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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION

IN RE: )  
 ) CHAPTER 11  
EL PASO CHILDREN'S HOSPITAL )  
CORPORATION, ) CASE NO. No. 15-30784  
 )  
Debtor. )

The Oral Deposition of MARK C.HERBERS, SR., taken  
at the request of El Paso County Hospital District  
d/b/a University Medical Center of El Paso, pursuant to  
Federal Rules of Civil Procedure, on Thursday, July 16,  
2015, from 10:32 a.m. to 4:40 p.m., at 4845 Alameda, El  
Paso, Texas 79905.

Reported by:  
Teri C. Finnegan, TX & NM CSR, RPR

2

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3

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MARK C. HERBERS, SR.,

1 sworn by the Certified Court Reporter, testified as  
 2 follows:  
 3

EXAMINATION

4

5 BY MR. DRAKE:

6 Q. Good morning, Mr. Herbers. Could you please  
 7 state your full name for the record.

8 **A. Mark C. Herbers, Sr.**

9 Q. Mr. Herbers, we just met a moment ago. My  
 10 name is Scott Drake. You understand I'm one of the  
 11 lawyers representing UMC. Correct?

12 **A. Yes.**

13 Q. And you're here today to testify on behalf of  
 14 debtors in what's known as a Rule 2004 examination. Is  
 15 that correct?

16 **A. Yes.**

17 Q. Mr. Herbers, I believe you've obviously  
 18 participated in some of these bankruptcy proceedings to  
 19 date on behalf of debtor. Correct?

20 **A. Yes.**

21 Q. And you've been deposed -- you've given  
 22 testimony in a deposition before. Is that right?

23 **A. Yes.**

24 Q. Have you ever testified under a Rule 2004  
 25 examination?

5

1 **A. Not that I recall, but it's possible.**

2 Q. Okay. And I don't want to know what you  
 3 discussed with your lawyer, but you've had a chance to  
 4 visit with your lawyer about the examination today. Is  
 5 that right?

6 **A. Yes.**

7 Q. Okay. And so you understand you're under oath  
 8 just like in a deposition or if you were testifying in  
 9 court.

10 **A. Yes.**

11 MR. SPROUSE: Mr. Drake, I should have  
 12 asked you this earlier, but can we agree -- just to  
 13 keep things moving -- to agree to preserve our  
 14 objections on relevance only going forward so I don't  
 15 have to object on relevance for each question?

16 MR. DRAKE: Yeah, that's fine.

17 MR. SPROUSE: All right. Thank you.  
 18 Please go ahead.

19 Q. (By Mr. Drake) Okay. So Mr. Herbers, I don't  
 20 want to go through a lot of your background since  
 21 you're here just on a 2004 exam as debtor's  
 22 representative, but I understand you're currently  
 23 serving as CEO and CRO for the El Paso Children's  
 24 Hospital. Is that correct?

25 **A. Yes.**

6

1 Q. Okay. And is it okay today during this  
 2 examination if I -- when I just say "hospital," we  
 3 understand that's referring to El Paso Children's  
 4 Hospital?  
 5 **A. Yes.**  
 6 Q. And I say CRO, that's chief restructuring  
 7 officer. Correct?  
 8 **A. Yes.**  
 9 Q. Prior to you taking the position of chief  
 10 restructuring officer, did Children's Hospital have a  
 11 CRO?  
 12 **A. No.**  
 13 Q. And you took the position of CEO and CRO  
 14 starting February 27, 2015. Correct?  
 15 **A. Yes.**  
 16 Q. At what point prior to you taking these  
 17 positions on February 27, 2015, did you first become  
 18 involved with the hospital?  
 19 **A. Approximately three to four weeks before.**  
 20 Q. Okay. So some time early February of 2015.  
 21 Is that fair?  
 22 **A. Correct.**  
 23 Q. Prior to February 1st of 2015, had you had any  
 24 involvement with El Paso Children's Hospital?  
 25 **A. Yes.**

7

1 Q. Please explain to me what that involvement  
 2 was.  
 3 **A. We were involved in a presentation of our**  
 4 **qualifications in late January.**  
 5 Q. And when you say "we" is this you and some of  
 6 your colleagues from AlixPartners?  
 7 **A. Yes.**  
 8 Q. And that was a pitch -- or that was a  
 9 presentation regarding potentially being retained by  
 10 the debtor. Is that right? Not a debtor at the time,  
 11 but the Children's Hospital?  
 12 **A. Yes.**  
 13 Q. Prior to presenting AlixPartners'  
 14 qualifications in January of 2015, did you personally  
 15 have any involvement with El Paso Children's Hospital?  
 16 **A. No.**  
 17 Q. Are you aware whether anyone else at  
 18 AlixPartners had any involvement with El Paso  
 19 Children's Hospital prior to being contacted about  
 20 putting together a qualification presentation?  
 21 **A. No.**  
 22 Q. You have some experience in the hospital  
 23 industry though. Correct?  
 24 **A. Yes.**  
 25 Q. Did you have just any general knowledge or

8

1 awareness of the Children's Hospital in El Paso?  
 2 **A. No.**  
 3 Q. So prior to being contacted sometime in  
 4 January of 2015, you were completely unfamiliar with  
 5 El Paso Children's Hospital. Is that fair?  
 6 **A. Yes.**  
 7 Q. You consider yourself an integral member of  
 8 debtor's senior management team. Is that correct?  
 9 **A. Yes.**  
 10 Q. Who else would you consider members of  
 11 debtor's senior management team?  
 12 **A. The chief operating officer and chief nursing**  
 13 **officer is a single individual, Elias Armendariz.**  
 14 Q. Anyone besides Mr. Armendariz that you would  
 15 consider part of debtor's senior management team?  
 16 **A. Well, clearly the board of directors, the**  
 17 **officers of the medical staff.**  
 18 Q. I'm sorry. What was the last --  
 19 **A. The officers of the medical staff.**  
 20 Q. How many officers on the medical staff are  
 21 there?  
 22 **A. I believe there are three.**  
 23 Q. Can you recall who those three people are?  
 24 **A. Dr. Patel, Dr. Moorthy and -- I'm having a**  
 25 **senior moment. I apologize.**

9

1 Q. I understand.  
 2 What is Dr. Patel's role on the --  
 3 **A. He's the chief of the medical staff, so he**  
 4 **chairs the medical executive committee. Dr. Moorthy is**  
 5 **the vice chair.**  
 6 Q. And is that -- do you know how to spell  
 7 Moorthy?  
 8 **A. M-O-O-R-T-H-Y, I believe.**  
 9 Q. And the third member that at present we can't  
 10 recall his or her name --  
 11 **A. Right.**  
 12 Q. -- can you remember what their role on the  
 13 medical staff is?  
 14 **A. They're secretary and treasurer of the medical**  
 15 **staff and it may be a combined position.**  
 16 Q. Sure. Is it fair to say, generally speaking,  
 17 that the medical staff's role is to oversee the  
 18 operations of the physicians and other medical  
 19 personnel?  
 20 **A. Yes.**  
 21 Q. Is that a yes?  
 22 **A. Yes.**  
 23 Q. Is there any other role that the medical staff  
 24 serves?  
 25 **A. They participate in advising the board on**

10

1 **issues of professional practice and general issues**  
 2 **concerning the hospital.**  
 3 Q. Does the medical staff have day-to-day  
 4 involvement in the business side of the hospital?  
 5 **A. No.**  
 6 Q. Is it fair to say the medical staff handles  
 7 the oversight of the practice of medicine at the  
 8 hospital?  
 9 **A. Yes.**  
 10 Q. And you and Mr. Armendariz are the two  
 11 individuals primarily responsible for the business  
 12 operations of the hospital?  
 13 **A. Yes.**  
 14 Q. You recall submitting a declaration in support  
 15 of debtor's first day motions earlier in this  
 16 bankruptcy proceeding?  
 17 **A. Yes.**  
 18 Q. And I can hand you a copy if you want.  
 19 MR. DRAKE: I guess I should mark it. We  
 20 might as well mark it.  
 21 (Exhibit marked, No. 1.)  
 22 Q. (By Mr. Drake) Mr. Herbers, the court  
 23 reporter has handed you what's been marked as Exhibit 1  
 24 to this examination. Do you recognize this as the --  
 25 your declaration that was submitted in support of

11

1 debtor's first day motions?  
 2 **A. Yes.**  
 3 Q. Now, Mr. Herbers, I'd like you to turn to page  
 4 2 of that declaration if you would, please. You see  
 5 there, there's a heading A which is styled Events  
 6 Leading to the Petition Date.  
 7 **A. Yes.**  
 8 Q. And then there's a series of paragraphs that  
 9 sort of summarize what debtor contends are the events  
 10 leading up to the debtor's filing of this proceeding.  
 11 Is that correct?  
 12 **A. Yes.**  
 13 Q. And just so our record's clear, this was dated  
 14 and signed May 19 of 2015, is that correct, this  
 15 declaration?  
 16 **A. Yes.**  
 17 Q. A little less than three months after you took  
 18 the position of CEO and CRO for the debtor. Correct?  
 19 **A. Yes.**  
 20 Q. In paragraph 5 you describe some events  
 21 regarding the opening of the Children's Hospital in  
 22 2012. Correct?  
 23 **A. Yes.**  
 24 Q. And you weren't present for that opening.  
 25 Right?

12

1 **A. Correct.**  
 2 Q. So could you please explain to me, you know,  
 3 what was the source of the information you describe in  
 4 your declaration in paragraph 5?  
 5 **A. Information maintained by the hospital.**  
 6 Q. Okay. And when you say "information," is this  
 7 documents?  
 8 **A. Yes.**  
 9 Q. So did you personally review documents in  
 10 order to make the declarations contained in paragraphs  
 11 5 through 18 of your declaration?  
 12 **A. Yes.**  
 13 Q. Do you recall what those documents were?  
 14 **A. I do not.**  
 15 Q. Did you maintain any notes of the documents  
 16 you reviewed in connection with making the declarations  
 17 contained in these paragraphs?  
 18 **A. No.**  
 19 Q. You did not?  
 20 **A. No.**  
 21 Q. How did you select what documents you reviewed  
 22 in order to make this declaration about the facts of  
 23 which you had no personal knowledge?  
 24 **A. As best I recall, the documents were readily**  
 25 **available, newspaper articles published at the time,**

13

1 **press releases issued by the hospital, those sorts of**  
 2 **documents.**  
 3 Q. So did I understand your testimony correctly  
 4 that paragraphs 5 through 18 are primarily based upon  
 5 your review of newspaper articles and press releases?  
 6 MR. SPROUSE: Objection. That  
 7 mischaracterizes the witness' testimony.  
 8 Q. (By Mr. Drake) You can answer the question.  
 9 **A. Paragraph 5 is primarily, as I recall, sourced**  
 10 **from the public documents and press statements. The**  
 11 **other components would have been the results of**  
 12 **reviewing other internal documents, including board**  
 13 **minutes, discussions with board members, and other**  
 14 **internal sources of information such as, in paragraph**  
 15 **9, the feasibility study, I did review the feasibility**  
 16 **study, I did review the Kurt Salmon feasibility study,**  
 17 **and other items mentioned were sourced from other**  
 18 **documents available by the hospital for me to review.**  
 19 Q. You mentioned discussions with personnel. Can  
 20 you recall any people that you had discussions with  
 21 that provided knowledge or information in connection  
 22 with your declarations made in this Exhibit 1?  
 23 **A. Yes.**  
 24 Q. Okay. And who would those be?  
 25 **A. I interviewed a number of individuals**

14

1 including the board chair, Rosemary Castillo; I  
 2 interviewed various directors here at the hospital, in  
 3 particular the director of marketing and public  
 4 relations; and other relevant staff members about  
 5 documents, sources of and so forth.  
 6 Q. Who was the director of marketing at the time?  
 7 A. Georgina Panahi and she still it.  
 8 I'll get the spelling of her last name.  
 9 Q. Do you recall any specific members of the  
 10 board of directors that you interviewed in connection  
 11 with your preparation of this declaration?  
 12 A. Yes.  
 13 Q. Who would they be?  
 14 A. Rosemary Castillo specifically was the board  
 15 chair, and then as part of the participating in  
 16 meetings of the board I had the opportunity to listen  
 17 to their discussions, and so all of the members of the  
 18 board that participated would have provided relevant  
 19 information.  
 20 Q. Were all of these discussions done in person?  
 21 A. I was present.  
 22 Q. Did anyone provide you information via e-mail  
 23 that was used in connection with preparing this  
 24 declaration?  
 25 A. Yes.

15

1 Q. And who provided you any e-mails that were  
 2 used to prepare the declaration?  
 3 A. I don't recall specifically, but the request  
 4 for documents would have been attached to those e-mails  
 5 and the documents that I requested, such as board  
 6 minutes, Kurt Salmon's feasibility study and so forth,  
 7 would have been attached to e-mails in response to my  
 8 requests.  
 9 Q. If I understand you correctly, Mr. Herbers,  
 10 you would have sent e-mails to various personnel asking  
 11 for various documents that you thought were important  
 12 in order for you to make the statements contained in  
 13 this declaration. Right?  
 14 A. Yes.  
 15 Q. And then the person would have responded via  
 16 e-mail and attached whatever information you requested.  
 17 Is that right?  
 18 A. Yes.  
 19 Q. Okay. Have those e-mails where you seek  
 20 information and people respond by attaching information  
 21 been produced to UMC in this case to your knowledge?  
 22 A. I'm not aware whether they have or they have  
 23 not been.  
 24 Q. Have you provided those e-mails to anyone in  
 25 order for them to be produced to UMC in connection with

16

1 this bankruptcy?  
 2 A. Again, I don't recall.  
 3 Q. Do you recall ever collecting those documents  
 4 for anyone so that they could be produced?  
 5 A. Again, I don't recall.  
 6 Q. You don't have any recollection of collecting  
 7 those documents. Is that accurate?  
 8 A. No.  
 9 Q. No, that's not accurate or no, you cannot  
 10 recall ever collecting --  
 11 A. No, it's not accurate.  
 12 Q. Okay. Tell me what you do recall then.  
 13 A. As part of the due diligence process following  
 14 the mediation, there were thousands of documents  
 15 requested and posted to the data room. I may have  
 16 supplied some of those documents or directed that some  
 17 of those documents be posted to the data room.  
 18 Q. But you can't recall either way. Is that  
 19 fair?  
 20 A. Correct.  
 21 Q. You've been asked for a lot of documents  
 22 probably --  
 23 A. Correct.  
 24 Q. -- and you have no specific recollection?  
 25 A. And if you have something specific that might

17

1 refresh my memory, I might be able to respond.  
 2 Q. Okay. And, Mr. Herbers, you mentioned that  
 3 you provided some documents to the data room following  
 4 the mediation. Can you recall which mediation it is  
 5 you're referring to?  
 6 A. March 9th that concluded early in the morning  
 7 on March 10th.  
 8 Q. Anyone else you can recall talking to besides  
 9 Ms. Castillo and the director of marketing -- was it  
 10 Ms. -- it starts with a "P" -- what's her last name,  
 11 Georgina?  
 12 A. Georgina Panahi, I believe.  
 13 Q. Panahi?  
 14 A. We'll get the spelling for you when we break.  
 15 Q. Okay. I would call her by her last name, but  
 16 just because we're not sure I'll say Georgina and hope  
 17 she's not offended.  
 18 A. That's fine.  
 19 Q. But anybody specifically you can recall  
 20 talking to besides Ms. Castillo, Georgina, and then  
 21 listening in to some meetings of the board members?  
 22 A. Yes.  
 23 Q. And who would that be?  
 24 A. I did interview Elias Armendariz, I did  
 25 interview Jim Sexton and I did interview Jim O'Keffe.

18

1 I interviewed several other directors and consultants  
 2 involved in interim positions in the financial  
 3 department. I don't recall all of the individuals I  
 4 interviewed, but those are some that I do remember.  
 5 Q. And were these interviews all for the  
 6 preparation of this declaration?  
 7 A. No.  
 8 Q. What was the purpose of these interviews?  
 9 A. To get background information about the  
 10 client, the hospital, to do the work I was engaged to  
 11 do in early February, which also supported this  
 12 declaration.  
 13 Q. So understandably you're coming in cold in  
 14 January of 2015, you're formally put in the position in  
 15 late February and you're trying to get up to speed. Is  
 16 that fair?  
 17 A. Yes, sir.  
 18 Q. And at least one of the other purposes of  
 19 these interviews and information gathering was so you  
 20 could make this declaration in support of the first day  
 21 motions. Correct?  
 22 A. No.  
 23 Q. What's inaccurate about that?  
 24 A. The work done in January and up to the filing  
 25 was for purposes of coming up to speed. The work to

19

1 support this declaration was done only after that  
 2 decision had been made.  
 3 Q. And "decision" meaning to file?  
 4 A. Correct.  
 5 Q. And so once the decision to file for  
 6 bankruptcy had been made and it was determined you  
 7 needed to prepare this declaration in support of the  
 8 first day motions, did you then go back and sort of  
 9 revisit the background information you had gained  
 10 previously on these interviews?  
 11 A. Yes.  
 12 Q. Okay. And did you maintain notes of these  
 13 interviews?  
 14 A. None that I retained because the document  
 15 stands on its own.  
 16 Q. "The document" being the declaration?  
 17 A. Yes.  
 18 Q. Okay. When you say none that you retained,  
 19 was there a time when you had notes from these  
 20 interviews?  
 21 A. There may have been. Again, I don't recall.  
 22 Q. Do you remember when you conducted the  
 23 interviews with Ms. Castillo, Georgina, Mr. Armendariz,  
 24 Mr. Sexton, Mr. O'Keffe and the consultants?  
 25 A. I would have to refer to my calendar to answer

20

1 that question.  
 2 Q. Does your calendar reflect when those  
 3 interviews were taken?  
 4 A. It reflects when they were scheduled.  
 5 Q. Fair enough.  
 6 So just so I'm clear, Mr. Herbers, when  
 7 you actually got around to providing the information  
 8 for this declaration, did you do it from memory or did  
 9 you refer to any type of information?  
 10 A. Both.  
 11 Q. And what information did you use specifically  
 12 for the purpose of making this declaration?  
 13 A. The historical records, press statements,  
 14 newspaper articles, internal documents and  
 15 communications with various parties here at the  
 16 hospital that were familiar with the history.  
 17 Q. But sitting here today you can't tell me  
 18 specifically what those documents were. Is that right?  
 19 A. It would have been all of the above that were  
 20 available.  
 21 Q. But, for instance, press statements, you can't  
 22 tell me specifically what articles you reviewed?  
 23 A. I don't recall the specific articles. There  
 24 were many.  
 25 Q. Did you maintain that collection of documents

21

1 that you relied upon for this declaration in any type  
 2 of separate file cabinet or folder?  
 3 A. No.  
 4 Q. Are they organized in a way that you could go  
 5 back and access them now and tell us what documents you  
 6 relied upon for this declaration?  
 7 A. Probably, yes.  
 8 Q. Okay. That's something you could do?  
 9 A. Well, I would have to ask my staff if that was  
 10 possible.  
 11 Q. And when you say you'd have to ask your staff,  
 12 did your staff perform the review of the documents or  
 13 did you do it personally?  
 14 A. I did.  
 15 Q. And when you refer to your staff, are you  
 16 referring to people employed by the hospital or by  
 17 AlixPartners?  
 18 A. By the hospital.  
 19 Q. Mr. Herbers, I've got it somewhere in my  
 20 notes, but do you recall who your predecessor as CEO of  
 21 the hospital was?  
 22 A. James Sexton.  
 23 Q. And was Mr. Sexton in place when you came on  
 24 in February of 2015?  
 25 A. Yes.

