2012, what percentage of all of your surgical cases that you perform -- no matter what location you performed them in, what percentage of all of your cases originated with Saltzer PCPs?
A. Eighty percent or greater.
Q. And of those -- of those cases that you -- where you performed surgery, the hundred percent of cases where you performed surgery, where did you perform them in 2010 and 2011?
A. St. Luke's Meridian was my main inpatient hospital. And so the bulk, the majority of the surgeries were done there because I also took call there. So I would operate different days of the week. I had a standing block on Mondays. So I would operate at St. Luke's Meridian every Monday and then various other times throughout the week.
At that time, I had moved the location of my office practice to our Portico building in Meridian. And so it was right across the parking lot from St. Luke's Meridian.
I also did surgery at Treasure Valley Hospital in Boise, on Emerald in Boise. I also operated at a small surgery center called Millennium Surgery Center in Meridian. And I also still did a few cases at Saint Alphonsus in Nampa.
Q. Was it important to you to be able to perform

2476

surgery for your patients at various locations?
A. You know, it's onerous to go to different locations. But the more options you can offer the patient, the more referrals you get, the more options that you can give those patients to where they can have surgery.
Q. Okay. What percentage of your surgeries did you perform at St. Luke's Meridian during this time period, would you estimate?
A. Sixty percent.
Q. And what percentage were you performing at Treasure Valley Hospital?
A. Thirty percent.
Q. And the other 10 percent, I take it, were the other two facilities you mentioned?
A. Correct.
Q. And you had -- obviously, to practice at all those facilities, you had privileges at those facilities; is that correct?
A. Yes, sir.
Q. And let's talk about your affiliation with Treasure Valley Hospital. Why don't you explain to us, what year and for what reason did you begin to practice at Treasure Valley Hospital?
A. I started doing cases at Treasure Valley Hospital around 2005 -- 2004-2005, and I found that it was a nice

2477

place to go and do cases, and they had very rapid turnovers. They had good quality of care, and the patients all enjoyed going there. The patients, when they followed up, they would talk about the good care they received.
Q. Was -- were you aware at some point in time that the cost of care at Treasure Valley Hospital was lower than at other places where you practiced?
A. You know, initially that wasn't -- initially I started going there because they had fast turnovers, and it was a fast place to do outpatient surgery. But certainly over time, I learned to realize -- and especially from talking to patients, I found out how much -- how much of a lower cost facility it was.
Q. Okay. Let's describe turnover times for the court, if we could. Why is that an important issue for -- for surgeons?
A. It's hugely important because it determines how much work you can get done in a day. And so the turnover time is the amount of time that it takes the OR staff to clean the room, clean the anesthesia machine, get everything ready to go for a sterile environment for the next procedure.
And so, to be specific, the main thing I remember, what sticks in my head when you ask me the question, is one of the first few months that I had been going to Treasure

Valley, I put seven cases on. I got done at 2:00 p.m., and I did seven cases. And that had never happened to me before. So I found out that I could routinely put five, six cases on there and be done early in the afternoon and get home and see my family.

Q. All right. When did you decide to invest in Treasure Valley Hospital?

A. 2007.

Q. And your decision to invest was -- well, strike that.

In 2007, were you offered shares in the -- in the organization?

A. I pursued shares.

Q. Okay.

A. I pursued a share.

Q. And were you able to purchase a share?

A. Yes.

Q. And after that time, were you able to purchase an additional share?

A. Correct. So one in 2007 and one in 2008.

Q. And has that -- has that ownership in Treasure Valley Hospital been -- been a successful investment for you?

A. Yes.

Q. Let's talk a little bit about how your work at

Treasure Valley Hospital has progressed from when you began to practice there through the point in time that -- that you became an investor.

Did you -- did you begin to do more surgeries at Treasure Valley Hospital starting in 2008?

A. I don't know. I know I have turned in the numbers for everything.

Q. Okay.

A. Sorry. I don't know.

Q. Let's help you out here a bit.

MR. POWERS: Your Honor, if we could have TVH demonstrative Exhibit 3001, No. 6, placed up on the board. Counsel --

THE COURT: Is this 3001? Is that correct?

MR. POWERS: 3001, Your Honor. It's the TVH demonstrative exhibits. We're extending it from the Genna deposition to No. 6 now.

BY MR. POWERS:

Q. Dr. Williams, we have -- we put on the screen here an accounting of the cases that you performed at Treasure Valley Hospital. If you go to the bottom column, you will see the totals for the years 2008 through 2013. Do you see that?

A. I do.

Q. Okay. And it would appear, from reviewing those

numbers, that you progressed from -- from 2008 from doing 32 cases at Treasure Valley Hospital in Boise to doing 205 in 2009, 208 in 2010, 189 in 2011, and 150 in 2012; correct?

A. Yes.

Q. And is that consistent with your -- with your recall of your level of activity at Treasure Valley Hospital?

A. Yes.

Q. Okay. You can trust me on this.

A. Okay. Thank you.

Q. We have already -- we have already established these numbers.

A. Looking at 2008, Ray, that's when I left the hospital in Nampa and moved my inpatient practice from -- from the Nampa hospital -- which at that time was Mercy Medical Center before it became Saint Alphonsus -- and moved to Meridian.

And so that -- that also probably has something to do with those numbers going from 32 to 205.

Q. All right. And so when we look at -- when we look at 2010 and 2011, for instance, is it correct to say that of those surgeries that you performed at Treasure Valley Hospital, that 80-percent referral from Saltzer PCPs is pretty consistent in those numbers?

A. Yes.

Q. All right. So it's fair to say that the surgeries you did at Treasure Valley Hospital, 80 percent of them came from Saltzer PCPs prior to the fall of 2013?

A. Yes.

Q. All right. Let's talk a little bit about the conversations you would have with patients when -- at Saltzer when a Saltzer primary care physician would refer a patient who needed surgery to you. Tell the court how you would discuss with the patient options for the location of their surgery.

A. You know, it's a hard question to answer because I think it varies every time. I don't have a -- I don't have a set way to do that. A lot of patients come in, and probably the biggest factor is going to be something that you already know they can't go one place or the other.

For a long time -- we're talking about Treasure Valley Hospital -- Treasure Valley Hospital didn't have a contract with TrueBlue insurance. And so we had a lot of TrueBlue patients at Saltzer. And when a TrueBlue patient would come in, you knew that that wouldn't be an option, so I couldn't do them on a Tuesday. So we would look for another day of the week I could do their surgery because I was at Treasure Valley Hospital every Tuesday.

Otherwise, it may be a situation where a patient is a -- one area or the other, has some preference. It may

be the type of case. If they needed a bowel resection or another high-acuity case where I knew that they were going to be in the hospital for several days, they might need an ICU, those cases would need to be done at the inpatient hospital.

Q. Okay. So depending upon the patient's needs, it sounds like one of the -- one of the first issues was availability of a particular surgical location and the ability of the patient to be there at that location. Is that fair?

A. Right. Availability is huge because a lot -- sometimes, you know, I get -- the thing that pops in my mind is you say, "Well, when do you want to do this?" And the patient says, "Yesterday," sometimes.

And so they -- you know that that patient -- you're not going to be able to go out, look at your book, and say come back and say, "Well, I've got a spot three weeks down the road." They want to get in.

Some people are hurting. Some people have cancer. Those are two -- people with cancer want to get a surgery scheduled. People that are hurting want to get a surgery scheduled.

So availability is probably the biggest -- the biggest issue.

Q. Is convenience for the patient also an issue?

A. Well, sure.

Q. Have you ever -- have you ever told a patient that they could not have a particular surgery at a location they desired?