22

1 Q. And so when you took the position of CEO on  
 2 February 27, 2015, Mr. Sexton stepped down effectively?  
 3 **A. Yes.**  
 4 Q. Did you interview anyone else who is a former  
 5 officer of the hospital in connection with getting up  
 6 to speed about the hospital's operations?  
 7 **A. Yes.**  
 8 Q. Who would that be?  
 9 **A. Jim O'Keffe.**  
 10 Q. Anyone besides Mr. O'Keffe?  
 11 **A. Not that I recall.**  
 12 Q. Mr. Herbers, you mentioned a data room that  
 13 you posted some documents to or provided some documents  
 14 to be posted in a data room following the March 9  
 15 mediation. What is the purpose of that data room?  
 16 **A. Provide an electronic and digital media for**  
 17 **parties relevant to the mediation and consultants**  
 18 **supporting UMC due diligence of Children's Hospital.**  
 19 Q. Do you know who maintains that data room?  
 20 **A. I don't recall the vendor's name, no.**  
 21 Q. Do you know, for lack of a better word, sort  
 22 of who's in charge of the data room, not necessarily  
 23 from a technical perspective as a vendor, but actually  
 24 what person is in charge of putting documents into the  
 25 data room and allowing people access?

23

1 **A. Yes.**  
 2 Q. And who is that?  
 3 **A. There were several because of staff turnover.**  
 4 **Initially was Melissa -- I'm not going to remember her**  
 5 **last name but I can get it for you -- who was our**  
 6 **paralegal; and Amy -- and I'll have to get her last**  
 7 **name -- who was an executive assistant; and the interim**  
 8 **controller Jim -- I'll get you his last name.**  
 9 **Subsequently, because of their departures, we**  
 10 **designated other individuals.**  
 11 Q. I understand you're going to provide last  
 12 names when you can.  
 13 Melissa, Amy and Jim all employed by  
 14 Children's Hospital?  
 15 **A. No.**  
 16 Q. Who are they employed by?  
 17 **A. Melissa and Amy were employed by the hospital,**  
 18 **Jim was an independent consultant.**  
 19 Q. Was he affiliated with any company or was  
 20 he completely independent?  
 21 **A. He was.**  
 22 Q. Do you recall what entity he was affiliated  
 23 with?  
 24 **A. I don't.**  
 25 Q. Was Jim serving as interim controller prior to

24

1 you taking the CEO position in February of 2015?  
 2 **A. Yes.**  
 3 Q. So you weren't responsible for bringing him on  
 4 board. Is that fair?  
 5 **A. Yes.**  
 6 Q. Were you responsible for him no longer serving  
 7 as interim controller?  
 8 **A. No.**  
 9 Q. Do you recall why Jim left -- I guess he was a  
 10 consultant so "left" may be not the right word.  
 11 Do you recall the reasons why Jim no  
 12 longer served as interim controller for the hospital?  
 13 **A. Yes.**  
 14 Q. And please explain that to me.  
 15 **A. His contract expired and he was not interested**  
 16 **in renewing it nor were we.**  
 17 Q. Do you know, Mr. Herbers, who-all has access  
 18 to the data room outside of people working for the  
 19 hospital or serving as advisors or consultants to the  
 20 hospital?  
 21 **A. No.**  
 22 Q. Do you know who would have that information?  
 23 **A. Yes.**  
 24 Q. Who would that be?  
 25 **A. One of the delegees who are responsible for**

25

1 **the data room, including my executive assistant,**  
 2 **Nora -- I'll get you her last name -- Salazar and Ray**  
 3 **Adams.**  
 4 Q. Mr. Adams is AlixPartners?  
 5 **A. Correct.**  
 6 Q. Do you know whether UMC has access to the data  
 7 room?  
 8 **A. Now?**  
 9 Q. Now.  
 10 **A. No.**  
 11 Q. No, you don't know or no, they do not have  
 12 access?  
 13 **A. No, they do not have access.**  
 14 Q. And you said "now." Was there a point in time  
 15 in which UMC had access to the data room?  
 16 **A. Yes.**  
 17 Q. When was that?  
 18 **A. Shortly after the mediation was concluded and**  
 19 **we opened the data room up until the mediation -- up**  
 20 **until the due diligence process ended and I don't know**  
 21 **the exact date.**  
 22 Q. Mr. Herbers, I assume from reading your  
 23 declaration that you've reviewed the various written  
 24 agreements between the hospital and UMC. Is that  
 25 correct?

26

1     **A. Yes.**

2     Q. And just to make sure we're talking about the

3 same thing. You've reviewed the master agreement. Is

4 that fair?

5     **A. Yes.**

6     Q. Also the facility lease agreement?

7     **A. Yes.**

8     Q. Have you reviewed the forbearance agreement?

9     **A. Yes.**

10    Q. And also have you reviewed the first amendment

11 to the forbearance agreement?

12    **A. Yes.**

13    Q. Have you reviewed the administrative services

14 agreement?

15    **A. Yes.**

16    Q. Have you reviewed the pledge and security

17 agreement?

18    **A. Yes.**

19    Q. We'll talk a little bit more in detail about

20 some of those agreements later, but I want to ask you

21 since we're talking about your declaration right now,

22 in paragraph 13 of your declaration, on page 5, you

23 make the statement that: UMC instead charged the

24 debtor multiples of its actual costs for myriad

25 services, rent, and ancillary items.

27

1                    Do you see that?

2     **A. I do.**

3     Q. And so, Mr. Herbers, can you tell me, please,

4 specifically what services that you contend UMC charged

5 the debtor multiples of its actual costs?

6     **A. As I recall the entire listing of services**

7 **were all aggressive cost numbers.**

8     Q. And when you say "the entire listing of

9 services," are you referring to services provided under

10 any particular agreement or you're saying that every

11 service provided by UMC to the hospital was aggressive

12 in your word?

13    **A. Yes.**

14    Q. "Yes" meaning you believe that every single

15 service UMC provided to the hospital was aggressive

16 with respect to the pricing?

17    **A. Yes.**

18    Q. In your declaration you say that the debtor

19 charged multiples of its actual costs. How did you

20 determine what debtor's actual -- or excuse me. Strike

21 that.

22                    In your declaration on page 13 you say

23 that UMC charged the hospital multiples of UMC's actual

24 costs. How did you determine what UMC's actual costs

25 were?

28

1     **A. There were analyses supporting negotiations**

2 **that took place in mid-2014 and there were supporting**

3 **analyses for the original service fees for the myriad**

4 **of services that were presented and as the basis being**

5 **the Medicaid cost reports cost-to-charge ratios for the**

6 **various departments.**

7     Q. Anything else?

8     **A. My own experience coupled with those analyses**

9 **about the functions of the operating departments for**

10 **which services were being provided to us and the**

11 **methodology of the cost report cost approach.**

12    Q. Mr. Herbers, just so I make sure I understand

13 you, I believe the word you used not in your

14 declaration but here in your examination is that you

15 determined that UMC's pricing was aggressive. Is that

16 what you said?

17    **A. Correct.**

18    Q. What do you mean by "aggressive"?

19    **A. Cost is a generic term and there are different**

20 **methodologies for determining cost. Incremental cost,**

21 **marginal cost, fully allocated, fully loaded are**

22 **different distinctions in terms of determining a cost**

23 **number.**

24    Q. Did you determine which methodology UMC had

25 used in calculating its costs?

29

1     **A. Yes.**

2     Q. And what method was that?

3     **A. The methodology consistent with the Medicaid**

4 **cost reporting process, which is fully allocated, fully**

5 **loaded.**

6     Q. So we're on the same page, when you say fully

7 loaded or fully allocated, that means that in addition

8 to your incremental and marginal costs, you're also

9 including some allocated portion of fixed overhead. Is

10 that right?

11    **A. Yes.**

12    Q. Anything else besides your marginal and

13 incremental costs and your allocated fixed overhead

14 that went into that number?

15    **A. Yes.**

16    Q. What would that be?

17    **A. There was an administrative fee added to each**

18 **service contract.**

19    Q. Anything else besides fully allocated cost and

20 administrative fee?

21    **A. To the best of my recollection, no.**

22    Q. Now, what your declaration states is that the

23 debtor charged multiples of its actual costs [sic]. So

24 do you believe that the fully allocated cost that UMC

25 used differs from its actual cost?



30

1     **A. Yes.**

2     Q. What do you mean by "actual cost"?

3     **A. The direct costs incurred as a result of**

4 **providing the service to Children's Hospital over and**

5 **above the costs incurred prior to assuming the service**

6 **contract.**

7     Q. So you would contend actual cost is merely

8 just a marginal or incremental cost?

9     **A. Correct.**

10    Q. And it wouldn't contain any portion of

11 overhead?

12    **A. That wasn't incremental.**

13    Q. So no allocation of fixed cost. Is that your

14 contention?

15    **A. Correct.**

16    Q. So do I understand you correctly, sir, that

17 the debtor's contention is that UMC should bear the

18 entirety of any fixed costs that are incurred in

19 providing services to debtor?

20    **A. No.**

21    Q. What fixed costs would in your opinion be

22 properly passed on to the Children's Hospital in

23 connection with services provided by UMC?

24    **A. If the fixed cost incurred was specifically**

25 **related to the hospital being added to the operation,**

31

1 **it would be appropriate.**

2     Q. And do you have any basis for that opinion of

3 how cost allocation should be treated?

4     **A. I'm not certain I understand the question.**

5     Q. Well, it sounds like your opinion is that UMC

6 should not have included any fixed cost unless it was

7 an incremental cost. Is that right?

8     **A. That's correct.**

9     Q. Okay. And I believe you testified a moment

10 ago that the way UMC did in fact calculate its costs

11 was consistent with Medicaid cost reporting. Correct?

12    **A. Correct.**

13    Q. And it's also consistent with GAAP reporting.

14 Correct?

15    **A. I don't believe so.**

16    Q. What, then, is your basis for contending that

17 it's not consistent with GAAP?

18    **A. Generally accepted accounting principles don't**

19 **really address this issue as I understand them.**

20    Q. "This issue" being how to calculate costs?

21    **A. No, how to allocate costs.**

22    Q. Well, certainly GAAP does handle how costs are

23 calculated for financial reporting. Correct?

24    **A. Yes.**

25    Q. Okay. And this methodology where an allocated

32

1 portion of the fixed costs are included in the costs is

2 in fact consistent with GAAP principles on financial

3 reporting. Correct?

4     **A. It depends upon the circumstances, but**

5 **generally, yes.**

6     Q. Okay. So are you aware of any authority to

7 support your contention that it was improper for UMC to

8 allocate a portion of fixed overhead in its calculation

9 of costs incurred for services provided by UMC to the

10 hospital?

11    **A. I believe from my reading of the documents,**

12 **including the feasibility study, that that methodology**

13 **was inconsistent with the intent of the services to be**

14 **provided.**

15    Q. So let me make sure I understand you, Mr.

16 Herbers. Your testimony is that you believe that the

17 2007 feasibility study may have contemplated a

18 different methodology for cost calculation. Is that

19 correct?

20    **A. Correct.**

21    Q. Were there any other documents that you

22 reviewed or are aware of that support your contention

23 that fixed overhead should not be considered part of

24 the cost calculation?

25    **A. Yes.**

33

1     Q. And what documents are those?

2     **A. I don't recall specific documents, more**

3 **generic or general recollections from reading many**

4 **documents that the intent of the parties was to provide**

5 **services at an incremental cost basis rather than a**

6 **fully allocated cost basis.**

7     Q. But sitting here today you can't point me to

8 any specific document. Is that right?

9     **A. Correct.**

10    Q. Okay. I think we've covered actual costs, Mr.

11 Herbers. I'd like to go a couple of words before that

12 where you say that: UMC instead charged the debtor

13 multiples of its actual costs.

14                    Just again to connect the dots, your

15 contention is "actual costs" means incremental costs.

16 Correct?

17    **A. Correct.**

18    Q. And when you say "multiples of its actual

19 costs," what do you mean by that statement?

20    **A. The service agreements were at rates**

21 **equivalent to multiples of the incremental costs**

22 **incurred.**

23    Q. Do you recall what the multiples were?

24    **A. I do not.**

25    Q. And when you say "the service agreements,"

34

1 we're referring to the administrative services  
 2 agreement and the -- the ASA?  
 3 **A. If by that you mean all of the sub-schedules**  
 4 **for specific services, housekeeping, security, dietary,**  
 5 **engineering and so forth, yes.**  
 6 Q. Okay. And so again to make sure I understand  
 7 correctly, you say the debtor charged multiples of its  
 8 actual costs and those are set forth on the schedules  
 9 in these various sub-agreements, correct, those  
 10 multiples?  
 11 **A. Correct.**  
 12 Q. Do you contend that UMC charged the debtor  
 13 multiples different from what is contained on the  
 14 schedules?  
 15 **A. No.**  
 16 Q. So you would agree with me, sir, that UMC  
 17 charged multiples of its costs that were set forth in  
 18 the written agreements between UMC and the debtor?  
 19 **A. Would you mind repeating that.**  
 20 Q. Sure. I just want to make sure I understand.  
 21 The declaration says debtor charged multiples of its  
 22 actual costs. Correct?  
 23 **A. Yes.**  
 24 Q. Okay. And we've established that the actual  
 25 costs means, in your mine, incremental costs. Correct?

35

1 **A. Yes.**  
 2 Q. And that UMC charged multiples of those costs  
 3 to the hospital. Correct?  
 4 **A. Correct.**  
 5 Q. And those multiples were specifically set  
 6 forth in the schedules to the various agreements and  
 7 sub-agreements entered into between UMC and the  
 8 Children's Hospital. Correct?  
 9 **A. Yes.**  
 10 Q. But debtor is not contending that the  
 11 multiples charged to it by UMC were different than the  
 12 multiples set forth on the schedules. Is that right?  
 13 **A. I'm not certain I understand the question.**  
 14 Q. Yeah. I'm sorry. I'm not -- I just want to  
 15 make sure I understand and I'm probably just wording it  
 16 poorly.  
 17 So I just want to ask do you contend --  
 18 you being the debtor -- does the debtor contend that  
 19 the multiples charged by UMC to the hospital were  
 20 different than the multiples set out in the schedules?  
 21 **A. No, if I understand your question.**  
 22 Q. All right. So you're not -- does the debtor  
 23 contend that the rates UMC charged the hospital were  
 24 different than what was set forth in the agreements and  
 25 sub-agreements?

36

1 **A. Generally, no. Some of the amounts in the**  
 2 **schedules assumed a level that may not have been**  
 3 **achieved or was more than, but consistent with the**  
 4 **volume indicator in the schedule, if that clarifies.**  
 5 Q. Yeah. Again, just to make sure we're not  
 6 talking past each other. Does the debtor contend that  
 7 UMC's charges to the Children's Hospital violated any  
 8 of the agreements or sub-agreements between UMC and  
 9 Children's Hospital?  
 10 MR. SPROUSE: I'm going to object to the  
 11 form of that question. The term "violated" is not  
 12 defined.  
 13 Q. (By Mr. Drake) You can answer.  
 14 **A. If I understand your question, the amounts**  
 15 **invoiced were consistent with the contracts.**  
 16 Q. And just so there's no uncertainty in light of  
 17 counsel's objection, I'll ask it one more way.  
 18 Does debtor contend that the charges  
 19 invoiced by UMC to the Children's Hospital were  
 20 inconsistent with any of the contracts?  
 21 **A. One more time, please.**  
 22 Q. Sure. Does debtor contend that any of the  
 23 amounts invoiced by UMC to debtor were inconsistent  
 24 with the terms of the written agreements between UMC  
 25 and Children's Hospital?

37

1 MR. SPROUSE: I'm going to object because  
 2 we're talking about multiple contracts with multiple  
 3 terms and I think if you want to talk about a contract  
 4 or a term --  
 5 MR. DRAKE: You can make your objection.  
 6 MR. SPROUSE: I'm explaining my  
 7 objection. Let me finish.  
 8 MR. DRAKE: Okay.  
 9 MR. SPROUSE: So with that in mind, I'm  
 10 objecting to your question on the basis of it being  
 11 vague and ambiguous.  
 12 MR. DRAKE: Okay.  
 13 MR. SPROUSE: You can answer.  
 14 Q. (By Mr. Drake) And, Mr. Herbers, I'm happy to  
 15 go agreement by agreement. My understanding of your  
 16 testimony was that every single service provided by UMC  
 17 to the Children's Hospital was aggressive and more than  
 18 what you contend it should have been. Correct?  
 19 **A. Correct.**  
 20 Q. Okay. And so my only question is, consistent  
 21 with that testimony, does debtor contend that any of  
 22 the amounts invoiced by UMC to the Children's Hospital  
 23 were inconsistent with the terms of any of the written  
 24 agreements between the parties?  
 25 MR. SPROUSE: Same objection.

38

1 **A. To the best of my recollection and knowledge,**  
 2 **no.**

3 Q. (By Mr. Drake) So is it fair to say instead  
 4 what debtor contends is that the terms agreed upon by  
 5 the parties in these written agreements were different  
 6 than what you think they should have been?

7 **A. Yes.**

8 Q. Mr. Herbers, the last sentence in paragraph 13  
 9 of Exhibit 1 says that: These charges were not only  
 10 above UMC's cost but far more than what the debtor  
 11 would pay third-party vendors for equivalent services.  
 12 Do you see that sentence?

13 **A. I do.**

14 Q. In connection with preparing this declaration  
 15 and making that specific statement, did you do an  
 16 analysis of what third-party vendors might charge the  
 17 Children's Hospital for the same services being  
 18 provided by UMC?

19 **A. Yes.**

20 Q. Okay. And how did you undertake that  
 21 analysis?

22 **A. Evaluating what the charges were, what the**  
 23 **services received were and what my experience has been**  
 24 **with those services in similar settings of a hospital.**

25 Q. Okay. Did you contact any third-party vendors

39

1 and ask them for quotations on what they would charge  
 2 for specific services to El Paso Children's Hospital?

3 **A. No.**

4 Q. Did you prepare any documents that reflect  
 5 your analysis of what you believe third-party vendors  
 6 would charge El Paso Children's Hospital for services  
 7 equivalent to what was being provided by UMC?

8 **A. Could you ask the question one more time. I'm**  
 9 **sorry.**

10 Q. Sure. You came to the conclusion, did you  
 11 not, that UMC's costs were more than what a third-party  
 12 vendor would charge the debtor. Right?

13 **A. Yes.**

14 Q. All right. In making that opinion, did you --  
 15 strike that.

16 In forming that opinion did you create  
 17 any sort of documents that compared what you believed a  
 18 third party would charge to what UMC was charging the  
 19 debtor?

20 **A. Yes.**

21 Q. You did. Okay. And describe for me just  
 22 generally what type of document you created.

23 **A. A spreadsheet of the various contracts, the**  
 24 **amount being charged, and what in my opinion the**  
 25 **reasonable incremental costs incurred would have been**

40

1 **as well as what a third party -- what I have seen the**  
 2 **costs to be in other hospital settings.**

3 Q. Okay. And was this document something you  
 4 decided to create or something someone asked you to  
 5 create?

6 **A. Both.**

7 Q. Okay. What do you mean by "both"?

8 **A. It was part of my engagement scope as well as**  
 9 **requested by counsel.**

10 Q. Okay. And when you say it was part of your  
 11 engagement scope, that was the scope of your engagement  
 12 to serve as CEO and CRO of the Children's Hospital?

13 **A. No.**

14 Q. Okay. What engagement?

15 **A. The engagement immediately preceding that.**

16 Q. Which would be the engagement of  
 17 AlixPartners --

18 **A. Correct.**

19 Q. -- to be financial advisor to the debtor?

20 **A. Correct.**

21 Q. So part of the scope of the engagement between  
 22 the hospital and AlixPartners was to perform an  
 23 analysis of the charges from UMC to the hospital  
 24 compared to what AlixPartners thought a third-party  
 25 vendor might charge?

41

1 **A. Under the assumptions provided, correct.**

2 Q. Okay. And so did you consult any materials  
 3 for the information that you used as a cost number for  
 4 what a hypothetical third-party vendor might charge?

5 **A. Again I'm not certain I understand your**  
 6 **question if you don't mind.**

7 Q. Yeah. Sorry. So you said that you made a  
 8 spreadsheet that had what the costs actually were from  
 9 UMC to the hospital. Correct?

10 **A. Yes.**

11 Q. And compared that to hypothetical costs that a  
 12 third-party vendor might charge. Is that right?

13 **A. Correct.**

14 Q. So the information where you detailed what a  
 15 third-party vendor might charge, did you consult any  
 16 materials in order to come up with those third party  
 17 cost numbers?

18 **A. Yes.**

19 Q. Okay. What materials did you consult?

20 **A. My experience over 15 years of evaluating cost**  
 21 **performance in hospitals for various services.**

22 Q. So when you say you consulted your experience,  
 23 just so I'm clear, is that something you just have in  
 24 your head from your experience or you actually keep  
 25 records from your previous engagements?

42

1     **A. The experience is primarily from my**  
2 **recollections of specific engagements, which by**  
3 **professional standards I'm precluded from retaining**  
4 **once the engagement is finished.**

5             **However, to answer your question, by**  
6 **example, if raw food cost per meal as a standard for an**  
7 **adult facility is \$4.25 on the East Coast, on the West**  
8 **Coast it's \$4.05, in the south it's a different number,**  
9 **those metrics are part of my memory collectively from**  
10 **15 years of experience in evaluating costs in**  
11 **hospitals.**

12             MR. SPROUSE: Mr. Drake, we've gone about  
13 an hour. Can we take a break?

14             MR. DRAKE: Do you mind if we just finish  
15 this -- I mean do you -- is it okay -- if you need to  
16 go to the restroom or something, I'm fine.

17             MR. SPROUSE: No. If you'd like to  
18 finish that line of questioning --

19             MR. DRAKE: If you don't mind.

20             MR. SPROUSE: No, that's fine and then  
21 we'll take a break.

22             MR. DRAKE: Five or ten minutes.

23             MR. SPROUSE: Thank you. Perfect.

24 Thanks.

25     Q. (By Mr. Drake) Mr. Herbers, again, just so I

43

1 understand, I understand we all -- you know everybody's  
2 been in a position where you draw on experience. I'm  
3 just trying to understand were there any physical  
4 documents that you reviewed in formulating the opinions  
5 that UMC's charges were in excess of what third-party  
6 vendors might charge?

7     **A. Yes.**

8     Q. What were those?

9     **A. The documents as referred to earlier which was**  
10 **the foundation for the development of the costs by**  
11 **service by UMC.**

12     Q. Okay. And so that's -- those are documents  
13 relative to how UMC calculated its costs. Correct?

14     **A. Correct.**

15     Q. Okay. But you didn't review any documents  
16 actually from some other vendor that showed what they  
17 might actually charge children's hospital. Is that  
18 right?

19     **A. Not that I recall.**

20     Q. Okay. And when you said you referred just to  
21 your general experience analyzing costs for other  
22 hospitals, was there any particular hospital you used  
23 as a comparison?

24     **A. No.**

25     Q. Do you know whether -- well, let me ask, do

44

1 you still have the spreadsheet you created comparing  
2 UMC's costs to third party costs?

3     **A. I believe so.**

4     Q. And do you know whether that's been produced  
5 in connection with this bankruptcy case?

6     **A. I don't know that it has, I don't know that it**  
7 **hasn't.**

8     Q. Fair enough.

9             MR. DRAKE: Why don't we take a break  
10 since your counsel requested it and then we can come  
11 back.

12             THE WITNESS: Thank you.

13             MR. DRAKE: Off the record.

14             (A recess was had.)

15     Q. (By Mr. Drake) Mr. Herbers, we're back on the  
16 record after a break. Continuing to look at Exhibit 1,  
17 which is your declaration, I just want to make sure I  
18 understood your testimony before the break.

19             In formulating your opinion in paragraph  
20 13 that the amounts charged by UMC were far more -- in  
21 your words -- far more than what debtor would pay  
22 third-party vendors for equivalent services, you  
23 performed that analysis by just looking at what UMC's  
24 calculated costs were. Correct?

25     **A. In part.**

45

1     Q. But you didn't actually look at what prices a  
2 third party would charge the Children's Hospital.  
3 Correct?

4     **A. Correct.**

5     Q. So when you say "in part," what besides UMC's  
6 calculation of costs did you look at?

7     **A. As I understood your question, you said, "Your**  
8 **analysis was based upon that," and I responded, "In**  
9 **part," because my analysis was only in part dependent**  
10 **upon that.**

11     Q. Okay. And what were the other parts?

12     **A. My experiential history of doing similar**  
13 **analyses in other facilities.**

14     Q. And that analysis is what other hospitals  
15 calculated their own costs at. Is that right?

16     **A. Again in part because not all provided it**  
17 **themselves, others outsourced.**

18     Q. And so the outsourced -- strike that.  
19             Can you recall any specific hospital that  
20 used third-party vendors for services where you relied  
21 upon those agreements in formulating your opinion in  
22 paragraph 13?

23     **A. I can't recall.**

24     Q. You can't recall that today?

25     **A. Correct.**

46

1 Q. Did you in fact use third party pricing to  
 2 other hospitals when you prepared this declaration in  
 3 May of this year?  
 4 **A. No.**  
 5 Q. You did not?  
 6 **A. Correct.**  
 7 Q. So is it fair to say, then, your opinion in  
 8 paragraph 13 of your declaration that UMC's invoiced  
 9 amount to debtor is higher than what third-party  
 10 vendors would charge for equivalent services is not  
 11 based on any pricing from third-party vendors whether  
 12 to El Paso Children's Hospital or any other hospital  
 13 anywhere?  
 14 **A. No.**  
 15 Q. That's not correct?  
 16 **A. No.**  
 17 Q. Okay. But you didn't look at any pricing for  
 18 third-party vendors and what they charged other  
 19 hospitals. Correct?  
 20 **A. Correct.**  
 21 Q. And you didn't seek any quotes from  
 22 third-party vendors as to what they might charge  
 23 El Paso Children's Hospital. Correct?  
 24 **A. Correct.**  
 25 Q. So there wasn't actually any pricing

47

1 information from third-party vendors that you  
 2 consulted. Is that right?  
 3 **A. Directly, no.**  
 4 Q. Indirectly?  
 5 **A. From my experience.**  
 6 Q. And so I'm asking you what facilities did you  
 7 indirectly consult from your experience in formulating  
 8 this opinion in paragraph 13?  
 9 **A. I don't recall any specific facilities.**  
 10 Q. Do you recall any specific vendors?  
 11 **A. The vendors from my experiential base include**  
 12 **the top three or four national vendors, Marriott,**  
 13 **Sysco, et cetera, and the other referential points are**  
 14 **healthcare survey data published by various independent**  
 15 **sources that collect statistical information about**  
 16 **services that are outsourced.**  
 17 Q. So did you consult the survey data when  
 18 performing this analysis of what UMC charged as  
 19 compared to what a third-party vendor might charge?  
 20 **A. I consulted the survey data from my**  
 21 **experiential base but not a direct survey.**  
 22 Q. So you didn't consult survey data in  
 23 connection with analyzing UMC's charges compared to  
 24 third-party vendors. Is that correct?  
 25 **A. No.**

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1 Q. That's not correct?  
 2 **A. Correct.**  
 3 Q. I believe what you're saying is over your  
 4 career you've consulted survey data in order to gain  
 5 what you'll call just experience regarding vendor  
 6 pricing. Is that right?  
 7 **A. Correct.**  
 8 Q. But what I'm asking you is AlixPartners was  
 9 specifically engaged to perform an analysis of the  
 10 charges by UMC to the hospital as compared to what a  
 11 third-party vendor might charge El Paso Children's  
 12 Hospital. Correct?  
 13 **A. Incorrect.**  
 14 Q. That was one of the -- one of the reasons  
 15 AlixPartners was engaged. Right?  
 16 **A. No.**  
 17 Q. What am I getting wrong?  
 18 **A. I would have to refer back to the scope of**  
 19 **services in that initial engagement letter.**  
 20 Q. Okay. Well, I believe before the break you  
 21 testified the spreadsheet containing this cost  
 22 comparison was done in connection with the engagement  
 23 of AlixPartners. Is that right?  
 24 **A. Correct.**  
 25 Q. So the analysis of third party costs I

49

1 understood was one of the assignments that AlixPartners  
 2 was undertaking.  
 3 **A. Correct.**  
 4 Q. Okay. And so my question is were you  
 5 responsible primarily for doing this analysis --  
 6 **A. Yes.**  
 7 Q. -- or was it a team? It was you?  
 8 **A. Yes.**  
 9 Q. And so in preparing this spreadsheet did you  
 10 specifically consult any survey data of third-party  
 11 vendor pricing?  
 12 **A. No.**  
 13 Q. Mr. Herbers, if you'll turn to page 6 and 7 of  
 14 your declaration, Exhibit 1. You see paragraph 19 and  
 15 in the last sentence you declare: In particular, Alix  
 16 reviewed how much UMC overcharged the debtor and how  
 17 much El Paso First underpaid the debtor.  
 18 Do you see that?  
 19 **A. I do.**  
 20 Q. Who at Alix was responsible for reviewing how  
 21 much UMC overcharged the debtor?  
 22 **A. I was.**  
 23 Q. Was there anyone else?  
 24 **A. No.**  
 25 Q. Just you?

50

1     **A. Yes.**

2     Q. Did you come to any conclusions about whether

3 or not UMC had overcharged the debtor?

4     **A. Yes.**

5     Q. What were those conclusions?

6     **A. The actual amounts due using an incremental**

7 **costing approach over a three and a half year period of**

8 **time would have been in the range of 15 to \$20 million,**

9 **which is significantly less than what was invoiced for**

10 **those services.**

11    Q. Can you recall sitting here what was invoiced

12 for those same services that you contend should have

13 been 15 to 20 million?

14    **A. I don't.**

15    Q. Okay. And do you recall what services were

16 included in the bundle of services you believe should

17 have resulted in only 15 or \$20 million of charges?

18    **A. Specifically I don't recall all of them.**

19    Q. Do you recall any of them?

20    **A. Yes.**

21    Q. Okay. What?

22    **A. Housekeeping, dietary, security, human**

23 **resources, finance, information systems, quality,**

24 **engineering, utilities, laboratory services, radiology**

25 **services. Those are all that I recall at the moment.**

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1     Q. Are there any services that were provided by

2 UMC to the hospital that were not included in the 15 to

3 \$20 million number you calculated?

4     **A. I don't believe so.**

5     Q. And this calculation of 15 to \$20 million, was

6 that all done based on an incremental cost methodology?

7     **A. Yes.**

8     Q. Do you believe that UMC should have charged

9 the Children's Hospital any type of margin?

10    **A. No.**

11    Q. So is it debtor's contention that all services

12 provided to the hospital by UMC should have been at

13 UMC's incremental cost?

14    **A. Yes.**

15    Q. And not a penny more?

16    **A. I won't argue about pennies.**

17    Q. Well, I just want to make sure. At zero

18 margin.

19    **A. Correct.**

20    Q. And it's debtor's contention that that's

21 reflected in the -- that was just the spirit of the

22 agreement. Is that right?

23    **A. Yes.**

24    Q. And you understand that the actual contract

25 signed by the hospital and UMC -- we referred to them

52

1 earlier -- that they have schedules of the various

2 services that were going to be provided. Right?

3     **A. Yes.**

4     Q. And I think I may have misspoke and said that

5 there were multiples or percentages on those schedules,

6 but in fact there's actual dollar amounts for the

7 services. Correct?

8     **A. Correct. Actually there are both.**

9     Q. Does debtor contend that it could have

10 procured any of these services from a third party at

11 only incremental costs with no margin?

12    **A. No.**

13    Q. And in fact based on your experience it's

14 unlikely that the debtor would be able to procure these

15 services from a third-party vendor at only incremental

16 costs with no margin. Correct?

17    **A. No.**

18    Q. No, it's not unlikely?

19    **A. Again, ask your question just to make certain**

20 **I'm responding.**

21    Q. Sure. Do you think, based on your experience,

22 that the Children's Hospital would be able to get a

23 third-party vendor to perform all the services that

24 UMC's provided at only the third party's incremental

25 costs and nothing more?

53

1     **A. No.**

2     Q. Just so it's clear, it wouldn't be possible

3 for the hospital to get a third-party vendor to provide

4 those services at only incremental costs?

5     **A. To be clear, I don't think there's a single**

6 **vendor that would provide all of those services.**

7     Q. Do you think the Children's Hospital could get

8 a third-party vendor or collection of third-party

9 vendors to provide all the services that UMC has

10 provided and charge the hospital only those vendors'

11 incremental costs?

12    **A. Yes.**

13    Q. And upon what do you base your belief?

14    **A. The negotiation process and the willingness of**

15 **some vendors to take on incremental revenue at an**

16 **incremental cost basis.**

17    Q. Have you had a discussion with any vendor

18 about providing services to El Paso Children's Hospital

19 at a cost that represents only incremental cost to the

20 vendor?

21    **A. I can't answer that question because I don't**

22 **know a vendor's incremental cost when I'm negotiating.**

23    Q. Have you had any negotiations with third-party

24 vendors about providing services to the Children's

25 Hospital?

54

1     **A. No. Because that's a broad question I have to**  
2 **change that to yes, there have been some vendors, but**  
3 **not related to these services.**  
4     Q. Okay.  
5     **A. Those are the names of the individuals we**  
6 **spoke about earlier.**  
7     Q. Thanks.  
8             (Exhibit marked, No. 2.)  
9     Q. (By Mr. Drake) Mr. Herbers, just to close the  
10 loop before we move on to this document, you have not  
11 had any discussions with third-party vendors about  
12 providing the services that have been provided to the  
13 hospital by UMC in the past. Did I understand that  
14 right?  
15     **A. Correct.**  
16     Q. Are you aware of anyone at Children's Hospital  
17 that has had discussions with third-party vendors about  
18 providing services to the hospital that UMC has  
19 previously provided?  
20     **A. Yes.**  
21     Q. And who at the hospital has had those  
22 conversations?  
23     **A. I don't know that I can speak to all, but**  
24 **Elias certainly has had conversations with several**  
25 **vendors for selective services.**

55

1     Q. Is that since February of this year that he's  
2 had those conversations?  
3     **A. Yes.**  
4     Q. What services are you aware that he's  
5 approached vendors about?  
6     **A. Specifically in direct correlation to the**  
7 **communication we received in late February giving us**  
8 **notice of cancellation of services from UMC, we**  
9 **immediately started contacting potential vendors to**  
10 **replace the service.**  
11     Q. Anyone besides Mr. Armendariz?  
12     **A. Jim Schmidt would have been involved, Ray**  
13 **Adams would have been involved, Elias would have been**  
14 **involved, others that have direct operational**  
15 **responsibility for some of those areas would have been**  
16 **involved, human resources.**  
17     Q. Were these discussions done at your direction?  
18     **A. Yes.**  
19     Q. Are you aware of whether any of these people  
20 you directed to talk to third-party vendors received  
21 any type of price quotations from the vendors?  
22     **A. No.**  
23     Q. You're not aware that they did?  
24     **A. Correct.**  
25     Q. Okay. Do you know for certain that they have

56

1 not received any quotes?  
2     **A. I don't know for certain.**  
3     Q. Did any of them report to you the substance of  
4 their discussions with these third-party vendors?  
5     **A. Yes.**  
6     Q. What do you recall them reporting to you about  
7 these conversations with third-party vendors?  
8     **A. The vendors were all extremely interested and**  
9 **believed that their quote when provided with sufficient**  
10 **information would be well below the costs that we had**  
11 **been billed by UMC.**  
12     Q. And who specifically told you this?  
13     **A. As I recall, director of human resources,**  
14 **Carol Sierra; Jim Schmidt, who was the interim**  
15 **controller; Elias Armendariz, chief operating officer.**  
16 **Those are the ones I recall immediately. There may be**  
17 **others at the time.**  
18     Q. Ms. Sierra, the director of human resources --  
19     **A. Correct.**  
20     Q. -- do you know what vendor she spoke with?  
21     **A. She was looking at vendors who would be able**  
22 **to process our payroll.**  
23     Q. Do you know who she spoke with?  
24     **A. I believe she spoke with ADP and Paychex,**  
25 **P-A-Y-C-H-E-X.**

57

1     Q. Did she provide you any written communication  
2 regarding her conversations with ADP or Paychex --  
3     **A. No.**  
4     Q. -- or any other payroll processor?  
5     **A. Not that I recall.**  
6     Q. And what area of services was Mr. Schmidt  
7 responsible for?  
8     **A. All of the financial areas, but the payroll**  
9 **was the primary one of concern given the short notice**  
10 **of termination. Dietary was the second and all the**  
11 **other related services that would directly influence**  
12 **patient care.**  
13     Q. When did Mr. Schmidt's contract expire?  
14     **A. I believe it was April 30th, 2015.**  
15     Q. I believe you said you didn't have any desire  
16 for his contract to be reviewed. Is that right?  
17     **A. Well, it was mutual. We didn't try to talk**  
18 **him into extending his engagement.**  
19     Q. If Mr. Schmidt had wanted to stay on, would  
20 you have considered renewing his contract?  
21     **A. Yes.**  
22     Q. Did anyone take over for Mr. Schmidt following  
23 his departure as far as eliciting bids for third-party  
24 vendor services?  
25     **A. No.**

58

1 Q. Did Mr. Schmidt provide you any report on his  
2 conversations with third-party vendors?  
3 A. Yes.  
4 Q. What did he report?  
5 A. That both Paychex and ADP were very interested  
6 in bidding for our payroll services and that both were  
7 familiar with our timekeeping system and have  
8 interfaced with it multiple times.  
9 Q. Anything else?  
10 A. Those are the highlights that I recall.  
11 Q. Do you recall anything other than the  
12 highlights?  
13 A. At this time, no.  
14 Q. Okay. Did Mr. Schmidt and Ms. Sierra work  
15 together on talking to these payroll services  
16 companies?  
17 A. Yes.  
18 Q. But I believe you said earlier that Ms. Sierra  
19 said neither one of them, meaning ADP or Paychex, had  
20 enough information to provide a bid. Is that right?  
21 A. Correct.  
22 Q. Did you ever provide or are you aware that  
23 anyone from debtor provided ADP or Paychex more  
24 information so that they could provide a bid?  
25 A. No.

59

1 Q. And I understand at the time that ADP and  
2 Paychex were consulted, neither ADP nor Paychex had  
3 enough information to actually give anyone at  
4 Children's Hospital a price quote. Is that right?  
5 A. Correct.  
6 Q. What was Mr. Armendariz responsible for?  
7 A. As chief operating officer all of the other  
8 operating areas.  
9 Q. Do you know which vendors he had conversations  
10 with?  
11 A. I do not know.  
12 Q. Did Mr. Armendariz report to you any of his  
13 discussions with vendors?  
14 A. Only that they were progressing and that they,  
15 too, would require more information, but they, too,  
16 were optimistic that they would be able to supply a  
17 competitive bid well below our existing costs.  
18 Q. Do you know whether Ms. Sierra, Mr. Schmidt or  
19 Mr. Armendariz actually provided to these vendors the  
20 specific pricing terms between UMC and the hospital?  
21 A. No, they didn't.  
22 Q. They did not?  
23 A. They did not.  
24 Q. Okay. And am I also -- is it true, though,  
25 that none of the third-party vendors actually provided

60

1 to anyone at the hospital potential prices for  
2 services?  
3 A. Correct, to the best of my knowledge.  
4 Q. And none of the vendors received the UMC  
5 pricing. Is that right?  
6 A. To the best of my knowledge, correct.  
7 Q. So how would it be that the vendors could say  
8 that they could beat UMC's prices if they didn't  
9 actually have the prices?  
10 A. I can't speak for why they would say that.  
11 Q. I mean in your experience being in the  
12 hospital industry or any industry, isn't it typical for  
13 vendors who are contacted about a potential new  
14 customer, that they give statements in order to  
15 hopefully gain that business?  
16 A. It's not unusual. Correct.  
17 Q. So it's fair to say that, to your  
18 understanding, there wasn't anything that you could  
19 rely upon from any of these third-party vendors that  
20 they could, in fact, beat UMC's pricing?  
21 A. That would be incorrect.  
22 Q. Okay. What did any of these third-party  
23 vendors provide to someone at the Children's Hospital  
24 that would cause you to rely on their statement that  
25 they could provide better pricing?