A. Sure. If they -- if they desired to be done at a small surgical center and they don't have the capacity to do that type of case, then you wouldn't be able to do it there.

Q. Have you ever told a patient that you have to have a surgery performed at a particular location, say, Treasure Valley Hospital?

A. No.

Q. If a patient tells you that they want to have their surgery performed at a particular location, do you do everything you can to accommodate them?

A. Absolutely. You're going to not make any friends taking someone somewhere they don't want to go.

Q. Now, with respect to the cost of surgery, is that also a factor you discuss with patients?

A. Sure, if it comes up and if it's -- if it's something the patient is concerned about.

Q. And some patients, cost is not a factor; correct?

A. Correct.

Q. Which patients are those?

A. Medicaid, for one, cost isn't a factor to the patient. They have no copay. They have no -- no payment

that they're going to have to make. Some Medicare Advantage programs, such as TrueBlue. TrueBlue does have a copay now.

Q. But with patients -- with patients who have insurance or are paying for the surgery themselves or have a deductible or a copay, is cost usually a factor?

A. Yes.

Q. And when you -- when cost becomes a factor, explain to the court what you would explain to your patients about the cost of surgery at various locations.

A. You know, for that, I kind of do have a paradigm now. I don't stay and talk about that. I -- I have them call around, a lot of times, to find the facility fees. But if someone asks me, I explain to them that wherever I do their surgery, the surgery fee is the same because they're getting the same surgeon; I'm doing the same surgery, but the facility fees differ. And people -- sometimes they're better educated, oftentimes not. A lot of times they don't understand what the facility fee is or that it does differ from different facilities.

Q. And do you ever describe to the patients that the facility fee at Treasure Valley Hospital is lower than at other institutions?

A. Sure, I would do that.

Q. Okay. By the way, let me ask you a couple of questions. Have you ever refused to see a Medicare or

Medicaid patient or provide surgical services to them?

A. No.

Q. Have you ever refused to care for an indigent patient that was referred to you?

A. No. I have never limited my practice.

Q. A couple of other questions on the side. Have you ever received a referral in the last 12 months from a Dr. Crownson, a Nampa primary care physician?

A. No. I had a Crownson patient, and I called Bayo and left him a voicemail. And then I found out later that he didn't refer the patient when the patient came.

THE COURT: Excuse me. What is "Bayo"?

THE WITNESS: Sorry. That's Dr. Crownson's first name. We have known each other for years.

THE COURT: I understand.

THE WITNESS: I got excited. I thought he referred the patient to me. I left him this long voicemail about how we should get together. And then the patient came in and told me that he had sent the patient to another surgeon, but the patient had heard from his neighbor that he should come to me, so he came and saw me.

BY MR. POWERS:

Q. All right. I think in an earlier question, I referred -- and I need to correct this on the record -- I referred to, in referring to your case counts, the fall of

2013, and I meant to refer to up until the fall of 2012. So I want to correct that on the record. It doesn't affect your answer, though.

Now, let's talk a little bit about your negotiations with Saltzer when you were on the executive committee. First, what was your impression about who approached who about a merger with St. Luke's based on your position on the executive committee?

A. Well, I can tell you that, as a member of the executive committee, there was never -- we never had a meeting before these discussions commenced about going to a hospital system to talk about a merger or another type of affiliation. There was no direction that we ever gave, took a vote to say "let's go to St. Luke's" or any other hospital.

Q. What was your impression about who approached who, then?

A. Well, I know that Dr. Kaiser had --

MR. SCHAFER: I'll object to foundation. I don't think a foundation has been laid for his impression on that subject.

MR. POWERS: He is on the executive committee, Your Honor.

THE COURT: I think we are now on to another question, which is -- well, actually, I guess that was the

question. But his response was he knows that Dr. Kaiser had, and then he had not -- did not complete the response.

I will limit the witness, though, to testify not as to his impression but only as to things he observed. Now, he can -- I mean, there is probably going to be some impressions necessarily involved in the response, but I think it does have to be based upon something more than just a general impression.

Let's back up, Mr. Powers. And with that direction, approach it in a somewhat different manner.

MR. POWERS: Certainly.

BY MR. POWERS:

Q. When did you -- when did you first hear that there was an interest in a merger between St. Luke's and Saltzer?

A. We --

Q. How did you hear it?

A. Well, we had been working -- we worked with both hospital systems, being Mercy Medical Center didn't have much interaction with Saint Alphonsus because, at the time, Saint Alphonsus had just came in, was taking over. And actually, I think our negotiations with St. Luke's preceded Saint Alphonsus buying the hospital in Nampa.

We were already working with St. Luke's on recruiting a urologist to the area, and so I know that that's how -- that's how the dialogue started.

And I was just going to say, Your Honor, that I know that Dr. Kaiser had some conversations, but I don't think that answers your question of who approached who. I just know there were conversations.

Q. Okay.

A. But we had been talking with St. Luke's about jointly recruiting urology to the area. And from that, at some point, stemmed further conversations of what could be a closer affiliation.

Q. And as -- as the negotiations started out with St. Luke's, an initial offer was made that required that you divest your interest in Treasure Valley Hospital; correct?

A. That came a little bit later, yes. At first, we were -- at first, we had a meeting, and we were told about partnership possibilities, meaning joint venturing on some different ancillary projects. It was a three-pronged presentation: Joint venturing on some ancillary projects; No. 2 was a PSA, a modelled PSA, which we had no knowledge -- I, personally, certainly had no knowledge of even what a PSA was at the time -- and then, third, was employment by the -- by the hospital system.

Q. And the first -- the first offer that was made to you required that anybody who had investment in Treasure Valley Hospital divest of that; correct?

A. Correct.

Q. All right. And that was voted down; correct?

A. Correct.

Q. And then there was a second offer made that was proposed in September of 2011 --

MR. SCHAFER: Your Honor, I think we are getting very leading here in direct.

MR. POWERS: Your Honor, we have been through this with how many witnesses?

THE COURT: We have.

MR. SCHAFER: Not this witness who is testifying now.

THE COURT: I understand. But if we get into an area where I think it's an issue truly in controversy, I am going to be much more strict about the leading questions with your own clients. But I think in laying this background and areas we have already covered, I'm going to give you a fair amount of leeway.

MR. POWERS: Thank you, Your Honor.

THE COURT: The court has that discretion under Rule 611. Go ahead, Counsel.

MR. POWERS: Thank you, Your Honor.

BY MR. POWERS:

Q. So there was a second round of negotiations. And in September of 2011, another offer was made by St. Luke's to the group as a whole; correct?