61

1 A. They provided relevant ranges per transaction,  
2 per employee, per pay period cost that they felt  
3 confident their final bid would be within.  
4 Q. Did they do this in writing?  
5 A. No.  
6 Q. This was all verbal?  
7 A. Yes, sir, to the best of my knowledge.  
8 Q. And what were the relevant ranges for costs  
9 that were provided to anyone at the hospital?  
10 A. I don't recall what they are. I wasn't  
11 present for those meetings.  
12 Q. Can you recall any ranges for any services?  
13 A. I cannot.  
14 Q. Has debtor made any further pursuit of getting  
15 third-party vendors to provide any services previously  
16 provided by UMC other than these conversations?  
17 A. Yes.  
18 Q. Describe those efforts.  
19 A. We have initiated contacts with various  
20 vendors to secure bids for replacing the services by  
21 UMC.  
22 Q. And who is responsible for that process?  
23 A. It's been delegated to a number of  
24 individuals, so Carol -- it's been delegated to a  
25 number of individuals consistent with their



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1 organizational responsibilities.

2 Q. Who are those individuals?

3 A. Carol Sierra in human resources and Jesus

4 Gonzalez who is our controller, present day controller,

5 for payroll services. Elias is heading up the

6 housekeeping initiative and dietary services and

7 security services. I've made contacts with our current

8 IT vendor for discussions about an independent

9 information system for Children's Hospital.

10 Q. You personally have handled the discussions

11 about an IT vendor?

12 A. Correct.

13 Q. Who's the vendor you've talked to?

14 A. Present vendor is Cerner/Soarian. Cerner is

15 C-E-R-N-E-R, Soarian S-O-A-R-I-A-N.

16 Q. When did you first contact Cerner?

17 A. It would have been in the last couple of

18 weeks.

19 Q. Have you had previous dealings with Cerner?

20 A. Me personally in other client engagements,

21 yes.

22 Q. Who at Cerner do you deal with?

23 A. I've contacted the senior VP, Jack -- I'll

24 have to get his final name -- who's responsible for the

25 entire engagement and the upgrade that's presently

63

1 underway with UMC.

2 Q. Have you contacted him about providing a --

3 entering into a separate contract just for the

4 Children's Hospital?

5 A. A stand-alone solution for Children's Hospital

6 separate from the UMC configuration.

7 Q. Has he provided you any preliminary price

8 quotations for that?

9 A. No.

10 Q. Has he provided you any written information?

11 A. No.

12 Q. Have you provided to him any written

13 information?

14 A. No.

15 Q. I'm sorry. Did you have his last name?

16 A. I can get it. I don't recall at the present

17 time.

18 Q. It's Jack something?

19 A. Yes, I believe.

20 Q. So again I'll just call him Jack. Has Jack

21 made -- or what did you -- what did you say when you

22 contacted Jack?

23 A. I asked him if it would be possible to

24 entertain discussions of a stand-alone solution of

25 their product offerings for Children's Hospital

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1 separate from the current configuration with UMC.

2 Q. And what did he say?

3 A. As I recall, this is the third conversation

4 he's had on this topic, the previous two being with

5 Mr. Duncan, the first CEO, and Ray Dzieszinski, the CEO

6 that followed him, that had preliminary conversations

7 of the same nature. And so he was not uncomfortable

8 with the conversation, but he would be -- he would get

9 back to me with another individual and himself to

10 continue the conversation.

11 Q. And as of today has he gotten back to you with

12 that other individual?

13 A. He has not.

14 Q. Did he say who the other individual was?

15 A. He did but I don't recall.

16 Q. Have you talked to any other IT vendors about

17 IT services for the Children's Hospital?

18 A. Yes.

19 Q. And who's that?

20 A. Dell Systems.

21 Q. When did you talk to Dell?

22 A. Approximately three weeks or so ago.

23 Q. Who at Dell did you speak with?

24 A. I can give you the contact information. I

25 don't recall her name. Someone I met at a conference.

65

1 Q. Was this over the phone?

2 A. Yes, it was.

3 Q. Have you traded any written communications,

4 including e-mail, with her?

5 A. Yes.

6 Q. What's the nature of those communications?

7 A. Following up on the previous discussion.

8 Q. Have you provided her any information about

9 the current IT system or what you contend Children's

10 Hospital would need?

11 A. Yes.

12 Q. Is that verbally or in written documents?

13 A. Verbally.

14 Q. What did you describe to her that you believe

15 Children's Hospital would need?

16 A. A system capable of serving a 122-bed

17 facility, certain of the volumetrics of our operations,

18 and the potential to have it done in a hosted

19 environment, which is what Dell Services does, and that

20 they do in fact host the Cerner/Soarian system for

21 other providers.

22 Q. Does this woman at Dell have any knowledge of

23 the specifics of the Children's Hospital's current

24 system?

25 A. I couldn't respond to that.

66

1 Q. Well, when you talked to her did she display  
 2 any familiarity with the system that was currently in  
 3 place or did you believe she was sort of being called  
 4 out the blue by you?

5 A. Well, there are two questions there. Which  
 6 would you like me to answer?

7 Q. Well, I'm just trying to get an idea of --  
 8 unlike Jack -- Jack obviously had some familiarity with  
 9 the system because he's responsible for the provision  
 10 of services to UMC. Correct?

11 A. Yes.

12 Q. Okay. And so to your knowledge, did the lady  
 13 at Dell have any familiarity with the systems at the  
 14 Children's Hospital?

15 A. I can't answer what her familiarity would be  
 16 with our specific systems. I can answer she is  
 17 familiar with the Cerner and the Soarian products.

18 Q. Just to your knowledge -- I understand you  
 19 don't know everything inside her head, but to your  
 20 knowledge, based on your conversations and interaction  
 21 with her, did she have any previous experience with  
 22 El Paso Children's Hospital?

23 A. No.

24 Q. And has she provided you any type of potential  
 25 pricing?

67

1 A. No.

2 Q. Has she provided you anything in written  
 3 communication?

4 A. Just e-mails.

5 Q. And you've e-mailed her likewise?

6 A. As follow-up, yes.

7 Q. Have you provided those e-mails to UMC in  
 8 connection with its document requests?

9 A. No.

10 Q. You have not?

11 A. I don't believe they've been requested.

12 Q. Have you talked to anybody besides those two  
 13 IT providers?

14 A. Yes.

15 Q. Okay. Who else?

16 A. I talked with our accounting firm, Moss Adams,  
 17 M-O-S-S A-D-A-M-S.

18 Q. What have you talked to Moss Adams about?

19 A. The concept of going to a stand-alone IT  
 20 system for the Children's Hospital.

21 Q. And who at Moss Adams did you have those  
 22 conversations with?

23 A. I will give you the partner's name directly.  
 24 I don't recall the others that he invited to  
 25 participate in the phone call.

68

1 Q. Sure. Who is the partner?

2 A. I'll have to get it for you.

3 Q. Sure. So this was about developing a  
 4 stand-alone accounting system for the Children's  
 5 Hospital?

6 A. No.

7 Q. A stand-alone accounting platform for the IT  
 8 system?

9 A. A stand-alone information system for the  
 10 hospital, yes.

11 Q. That you asked Moss Adams to provide?

12 A. No, I was having the conversation with respect  
 13 to the concept and the timing.

14 Q. Okay. And what was the nature of the  
 15 conversation?

16 A. Whether they believe it was, one, feasible to  
 17 accomplish in the time frame and potential vendors.

18 Q. So Moss Adams is the outside accountant for  
 19 both UMC and the Children's Hospital. Correct?

20 A. No.

21 Q. Just the Children's Hospital?

22 A. Yes.

23 Q. And it does its audited financials. Correct?

24 A. Correct.

25 Q. So you were just asking their opinion about

69

1 potential vendors to provide the accounting system. Is  
 2 that right?

3 A. Yes.

4 Q. Moss Adams wouldn't actually provide -- they  
 5 don't have a product themselves. Is that right?

6 A. Correct.

7 Q. Okay. What was the time frame in which you  
 8 desired to move to a stand-alone accounting IT system?

9 A. By June 1st, 2016.

10 Q. How did you develop that specific time frame  
 11 as your goal?

12 A. UMC has launched an initiative to upgrade the  
 13 Cerner/Soarian platform and their goal live date is  
 14 June 1st, 2016.

15 Q. Did Moss Adams think it was feasible to do by  
 16 June 1 of 2016?

17 A. They didn't commit but did say anything's  
 18 possible with the proper amount of resources.

19 Q. Did they give you a ballpark about how much  
 20 this conversion might cost?

21 A. They did not.

22 Q. Did they mention it would likely be expensive?

23 A. They did not.

24 Q. Did they describe any potential vendors?

25 A. They did not.

70

1 Q. Have you had any further conversations other  
 2 than this one call about moving to a stand-alone  
 3 accounting system?  
 4 A. No.  
 5 Q. Whose idea was it to potentially move the  
 6 hospital to a stand-alone accounting IT system?  
 7 A. It was a collective idea of the organization.  
 8 Q. Were you involved in that?  
 9 A. Yes.  
 10 Q. Anyone else?  
 11 A. The board.  
 12 Q. What were the reasons given for expressing an  
 13 interest to move into a stand-alone accounting IT  
 14 system?  
 15 A. One, the complexity of the current system;  
 16 two, the frustration and poor service being received  
 17 from UMC; and three, the inability to control the  
 18 changes to and the development of the system for our  
 19 specific clinical needs.  
 20 Q. Have you had any discussions with UMC about  
 21 any of these three complaints you have?  
 22 A. Yes.  
 23 Q. You personally?  
 24 A. No.  
 25 Q. Who for the hospital has had discussions with

71

1 UMC about complaints about the accounting system?  
 2 A. It would be a long list.  
 3 Q. Okay. Who can you recall is on that list?  
 4 A. Elias specifically as the chief operating  
 5 officer, every one of our directors in most all of our  
 6 departments, and most if not all of our physicians.  
 7 Q. How many physicians do you have at the  
 8 hospital?  
 9 A. I believe there are -- I know there are more  
 10 than 250 members of the medical staff. I don't recall  
 11 the exact number.  
 12 Q. Is it your testimony that most or all of those  
 13 250 members of the medical staff have had conversations  
 14 with UMC about the accounting system?  
 15 A. No. I would qualify it to say "many" rather  
 16 than "most if not all." I've heard from many.  
 17 Q. You've heard them complain to you?  
 18 A. Yes, sir.  
 19 Q. My question is who has talked with UMC about  
 20 their complaints?  
 21 A. Again that would be a long list. We have a  
 22 number of tickets that have been entered, most recently  
 23 a request that was flatly denied because we're  
 24 Children's Hospital, that was the reason for the  
 25 denial, et cetera.

72

1 Q. When you say "tickets," do you put the tickets  
 2 into the accounting system?  
 3 A. No. It goes into the IT help desk, a work  
 4 ticket.  
 5 Q. What specifically are you referencing when you  
 6 say one was recently denied because you were Children's  
 7 Hospital?  
 8 A. We recently hired a systems analyst, used to  
 9 work for UMC, to assist us with some of our revenue  
 10 cycle issues that are systemic related to the system  
 11 and access to certain applications and master files.  
 12 The person was employed in the last week  
 13 or so, had accepted the position more than a month ago,  
 14 and we had applied for rights for this individual to  
 15 have access to specific applications to help us make  
 16 the changes necessary to improve our revenue cycle  
 17 functions.  
 18 That application was submitted timely and  
 19 as of today it was rejected more than four weeks after  
 20 we had requested it for the reason, "because you're  
 21 Children's Hospital."  
 22 Q. The request was for this individual to have  
 23 access to certain information?  
 24 A. To certain files and master files, certain  
 25 components of the information system that would allow

73

1 us to control changes to individual patient accounts of  
 2 the Children's Hospital that needed to be corrected for  
 3 past errors and the account is hung up. We can't bill  
 4 it, we can't delete it, we can't modify it, causing a  
 5 number of complications that we're trying to rectify.  
 6 Q. So does this issue relate to one specific  
 7 account?  
 8 A. No. I wouldn't be concerned about one  
 9 specific account.  
 10 Q. Maybe I just misheard you. I thought you said  
 11 the account is hung up and you can't bill it.  
 12 A. Individual accounts. There are thousands of  
 13 accounts that need maintenance.  
 14 Q. Do you understand what specifically is the  
 15 issue that causes them to be hung up?  
 16 A. No.  
 17 Q. Who at Children's Hospital would understand  
 18 that issue?  
 19 A. The systems analyst we just hired.  
 20 Q. What's his name or her name?  
 21 A. I don't recall. We can get it for you. A  
 22 former employee of UMC.  
 23 Q. With respect to the IT system, do you, meaning  
 24 debtor, contend that you have the right to no longer  
 25 receive IT services from UMC and can instead get that

74

1 from some third party?

2 **A. Yes.**

3 Q. On what do you base that belief?

4 **A. We've been told that our contract expired. It**

5 **has not been renewed.**

6 Q. Does UMC continue to provide the Children's

7 Hospital IT services?

8 **A. Yes, they do.**

9 Q. And Children's Hospital continues to pay UMC

10 for those services. Right?

11 **A. Correct.**

12 Q. And payment for those services is contemplated

13 under your cash collateral budget?

14 **A. Yes.**

15 Q. Is the amount contemplated to be paid under

16 the cash collateral budget to UMC for the IT services

17 based on the amount set forth in the IT services

18 agreement --

19 **A. Yes.**

20 Q. -- or is it a different amount?

21 **A. The original schedules have been modified with**

22 **time, so it's consistent with the agreed schedule for**

23 **fiscal '15.**

24 Q. Similarly does debtor contend that it can

25 likewise move to a separate accounting system?

75

1 **A. Yes.**

2 Q. And what's the basis for that belief?

3 **A. Again our service agreement with UMC expired,**

4 **so we're on a month-to-month basis.**

5 Q. And is that debtor's contention with respect

6 to all the services provided to the Children's Hospital

7 by UMC?

8 **A. As we've been told by UMC, yes.**

9 Q. What is debtor's belief as to the state of its

10 obligations, if any, to procure services from UMC?

11 **A. We're honoring the month-to-month basis of the**

12 **previous agreements until we can replace them.**

13 Q. Does debtor contend any services provided to

14 it by UMC are being provided on a basis other than

15 month to month?

16 **A. Correct.**

17 Q. No. Are all the services month to month?

18 **A. That's our understanding.**

19 Q. You're not aware of any services being

20 provided to the hospital by UMC on any basis other than

21 month to month?

22 **A. Of the services agreements, no.**

23 Q. Are there any other agreements that you

24 believe are subject to terms other than a month to

25 month term?

76

1 **A. The only other agreement is the lease**

2 **agreement that I'm aware of.**

3 Q. And what is the debtor's position as to the

4 term of the lease agreement?

5 **A. If I could ask a question. Which term are you**

6 **referring to?**

7 Q. Well, I think you made a distinction that the

8 service agreements are all subject to a month-to-month

9 term. Right?

10 **A. Correct.**

11 Q. Okay. And you distinguished the lease

12 agreement, I believe. Is that right?

13 **A. Yes.**

14 Q. And suggested that the lease agreement was on

15 a term other than month to month. Right?

16 **A. No, I was just excluding it from the**

17 **month-to-month assertion.**

18 Q. Okay. Do you believe that the lease agreement

19 between UMC and the hospital is presently on a

20 month-to-month basis?

21 **A. I don't know that I have an opinion as to what**

22 **the proper terms of that lease agreement really are.**

23 Q. Does debtor take a position on what the proper

24 terms of that lease agreement are?

25 **A. I'm not certain how to answer the question.**

77

1 Q. Well, does debtor contend that it's entitled

2 to occupy the physical space in this building --

3 **A. Yes.**

4 Q. -- longer than a month-to-month --

5 **A. Yes.**

6 Q. -- arrangement?

7 Okay. And so what -- what is debtor's

8 contention with respect to its rights to occupy this

9 space as far as how long?

10 **A. It's my understanding that the entire lease**

11 **agreement and all of the associated terms are in**

12 **dispute and question. Having said that, the initial**

13 **term of the lease was coterminous with the bond issue**

14 **which is a 30-year bond issue.**

15 Q. So does debtor contend that even with the

16 disputes about the terms of the lease agreement, it has

17 a right to occupy this space for the 30-year period

18 originally set out in the bond offering terms?

19 **A. Until otherwise notified, yes.**

20 Q. We talked about cash collateral budget.

21 Mr. Herbers, I've handed you what the

22 court reporter previously marked as Exhibit 2 to this

23 deposition. This is a document you provided us a few

24 minutes ago.

25 **A. Right.**

78

1 Q. Okay. Is this something you prepared on the  
 2 break in order to fill in --  
 3 **A. Correct.**  
 4 Q. -- some of the names that were missing on your  
 5 transcript?  
 6 **A. Correct.**  
 7 Q. And does this accurately reflect those names  
 8 which were previously blank in the transcript?  
 9 **A. To the best of my knowledge, yes.**  
 10 Q. Okay. Thank you.  
 11 MR. SPROUSE: Mr. Drake, if we could take  
 12 a break if you're done with that line of questions.  
 13 MR. DRAKE: Sure. Can we go off the  
 14 record.  
 15 (A recess was had.)  
 16 (Exhibit marked, No. 3.)  
 17 Q. (By Mr. Drake) Mr. Herbers, we're back after  
 18 a lunch break and the court reporter has marked a  
 19 document, Exhibit 3. Can you identify that for the  
 20 record, please.  
 21 **A. Yes. These are the three individuals whose**  
 22 **names I couldn't remember earlier. Jack Bartlett was**  
 23 **the Cerner executive, Devon Wiens is the partner from**  
 24 **Moss Adams and Rosalyn Ryan is my contact person at**  
 25 **Dell Healthcare Consulting.**

79

1 Q. Thank you for that.  
 2 MR. DRAKE: I'm now going to ask the  
 3 court reporter to mark Exhibits 4 and 5.  
 4 (Exhibits marked, No. 4 and No. 5.)  
 5 Q. (By Mr. Drake) Mr. Herbers, I've now handed  
 6 you what the court reporter has marked as Exhibit 4 and  
 7 Exhibit 5. Let's first look at Exhibit 4. Do you  
 8 recognize this document?  
 9 **A. Yes.**  
 10 Q. Okay. And could you just identify it for the  
 11 record?  
 12 **A. It's labeled Third Interim Order (I)**  
 13 **Authorizing Use of Cash Collateral, (II) Granting**  
 14 **Adequate Protection, and (III) Scheduling Final**  
 15 **Hearing.**  
 16 Q. And if you'll turn to the back of Exhibit 4  
 17 you'll see a two page document labeled Exhibit A. Do  
 18 you see that?  
 19 **A. I do.**  
 20 Q. Do you recognize this Exhibit A?  
 21 **A. Yes, I do.**  
 22 Q. And what is that?  
 23 **A. It's the weekly cash forecast, actuals through**  
 24 **June 26 of '15 and a 13-week projection through**  
 25 **September 25, '15 --**

80

1 Q. Okay.  
 2 **A. -- in thousands of dollars.**  
 3 Q. Perfect.  
 4 And did you have any involvement in  
 5 preparing Exhibit A?  
 6 **A. I guess technically, no, I didn't prepare it,**  
 7 **but I did review it.**  
 8 Q. Okay. Do you know who prepared it?  
 9 **A. Ray Adams.**  
 10 Q. Okay. Did you make any changes when you  
 11 reviewed it?  
 12 **A. Nothing substantive.**  
 13 Q. Did you make any changes at all that were  
 14 nonsubstantive?  
 15 **A. I asked questions that were evaluated and may**  
 16 **have resulted in changes.**  
 17 Q. What specifically did you question about the  
 18 initial draft you saw of this Exhibit A?  
 19 **A. How individual numbers, such as Other**  
 20 **Disbursements, what it included, what it didn't**  
 21 **include, to ensure that there wasn't anything missing**  
 22 **or anything double counted.**  
 23 Q. Mr. Herbers, could you look at Exhibit 5,  
 24 which is the other exhibit I handed you. Do you  
 25 recognize this exhibit?

81

1 **A. Yes.**  
 2 Q. What is Exhibit 5?  
 3 **A. It is four individual pages labeled 1, 2, 3**  
 4 **and 4 of 4. Page 1 is identical to Schedule A with the**  
 5 **sole exception that Schedule A has a 13-week total and**  
 6 **Exhibit 5, page 1, does not, but otherwise I believe**  
 7 **they are identical as the available cash numbers at the**  
 8 **bottom match -- if I can spot check very quickly --**  
 9 **exactly.**  
 10 **Page 2 is the same format, but extending**  
 11 **beyond week 13 of the forecast period to include week**  
 12 **14, October 2nd of '15 through week 26, December 25th**  
 13 **of '15, and here the 13 week total from the first page**  
 14 **is presented and then the 26 week total, which is the**  
 15 **sum of both page 1 and page 2, is presented.**  
 16 **There's a demarcation at the end of week**  
 17 **22, which is an estimate of when El Paso Children's**  
 18 **Hospital would emerge from the bankruptcy process.**  
 19 **Page 3 and page 4 are the same respective**  
 20 **periods shown on page 2 of Exhibit A.**  
 21 **Perhaps that is sufficient.**  
 22 Q. Yes. Thank you.  
 23 So I think based on your response that we  
 24 can just look at Exhibit 5 --  
 25 **A. Because it's inclusive of Exhibit A.**

82

1 Q. Right. Okay. Very good. But I did want to  
 2 just confirm that I had deduced, which was that Exhibit  
 3 A on Exhibit 4 was based -- or at least is inclusive of  
 4 information in Exhibit 5.

5 A. Yes.

6 Q. Okay. And so I understand Mr. Adams is  
 7 responsible for preparing this exhibit, but I would  
 8 like to ask you some questions.

9 So this is the latest weekly cash  
 10 forecast for the debtor. Correct?

11 A. Correct.

12 Q. And let's just kind of take it line by line  
 13 from the top. The first line is the Patient Related  
 14 Receipts. Correct?

15 A. Yes.

16 Q. Are you aware of how those numbers were  
 17 derived?

18 A. Yes.

19 Q. Okay. Could you please explain that to me.

20 A. We track patient cash receipts on a daily  
 21 basis. So from a historical perspective, we  
 22 accumulated that to a weekly basis, evaluated the trend  
 23 and projected weekly cash collections going forward.

24 Q. And what sort of historical universe did you  
 25 use to calculate the projected receipts going forward?

83

1 A. I don't remember the exact time frame, but I  
 2 believe it's the most recent nine-month period ending  
 3 June 30 of '15.

4 Q. And is that something Mr. Adams did, that  
 5 calculation?

6 A. Yes.

7 Q. So the next line, then, is Other Receipts.  
 8 Correct?

9 A. Correct.

10 Q. Okay. And not every week has an Other Receipt  
 11 entry. Is that right?

12 A. Correct.

13 Q. Do you know what type of receipts would fall  
 14 in the category of Other Receipts?

15 A. Everything that is not related to a specific  
 16 patient account or services provided to individual  
 17 accounts. It would include things such as any grant  
 18 revenue, any contributions from a foundation, any  
 19 miscellaneous income or source thereof.

20 Q. Are you aware of any anticipated receipts that  
 21 Children's Hospital may receive between now and the end  
 22 of 2015 that aren't included on this weekly forecast?

23 A. I am not.

24 Q. You're not?

25 A. No.

84

1 Q. There's been some discussion that the hospital  
 2 could potentially receive some additional  
 3 reimbursements from governmental programs such as DSH.  
 4 Are those reflected anywhere on this budget?

5 A. No.

6 Q. Are you anticipating that the debtor may  
 7 receive additional monies in connection with the DSH  
 8 program?

9 A. I'm aware that the Children's Hospital  
 10 qualifies for additional DSH payments as a result of  
 11 completing its third full year of operations.

12 Q. That's because under the DSH program a mature  
 13 hospital that's been in existence and operation for at  
 14 least three years can qualify for additional  
 15 reimbursement. Correct?

16 A. Correct.

17 Q. And because El Paso Children's Hospital has  
 18 passed that three-year mark, it's your understanding it  
 19 could potentially receive additional reimbursement  
 20 under DSH?

21 A. Yes.

22 Q. Do you have any opinion as to whether or not  
 23 El Paso Children's Hospital will in fact receive  
 24 additional reimbursements?

25 A. I expect that we will because the state budget

85

1 has approved a fund for that purpose.

2 Q. Do you have any estimation as to when you  
 3 might receive these additional reimbursements?

4 A. To the best of my knowledge, the mechanism for  
 5 disbursement is still under discussion with the  
 6 Department of Health and Human -- HHSC, Health and  
 7 Human Services Commission for the State of Texas. I  
 8 understand that the discussion could be quarterly,  
 9 semiannually or annually.

10 Q. Who is having those discussions with the State  
 11 on behalf of the hospital?

12 A. The Texas Hospital Association.

13 Q. So it's the Texas Hospital Association.

14 A. That's my understanding. There may be other  
 15 lobbying groups, but that's my understanding.

16 Q. Where did you get your information about the  
 17 status of the discussions about the additional DSH  
 18 reimbursement?

19 A. Texas Hospital Association.

20 Q. Do you have someone you speak with directly?

21 A. I have not, though there is a webinar coming  
 22 up that will address many of those concerns.

23 Q. Have you received any estimation as to the  
 24 quantum of potential additional reimbursements?

25 A. Yes.

86

1 Q. What is that number?

2 A. In the range of eight million dollars for

3 fiscal '16.

4 Q. Do you know who calculated or estimated the

5 eight million dollar range?

6 A. I do not know who specifically.

7 Q. Has the hospital done any revenue projections

8 for the fiscal year 2016?

9 A. We're in the process of doing that now.

10 Q. And do you know whether the projections for

11 fiscal year 2016 will include an additional eight

12 million dollars for DSH reimbursement?

13 A. It will include the best estimate with a

14 handicap, if you will, based upon the information that

15 we receive from the Texas Hospital Association.

16 Q. Is this additional reimbursement for services

17 that will be rendered in the future as opposed to

18 previously rendered services for which you did not yet

19 receive reimbursement?

20 A. That's a question I'm not certain I can

21 answer. I understand the methodology is based upon

22 historic information and paid after the close of that

23 period, but as to whether or not it is intended for

24 future periods or past services or both, I'm not clear

25 what the State's position is on that.

87

1 Q. Okay. Are there any other receipts besides

2 this potential eight million dollar DSH reimbursement

3 that El Paso Children's Hospital expects to receive in

4 the future that it has not historically received?

5 What I mean by that are there any other

6 sources of revenue that the hospital may be able to

7 receive that it previously has not?

8 A. Yes.

9 Q. What are those?

10 A. It would include any specific grant for which

11 we might apply or any other special funding from a

12 state or other federal agency to specifically support

13 children's hospitals.

14 Q. And that's fair.

15 Are there any other than the DSH

16 reimbursement as a result of passing the three-year

17 mark that you know exist and there's, you know, some

18 reasonable expectation that it could be a source?

19 A. DSH is the primary one that I'm aware of.

20 Q. Okay. So I want to make sure I heard you

21 correctly earlier. Is it your testimony that the Other

22 Receipt line was related to grant money and

23 nonspecific -- when I say "nonspecific," I mean

24 receipts of revenue not specifically attributed to

25 particular medical services?

88

1 A. Correct.

2 Q. Do you know -- the Children's Hospital

3 received some payments from El Paso First. Correct?

4 A. Yes.

5 Q. Do you know where on this Exhibit 5 receipt of

6 money from El Paso First is reflected?

7 A. El Paso First is a Medicaid HMO plan, so it

8 would be -- and my understanding is that those would be

9 included in the Patient Related Receipts.

10 Q. Okay. And is that something Mr. Adams would

11 know more specifically?

12 A. Yes.

13 Q. Looking at the weekly forecast, they're not

14 static, they differ by month. Correct?

15 A. Correct.

16 Q. Or -- excuse me -- by week.

17 A. Correct.

18 Q. And is the weekly variance just based on

19 historical trend or what is the reason that -- what can

20 the weekly variance be attributed to?

21 A. The invoicing patterns of the vendors.

22 Q. So is that part of the revenue cycle as far as

23 when things are billed and collected?

24 A. Are you talking about Patient Related

25 Receipts?

89

1 Q. Yes.

2 A. Yes.

3 Q. So, for instance, one payor may pay the second

4 week of every month or something like that. Is that

5 what you mean?

6 A. In addition you have holidays and non bank

7 open days. So we only receive cash on days banks are

8 open. So if you have a banking holiday you would be

9 light that week. If you have a holiday, Fourth of

10 July, Labor Day, Memorial Day, et cetera, you'll be

11 light for that day, President's Day, et cetera.

12 So the number of banking days in a week

13 are a part of that as well as the payment patterns of

14 selected vendors or selected payors.

15 Q. Do you know whether the Patient Related

16 Receipts -- whether the variance is also a result of

17 variances in the census of the hospital?

18 A. Clearly it would be.

19 Q. And do you know for this projection whether --

20 excuse me. Let me just strike that.

21 What was the census or bed count used in

22 connection with preparing this Exhibit 5?

23 A. With respect to individual weekly numbers, I'm

24 not aware of what was the factor.

25 Q. Okay. Do you know just in general with

90

1 respect to the whole thing what was used?

2 **A. Our current average daily census as adjusted**

3 **by seasonal trends.**

4 Q. If you'll then look at the Disbursements,

5 you'll see the first line is UMC. Correct?

6 **A. Yes.**

7 Q. And so there's an actual payment reflected in

8 the first column for June, week of June 26. Do you see

9 that?

10 **A. Yes, I do.**

11 Q. That's a payment of \$501,000?

12 **A. Yes.**

13 Q. And was that for an agreed adequate protection

14 payment?

15 **A. No.**

16 Q. What was 501,000 for?

17 **A. Post petition services rendered in May.**

18 Q. And then the next column is July 1 -- or

19 excuse me -- week 1 of the forecast for the week of

20 July 3rd. Do you see that?

21 **A. I do.**

22 Q. And that is a \$500,000 payment. Right?

23 **A. Correct.**

24 Q. And was that for adequate protection?

25 **A. Yes.**

91

1 Q. And likewise week 3 there's another \$500,000

2 payment?

3 **A. Correct.**

4 Q. Do you know whether the debtor made the week 3

5 adequate protection payment in the amount of \$500,000?

6 **A. The check will be delivered this afternoon.**

7 Q. So then for week 5 you'll see there's a

8 contemplated disbursement to UMC in the amount of

9 \$1,228,000. Is that right?

10 **A. Correct.**

11 Q. Do you know how that number's calculated?

12 **A. Based upon the expected invoice for the**

13 **management services for the month of June.**

14 Q. And do you know specifically which services

15 make up that --

16 **A. It's all services with the exception of the**

17 **lease payment.**

18 (Exhibit marked, No. 6.)

19 Q. (By Mr. Drake) So, Mr. Herbers, I've handed

20 you what the court reporter just marked as Exhibit 6 to

21 this examination. Do you recognize this document?

22 **A. I recognize the information on the document.**

23 **I have not seen the document before.**

24 Q. I believe it's a printout of an Excel file

25 which represents a summary of the El Paso Children's

92

1 Hospital receivables and associated payback as produced

2 to UMC by debtor's counsel.

3 If you'll turn with me to page 3 -- and

4 the pages aren't labeled -- it says "IT Lease" at the

5 top.

6 **A. Yes.**

7 Q. Okay. And you'll see that this has IT lease

8 information going back to February of 2012 through

9 estimates for the month of September 2015. Do you see

10 that?

11 **A. I do.**

12 Q. And do you see that since September '13, the

13 monthly lease payment associated with the IT lease is

14 reflected on this sheet as \$145,716.65. I didn't say

15 that very well, but \$145,716.65.

16 **A. I see it.**

17 Q. Okay. And I think you testified earlier

18 before lunch that there was originally a scheduled

19 amount in the agreement and that it had changed over

20 time. Is that correct?

21 **A. Yes.**

22 Q. And does this page reflect that?

23 **A. Yes.**

24 Q. Do you have any personal knowledge of why the

25 amount was decreased beginning in September of 2013?

93

1 **A. I don't see that December of '13 changed from**

2 **the previous month.**

3 Q. I'm sorry. I meant September of '13. If I

4 said December, I apologize.

5 September of '13, it looks like it goes

6 to 145,000.

7 **A. I don't have any specific recollection of why**

8 **it changed.**

9 Q. Do you agree that this is the appropriate

10 amount under the contract and the one that debtor uses

11 in its cash collateral budget?

12 **A. I don't -- I can't specifically answer the**

13 **question. I don't know that it is, but I don't know**

14 **that it isn't.**

15 Q. Okay.

16 **A. We rely upon the invoice from UMC for**

17 **services. So if this is what they invoiced, then**

18 **that's what reflected in the cash collateral budget.**

19 Q. If you flip to the next page, it's the medical

20 equipment lease.

21 **A. Uh-huh.**

22 Q. And it's a similar format as to the preceding

23 page. Correct?

24 **A. Yes.**

25 Q. You'll see that beginning in October of 2013,



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1 the monthly payment attributed to the medical equipment  
 2 lease is \$108,695.50. Correct?  
 3 **A. Correct.**  
 4 Q. And do you sitting here today have any opinion  
 5 whether or not that is the appropriate amount for the  
 6 medical equipment lease?  
 7 **A. I don't have specific knowledge.**  
 8 Q. And then I'll ask you to flip two pages to the  
 9 page titled ASA/CSA. Do you see that page?  
 10 **A. I do.**  
 11 Q. Again a similar format to the equipment lease  
 12 and the IT lease pages. Correct?  
 13 **A. Correct.**  
 14 Q. And you'll see that this page has varying  
 15 payments over the different months attributed to the  
 16 services agreements. Correct?  
 17 **A. Correct.**  
 18 Q. I believe that the cash collateral budget uses  
 19 the figure from January of 2015, which is \$973,715.36.  
 20 First do you know whether that is  
 21 accurate that that's the number used in the cash  
 22 collateral?  
 23 **A. I don't have specific knowledge of that.**  
 24 Q. Is that something Mr. Adams would know?  
 25 **A. Yes.**

95

1 Q. And if it is the number that's used, do you  
 2 know why that number is used?  
 3 **A. I do not.**  
 4 Q. Okay. And do you know why there are monthly  
 5 variances for these agreements whereas the previous two  
 6 we looked at were more static?  
 7 **A. Specifically, no.**  
 8 Q. Do you know whether it has to do with the  
 9 amount of services provided in a month, for instance  
 10 laundry or something like that?  
 11 **A. That would be my assumption.**  
 12 Q. So is it your belief -- and we'll ask Mr.  
 13 Adams tomorrow about this, but is it your belief that  
 14 these three amounts I've pointed you to for the ASA and  
 15 CSA, for the IT lease and the medical equipment lease  
 16 that make up the 1,228,000 in the cash collateral  
 17 budget for disbursements to UMC, that these are the  
 18 amounts invoiced by UMC to the Children's Hospital  
 19 under the existing contracts?  
 20 **A. That's my understanding.**  
 21 Q. And your cash collateral budget filed with the  
 22 court in Exhibit 4 contemplates payment of those full  
 23 amounts based on the schedules set forth in the budget.  
 24 Correct?  
 25 **A. Yes.**

96

1 Q. Is it correct that the anticipated payments to  
 2 UMC under this cash collateral budget do not include  
 3 any monies for the lease agreement going forward?  
 4 **A. Correct.**  
 5 Q. Do you know why there is not any lease  
 6 payments included in the cash collateral budget?  
 7 **A. Yes.**  
 8 Q. And why is that?  
 9 **A. There was an agreement reached and signed by  
 10 the CFO of UMC and the CEO of El Paso Children's  
 11 Hospital in June or July of 2014 on amending the  
 12 contractual payment amounts and the lease payment was  
 13 specifically excluded from the schedule for fiscal '15.**  
 14 Q. Just for fiscal '15?  
 15 **A. Well, that was the basis for the schedule, but  
 16 I can't speak to what the two individuals who agreed to  
 17 the schedule, what their intentions were for post  
 18 fiscal '15.**  
 19 Q. Okay.  
 20 **A. There were draft agreements going back and  
 21 forth that would postpone any lease payments until  
 22 2018, but they were only draft agreements.**  
 23 Q. And your position is that there's a signed  
 24 agreement from June or July of 2014?  
 25 **A. There's a schedule outlining the CSA amounts,**

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1 **the equipment lease amounts, signed by both Michael  
 2 Nunez and Ray Dzieszinski. And I believe it was July,  
 3 but it may have been June. I don't know the specific  
 4 date, but yes.**  
 5 Q. Have you spoken with Mr. Nunez about this  
 6 alleged agreement?  
 7 **A. I have not.**  
 8 Q. Have you spoken with Mr. Dzieszinski?  
 9 **A. Yes.**  
 10 Q. When did you speak with Mr. Dzieszinski about  
 11 this purported agreement?  
 12 **A. I don't remember the date.**  
 13 Q. Was it in person or over the phone?  
 14 **A. Telephonic.**  
 15 Q. Where is Mr. Dzieszinski?  
 16 **A. I believe he's working in Nashville, but I'm  
 17 not certain of that. He was in Florida at the time  
 18 that we spoke to him on the phone.**  
 19 Q. Did you call him or did he call you?  
 20 **A. We called him.**  
 21 Q. What was the reason for calling  
 22 Mr. Dzieszinski?  
 23 **A. To verify and refresh the board's memory --  
 24 collective memory -- of certain facts and circumstances  
 25 that he would have direct personal knowledge of.**

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1 Q. And one of those things was this purported  
 2 agreement regarding rent payments for 2015?  
 3 **A. Correct.**  
 4 Q. If you'll look back on Exhibit 6 to the  
 5 lease -- or excuse me, I apologize -- if you'll look at  
 6 Exhibit 5, Exhibit 5 is the model for the cash  
 7 collateral budget. Correct?  
 8 **A. Yes.**  
 9 Q. If you'll look at page 3 of 4 of that exhibit.  
 10 Do you see that?  
 11 **A. I do.**  
 12 Q. What does page 3 of 4 reflect?  
 13 **A. Four subcomponents of the previous page.**  
 14 Q. And so with respect to the UMC balance, what  
 15 does that show -- or what is it intended to show?  
 16 Sorry.  
 17 **A. The amount outstanding, the accruals and any**  
 18 **payments rolling the balance forward week to week.**  
 19 Q. So this is a document prepared by debtor or  
 20 debtor's financial advisor. Correct?  
 21 **A. Yes.**  
 22 Q. Okay. And so, for instance, on these four --  
 23 I believe you said subcategories -- UMC Balance, Texas  
 24 Tech Balance Roll Forward, Restructuring Costs/  
 25 Professional Fees, and then Other Non-Recurring

99

1 Disbursements -- for those items that have accruals,  
 2 are these accruals which debtor acknowledges it is  
 3 accruing as debts or does it include just contested  
 4 debt?  
 5 **A. You have two questions there so which one**  
 6 **would you like me to answer?**  
 7 Q. Well, help me understand this. On the first  
 8 page you said that the disbursements don't include the  
 9 lease payment. Correct?  
 10 **A. That's correct.**  
 11 Q. And that's because debtor's contention is that  
 12 it doesn't owe any lease payment --  
 13 **A. Correct.**  
 14 Q. -- at least in 2015.  
 15 **A. Correct.**  
 16 Q. And so for the accruals on page 3 of 4, it  
 17 reflects that each month it continues to accrue  
 18 indebtedness for those services that add up to  
 19 1,228,000. Correct?  
 20 **A. Correct.**  
 21 Q. Okay. And so this also reflects some  
 22 additional accruals for UMC and Texas Tech. Correct?  
 23 **A. Correct.**  
 24 Q. And are these for debts that the debtor  
 25 acknowledges or disputes?