2490

A. Correct.
Q. And that particular offer did not require that you divest of your investment in Treasure Valley Hospital; is that right?
A. Correct. We could be nonexclusive providers.
Q. All right. I want to talk about your view of being a nonexclusive provider. What was your understanding of being a nonexclusive provider? What did it mean to you?
A. It wasn't a great deal.
Q. Why not?
A. As a nonexclusive provider, you were going to be paid at a lesser rate. Many of us had -- had been shown some RVU numbers, and those numbers went down when we were going to be nonexclusive providers.
We would also be barred from the operating council of the group. We were told that, specifically, Dr. Curran and I were, who were both on the executive committee, we were told we could keep our position on the executive committee; however, there would be a new committee formed which would oversee and supersede the executive committee, and we would not be able to be on that committee. That committee would be made up 50 percent of St. Luke's representatives and 50 percent of Saltzer representatives.
Q. What -- what was your understanding of the ability of St. Luke's to compete with you, as a specialist, being a

2491

nonexclusive partner?
A. It was very straightforward. They said that they would actively compete with us if we were a nonexclusive provider.
Q. By that, you understood what?
A. That they were going to have their specialists come to the area and get referrals from our partners.
Q. Eventually there was a vote at Saltzer on this particular proposal; correct?
A. Yes.
Q. And did the Saltzer surgeons vote a certain way?
A. Yes.
Q. How did you vote?
A. We did not want to move forward with that proposal.
Q. And the majority of your group voted for the proposal; is that right?
A. Correct.
THE COURT: Now, Counsel, when you say "your group," you're talking about Saltzer Medical Group as a whole?
MR. POWERS: Saltzer, yes. Thank you, Your Honor. Saltzer Medical Group as a whole.
BY MR. POWERS:
Q. During -- during your discussions with St. Luke's

2492

key representatives while you were -- before your vote on the final offer, did you have discussions with Mr. John Kee that involved the value of your Treasure Valley Hospital stock?
A. Yes.
Q. Tell -- tell us what -- what occurred in those conversations. What was said?
A. Mr. Kee told me that it was his opinion that I should more strongly consider divesting, selling off my Treasure Valley Hospital shares because they weren't going to be worth 50 percent of what they were worth in the future.
Q. And what was your understanding of that comment?
A. Well, it concerned me because I -- I didn't know if he was bluffing or if he had information that I didn't know. But certainly the way he said it, I was concerned that he had information that I didn't know, that he could be correct, that the value of that investment would be less than half of what it was currently.
Q. During the negotiations, did you also have conversations with Mr. Kee about whether you could provide services for a proposed hospital to be built by St. Luke's?
A. Yes. St. Luke's planned on eventually building a hospital in Nampa, but they were going to start out by first creating areas of office space, a freestanding ER, some

2493

imaging facilities, and a surgery center.
And so we were excited about the surgery center. It was going to open up a new place to do surgery in Nampa. And myself and all the surgeons felt that we could commit a certain amount of business and keep that surgery center busy, but I was told that half interest, as it was -- as it was put to me, wasn't good enough.
Q. And who told you this?
A. John Kee.
Q. And what did he say specifically?
A. He said specifically that St. Luke's was spending a lot of money on this and that a half interest from us was not going to be good enough and was not going to keep it running.
Q. What did he tell you he needed from you?
A. He said he needed all my business.
Q. What was your response to that?
A. I thanked him for his information and told him I would take it under advisement.
Q. Now, in all of your discussions with St. Luke's about negotiations on the purchase of Saltzer, was there -- was there any discussion about the ability of the deal to improve quality of care at Saltzer?
A. No.
Q. What was the focus of the discussions, the primary

2494

focus of the discussions with St. Luke's?
A. The primary focus of discussions was about revenue and what the differences could be for -- for primary care to increase the revenue and also what the future would be with the new hospital in Nampa.
Q. Was the discussion of revenue focused on work RVUs?
A. Correct.
Q. All right. Was there any discussion about the impact of providing indigent care on your work RVUs should a deal be put together?
A. Well, we knew that it would be liberating in the fact that if you saw a patient, it didn't matter if the patient was Medicare, Medicaid, Blue Shield, you know, or indigent, you were going to get paid the same amount.
But we -- we specifically asked the question about the amount of indigent care, and we were told that it would factor in when it came time to renegotiate the numbers, which I believe the term was two years. And we were told that if there was a large amount of indigent care that we had done, that the RVU numbers would have to -- to be -- to reflect that, it would be lower.
Q. So your compensation would actually be lower if you, in fact, cared for more indigent patients?
A. Correct.

2495

Q. You were aware of that based on your discussions with St. Luke's?
A. Yes.
Q. Okay. When it became apparent to you in -- in the fall of 2012 that the group -- the Saltzer Group as a whole had decided to move forward with a deal with Luke's, did you have -- did you attend a meeting where a Dr. Kaiser made certain representations to the group as a whole about referrals and locations of surgeries?
A. Yes. As I've testified in my deposition, the -- the focus on the meeting, we had obviously came a long way during these negotiations. At the time of that meeting, there was fracture in the group for the reasons that we have talked about here. And the -- the orthopedists had been regularly attending the -- these meetings. At least -- at least two of them would usually be present because they had a large stake in what happened.
And at this particular meeting, Dr. Kaiser had asked that -- that the surgery department and orthopedics department both come, and none of the orthopedists showed up. And so I know that he was very frustrated with the outcome of the meeting. The main reason is because we had reached that point where, as you said, the majority of the group had voted to go forward with the St. Luke's deal, but there were -- in the bylaws, there was a -- there is two

2496

different rules within the Saltzer bylaws: One that said that you needed a 75 percent majority for large decisions of the group and that you needed even greater supermajority of 90 percent for anything that changed the compensation to physicians.
And so there was a novel interpretation of the bylaws by Mr. Julian that said that if we merged with St. Luke's, it really wouldn't change our compensation. It would just -- we would go to work with St. Luke's and then later we would change the compensation. So we didn't really need a 90 percent vote, we only needed a 75 percent vote.
And so Dr. Kaiser knew that he had the 75 percent but not the -- not necessarily the 90 percent, so he really wanted the orthopedists there. So he was frustrated, and he made the statement to all the -- everyone there, 20, 25 people in the room that if the primary care doctors were getting their operative reports sent back to them from places such as Treasure Valley Hospital or Saint Alphonsus, that they needed to think long and hard about that because that was not the direction that the majority of the group had decided that the group wanted to take.
Q. And what was your -- what was your understanding of that comment?
A. My understanding of that comment was that I needed to find a new job. And so, that's why I remember it so

2497

well. I remember my walk from the meeting out to my car. I remember the morning very well.
Q. All right. And eventually you did take a position with Saint Alphonsus; correct?
A. Correct.
Q. And that was, I think you signed that -- you finalized that in the fall of 2012?
A. About a month after that meeting, yes.
Q. Okay.
MR. POWERS: If we can -- if we can put Exhibit 6 up on the board again. Treasure Valley Hospital Demonstrative 3001, No. 6, Your Honor. I'm sorry. It's properly stated.
BY MR. POWERS:
Q. I want to look at your -- your case count at Treasure Valley Hospital in 2012, and I want to focus on the top bar line, Dr. Williams. What -- what do you attribute the steep drop in your cases at Treasure Valley Hospital starting in September of 2012 through August of 2013? What do you attribute that to?
A. My Saltzer referrals became nonexistent.
Q. Okay. Do you -- have your Saltzer referrals increased at all since the month of September 2012?
A. No.
Q. Do you get any Saltzer referrals at all?

A. I get some patients that are Saltzer patients, but it's usually the situation similar to what I've described, either I have operated on the patient before or I have operated on their neighbor. So I don't -- that's not really a referral. It's not a group referral.

Q. If Treasure Valley Hospital is not an alternative you can offer for your patients for surgery, what -- what options will your patients be left with from -- from a cost standpoint?

A. Well, they're going to go to facilities that charge more.

MR. POWERS: Thank you. I have no further questions.

THE COURT: Mr. Schafer.

CROSS-EXAMINATION

BY MR. SCHAFER:

Q. Good afternoon, Dr. Williams.

A. Hi.

Q. Following up on a question that Mr. Powers asked you, and I just want to -- about conversations and the start of the conversations between Saltzer and St. Luke's. You heard me make an objection that I didn't think you had a foundation to answer that question. I just want to sort of establish that, which is: At a certain point Dr. Kaiser informed you that he had been talking to St. Luke's already

about creating a stronger relationship between the two organizations. Right?