100

1 **A. Disputes.**  
 2 Q. And what debt does -- what debts reflected on  
 3 page 3 of 4 does the debtor dispute?  
 4 **A. The amount related to the facility lease.**  
 5 Q. Okay. And where on page 3 of 4 is that  
 6 reflected?  
 7 **A. It would be the difference between the**  
 8 **accruals and the payments for UMC and I don't believe**  
 9 **there's any dispute with respect to Texas Tech.**  
 10 Q. And so specifically for UMC, the payments  
 11 reflected on page 3 of 4 remain at 1,228,000. Correct?  
 12 **A. As shown, yes.**  
 13 Q. As shown.  
 14 And the accruals, though, is 2,198,000.  
 15 Correct?  
 16 **A. Correct.**  
 17 Q. And that's a difference of 970,000. Right?  
 18 **A. Correct.**  
 19 Q. And that's the lease amount?  
 20 **A. In rounded dollars, yes.**  
 21 Q. Right. And so why is it that the lease amount  
 22 is reflected on page 3 of 4 as an accrual if you  
 23 believe there's an agreement between the parties that  
 24 the debtor is not responsible for any lease payment in  
 25 2015?

101

1 **A. The purpose of this section, my understanding,**  
 2 **and the section related to Texas Tech is to acknowledge**  
 3 **the invoiced amounts from the various parties and**  
 4 **the -- the amounts in dispute or the pre-petition**  
 5 **liability as earned through that week on a roll forward**  
 6 **basis to avoid any confusion as to what was billed to**  
 7 **us, yet the payments reflect what we believe we owe.**  
 8 Q. And so is it fair to say, then, that with  
 9 respect to the services included in the invoices  
 10 totaling \$1,228,000, the hospital does not dispute that  
 11 it owes those amounts?  
 12 **A. It does not dispute that we're receiving those**  
 13 **services and under the -- my understanding is under the**  
 14 **procedures of being under Chapter 11, we have to honor**  
 15 **all invoices as presented. Even though we dispute the**  
 16 **amounts charged, we're honoring the invoice as**  
 17 **presented for the services we acknowledge we're**  
 18 **receiving.**  
 19 Q. So did I understand you correctly that you  
 20 are -- that you, the debtor, does dispute the amount  
 21 invoiced for the services that make up the \$1.2  
 22 million?  
 23 **A. Correct.**  
 24 Q. Which specifically -- or what specifically of  
 25 the services that make up the \$1.2 million does debtor

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1 dispute?

2 **A. Virtually all of the services provided as**

3 **being unreasonably excessive.**

4 Q. And that's unreasonably excessive in your

5 opinion, not as inconsistent with the contracted

6 amount?

7 **A. As we discussed earlier, correct.**

8 Q. But your understanding is that under the

9 bankruptcy procedure you have to pay those amounts even

10 though they're disputed. Is that right?

11 **A. Correct.**

12 Q. And that later on the court can make some

13 determination on who's right and they'll be, for lack

14 of a better word, some kind of true-up?

15 **A. Correct.**

16 Q. And so why is that not the case with respect

17 to the lease payments where UMC is invoicing you an

18 amount which you dispute?

19 **A. Again, one factor, the exclusion from it being**

20 **in the fiscal '15 lease agreement or the revised**

21 **agreements for services rendered and the fact that we**

22 **should be paying anything at all for the lease going**

23 **forward.**

24 Q. Now, you understand, though, UMC doesn't agree

25 with that position. Right?

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1 **A. Yes, I do.**

2 Q. You're well aware of that?

3 **A. After three mediations, yes.**

4 Q. Fair.

5 So help me understand why debtor believes

6 that the dispute over the lease obligation is any

7 different than the dispute under any of the other

8 invoiced amounts.

9 MR. SPROUSE: I'm going to object to that

10 question to the extent it calls for a legal opinion or

11 a legal conclusion.

12 You can answer.

13 **A. Do you mind asking the question again.**

14 Q. (By Mr. Drake) Sure. I understood you to say

15 that the debtor is paying the \$1.2 million monthly

16 invoices for all the services except for the lease.

17 Correct?

18 **A. Yes.**

19 Q. But that there is a dispute in the debtor's

20 mind over whether that amount is appropriate. Right?

21 **A. Correct.**

22 Q. But that your understanding was bankruptcy

23 procedure provides that you have to pay the full amount

24 invoiced and then we can have a determination by the

25 court whether you may be entitled to some money back.

104

1 Right?

2 **A. Right.**

3 Q. And so my question to you is because there is

4 likewise a dispute between UMC and the hospital about

5 whether or not the amount invoiced for the lease of

6 \$970,000 is appropriate, why the debtor can treat that

7 differently.

8 MR. SPROUSE: I'm going to object to the

9 question to the extent it calls for a legal opinion or

10 a legal conclusion.

11 You can answer.

12 **A. I'm relying upon legal counsel's advice in the**

13 **preparation of a schedule and specifically with respect**

14 **to this issue.**

15 Q. (By Mr. Drake) Do you have any opinion of

16 your own not based on what your lawyers have told you

17 about why there would be any distinction between one

18 disputed invoice and another?

19 **A. Yes.**

20 Q. And what is that?

21 **A. One's real estate and the others are services.**

22 Q. Anything else?

23 **A. There may be others, but that's the most**

24 **obvious distinction.**

25 Q. If you'll flip back to page 1 of Exhibit 5,

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1 Mr. Herbers, I would just like to ask that based on the

2 financial status of -- strike that.

3 Mr. Herbers, based on the financial

4 status of the debtor in June, could debtor have made a

5 \$970,000 lease payment in June had it not felt there

6 was a dispute about the lease agreement?

7 Was the debtor financially able based on

8 the available cash in June of 2015 to pay the monthly

9 lease payment?

10 **A. No.**

11 Q. And why is that?

12 **A. Because the cash forecast indicates the cash**

13 **necessary to continue operations through the end of the**

14 **calendar year is, at least in this version un-updated,**

15 **uncertain.**

16 Q. So do I understand your testimony that debtor

17 couldn't pay the monthly lease in June because it might

18 have jeopardized its ability to operate through the end

19 of 2015?

20 **A. Correct.**

21 Q. But just as it relates to June of 2015, was

22 the debtor able to make a lease payment if it had not

23 disputed the lease amount?

24 **A. No.**

25 Q. I mean you'll agree, though, that it had the

106

1 available cash to make the lease payment in June.  
 2 Right?  
 3 **A. No.**  
 4 Q. It didn't?  
 5 **A. No.**  
 6 Q. Okay. Help me understand that.  
 7 **A. Your question assumes managerial prudence in**  
 8 **managing any cash balance and for a going concern,**  
 9 **you're not concerned about the bank balance on any**  
 10 **given day, but the financial operating needs of the**  
 11 **institution for the near term and long term.**  
 12 **It would be imprudent to dispense funds**  
 13 **that you, one, believe are not necessary or**  
 14 **inappropriate in an early period, even if you have the**  
 15 **cash in the bank, knowing that it would jeopardize your**  
 16 **ability in six short months to remain an operating**  
 17 **facility for which the community raised and approved**  
 18 **the revenue bonds and is continuing to make the debt**  
 19 **service.**  
 20 Q. Assume with me, Mr. Herbers, that the lease  
 21 wasn't in dispute. Okay? And I know that's a position  
 22 that debtor disagrees with. But if the lease were not  
 23 in dispute, would the debtor have been able to make the  
 24 lease payment in June of 2015?  
 25 MR. SPROUSE: I'm going to object. That

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1 question has been asked and answered.  
 2 MR. DRAKE: I disagree.  
 3 Q. (By Mr. Drake) You can answer the question.  
 4 **A. And I would say no.**  
 5 Q. It could not because you believe it would be  
 6 imprudent?  
 7 **A. Correct.**  
 8 Q. Even if it were not disputed?  
 9 **A. Correct.**  
 10 Q. Are there other creditors that are invoicing  
 11 the hospital for uncontested invoices that debtor is  
 12 not paying in order to conserve cash based on  
 13 managerial prudence?  
 14 **A. In this post petition period, no.**  
 15 Q. If you'll look with me, Mr. Herbers, at page 2  
 16 of Exhibit 5, you commented earlier that there was a  
 17 line with demarcation between pre-emergence and  
 18 post-emergence at the end of November 2015. Do you see  
 19 that on page 2 of 4?  
 20 **A. I do.**  
 21 Q. And that's the vertical dashed line between  
 22 week 22 and 23. Right?  
 23 **A. Correct.**  
 24 Q. Are you aware of who determined that that  
 25 would be an estimate of when the debtor may emerge from

108

1 bankruptcy?  
 2 **A. Yes.**  
 3 Q. And who did that?  
 4 **A. It was a collection of individuals, including**  
 5 **counsel, as to a reasonable date for projection**  
 6 **purposes.**  
 7 Q. Do you know, Mr. Herbers, when the debtor  
 8 intends to file a plan with the bankruptcy court?  
 9 **A. Specifically no, but in the near term, yes.**  
 10 Q. When you say "in the near term, yes," what do  
 11 you mean?  
 12 **A. Some time between now and the required filing**  
 13 **date for that plan.**  
 14 Q. What do you understand is the required filing  
 15 date?  
 16 **A. I'm unclear as to the exact required filing**  
 17 **date but counsel will keep me informed.**  
 18 Q. Are you aware that last night the debtor filed  
 19 a motion to extend the exclusivity period into January  
 20 of 2016?  
 21 **A. I was informed this morning, yes.**  
 22 Q. Did you authorize the filing of that motion?  
 23 **A. Yes.**  
 24 Q. And so you have an understanding, I assume, of  
 25 what it means for a debtor to have exclusivity?

109

1 **A. Generally so. Specifically, from a legal**  
 2 **perspective, no.**  
 3 Q. Sure. But just generally it means that only  
 4 the debtor can offer a plan of reorganization during  
 5 that period. Right?  
 6 **A. Correct.**  
 7 Q. And so by asking the court to extend  
 8 exclusivity through January of 2016, does that reflect  
 9 in any way when debtor intends to file its initial plan  
 10 of reorganization?  
 11 **A. I rely upon legal counsel's direction for**  
 12 **filing.**  
 13 Q. Sitting here today do you, as debtor's CEO and  
 14 chief restructuring officer, have any opinions as to  
 15 when debtor may be able to file its plan?  
 16 **A. Other than soon, no.**  
 17 Q. Do you have any sort of definition of what  
 18 "soon" means?  
 19 **A. Between now and the required filing date.**  
 20 Q. Do you still believe the line between week 22  
 21 and 23 reflects a realistic estimate of when debtor may  
 22 emerge from bankruptcy?  
 23 **A. Given the recent establishment of the trial**  
 24 **dates for late October, we will have to reevaluate**  
 25 **whether this is a realistic demarcation and we have not**

110

1 yet concluded what the appropriate action would be.

2 Q. Do I understand correctly that the debtor

3 intends to wait until the court has resolved the

4 disputes about the lease agreements before it intends

5 to file a plan?

6 A. I can't respond to that.

7 Q. Do you as debtor CEO and CRO have any opinion

8 as to whether or not the debtor needs to wait until

9 after the court has made rulings on the lease agreement

10 dispute?

11 A. I haven't formed an opinion yet.

12 Q. You have not?

13 A. I have not.

14 Q. Are you relying on your lawyers for that?

15 A. As part of the process of forming an opinion,

16 yes.

17 Q. Do you have an opinion as debtor CEO and CRO

18 as to whether the debtor will do a reorganization or

19 pursue a sale process?

20 A. I don't.

21 Q. Have you as CEO and CRO developed an exit

22 strategy for the Children's Hospital?

23 A. No.

24 Q. Is that something as CEO and CRO that you

25 would be involved in?

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1 A. Yes.

2 Q. Have you begun to formulate an exit strategy

3 for the debtor?

4 A. Yes.

5 Q. You've gone through bankruptcies before,

6 right, for other entities?

7 A. Yes.

8 Q. In your opinion, based on your experience and

9 your position as CEO and CRO of this debtor, do you

10 believe that the debtor can do a traditional

11 restructure?

12 MR. SPROUSE: I'm going to object to the

13 term "traditional" as being undefined.

14 A. Under -- using various assumptions, yes.

15 Q. (By Mr. Drake) And what are those

16 assumptions?

17 A. It would include any sort of positive impacts

18 on patient volumes, confirmation that governmental

19 funding would be greater than anticipated or expected,

20 new grants becoming available, a significant increase

21 in philanthropy, the availability of working capital

22 facilities, all of the above.

23 Q. Let's take those one by one. A positive

24 impact on patient counts, right, that's one factor?

25 A. Patient volumes, yes.

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1 Q. Patient volumes. And what in your

2 opinion would -- what level would patient volumes have

3 to reach for debtor to be able to do a restructure?

4 A. Well, certainly above our current operating

5 levels by a margin of three percent or more.

6 Q. What are your current operating levels?

7 A. Our gross charges for the month of June, I

8 believe, are in the \$223 million range based upon our

9 in- and outpatient activities. If our volumes continue

10 to grow at a clip of more than three percent annually,

11 that would be a significant impact to our operating

12 performance.

13 Q. Do you know what the annual growth was last

14 year?

15 A. I don't have that statistic at my beck and

16 call.

17 Q. And how long a period of three percent or

18 greater patient volume growth would the hospital have

19 to experience in order to achieve the levels of revenue

20 that would provide for a restructuring?

21 A. If that were the only variable and we were not

22 constrained with the renovation or construction of

23 space within the leased space we presently occupy, it

24 would probably take anywhere from 18 to 36 months to

25 reach a more sustainable operating base.

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1 Q. And with respect to the next -- the next

2 factor you mentioned was confirmation that government

3 reimbursement would increase. Right?

4 A. Correct.

5 Q. Does that refer to the DSH increase?

6 A. Or any other specialty funding through the

7 state programs for children's hospitals.

8 Q. And do I recall your testimony correctly that

9 other than the DSH you're not aware of anything that

10 could potentially result in increased reimbursement?

11 A. There's nothing concrete being actively

12 discussed as I understand it in Austin.

13 Q. If the DSH reimbursement results in an

14 increase in 2016 in the range of the estimated eight

15 million dollars, would that increase alone be

16 sufficient to allow the debtor to do a restructuring?

17 A. By itself, no, but in conjunction with other

18 operational improvements, yes.

19 Q. And are those other operational improvements

20 the three percent growth over 36 months that you

21 referred to?

22 A. Not exclusively.

23 Q. And when you say "not exclusively," do you

24 mean also philanthropy and grants?

25 A. No, I mean operational improvements of

114

1 efficiency.

2 Q. Okay. And what operational improvements of

3 efficiency do you believe are required before debtor

4 could do a restructuring.

5 A. Again I'm not certain what the question is.

6 Q. Well, I asked you if the eight million

7 dollars -- if the range of eight million dollars was

8 accurate and the Children's Hospital in fact received

9 an additional eight million dollars in DSH payments in

10 2016, if that would be enough to allow for a

11 restructuring. You said something along the lines of

12 not exclusively.

13 A. Correct.

14 Q. And so I mentioned the increased patient

15 volume and you said, "Yes, in addition to increased

16 operational efficiency."

17 A. Correct.

18 Q. And my question is what you do you mean by

19 "operational efficiency increases"?

20 A. Sure. Improvements in our productivity, in

21 our staffing ratios, improvements in our contracted

22 services, improvements in our revenue cycle that would

23 improve our net revenue as a percent of gross,

24 additional managed care contracting with -- in the area

25 for contracts we don't currently have, regional

115

1 coordination, regional -- networks with the other

2 children's hospitals and pediatric units in the

3 community, greater efficiencies in our purchasing and

4 supply chain processes, those types of things.

5 Q. As far as productivity, is that -- what do you

6 mean by "increased productivity"?

7 A. We currently staff our units with nursing

8 hours per patient day at a level to meet the demand and

9 that demand is met either by scheduled hours, part

10 time, called-in staff, overtime, all of the above.

11 It's a careful daily monitoring of those processes and

12 design that we may be able to improve our labor costs

13 to manage the patients that we have.

14 Q. Have you or anyone done an estimate of the

15 financial impact of increased productivity?

16 A. At a very high level, yes.

17 Q. And what is your high level estimation?

18 A. Between half a million and three-quarters of a

19 million dollars annually.

20 Q. All right. And staff ratios, that's obviously

21 just --

22 A. Part of the productivity.

23 Q. Part of the productivity. So am I correct in

24 understanding there's no additional financial impact to

25 staff ratios other than the estimated 500,000 to

116

1 750,000?

2 A. At the present that's the extent of the

3 analytics.

4 Q. All right. And then contracted services?

5 A. Yes.

6 Q. Is that referring to, what, reducing costs --

7 A. Correct.

8 Q. -- with respect to services the hospital pays

9 for?

10 A. Correct.

11 Q. And we discussed some of your efforts with

12 respect to that related to IT and accounting and other

13 services. Correct?

14 A. Correct.

15 Q. Have you done a similar high level analysis of

16 the potential financial savings if you contract for

17 services under different terms than what's presently in

18 place?

19 A. It has not been refined to that degree.

20 Q. Now, the revenue cycle, that's something that

21 you've discussed before, that's been a problem of the

22 hospital for some time. Correct?

23 A. Yes.

24 Q. And there's been various efforts over the

25 years, including multiple third parties brought in to

117

1 try to improve the revenue cycle. Correct?

2 A. Correct.

3 Q. And what is presently the efforts underway to

4 improve the hospital's revenue cycle?

5 A. I'm sorry. What was the question?

6 Q. Are there any present efforts --

7 A. Yes.

8 Q. -- as to improve the revenue cycle?

9 And what are they?

10 A. Improved clinical documentation, improved

11 education of medical coding, the conversion of the

12 ICD-10 coding methodology, improved patient

13 interactions to reduce bad debt expense, improved

14 contracting monitoring, reducing denied claims, the

15 reason for denied claims, and many more.

16 Q. Has there been any estimation of the financial

17 impact of improving the revenue cycle?

18 A. There have been, but it's not been refined to

19 a single number yet.

20 Q. Do you have any idea of a range?

21 A. I could guess, but that's as refined as the

22 analysis is right now.

23 Q. Okay. The next thing I believe you mentioned

24 is additional managed care contracting. Correct?

25 A. Correct.

118

1 Q. And have there been any efforts to increase  
 2 the level of managed care contracting?  
 3 A. There have.  
 4 Q. And what are those efforts?  
 5 A. We renegotiated the El Paso First contract  
 6 effective April 1st of this -- 2015.  
 7 Q. Anything else?  
 8 A. No.  
 9 Q. Have you done any estimation of the financial  
 10 impact of the new El Paso First contract?  
 11 A. Yes.  
 12 Q. And what is that estimation?  
 13 A. A significant increase into our reimbursement  
 14 and a significant reduction of the risks of the -- we  
 15 absorbed in the previous contract.  
 16 Q. What do you mean by "significant"?  
 17 A. The structure of the previous contract passed  
 18 certain risks to El Paso Children's Hospital that we  
 19 successfully renegotiated to eliminate that risk.  
 20 Q. Is there any dollar value associated with the  
 21 restructuring of the El Paso First contract?  
 22 A. Yes.  
 23 Q. And what is that?  
 24 A. It's not yet been proven. Because the  
 25 contract was just -- the term started April 1st, we

119

1 have not had a full maturation of even April's claim  
 2 history to fully evaluate that.  
 3 Q. You said it hasn't been proven, but I think  
 4 you suggested there was at least a preliminary  
 5 estimate. Is that true?  
 6 A. Yes.  
 7 Q. And what is that number?  
 8 A. It was an increase in the 20 percent range to  
 9 our prior reimbursement.  
 10 Q. 20 percent increase to the prior reimbursement  
 11 from El Paso First?  
 12 A. Correct.  
 13 Q. The next thing is regional networks and  
 14 coordination with regional hospitals?  
 15 A. Correct.  
 16 Q. That's just what it sounds like, right,  
 17 working with other hospitals in the region?  
 18 A. Uh-huh.  
 19 Q. Are there any efforts or specific things being  
 20 done to improve coordination with regional hospitals?  
 21 A. Well, we have a transport team that routinely  
 22 receives and goes to and brings back children that  
 23 require our care as opposed to care that can be  
 24 provided in that hospital, but there are some initial  
 25 discussions at a very, very high level and not very

120

1 deep about the value of a -- now that we have a  
 2 sustained children's hospital of a regional referral  
 3 network for pediatric care.  
 4 Q. Those discussions are preliminary at this  
 5 point?  
 6 A. They've gone no further than, "Let's talk  
 7 about it."  
 8 Q. And is this something that ultimately gets  
 9 reduced to a written agreement?  
 10 A. It could.  
 11 Q. And in your experience how long does that  
 12 process usually take?  
 13 A. As long as it takes for the parties to agree  
 14 how and what value and benefits each receives from the  
 15 process.  
 16 Q. Any estimation of how much revenue can be  
 17 improved through entering into some sort of regional  
 18 agreement?  
 19 A. It's such a broad range that it's impossible  
 20 to even talk about at this stage.  
 21 Q. I believe the last thing you mentioned was  
 22 greater efficiency in the purchasing and supply chain?  
 23 A. Correct.  
 24 Q. What do you mean by that?  
 25 A. We currently purchase all of our required

121

1 supplies through UMC's purchasing function. We do not  
 2 have our own receiving dock. The primary healthcare  
 3 vendors are becoming much more adept as well as capable  
 4 of streamlining the entire supply chain process to  
 5 eliminate warehousing at the site and eliminate the  
 6 need for large deliveries of supplies on a periodic  
 7 basis.  
 8 Q. Okay. Presently, though, you don't have your  
 9 own loading dock. Correct?  
 10 A. We do not. The building was not designed that  
 11 way.  
 12 Q. Have you done any estimation of potential  
 13 benefit to the bottom line of improving the purchasing  
 14 and supply chain efficiency?  
 15 A. Nothing to the point of a realistic range of  
 16 opportunity yet, no.  
 17 Q. So is it fair to say at this point you have  
 18 discussed and analyzed various ways to improve the  
 19 financial condition of the debtor, but thus far you've  
 20 been able to make an estimation of actual dollars only  
 21 for the productivity and staff ratios in the amount of  
 22 500- to \$750,000?  
 23 A. Correct.  
 24 Q. And then potentially an unproven estimate of  
 25 20 percent increase with respect to El Paso First

122

1 receipts?

2 **A. Correct.**

3 Q. But no other dollar values estimated for any

4 of the things we just talked about?

5 **A. Correct.**

6 Q. Then the next thing -- moving back up to some

7 of the assumptions, I believe four assumptions made by

8 you in connection with the belief that a restructuring

9 might be possible -- was increased philanthropy.

10 Correct?

11 **A. Correct.**

12 Q. And that's something that you mentioned at

13 your 341 exam as well. Right?

14 **A. I'm not familiar with --**

15 Q. It's been a while.

16 **A. -- which exam the 341 was.**

17 Q. With the trustee.

18 **A. Oh, yes.**

19 Q. Yeah.

20 **A. Yes.**

21 Q. So one of the things I believe you've stated

22 previously is that children hospitals generally rely

23 heavily on philanthropy. Right?

24 **A. Correct.**

25 Q. And that El Paso Children's Hospital hasn't

123

1 done a great job with philanthropy compared to many

2 other children's hospitals?

3 **A. I'm not sure I'd characterize my comment the**

4 **way you did.**

5 Q. Fair enough.

6 But would you agree with the proposition

7 that children's hospitals rely heavily on philanthropy?

8 **A. Yes.**

9 Q. And that El Paso Children's Hospital needs to

10 improve its philanthropic efforts in order to improve

11 the financial condition of the hospital?

12 **A. I wouldn't say it that way.**

13 Q. Okay. How would you -- what, if anything, do

14 you think the Children's Hospital here needs to do with

15 respect to its philanthropic efforts?

16 **A. Form a structure to increase the philanthropy**

17 **to the Children's Hospital from this community.**

18 Q. Do you know approximately how many dollars

19 each fiscal year the hospital receives in the form of

20 philanthropy?

21 **A. From the Foundation that is owned and operated**

22 **by UMC and fundraising on behalf of the Children's**

23 **Hospital, we have received amounts between one and one**

24 **and a half million dollars a year in funding for**

25 **specific programs, equipment or services.**

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1 Q. Are there any other philanthropy dollars the

2 hospital receives other than from the Foundation?

3 **A. No.**

4 Q. Have you made any kind of estimate as to what

5 level of increased philanthropy dollars the hospital

6 may be able to receive if it became more focused on

7 philanthropy?

8 **A. Only back-of-the-envelope type of estimates.**

9 Q. And what are those estimates?

10 **A. A minimum of three million dollars annually up**

11 **to ten million annually.**

12 Q. And how long would it take, in your opinion,

13 for the hospital to go from one and a half million

14 dollars to the higher level on the back-of-the-

15 envelope?

16 **A. It's exclusively a function of the membership**

17 **to the Foundation board.**

18 Q. But is this something you think realistically

19 you can double the philanthropy dollars in six months?

20 **A. Once independence is achieved and separation**

21 **from any governing structure with UMC, yes.**

22 Q. So presently, though, the philanthropy dollars

23 received by the hospital come from the UMC Foundation.

24 Right?

25 **A. Correct.**

125

1 Q. And so you would want to divorce yourself from

2 that UMC Foundation. Is that right?

3 **A. No. Simply focus our own energy on an**

4 **exclusively controlled foundation for the benefit of**

5 **the Children's Hospital.**

6 Q. Then the last area or assumption was an

7 increase in grant funding. Correct?

8 **A. Uh-huh.**

9 Q. Do you know approximately what the annual

10 funding from grants is for the hospital?

11 **A. Presently, in this current fiscal year, it was**

12 **a little more than \$300,000 through a graduate medical**

13 **education grant.**

14 Q. Have you come up with some target level for

15 grant funding?

16 **A. We have not.**

17 Q. What do you think is realistic that could

18 potentially be achieved in the next 12 months?

19 **A. The achievement of any grant funding will be**

20 **more dependent upon the cooperation of other entities**

21 **such Texas Tech, Children's Miracle Network, the United**

22 **Way, those sorts of organizations and our ability to**

23 **secure funding as well as the other private foundations**

24 **and corporate foundations that exist. We have not put**

25 **any efforts and energy into that initiative, so I can't**



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1 really project a financial impact.

2 Q. And so your opinion that the debtor could do a

3 traditional restructuring is based, though, on each of

4 those four assumptions becoming true. Is that right?

5 MR. SPROUSE: I'm going to object to the

6 term "traditional" as being vague and undefined.

7 A. I wouldn't characterize it that way.

8 Q. (By Mr. Drake) Okay.

9 A. I would characterize it this way. That each

10 of those areas plays a role and when successfully

11 implemented can be instrumental in achieving that goal

12 sooner rather than later.

13 Q. Is one of the assumptions that the debtor

14 could do a restructuring through the bankruptcy court

15 that the debtor is not obligated to pay UMC the lease

16 payments?

17 A. Rephrase the question. I forgot the first

18 part of it.

19 Q. Yeah, sure. Would it be possible for the

20 debtor to do a restructuring through the bankruptcy

21 court if the debtor is not successful in resolving the

22 lease dispute in the debtor's favor?

23 MR. SPROUSE: Object to the form of the

24 question, calling for a legal opinion or conclusion.

25 You can answer.

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1 A. If I understand your question is it possible

2 to emerge without a lease payment -- or without the

3 resolution of the lease agreement?

4 Q. It's probably a bad question. Let me -- what

5 I mean is is it possible for the debtor to emerge with

6 a requirement that it makes the monthly lease payments

7 that UMC contends it is owed?

8 MR. SPROUSE: I'm going to object again

9 on the basis that the question calls for a legal

10 opinion or legal conclusion.

11 You can answer.

12 A. As I understand the monthly lease payment

13 being close to a million dollars, therefore an annual

14 burden of \$12 million makes the emergence period longer

15 than any lease payment that is less than that and the

16 less than that would be a resolution to the disputed

17 amount.

18 Q. (By Mr. Drake) Maybe I just didn't understand

19 your answer. I apologize for that. And I'm not asking

20 for a legal conclusion. What I'm asking for is just if

21 it's determined that the hospital has to make the lease

22 payments to UMC in the amount of just under a million

23 dollars, in your opinion, if the hospital had that

24 obligation of close to a million dollars a month, would

25 it be able to emerge from bankruptcy through a

128

1 restructuring?

2 A. It's always possible. It makes it harder.

3 Q. Is one of the possible paths for the debtor to

4 pursue a sale?

5 A. Yes.

6 Q. Has the debtor undertaken any efforts to

7 explore a potential sale process?

8 A. Yes.

9 Q. And what are those efforts?

10 A. A year ago it sent out RFPs to ten companies,

11 entities, requesting their interest in becoming a

12 strategic partner.

13 Q. When you say "a year ago," sometime last

14 summer?

15 A. Sometime last summer.

16 Q. And has the debtor been able to find a

17 strategic partner to date?

18 A. No.

19 Q. Are there any current discussions with any

20 party about becoming a strategic partner to the

21 hospital?

22 A. Yes.

23 Q. And who are those discussions with?

24 MR. SPROUSE: I'm going to object to the

25 question to the extent it requests information that's

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1 subject to confidentiality agreements and also

2 confidential pursuant to Rule 9018 of the bankruptcy

3 code.

4 You can answer that question at a high

5 level, but to the extent the question calls for the

6 identification of specific parties, I'm going to

7 instruct the witness not to answer.

8 A. Would you like to ask the question again to be

9 certain.

10 Q. (By Mr. Drake) Yeah. Just to back up. The

11 first question was are there any current discussions

12 with any parties about being a strategic partner and

13 the answer was yes.

14 A. Yes.

15 Q. The next question and the question I'm posing

16 to you with your lawyer's asserted objection and an

17 instruction is who are they?

18 MR. SPROUSE: Same objection, same

19 instruction.

20 A. And under advice of counsel I decline to

21 respond.

22 Q. (By Mr. Drake) Okay. Has the hospital -- and

23 right now, for this question at least, I'm not asking

24 who -- has the hospital entered into NDAs,

25 nondisclosure agreements or confidentiality agreements,

130

1 with any parties about a potential strategic  
 2 partnership?  
 3 **A. Yes.**  
 4 Q. How many?  
 5 **A. Again, I prefer not to respond because of the**  
 6 **confidentiality.**  
 7 Q. Well, just how many. I haven't asked for  
 8 names of anybody. My question is how many -- how many?  
 9 **A. I don't have a firm number, but it's more than**  
 10 **two.**  
 11 Q. Okay. Is it less than ten?  
 12 **A. Yes, at the present time, to the best of my**  
 13 **knowledge.**  
 14 Q. Is there a data room for strategic partners to  
 15 receive and review information?  
 16 **A. Yes.**  
 17 Q. Are there parties that are actively accessing  
 18 that data room to review information?  
 19 **A. Yes.**  
 20 Q. How many?  
 21 **A. I haven't reviewed the logs, but several.**  
 22 Q. Is this more than two?  
 23 **A. Again, I haven't reviewed the logs so I don't**  
 24 **know the specific number.**  
 25 Q. Do you know whether any potential strategic

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1 partner has hired advisors?  
 2 MR. SPROUSE: I'm going to object to the  
 3 question to the extent that that question calls for  
 4 information that's subject to a confidentiality  
 5 agreement and I'm going to instruct the witness not to  
 6 answer.  
 7 Q. (By Mr. Drake) And I'm not asking right now  
 8 for the names of anybody, either the parties or their  
 9 advisors, I'm just asking if you're aware of whether  
 10 any of these potential strategic partners have hired  
 11 advisors?  
 12 MR. SPROUSE: Same objection, same  
 13 instruction.  
 14 **A. And under advice I'm not going to answer.**  
 15 MR. DRAKE: Can you repeat your  
 16 instruction?  
 17 MR. SPROUSE: Sure. To the extent the  
 18 question calls for information that's subject to a  
 19 confidentiality agreement, I'm objecting and advising  
 20 the witness not to answer.  
 21 MR. DRAKE: Have you produced a  
 22 confidentiality agreement with the names redacted?  
 23 MR. SPROUSE: I don't believe we have,  
 24 but I'll be happy to check with my partners on that.  
 25 MR. DRAKE: Yeah. I mean I think we

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1 should know because I'd be -- I'm having trouble and  
 2 maybe you can help me. I don't need the document right  
 3 now, but I'm having trouble understanding how the  
 4 answer to a question of whether or not they've hired  
 5 financial advisors could be covered by a  
 6 confidentiality agreement. We don't even know who  
 7 we're talking about.  
 8 MR. SPROUSE: Well, I understand that,  
 9 Mr. Drake, but the fact is that the parties are  
 10 exchanging hundreds and maybe thousands of documents a  
 11 day still, so I have not reviewed everything. I think  
 12 it's clear that there are in place active  
 13 confidentiality agreements. Okay?  
 14 So until we understand the contours of  
 15 that, I don't think that we can just broadly open the  
 16 door in a piecemeal fashion to allow you to discover  
 17 information that may be under the umbrella of these  
 18 agreements.  
 19 Now, that's a discrete issue. I can look  
 20 at it on my end. If you want to return to the question  
 21 at a later time, then we'll do that.  
 22 Q. (By Mr. Drake) Are you going to follow your  
 23 lawyer's instruction?  
 24 **A. I am.**  
 25 Q. Have you personally met -- again right now I'm

133

1 not asking for names, although I reserve the right to  
 2 do it later -- have you personally met with any of  
 3 those potential strategic partners?  
 4 **A. No.**  
 5 Q. Is there someone at the debtor who is  
 6 responsible for meeting with strategic partners?  
 7 **A. Yes.**  
 8 Q. Who is that?  
 9 **A. Our investment banker.**  
 10 Q. Is that Miller Buckfire?  
 11 **A. Yes, it is.**  
 12 Q. When did Miller Buckfire first start meeting  
 13 with potential strategic partners?  
 14 **A. I don't have their calendar or schedule.**  
 15 Q. Is there someone at debtor that interacts with  
 16 Miller Buckfire?  
 17 **A. Yes.**  
 18 Q. And provides Miller Buckfire instructions on  
 19 what the debtor would like them to do?  
 20 **A. Our engagement letter speaks to that, yes.**  
 21 Q. Yeah. Other than an engagement letter, does  
 22 anyone at the hospital give Miller Buckfire  
 23 instructions on what it wants Miller Buckfire to do?  
 24 **A. Again that's spelled out in the engagement**  
 25 **letter and their role as investment banker. Beyond**

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1 that there aren't any specific instructions.

2 Q. So do I understand you correctly that Miller

3 Buckfire has an engagement letter and they're just off

4 doing their own thing without any interaction with the

5 debtor?

6 A. No, I didn't say that.

7 MR. SPROUSE: Just a minute. I'm going

8 to object. I believe the question mischaracterizes the

9 witness' prior testimony.

10 MR. DRAKE: Okay.

11 A. So the question is?

12 Q. (By Mr. Drake) The question is is there

13 anyone at the debtor who's interacting with Miller

14 Buckfire to instruct them on what the debtor would like

15 Miller Buckfire to do?

16 A. I'm not certain how to answer the question.

17 Q. Well, you're the CEO. Right?

18 A. Yes.

19 Q. You signed the engagement letter with Miller

20 Buckfire. Correct?

21 A. Yes.

22 Q. And so at least you personally have had some

23 interaction with Miller Buckfire --

24 A. Yes.

25 Q. -- at least as far as getting them officially

135

1 signed up and under an engagement letter?

2 A. Yes.

3 Q. Okay. Since the time they've been engaged

4 with the engagement letter you signed, is anyone at the

5 debtor responsible for communicating with Miller

6 Buckfire about what they're doing?

7 A. Yes.

8 Q. Who's that?

9 A. I am.

10 Q. Okay. And so have you -- are you the one that

11 gives them instructions with respect to the sale

12 process?

13 A. I'm not certain how to answer the question.

14 Q. Have you identified for Miller Buckfire

15 strategic partners or did Miller Buckfire identify the

16 potential strategic partners?

17 A. Both.

18 Q. Do you know approximately when you provided to

19 Miller Buckfire names of potential strategic partners?

20 A. After they were engaged.

21 Q. Do you know how long after they were engaged?

22 A. Again I'd have to consult my schedule. I

23 don't remember specifically.

24 Q. Is it correct, Mr. Herbers, that Miller

25 Buckfire was engaged sometime around June 23rd of 2015?

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1 A. Yes.

2 Q. So sometime after June 23rd of 2015, you've

3 provided Miller Buckfire with the name or names of

4 potential strategic partners. Is that right?

5 A. Yes.

6 Q. Is there anyone else -- strike that.

7 Do you believe that, at least as the

8 debtor's concerned, that you're leading the sale

9 process?

10 A. I'm not certain what the question is.

11 Q. Who's leading the potential sales process?

12 A. Miller Buckfire is conducting the sale

13 process. They are reporting on a regular basis with me

14 and counsel as well as with the board.

15 Q. Do you have an opinion as to whether a sale or

16 a restructuring is the preferred path for this debtor?

17 A. I do not.

18 Q. Do you have an estimation in your mind of when

19 the decision will be made whether a restructuring or

20 sale would be the preferred path for this debtor?

21 A. I don't have a date in mind, no.

22 Q. Do you have any estimation of when that

23 decision might be made?

24 A. In the not too distant future. This is the

25 best I can tell you.

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1 Q. And by "not too distant future," do you mean

2 sometime by the end of November?

3 A. By the time we put our plan together and

4 submit it to the court.

5 Q. And that's something that you're still not

6 sure when that will be. Right?

7 A. Correct.

8 MR. SPROUSE: Mr. Drake, I want you to

9 finish this line of questioning, but when you do if we

10 could take a break. We've been on the record for about

11 an hour and a half.

12 MR. DRAKE: We can take a break. I don't

13 care.

14 MR. SPROUSE: Thank you.

15 MR. DRAKE: Sure.

16 (A recess was had.)

17 Q. (By Mr. Drake) Mr. Herbers, we're back on the

18 record. One thing that came up on the break is we've

19 been talking today about DSH. Correct?

20 A. Yes.

21 Q. And I think you and I have understood each

22 other, but just for the record could you please explain

23 what DSH stands for and what it is?

24 A. The acronym is Disproportionate Share

25 Hospitals. It's a requirement of each state's Medicaid

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1 program to have a mechanism to fund those facilities  
 2 that provide a disproportionate share of their services  
 3 to the indigent.  
 4 Q. Thank you for that.  
 5 And that was the program we were talking  
 6 about that also includes a component of the program  
 7 that if you're a mature hospital, meaning being  
 8 operating for more than three years, you could  
 9 potentially receive a higher rate of reimbursement?  
 10 A. You participate at a different level of the  
 11 pools, yes.  
 12 Q. And while we're on the subject of programs  
 13 like that, there are other federal programs that  
 14 provide reimbursement to the hospital. Correct?  
 15 A. Yes.  
 16 Q. And one of them is the Delivery System Reform  
 17 Incentive Payment pool. Is that right?  
 18 A. Correct.  
 19 Q. And that's sometimes called DSRIP?  
 20 A. DSRIP, yes.  
 21 Q. DSRIP. And the hospital participates in that.  
 22 Correct?  
 23 A. Yes.  
 24 Q. Another pool of funding is what's called the  
 25 Uncompensated Care pool. Is that correct?