A. Correct.

Q. And you weren't a party to those initial conversations between Dr. Kaiser and St. Luke's?

A. No.

Q. And you don't know who initiated those conversations, do you?

A. I do not.

Q. You talked about some of the discussions and the meetings that you had with St. Luke's representatives. At one of the early meetings between Saltzer and St. Luke's, you attended a meeting at which Dr. David Pate spoke; correct?

A. Yes.

Q. And Dr. Pate spoke about healthcare changes and his thoughts on the future of healthcare; right?

A. Yes.

Q. And he talked about the formation of ACOs?

A. Yes.

Q. And that's accountable care organizations; right?

A. Correct.

Q. And the cost of healthcare was a large part of what that first meeting was about, wasn't it?

A. No.

MR. SCHAFER: If you could play W10, please.

THE COURT: What are -- what are we playing, Counsel?

MR. SCHAFER: This is the deposition of Dr. Williams, page 53, lines 1 through 3.

THE COURT: Thank you.

(Video clip played as follows.)

A. "And so the -- the cost of healthcare was a -- was a large part of -- of what the first meeting had been on -- about."

(Video clip concluded.)

BY MR. SCHAFER:

Q. And that was your testimony; correct, Dr. Williams?

A. Correct.

Q. And part of the discussion at that meeting was that with the advent of ACOs, the most cost-effective care that could be provided at good quality was going to be the care preferred by ACOs; right?

A. I -- that was -- I'm sorry. Can you say that again.

Q. Sure. Part of the discussion at that first meeting was that with the advent of ACOs, the most cost-effective care that could be provided at good quality was going to be the care preferred by any ACO; right?

A. I'm sorry to -- part of the cost-effective care by an ACO --

Q. Well, let's do it this way.

MR. SCHAFER: Will you play W11, please.

MR. SINCLAIR: Page and line?

MR. SCHAFER: Yeah. This is Dr. Williams' deposition, page 53, lines 4 through 12.

(Video clip played as follows.)

A. "And, you know, like I said, ACOs and I think this was probably the -- the largest part of what we were all trying to do is to be concerned with what our costs were going to be. Because we knew that reimbursement was going down and that also in the ACO model, the cheapest care that you can provide with good quality is going to be that which is preferred by -- by the -- any accountable care organization."

(Video clip concluded.)

BY MR. SCHAFER:

Q. And was that your testimony, Dr. Williams?

A. Yes.

Q. And was that part of the discussion at that meeting?

A. Yes. I believe it was part of the discussion at

the meeting.

Q. And St. Luke's representatives expressed their goal of reducing the costs of healthcare; correct?

A. They expressed their goal, yes, of reducing the cost of healthcare.

Q. And you understood at the time of that meeting that vertical integration was expected to lead to decreases in the cost of healthcare; right?

A. Vertical integration wasn't -- that didn't come up until the second meeting with Mr. Fletcher.

Q. Okay. In connection with the second meeting, did you understand that vertical integration was expected to lead to decreases in the cost of healthcare?

A. Decreases in the cost of -- decreases in the expenses of healthcare, yes.

Q. And at that -- either the first or the second meeting, you believed that decreasing the costs of the care provided was something that Saltzer and St. Luke's shared common ground on, didn't you?

A. Oh, absolutely.

Q. At the -- going back to the initial meeting, other St. Luke's representatives at that meeting spoke in additional detail about how Saltzer could help St. Luke's vision for the Western Treasure Valley and what St. Luke's wanted to accomplish; right?

A. Yes.

Q. And among other things, those individuals discussed the fact that roughly 20 percent of St. Luke's patients already came from areas west of Meridian; right?

A. Yes, correct.

Q. And they also explained their desire to establish a presence in Canyon County to better serve those patients; correct?

A. Sure, yes.

Q. And then moving ahead to the second meeting that we have already referenced briefly, that was the one at which Mr. Fletcher spoke?

A. Correct.

Q. And Mr. Fletcher addressed some of the benefits of integration between Saltzer and St. Luke's, didn't he?

A. Yes.

Q. And Mr. Fletcher told the group that there were economies of scale that would result from a patient being brought within a system and receiving his care within that system; correct?

A. Yes, he spoke to that.

Q. And he told the group that care could be made cheaper for patients if their care was kept within a system; right?

A. That expenses to be decreased.

Q. Did he -- do you remember him saying that care could be made cheaper for patients if care was kept within a single system?

A. I don't recall that.

MR. SCHAFER: Play 19. This is page 52, lines 18 through 25 of Dr. Williams' deposition.

(Video clip played as follows.)

Q. "And what is it that Mr. Fletcher said about vertical integration?

A. "That there were efficiencies of scale that could be brought to bear if -- if a patient was brought within the system and received their care within the system, that there were economies of scale that could be realized, that you could perform the care for cheaper."

(Video clip concluded.)

BY MR. SCHAFER:

Q. Okay. Is it your testimony that you meant by that that costs to Saltzer would be cheaper?

A. Yes.

Q. Okay. And Mr. Fletcher also stated that economies of scale would result from group purchasing power, didn't he?

A. Correct. Same thing.

Q. And, in fact, at -- at that meeting, there were even specific slides that were presented breaking out savings in certain areas that could result from those economies of scale; correct?

A. Yes.

Q. Mr. Fletcher also talked about the high quality of care that St. Luke's offered; right?

A. Yes. He is proud of his quality of care at St. Luke's, absolutely.

Q. And he also stated that he believed Saltzer also offered quality care; right?

A. Yes, he did.

Q. And he told the group that if Saltzer and St. Luke's could be brought together, they could provide high quality care at a lower cost; right?

A. Yes. I would agree with that.

Q. With respect to negotiations with payors and third parties, Saltzer's ability to negotiate with third parties at the time that it was going through these discussions with St. Luke's was something that had been a big concern at Saltzer over the years prior to those discussions; correct?

A. It had been a concern.

Q. Would you say a big concern?

A. I, you know, it's hard to put a qualifier on everything. Sure. It's a big concern.

2506

Q. Did you say it would be a big concern?
A. **Sure. It was one of the -- one of the many big concerns, I guess.**
Q. Okay. And that was because you felt that there had been an erosion of the fees that Saltzer was able to get in negotiations with payors; correct?
A. **We -- there had been some erosion of our fee base, yes.**
Q. And you attributed that to Saltzer's lack of power at the bargaining table with third party payors; right?
A. **Correct.**
Q. You talked about, I think, a statement that you attributed to Mr. Kee regarding needing the full support of the Saltzer physicians as part of an arrangement with St. Luke's; right?
A. **The surgeons specifically, yes, full support of all physicians.**
Q. And you understood where St. Luke's was coming from in wanting to have the physicians that it partnered with to have full buy-in with what St. Luke's was trying to accomplish in Canyon County; right?
A. **Sure.**
Q. You were asked some questions about eClinicalWorks during your time at Saltzer. Do you remember those questions from your counsel?

2507

A. **Yes. Just a few minutes ago?**
Q. Yes.
A. **Yes.**
Q. And during the time that you were at Saltzer, it was easier to get access to labs and other test results if those results were performed at Saltzer rather than if they were performed at a hospital; correct?
A. **On eClinicalWorks?**
Q. Correct.
A. **Correct. The -- the faxed pages would be scanned in from the hospital so --**
Q. And that was a different functionality than if the tests or labs had been performed within Saltzer --
A. **Correct.**
Q. -- correct?
A. **Because it -- it was prepopulated if it's performed inhouse versus scanned in if it was outside.**
Q. And you mentioned that you were on staff at St. Luke's Meridian hospital while you were employed by Saltzer; correct?
A. **Yes.**
Q. Could you share medical records or was the data interoperable between St. Luke's EMR system and the Saltzer's eClinicalWorks?
A. **No. You had to go online to a separate website**

2508

called Dashboard.
Q. So when you talked about attaching those notes to patient charts and that you could communicate within Saltzer using that method, that didn't work as far as communicating outside of Saltzer; correct?
A. **Correct.**
Q. You talked about some of the discussions you had or statements that were made by management in connection with Saltzer's discussions with St. Luke's. At the time you left Saltzer, you believed that Saltzer's leadership and the partners at Saltzer had put a lot of work into determining the best course for Saltzer in the future as healthcare continued to change, didn't you?
A. **I would say that's fair to say. Everyone that was working on it felt that it was the best direction for the group. Now, everyone didn't have the same --**
Q. That's fine, Dr. Williams.
A. **Yeah.**
Q. That -- that's fine.
A. **Each person thought that was the best direction.**
Q. While you were at Saltzer, the vast majority of the group was opposed to working more closely with Saint Al's; correct?
A. **The -- when you say "working more closely," you mean the -- the deal that was offered?**

2509

Q. Correct.
A. **The PSA, correct.**
Q. And as part of the discussions as to why that was, history between Saint Al's and Saltzer was often brought up as one of the reasons; correct?
A. **Correct.**
Q. And that history related to the way that Saint Al's had treated Saltzer prior to joining --
MR. ETTINGER: Your Honor, now we're getting -- it's both irrelevant and outside of the scope of your ruling on your motion in limine and beyond the scope of cross.
THE COURT: Counsel, I -- I think we are getting beyond the scope of cross, and I think we're getting into some areas that I thought we had agreed.
Well, I'm going to sustain the objection.
MR. SCHAFER: Your Honor, if I may?
THE COURT: Yes.
MR. SCHAFER: We -- we did notice Dr. Williams today, this is obviously in our case in chief, we did notice him here as a direct witness as well, so some of my questions may be on direct.
MR. ETTINGER: It still violates the motion in limine. It's irrelevant.
MR. SCHAFER: I -- and if I can -- if I can speak to that point --

THE COURT: Yes, yes.
MR. SCHAFER: Again, this -- this is not -- this is not raising any sort of unclean hands defense. This is relating to the motivation of the Saltzer physicians which was -- which was also a part of Mr. Powers' direct examination, which is to imply that the reason why St. Luke's was chosen versus Saint Al's was for some factor other than, you know, the group that they have decided to align with. That -- that's the purpose of these questions.
THE COURT: Mr. Ettinger.
MR. ETTINGER: I have never heard a question suggesting that. That's never been an issue in this case, and there can't be an issue under the antitrust laws as to whether they should have picked St. Luke's or Saint Al's. That's not the issue here at all.
THE COURT: Well, the witness was providing -- the witness clearly went through and explained why he opposed the merger with St. Luke's and what the consequences were. I'm going to give him some leeway, I think, to proceed with the understanding that my prior ruling does not change.
Unclean hands is not a defense in the case, but since I think the issue was broadly approached, if you will, by Mr. Powers in the direct examination, I think counsel is entitled to at least provide an alternative explanation.
So the objection is overruled. But it doesn't change

the court's prior ruling.
Proceed.
MR. SCHAFER: Thank you, Your Honor.
THE COURT REPORTER: Mr. Schafer, would you please try to slow down.
THE COURT: Yeah. And I was just going to actually make that comment as well.
MR. SCHAFER: I apologize to both of you. I will endeavor to do so.
BY MR. SCHAFER:
Q. The discussion part -- part of that history that was discussed as a reason why Saltzer or at least many at Saltzer preferred St. Luke's over Saint Al's, part of that related to a prior offer overture that Saint Al's had made to purchase the Saltzer Group; correct?
A. Years before, correct.
Q. And that offer or that overture involved Saint Al's CEO telling Saltzer that if Saltzer didn't join with Saint Al's, Saint Al's was going to drive Saltzer out of business. Isn't that what you -- part of the discussion?
A. A previous Saint Al's CEO, correct.
Q. And that history led many in the group to express deep concerns about working with Saint Al's; correct?
A. Correct. Part -- that was part of it. Yes.
Q. And those conversations caused you to have a

negative view of Saint Al's; right?
A. Yes. I didn't know -- I didn't know Saint Al's at all, so I would say that was correct.
Q. During those discussions, do you ever remember expressing the sentiment to others within the group that you did not want to work for Saint Al's or even do a PSA with Saint Al's?
MR. ETTINGER: Your Honor, may we approach? This is way beyond the motion.
THE COURT: Well -- well, Counsel, I'm not sure. Where are we going? I mean, the fact that they had some concern about going with Saint Al's, didn't like Saint Al's. I'm just not sure where that is going.
MR. SCHAFER: That's fine, Your Honor. I'll move on.
THE COURT: All right. Thank you.
And I should note, it just -- it really does become a question of relevance, even though I think the subject was generally broached. I think we are getting a little too far afield there.
Proceed.
BY MR. SCHAFER:
Q. Dr. Williams, your counsel asked you some questions regarding whether or not you had ever turned down a Medicare, Medicaid, or indigent patient while you were at

Saltzer. Do you remember those questions?
A. I do.
Q. Do you know how many Medicare, Medicaid, and indigent patients you have taken to Treasure Valley Hospital?
A. I don't know the answer to that, no.
Q. Many?
A. Are you asking me for --
Q. Ballpark.
A. Many.
Q. Do you take more of your Medicare, Medicaid, and indigent patients, do you treat them at Treasure Valley Hospital or at one of the other hospital facilities?
A. I'm going to ask you to qualify that. Are these patients that are in the ER from another hospital? I don't ever take patients that are in a ER from another hospital to Treasure Valley. So if it's an indigent patient that came in the ER, they are going to be treated in the hospital where I'm on call where I saw them in the ER. So if you qualify with elective, you can re-ask the question. I'm happy to answer it.
Q. Well, let -- let me back up a step.
With respect to your clinic at St. Luke's, someone that didn't come in --
A. Saltzer.

2514

Q. At -- at Saltzer, I guess you referred to it as an elective patient.
A. **Right. Elective surgery.**
Q. Elective surgery. Do you know what percentage of your patients while you were at Saltzer the elective surgeries were accounted for by Medicare, Medicaid, and indigent patients?
A. **So out of the total number of surgeries that I would be doing, how many of them fall into that -- those three categories?**
Q. Correct.
A. **Probably at least 30 percent, I would say more than -- I would think just Medicare alone would be over 30 percent, so, you know, probably -- we're probably talking closer to 40 percent. Indigent was very probably few and far between. And by indigent, I'm assuming you don't mean just patients that don't pay, you mean patients that don't have insurance?**
Q. Correct.
A. **Okay.**
Q. And you're saying those were few and far between that you would see those types of patients at Saltzer?
A. **Right. Correct. I mean, we had people -- you know, indigent and that's why I wanted to -- to make sure I understand what you mean by that. Because we -- you know,**

2515

we see a lot of patients that come in that don't have insurance, but I don't know that those are necessarily indigent. They may own their own company. They may have made the conscious decision they weren't going to purchase insurance, but they come in and want to pay cash for their surgery.
Q. During your -- your counsel's questions to you, you indicated that at some point someone from St. Luke's told you that if Saltzer treated a large number of indigent care patients, your RVU rates would go down when the compensation structure was renegotiated.
Do you remember that testimony?
A. **Correct. When the term was over and it came time to renegotiate the -- the numbers.**
Q. Who was it that made that comment?
A. **You know, I don't know a specific person. I know it's -- it's not a question that I had asked. It's a question someone else had asked, and so I took note. I just remember thinking, oh, wow, this is something we have to think about.**
Q. But you can't remember who made that comment?
A. **It was during all the -- it was during all the presentations.**
Q. Do you remember when that comment was made?
A. **It would have been when we were doing the**

2516

negotiation sometime probably in 2011, probably in late 2011. We were still feeling out -- we had lots of questions, obviously.
Q. Can you identify anybody else that was at the meeting when that statement was made?
A. **You know, I would think that -- that was -- that was a meeting that was down in the executive -- executive conference room, and there would have been a lot of people there, so I think anybody that you want to ask to testify could probably testify to that.**
Q. Was Dr. Kaiser in that meeting?
A. **I'm sure he was, yes.**
Q. You also referenced -- I can't remember what it was apropos of, but a -- a referral that you thought you had gotten from Dr. Crownson and turned out had been a self-referral; correct?
A. **Correct.**
Q. While you were at Saltzer, how many referrals did you get from Dr. Crownson?
A. **Well, initially, Dr. Crownson and I had been friends, and so that's -- like you say my comment, I -- I thought, Wow, Bayo sent me a patient, this is great, because I hadn't talked to him in so long. Bayo has switched groups several times. Bayo had initially came to the area and had worked for Saint Alphonsus Medical Group and then he**

2517

had -- they had switched from there to Mercy Medical Group, and then they switched from there to St. Luke's Medical Group. And so at various times he would refer to me more or less but --
Q. During the period --
A. **Sorry. Go ahead.**
Q. During the period when Dr. Crownson was part of the Mercy Medical Group as part of Saint Alphonsus, how often would you receive referrals from Dr. Crownson?
A. **Well, when he was part of the Mercy group, I received a lot of referrals from -- from Dr. Crownson. Then when he switched over to St. Luke's, I thought that with Saltzer in there, you know, affiliation getting closer with St. Luke's, I thought that the referrals would increase, but they didn't with the switch for whatever reason.**
Q. With respect to Treasure Valley Hospital, your professional fee was the same regardless of whether you performed a surgery at Treasure Valley Hospital or if you performed that surgery at St. Luke's or Saint Al's; correct?
A. **Correct.**
Q. But if you perform a surgery at Saint Al's or St. Luke's, you don't receive any part of the facility fee; correct?
A. **Correct.**
Q. But if you perform a surgery at Treasure Valley

Hospital, that facility fee goes towards the profits of the hospital; correct?

A. It goes towards the profits of the hospital, correct.

Q. And you share in Treasure Valley Hospital's profits?

A. Correct.

Q. And under your PSA with Saint Al's, you were also permitted to retain your investment in Treasure Valley Hospital; right?

A. As a nonexclusive provider, correct.

Q. This is with Saint Al's?

A. Oh, I'm sorry. I -- I wasn't following you.

Q. Sure. Under your current PSA with Saint Al's, you were permitted to retain your ownership in Treasure Valley Hospital?

A. Correct.

Q. And you also have an ownership interest in the Treasure Valley Surgery Center?

A. All the Saint Al's or -- I'm sorry. All of the Treasure Valley Hospital partners bought in in aggregate into the Treasure Valley Surgery Center.

Q. And that surgery center is a joint venture between Treasure Valley Hospital and Saint Alphonsus; correct?

A. That's correct.

Q. And if you perform surgery at Treasure Valley Surgery Center, that facility fee also goes towards the profits of the hospital; right?

A. If there were any profits. There has never been a profit, so.

Q. And at what point -- do you remember at what point you -- your ownership or the Treasure Valley Hospital invested in the Treasure Valley Surgery Center?

A. When it -- when it opened. It was an initial investment.

Q. And when did it open?

A. In August of -- I guess August of last year, 2012.

MR. SCHAFER: Ray, could you put up -- or whoever is doing your demonstratives, put up that Treasure Valley Hospital demonstrative, 3001.

MR. POWERS: Which one? Which number? The one I had up?

MR. SCHAFER: Yes.

MR. POWERS: Number 6? Sure. I won't do it, but Andy will do it.

MR. SCHAFER: That's probably better for all of us.

MR. POWERS: Yes.

BY MR. SCHAFER:

Q. You mentioned that it opened in August of 2012,

Dr. Williams, and if you look at your case counts here, it seems to be pretty much exactly the point where your surgeries drop from 22 to 4; correct?

A. August 2012, correct. I'm following.

Q. What percentage of your outpatient surgeries do you take to Treasure Valley Hospital?

A. Of my outpatient surgeries, probably 40 percent, maybe, 30 percent.

Q. What percentage of your outpatient surgeries do you take to Treasure Valley Surgery Center?

A. Probably 40 percent, 30 percent, 40 percent.

Q. And you said in answer to one of your counsel's questions that the nonexclusive offer from St. Luke's was not a great deal; correct?

A. Correct.

Q. But as part of that deal, you would have gotten to keep your 2 percent interest in Treasure Valley Hospital; correct?

A. It was 1.6 percent, but, yes.

Q. And I believe as you told Mr. Powers, that's been a fairly lucrative investment for you; correct?

A. It turned out to be a good investment, yes.

Q. During early to mid 2012, you had a number of conversations with representatives of Saint Al's regarding the potential for you to affiliate with Saint Al's; correct?

A. What was the time on it again?

Q. Early to mid 2012.

A. No. That -- that part -- that was later that I had -- I had one meeting that I attended with Saint Al's after Saint Al's presented to Saltzer as individuals. We went -- we went to one meeting. We were presented with a letter of intent, and that was in -- it was right at the end of February, start of March of 2012, and then I had -- didn't have further conversations with him until late 2012 until it became apparent that I was going to have to do something different.

Q. So you don't remember having any conversations with anyone from Saint Al's in the May 2012 time frame?

A. About? I mean, you said conversations with Saint Al's. About my -- about me doing a deal with them?

Q. Right. About a -- about a potential future affiliation.

A. About a PSA, myself? No. Like I say, I had the one meeting, and we were offered a letter of intent at the meeting. We left with folders in our hand. And that was -- I think it was March 1st. I have turned the -- I have turned the letter of intent in. You guys have it.

Q. Well, do you remember in May of 2012 having a conversation with Karl Keeler?

A. I don't recall that conversation, no.

Q. Do you remember ever discussing anything about -- or do you know who April Reimers is? Or Reimers?

A. Yes.

Q. And who is she?

A. She -- she doesn't work for Saint Alphonsus anymore, but at that time, she was a physician liaison for Canyon County.

Q. Do you remember ever having a conversation with Mr. Keeler at which he mentioned that SAMG referrals, SAMG was going to start referring more patients to you?

A. Possibly, but that didn't have anything to do with me being employed by Saint Al's. That was about referrals. I was working for Saltzer. That's -- you asked me about contractual negotiations or talks about a contract. So now you're talking about referrals -- patient referrals.

Q. Do you remember having any conversations with Ms. --

Is it Reimers?

A. Reimers.

Q. Reimers.

-- with Ms. Reimers that when the Treasure Valley Surgery Center opened, which at that time, I guess, was slated to happen in June of 2012, that you would support that center?

A. That -- that sounds correct, yes.

Q. And do you remember having conversations with her that you would try to keep SAMG referrals within the system as much as possible?

A. You know, I don't recall her specifically saying that, but I can certainly imagine that that was part of the conversations.

Q. Do you remember Ms. Reimers telling you that SAMG expected you -- that if they sent you a patient, you would keep it within the Saint Al's system?

A. Well, I think that the primary care base of any organization expects -- I already know that --

Q. Could you just answer my question, yes or no. Sorry.

A. State it again.

THE COURT: Just a moment. Let's go one at a time. Now, rephrase the question. Listen carefully to counsel's question and try to answer it as directly as possible. Mr. Powers will have a chance to let you explain in more detail.

Go ahead and proceed, Mr. Schafer.

BY MR. SCHAFER:

Q. Did Ms. Reimers tell you during that conversation that SAMG expected that if its physicians sent you a patient, you would perform that surgery at a Saint Alphonsus facility?

A. I can -- sure. Probably so.

Q. And do you remember telling Ms. Reimers during that conversation that if the SAMG primary care providers could keep you busy with referrals, that you would sign a PSA with Saint Al's?

A. No.

MR. SCHAFER: And, Your Honor, this is AEO, but I think if we turn off the screen, we should be able to --

THE COURT: All right.

MR. SCHAFER: Put up Exhibit 2016.

THE WITNESS: I remember seeing this in my deposition, but I don't remember her saying that to me.

MR. SCHAFER: And if you could blow up that.

BY MR. SCHAFER:

Q. And you can see that -- I won't read the text of it, but at least Ms. Reimers said that she got the impression that --

MR. ETTINGER: Your Honor, you know, if something is AEO, not using the verbatim words but stating the substance doesn't really solve the problem.

THE COURT: Who -- whose AEO is it? Is it Treasure Valley's?

MR. ETTINGER: I think it's ours, Your Honor.

THE COURT: All right. Then I think, Counsel, we will need to clear the courtroom or figure out a way to do

it without relating --

MR. SCHAFER: Let me ask Mr. Ettinger if that second sentence is considered AEO by Saint Al's?

MR. ETTINGER: I think it is still -- I believe it is still AEO.

MR. SCHAFER: The question is whether you are actually deeming that second sentence to be AEO.

THE COURT: Well, Counsel, we can indicate that that is -- I can read it.

MR. SCHAFER: Okay. That -- that's fine, Your Honor. Can you read that second --

Sorry, Your Honor.

THE COURT: For the record, this is which paragraph of the exhibit? I can't see behind the -- the call-out.

MR. SCHAFER: The second paragraph.

THE COURT: The second sentence of the second paragraph of -- what's the exhibit number, again?

MR. SCHAFER: It is Exhibit --

THE COURT: 2016.

MR. SCHAFER: Yes, Your Honor.

THE COURT: All right.

BY MR. SCHAFER:

Q. And, Dr. Williams, I won't read this second sentence, but can you read that?

A. The highlighted portion?
Q. Correct.
A. "If our primary care providers" --
Q. Don't read it out loud.
THE COURT: No. No. Just to yourself.
THE WITNESS: Oh, I'm sorry.
THE COURT: That's what we're trying to avoid.
THE WITNESS: Yeah. I've read it. I have seen this document before.
BY MR. SCHAFER:
Q. Okay. And do you know how Ms. Reimers arrived at the impression that she references in this email?
A. Well, let me ask you, she probably said -- did she say on the day that she met with me or us or --
Q. The email is in front of you --
A. I would assume that she arrived at that conclusion from our conversations.
Q. Thank you.
A. If that helps you.
THE COURT: Counsel, actually, 2016 has not been admitted. Ms. Gearhart is on her toes and just alerted me to that fact.
Do you intend to offer 2016 at this time?
MR. SCHAFER: Yes, Your Honor.
THE COURT: Is there any objection?

MR. ETTINGER: No, Your Honor.
THE COURT: All right. 2016 is admitted.
(Defendants' Exhibit No. 2016 admitted.)
THE COURT: Go ahead and proceed.
BY MR. SCHAFER:
Q. Dr. Williams, during your time at Saltzer, you recognized that patients often chose to receive care from other providers instead of Saltzer if they could receive care from those providers for less out-of-pocket costs; correct?
A. I'm sorry. Patients chose to see other providers other than Saltzer if it was cheaper for them to do so?
Q. If -- if they could receive that care for less out-of-pocket costs.
MR. POWERS: Your Honor, could we have the question either read back to the witness, or, Mr. Schafer, ask the question a little slower.
MR. SCHAFER: I will restate the question.
THE COURT: All right. And let's slow down.
MR. SCHAFER: Yeah.
BY MR. SCHAFER:
Q. Dr. Williams, during your time at Saltzer --
A. Yes.
Q. -- you recognized that patients often chose to receive care from other providers, nonSaltzer providers, if

they could receive that care for less out-of-pocket costs than they would have to pay to see a Saltzer physician?
A. Now, I -- I thought that's what you said, but I -- are you asking me if I can imagine if that happened or you're asking me if that was something that happened a lot? I'm not sure how to answer. Now I understand the question, but I still don't know how to answer.
Q. I'm asking if that is a -- something that you recognized and communicated to your Saltzer partners while you were at Saltzer?
A. So in other words, a different way to say it is, did I think that our fees were too high and the patients were going other places?
Q. Sure.
A. No. Not necessarily. I mean, I -- maybe. I don't -- I don't remember that ever having thought of that as a big problem, but --
Q. And if we could pull --
A. I assume you're going somewhere with this.
MR. SCHAFER: If you could put up Trial Exhibit 2558. Just pull up that whole middle email from Dr. Williams.
THE WITNESS: 2008.
BY MR. SCHAFER:
Q. Dr. Williams, it says here, "The out-of-pocket

expense considerations for patients contemplating elective procedures is more important currently than it has ever been in the past. We lose patients weekly when they find out that another provider can provide the same service at less out-of-pocket expense. The patient is already very aware of their deductible, copayment responsibility, and et cetera, and we look even worse when they find out later they could have received their care somewhere else cheaper."
Do you see that?
A. Yeah. And I think we're talking about surgeries here, so that -- that helps with the question, too.
Q. And was that your view at the time?
A. If I wrote it, yes.
THE COURT: Counsel, 2558 also has not been admitted, but the only objection is hearsay.
Counsel, do you withdraw the objection?
MR. POWERS: Yes, Your Honor.
THE COURT: All right. Exhibit 2558 will be admitted.
(Defendants' Exhibit No. 2558 admitted.)
THE WITNESS: And this was an answer to another email.
BY MR. SCHAFER:
Q. That -- that's all I needed for my question. Thank you.

You mentioned that you believe your referrals -- notice your referrals have dropped off some from your former Saltzer colleagues; correct?

A. Yes.

Q. And you don't think it's surprising, do you, that your former colleagues at Saltzer refer less cases to you now?

A. It's not surprising.

Q. And the reasons that you think your former colleagues at Saltzer are sending less cases to you now or less referrals to you now include the fact that you're no longer their partner; correct?

A. Correct.

Q. And because you no longer do any work at St. Luke's Meridian? Is that another reason?

A. That would be probably another less -- less important reason, but yes.

Q. And because you are part of a group that has filed a lawsuit against Saltzer; right?

A. I don't feel like I'm part of a group that's filed a lawsuit against Saltzer.

MR. SCHAFER: Play W50.

MR. SINCLAIR: Page and line?

THE WITNESS: I had nothing to do with the filing of the lawsuit for sure.

MR. SCHAFER: This is page 118, line 23 through 119-1 of Dr. Williams's deposition.

(Video clip played as follows.)

Q. "Why do you think that physicians who you were former partners with at Saltzer are not sending you cases anymore?

A. "Well, I'm not their partner anymore. I have resigned from the group. I no longer work out of St. Luke's in Meridian. I had to give that up because of the call difficulties. I -- I now have call coverage at Saint Alphonsus, and none of those doctors have St. Luke's privileges. And so more and more in the Valley, there is no cross-pollination of the hospitals anymore. You're either on this medical staff or you're on that medical staff. And now I'm working with an organization that is involved in a lawsuit against the organization that has acquired that entity."

(Video clip concluded.)

BY MR. SCHAFER:

Q. Was that your testimony, Dr. Williams?

A. That was.

Q. And, Dr. Williams, while you were still at Saltzer, you expected even before you left that your

referrals would begin to tank before even leaving the group; correct?

A. Yes.

Q. And you also believed, did you not, that towards the end of your and the other surgeons' presence or employment with Saltzer that if all of the surgeons quit and the FTC held up or unwound the Saltzer-St. Luke's transaction, that Saltzer's overhead would go through the roof? Do you remember expressing that view?

A. I remember the text message that I received that the defendant counsel gave in my deposition, yes.

Q. Okay.

MR. SCHAFER: Well, let's put that up. It's Exhibit 2020.

BY MR. SCHAFER:

Q. This is the fourth page, and I'll blow it up for you, Dr. Williams, so you can see the text I'm talking about because they're very small.

An August 13th, 2012, text at 9:45 a.m.

MR. SCHAFER: If you could blow that up, Mr. Chase.

BY MR. SCHAFER:

Q. It says, "Beasley thinks" -- and I'm going to -- some -- some of these words are abbreviated in text message style. I'm going to read how -- what I think they mean. If

you think I have misconstrued any of it, please let me know.

It says, "Beasley thinks Kaiser is pushing for resignation so that he can have a final 90 percent approval and avoid any legal issues. But if they do this prior to December 31st anyway, does it matter? We won't be supported by our group anyway. And honestly, if we all quit and then FTC does hold up or unwind deal, Saltzer's overhead will be through roof without us and Kaiser will finally get his due."

Do you see that?

A. I do.

THE COURT: Counsel, we've got the same, 2020 was not -- has not been admitted.

Is there any objection?

MR. POWERS: No. No, Your Honor.

THE COURT: All right. 2020 now will be admitted.

(Defendants' Exhibit No. 2020 admitted.)

BY MR. SCHAFER:

Q. Do you see that at the top of this page in -- in text that was included by your counsel, this is identified on a series of texts that are -- that are identified as Curran text -- texts with Williams?

A. Correct.

Q. And do you believe you received this text message rather than sending it?

A. I received it, correct. It's to my number. That's my number.

Q. And with respect to the overhead going through the roof, you understood that the Saltzer surgeons paid based on their -- based on their volumes and the amount of money they generated, they paid a large portion of Saltzer's overhead; correct?

A. Correct.

MR. SCHAFER: No further questions. Let me confer with my colleagues.

THE COURT: Yes.

BY MR. SCHAFER:

Q. And when you received that text message, Dr. Williams, what -- what was your understanding of the phrase, "Kaiser will finally get his due"?

A. Well, I think there was a lot of frustration with Dr. Kaiser, especially amongst the surgeons. Dr. Kaiser was the stopgap communication between St. Luke's and the surgeons. We had no direct communication.

Q. And I'm sorry to cut you off --

MR. POWERS: He asked the question, and he is entitled to answer it.

MR. SCHAFER: But I -- I -- what he is giving me is a background, what I --

MR. POWERS: Well, he asked --

THE COURT: Just a moment. Just a moment. All right.

Mr. Schafer, were you trying to suggest the witness should not be allowed to complete his response?

MR. SCHAFER: I was trying to suggest that I -- what I asked for was his interpretation of that phrase, not the background that was entailed.

MR. POWERS: The question -- I'm sorry. The question is what was your understanding of the reference to Kaiser. And that's an open-ended question, and the witness should be entitled to answer it, and he was in the middle of answering it. Just because counsel doesn't like the answer, doesn't mean --

THE COURT: Counsel -- Counsel, I think I heard enough, Mr. Powers. Thank you.

I'm going to overrule -- well, I don't know if there is even an objection, but I am certainly going to allow the witness to complete his response.

THE WITNESS: And I will be brief. We were forced out of our group. I was forced out of the group that I had been in ten years that I had helped build. And so was there frustration? Yes. You know, I didn't write the text, but I -- I would agree with the sentiment that, you know, the -- we -- we felt that Dr. Kaiser was -- was mostly behind that.

BY MR. SCHAFER:

Q. And what did it mean -- what did that phrase mean to you that "Dr. Kaiser would finally get his due"?

A. That I think the rest of the group would see everything that he had done, that he had tried to hide from the rest of the group.

Q. Didn't you interpret that phrase to mean that Saltzer would not be able to survive in the event of an unwind?

A. No. It meant that he wouldn't get to be president anymore.

Q. That's how you interpreted that?

A. Yes.

MR. SCHAFER: Okay. No further questions.

THE COURT: All right. Mr. Powers, we're right at the breaking time. I don't know how much you have, but we can't stay much beyond 2:30.

MR. POWERS: Understood, Your Honor.

REDIRECT EXAMINATION

BY MR. POWERS:

Q. A few questions for you, Dr. Williams. Did -- did you regularly, when you were a member of Saltzer, take Medicare or Medicaid patients to Treasure Valley Hospital?

A. Absolutely, yes.

Q. Was there any reason not to take them to Treasure Valley Hospital?

A. No. I was hoping you guys would have numbers. I think the numbers reflect out of my total Medicare, Medicaid, there is a large portion that go to Treasure Valley Hospital. And by that I mean probably 50-50 between insured and Medicare, Medicaid.

Q. Is the significant reduction in your case count at Treasure Valley Hospital in Boise in September of 2012 attributed, in your opinion, to your performance of surgeries at Treasure Valley Surgical Center in Nampa?

A. No. They are two different patient populations.

Q. Thank you.

MR. POWERS: No further questions, Your Honor.

THE COURT: Anything else?

MR. SCHAFER: Nothing, Your Honor.

THE COURT: All right.

Dr. Williams, you may step down and are excused. Thank you, sir.

Counsel, we'll take the recess. We're going to start at 8:30 regardless on Tuesday, Monday being a holiday. I'm -- I don't know if counsel has had a chance to confer.

MR. SINCLAIR: Your proposed rescheduling is fine with us.

THE COURT: All right. It is? That's what we'll do. The meeting happens to be here in this building. So we will go 8:30 until noon and then 1:00 until 3:30. So we're

all -- all right.
We'll be in recess then until -- oh, Mr. --
MR. JULIAN: Can I raise one issue?
THE COURT: Yes.
MR. JULIAN: Have the plaintiffs rested at this point?
MR. ETTINGER: Your Honor, we --
THE COURT: I don't know.
MR. JULIAN: They're three weeks into it.
MR. ETTINGER: Your Honor, we still have to work out these exhibits and these deposition designation issues, and we intend to do so.
THE COURT: Well, do we -- you anticipate a Rule 50 motion, is that what --
MR. JULIAN: A 52(c) actually, Your Honor.
THE COURT: Oh, that's true.
MR. JULIAN: Yes.
THE COURT: I forget, we don't have a jury.
All right. We'll wait until we have this all resolved. I'm obviously allowing the case to proceed in a somewhat unusual fashion because of the way the length of the trial, the difficulty in trying to work around schedules, but I think at some point, the plaintiffs are going to have to rest before the defendants rest to keep the cart -- horse before the cart, and then we'll have a chance to hear the

appropriate motions at that time.
MR. JULIAN: Thank you, Your Honor.
THE COURT: All right. We'll be in recess.
(Court recessed at 2:32 p.m.)

REPORTER'S CERTIFICATE

I, Tamara I. Hohenleitner, Official Court Reporter, County of Ada, State of Idaho, hereby certify:
That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and
That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.
IN WITNESS WHEREOF, I have hereunto set my hand October 14, 2013.

-s-
Tamara I. Hohenleitner
Official Court Reporter
CSR No. 619