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1 A. Correct.  
 2 Q. Sometimes called the UC Pool?  
 3 A. Correct.  
 4 Q. According to the audited financial statements  
 5 of the hospital, the hospital participated in the UC  
 6 pool for year ending 2013. Correct?  
 7 A. Yes.  
 8 Q. Sometime during 2014 the hospital elected not  
 9 to sign a certification that would have allowed it to  
 10 continue to collect from the UC pool. Is that right?  
 11 A. Yes.  
 12 Q. And as a result of that decision the hospital  
 13 wrote off the remaining receivables under the UC  
 14 program, which resulted in a net decrease of  
 15 approximately eight million dollars for year ending  
 16 September 30, 2014. Correct?  
 17 A. Correct.  
 18 Q. Now, the decision not to sign a certification  
 19 that was prior to you being in this position. Correct?  
 20 A. Correct.  
 21 Q. Now, are you sitting here today aware of why  
 22 the decision was made in 2014 not to sign the  
 23 certification?  
 24 A. Yes.  
 25 Q. Okay. And what was the reason for not signing

140

1 the certification?  
 2 A. Ray Dzieszinski was the interim CEO at the time  
 3 and the decision he made was based upon ethical reasons  
 4 for not executing the document that purportedly would  
 5 have allowed the Children's Hospital to participate in  
 6 that program for fiscal '14 and '15.  
 7 Q. And this is based on your conversation with  
 8 Mr. Dzieszinski?  
 9 A. Yes.  
 10 Q. Is this the one that took place while he was  
 11 in Florida?  
 12 A. Yes.  
 13 Q. Did he explain to you what his ethical  
 14 concerns were at the time?  
 15 A. Yes.  
 16 Q. And what were they according to  
 17 Mr. Dzieszinski?  
 18 A. He was being asked to sign a document making  
 19 certain assertions about a discussion at a board  
 20 meeting at which he was not present.  
 21 Q. Can you put any more detail on that?  
 22 A. I can't.  
 23 Q. So you understand that Mr. Dzieszinski was  
 24 asked to certify to something that happened at a board  
 25 meeting where he wasn't actually there?

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1 A. Correct.  
 2 Q. Okay. But you don't know what the subject  
 3 matter of that statement or board meeting was?  
 4 A. Well, it had to do with the program itself and  
 5 certain components of the discussion is all that I'm  
 6 aware of.  
 7 Q. But you don't know which components?  
 8 A. I don't.  
 9 Q. That would be something we'd have to ask Mr.  
 10 Dzieszinski?  
 11 A. Correct.  
 12 Q. Have you ever been at another hospital that  
 13 participated in the UC pool?  
 14 A. Yes.  
 15 Q. Okay. And do you recall the names of those  
 16 hospitals?  
 17 A. I don't recall exactly which ones were or  
 18 weren't because I've been in many facilities.  
 19 Q. Sure. Now, if I understand, I mean these are  
 20 hospitals -- for lack of a better word, they're  
 21 hospitals that have some sort of like sponsor which is  
 22 a public entity that puts money into this pool. Right?  
 23 A. You're referring to the intergovernmental  
 24 transfer process, yes.  
 25 Q. Correct. And so not all hospitals are

142

1 eligible to participate in the UC pool. Is that right?

2 **A. Again I'm struggling how to answer your**

3 **question, because any hospital can participate if the**

4 **sponsoring governmental entity and they are in the same**

5 **community and meet the requirements of the**

6 **intergovernmental transfer program.**

7 Q. Correct. So one requirement is you have to

8 have -- there has to be a government sponsor. Right?

9 **A. Yes.**

10 Q. And that sponsor has to be in the same

11 community as the participating hospital. Correct?

12 **A. Correct.**

13 Q. Then the hospital that wants to participate in

14 the pool has to make an annual certification. Correct?

15 **A. Yes.**

16 Q. And the subject matter of that certification

17 is set forth in the statutes. Right?

18 **A. Yes.**

19 Q. And it sets forth various things having to do

20 with representations made by the participating hospital

21 about the relationship with the sponsoring entity.

22 Right?

23 **A. Correct.**

24 Q. And so have you ever been at a hospital where

25 it had previously participated in the UC pool but

143

1 elected not to sign the annual certification?

2 **A. No.**

3 Q. Do you know whether Children's Hospital

4 intends to participate in the UC pool going forward?

5 **A. If possible, yes.**

6 Q. And when you say "if possible," what does that

7 mean?

8 **A. We have to find a governmental entity willing**

9 **to participate with us in that program.**

10 Q. At the time of 2014, when the hospital had to

11 write off approximately eight million dollars, it had a

12 willing sponsor though. Correct?

13 **A. Purportedly, yes.**

14 Q. And you say "purportedly." Are you aware of

15 any reason why the hospital wasn't eligible to

16 participate in the pool?

17 **A. I am not.**

18 Q. Have you had any discussions with UMC about it

19 being the sponsor of Children's Hospital as it has been

20 in the past?

21 **A. Yes.**

22 Q. And when were those discussions?

23 **A. It was part of the mediation process.**

24 Q. And I understand that the lack of

25 participation for year ending September 30, 2015, is

144

1 approximately 12 or \$13 million?

2 **A. That would have been the ceiling, yes.**

3 Q. So between 2014 and 2015, not participating in

4 the UC pool has resulted in approximately \$20 million

5 less in revenue to the hospital. Correct?

6 **A. Had we participated that might have been the**

7 **outcome.**

8 Q. In your opinion as CEO, and I know you weren't

9 there in 2014, but do you believe the hospital should

10 have participated in the program in 2014?

11 **A. No.**

12 Q. Why is that?

13 **A. Because of the conditions established between**

14 **the governmental entity and the Children's Hospital for**

15 **participating.**

16 Q. And what are those conditions?

17 **A. My understanding was that the quid pro quo**

18 **component of the agreement would have violated the**

19 **statutory restrictions on the intergovernmental**

20 **transfer process.**

21 Q. And what do you understand was the

22 contemplated quid pro quo?

23 **A. I don't have all of the details, but that's my**

24 **understanding of the concerns by board members at the**

25 **time it was being discussed.**

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1 Q. Have you spoken with any members of the board

2 from 2014 other than Mr. Dzieszinski?

3 **A. Yes.**

4 Q. And who are they?

5 **A. The current members of the board.**

6 Q. The current members of the board that were

7 also in place in 2014?

8 **A. I believe the current five member board were**

9 **all present in 2014.**

10 Q. So have you discussed this issue with all five

11 members of the current board?

12 **A. Collectively, yes.**

13 Q. When you say "collectively" you mean at a

14 meeting?

15 **A. When we were all together, yes.**

16 Q. So what have the other five members of the

17 board told you about this issue?

18 **A. Their understanding of the specifics of the**

19 **intergovernmental transfer program is low and spotty.**

20 **They relied upon Ray Dzieszinski's specific knowledge in**

21 **dealing with that both at Dallas Children's Hospital**

22 **where he was the CFO before and his understanding of**

23 **the relationships with UMC here.**

24 **They all recall that it wasn't signed**

25 **because Ray had ethical concerns that prevented him**

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1 from executing the document and the board supported  
 2 that decision.

3 Q. The board supported Mr. Dzieszinski's decision  
 4 not to sign the certification?

5 A. Correct.

6 Q. But in your opinion those same board members  
 7 supporting his decision have what you say is a spotty  
 8 understanding of the program?

9 A. Yes.

10 Q. Is it true, sir, the certifications are due in  
 11 June of each year?

12 A. Again, I'm just learning the Texas  
 13 requirements, because the uncompensated care or the DSH  
 14 pool funds are administered differently in each state.

15 Q. Correct.

16 A. My understanding is that the filing  
 17 requirements this year were May 1 and June 1.

18 Q. May 1 for DSH and June 1 for the UC pool?

19 A. I believe that's the distinction.

20 Q. Sure. And so you came on end of  
 21 February 2015. Right?

22 A. Yes.

23 Q. So that would be a couple months before these  
 24 deadlines. Right?

25 A. Yes.

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1 Q. And I assume as CEO and CRO of an entity in  
 2 bankruptcy, if you could potentially access 12 or  
 3 \$13 million that would be something you would want to  
 4 explore?

5 A. Yes.

6 Q. Okay. And so my understanding is the reason  
 7 that the hospital didn't do the certification in 2014  
 8 is because of Mr. Dzieszinski's ethical concerns.  
 9 Right?

10 A. Yes.

11 Q. But now the decision of whether or not to sign  
 12 the certification in May or June of 2015, that now  
 13 falls on you and the current board. Right?

14 A. Right.

15 Q. Did you have any ethical concerns about  
 16 signing a certification for calendar year 2015?

17 A. No.

18 Q. You did not?

19 A. No.

20 Q. Okay. Did the board?

21 A. No.

22 Q. But the decision was made not to sign a  
 23 certification in June?

24 A. No, I did sign a certification.

25 Q. You did sign a certification?

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1 A. Uh-huh.

2 Q. Okay. And so what then is preventing the  
 3 hospital from participating in the program for year  
 4 ending September 30, 2015?

5 A. Specifically, Texas Tech Medical School did  
 6 not put the funds up to be matched.

7 Q. Are you aware of the reason Texas Tech didn't  
 8 put funds up?

9 A. Yes.

10 Q. And what is that?

11 A. We filed on May 19th. The deadline to put  
 12 money into the general fund for the State was May 27th.  
 13 Once we filed their thinking was to put any money in  
 14 would be throwing good money after bad, so they  
 15 declined to put any matching dollars in. UMC never  
 16 offered to participate with us preferring to fully  
 17 participate into their cap themselves.

18 Q. Did you have discussions with UMC about  
 19 participating?

20 A. We did.

21 Q. Just to make sure, though, you signed the  
 22 certification. Correct?

23 A. We were prepared with Texas Tech to proceed  
 24 pending our decision about the future filing or not  
 25 filing or the success of mediation with UMC.

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1 Q. But you were prepared to sign the  
 2 certification?

3 A. And I did sign the papers.

4 Q. And you did sign the certification. So I  
 5 assume, based on your experience and knowledge of the  
 6 program, in light of the fact you had spoken with Mr.  
 7 Dzieszinski, you had convinced yourself or gotten  
 8 comfortable with there weren't the ethical concerns he  
 9 had?

10 A. His concerns dealt with the plan and  
 11 certification between UMC and Children's. The one I  
 12 executed was an intergovernmental transfer between  
 13 Texas Tech and Children's, both governmental entities.

14 Q. But you yourself had conversations with UMC  
 15 about putting funds into the UC pool?

16 A. And they declined to do so.

17 Q. They declined to do so, but you were at least  
 18 willing to have discussions with them about putting  
 19 funds in. Correct?

20 A. Absolutely.

21 Q. And had they been willing to put funds in,  
 22 would you have signed the certification to allow you  
 23 access to those funds?

24 A. If the conditions of those certifications were  
 25 consistent with the statutory requirements, I would not

150

1 have had any reservations.

2 Q. Were you aware of anything inconsistent with

3 the requirements of the statute?

4 A. Well, I didn't have anything to evaluate other

5 than Texas Tech's certification which I had no reasons

6 to be concerned about.

7 Q. Right. But the statutory certification

8 requirements deal more -- deal with more than just the

9 hospital -- or the sponsoring entity's certification.

10 Correct?

11 A. Absolutely.

12 Q. So I'm just saying at the time you were having

13 the discussions with UMC about participation in the

14 pool, was there anything you were aware of that caused

15 you concerns that you might not be able to sign the

16 certification?

17 A. The discussions never reached that level, so

18 the answer would be no.

19 Q. And was it you, I assume, on behalf of debtor

20 having these discussions with UMC?

21 A. Yes.

22 Q. And who at UMC were you speaking with about

23 participation in the pool?

24 A. Jim Valenti specifically.

25 Q. Anyone else?

151

1 A. Indirectly through Michael Nunez, the CFO,

2 though he and I did not have direct conversations about

3 it.

4 Q. Yours were all with Mr. Valenti?

5 A. Yes.

6 Q. And was it Mr. Valenti who told you that UMC

7 was unwilling to put money into the pool?

8 A. No.

9 Q. Who told that?

10 A. The CFO of Texas Tech.

11 Q. The CFO of Texas Tech told you that UMC was

12 not willing to?

13 A. Correct.

14 Q. Did anyone from UMC ever tell you that UMC was

15 unwilling to put money into the pool?

16 A. Directly, no.

17 Q. And when you say "directly, no," you mean they

18 did indirectly through Texas Tech?

19 A. No. That and there was no overture of any

20 agreement to sign with UMC.

21 Q. Did you ever say anything to confirm to UMC,

22 "Hey, we're willing to sign the certification this

23 year, put some money in"?

24 A. I never made those comments, no.

25 Q. Mr. Herbers, if we look at Exhibit 5, which is

152

1 the budget and weekly cash forecast that is the basis

2 for the Exhibit 4 cash collateral budget, we've already

3 established earlier that this does not include any

4 payments for the lease. Correct?

5 A. Yes.

6 Q. Am I reading this correctly that even without

7 the lease payments that the forecast is for the debtor

8 to run out of money by week 22?

9 A. Yes.

10 Q. And that week 22 is the week of November 27,

11 2015. Correct?

12 A. Correct.

13 Q. Do you still believe that to be the case, that

14 under the current operations of the hospital that it

15 will run out of money sometime at the end of November?

16 A. I haven't seen the actuals for week 1, 2 and

17 3, which will end tomorrow, so I don't know if the

18 available cash position improves or doesn't improve in

19 that three-week period of actuals. That would change

20 my opinion as to when the cash balance -- available

21 cash balance goes negative. But using this set of

22 assumptions as prepared on June 26th, that's the

23 conclusion.

24 Q. And would it be fair to say given the monthly

25 net cash flows that even if there was some improvement

153

1 of the actuals from June of the patient receipts and

2 disbursements, that any improvement in the bottom line

3 available cash would only result in maybe, you know,

4 another week or so before it ran out of money?

5 A. No.

6 Q. Okay. And why is that?

7 A. An improvement of \$500,000 of patient

8 collections on a monthly basis -- July, August,

9 September, October, five months -- could generate two

10 and a half million dollars of cash and extend us into

11 the January time frame. An improvement of \$100,000

12 more of patient cash for five months would add \$500,000

13 to the available cash balances and we would make it to

14 Christmas.

15 Q. And improvement of how much?

16 A. 100,000 a month. Would be 500,000 more cash

17 than we are projecting here. From the million two

18 negative, we would -- the week of Christmas we would be

19 out of cash. So relatively small monthly numbers of

20 patient cash collections, improvements in our revenue

21 cycle processes and our patient volumes could extend

22 this one week, two weeks, three weeks, four weeks or

23 beyond.

24 Q. But based on the information you have sitting

25 here today, your current forecast is that you'd go cash

154

1 negative --

2 **A. Around Thanksgiving.**

3 Q. -- the last week of November?

4 **A. Correct.**

5 Q. And you haven't seen any information up to

6 right now that changes that opinion?

7 **A. Nothing in this format that has all of --**

8 **that's consistently applied. I do watch the daily cash**

9 **collections number and I do watch some of our**

10 **expenditures and I do watch our payroll every two**

11 **weeks.**

12 Q. But at least according to this, the 13 week

13 net cash flow is negative \$6.8 million. Right?

14 **A. I'm sorry. If you could point me to the page.**

15 Q. Yeah. Page 2 of 4, on the far right there's a

16 13 week total and a 26 week total. Right?

17 **A. Yes.**

18 Q. And so the operating cash flow for the 13 week

19 period is negative \$5.362 million. Correct?

20 **A. Correct.**

21 Q. And then because this entity is in bankruptcy,

22 there are also non-operating cash flows which are

23 primarily professional fees. Right?

24 **A. Correct.**

25 Q. And those for the 13 week period are estimated

155

1 to be a million and a half dollars. Right?

2 **A. Correct.**

3 Q. And that's primarily AlixPartners and the

4 Jackson Walker Law Firm. Right?

5 **A. And the healthcare ombudsman, yes.**

6 Q. Okay. And so as a result of those additional

7 non-operating cash flows, the net cash flow for the 13

8 week period is negative \$6.862 million. Right?

9 **A. Correct.**

10 Q. And so for the 26 week period, it's almost

11 double that, which is negative \$13.148 million. Right?

12 **A. Correct.**

13 Q. And only because there's some available cash

14 in the ST Investment Account Balance that, you know,

15 the debtor can survive a bit longer before it goes

16 negative available cash. Right?

17 **A. Correct.**

18 Q. Does the week 22 professional fees where

19 that's \$800,000, the previous payments were all

20 \$500,000, is that \$800,000 -- do you know why that's

21 higher?

22 **A. I don't.**

23 Q. Okay. Is it because of a success fee?

24 **A. Most likely.**

25 Q. For AlixPartners?

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1 **A. I don't know that specifically.**

2 Q. Would that be something for Mr. Adams?

3 **A. Yes.**

4 Q. Mr. Herbers, is there any D&O coverage

5 available to this debtor?

6 **A. Yes.**

7 Q. Do you know how much?

8 **A. I don't recall.**

9 Q. Do you know who the insurer is?

10 **A. I don't recall specifically.**

11 Q. Who at the hospital is responsible for

12 procuring and maintaining insurance coverage?

13 **A. I am.**

14 Q. Have you done an evaluation in connection with

15 operating this debtor as to what insurance coverages

16 might be available?

17 **A. I have not.**

18 Q. Has the debtor done any investigation whether

19 there are any potential claims against prior management

20 of the hospital?

21 **A. Not aware of any.**

22 Q. What about former directors?

23 **A. Not aware of any.**

24 Q. Do you know whether the debtor has done any

25 investigation about whether it has any claims against

157

1 any parties other than the ones it's already made in

2 various adversary proceedings?

3 **A. With regard to D&O coverage?**

4 Q. Just with respect to any claims that would

5 benefit the estate.

6 **A. Again, I'm not clear on the scope of the**

7 **claim. Are you referring to specific insurance**

8 **policies or --**

9 Q. No. Just any claims, whether covered by

10 insurance or not, against prior management or

11 directors.

12 **A. I'm not aware of any new asserted claims or**

13 **filed claims.**

14 Q. And you're also not aware of any investigation

15 that's been done to determine whether there are claims

16 against prior management. Is that right?

17 **A. Correct.**

18 Q. Do you know why the debtor hasn't done an

19 investigation of whether it has any claims against

20 prior management or prior directors?

21 **MR. SPROUSE: I'm going to object. That**

22 **mischaracterizes the witness' testimony.**

23 Q. (By Mr. Drake) Has the debtor done an

24 investigation of potential claims against prior

25 directors or management?



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1 **A. Not that I'm aware of.**

2 Q. Do you know why -- and you're the CEO. Right?

3 **A. Yes.**

4 Q. And you're the CRO. Right?

5 **A. Yes.**

6 Q. And you have been since before this debtor

7 filed bankruptcy. Right?

8 **A. Yes.**

9 Q. So my question to you is if there had been an

10 investigation done since this entity filed bankruptcy,

11 as CEO and CRO, would you be aware of it?

12 **A. Most likely.**

13 Q. And you're not aware of any such

14 investigations?

15 **A. That's right.**

16 Q. And tell me why, then, is it, sir, that the

17 debtor hasn't done an investigation of any claims it

18 may have against former management or former directors?

19 MR. SPROUSE: I'm going to object. That

20 mischaracterizes the witness' system.

21 Q. (By Mr. Drake) You can answer.

22 **A. The insurance companies' representatives keep**

23 **us informed of claims filed and we have not been made**

24 **aware of any such claims.**

25 Q. Maybe you misunderstood my question.

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1 **A. Most likely. I apologize.**

2 Q. It could be my fault. I'm not asking if

3 you've notified your carrier of claims against your

4 directors or if the carrier's notified you or a

5 broker's notified you.

6 My question is this. Has the debtor

7 investigated whether or not it has any potential claims

8 against its prior management or directors?

9 MR. SPROUSE: I object. That's been

10 asked and answered.

11 **A. Not that I'm aware of.**

12 MR. DRAKE: He just said he didn't

13 understand the question. I'm trying to help your

14 witness out.

15 MR. SPROUSE: That's the third time,

16 Counsel, you have asked the same question using the

17 same words.

18 MR. DRAKE: And you heard his answer,

19 which was whether or not the carrier had notified him

20 of a claim. And I'm trying to help your witness. If

21 you want to coach him, take a break and go coach him,

22 but don't -- don't assert an objection like that after

23 I'm trying to help your witness when he -- he and I

24 just had a discussion that he didn't understand my

25 question and I said, "Well, it might be me, let me try

160

1 to re-ask it."

2 MR. SPROUSE: I'm going to object to the

3 sidebar.

4 MR. DRAKE: That's fine.

5 Q. (By Mr. Drake) Mr. Herbers, because I believe

6 maybe you and I weren't understanding each other, my

7 question is has the debtor done an investigation

8 whether the debtor has claims against any of its former

9 management or directors?

10 **A. Not that I'm aware of.**

11 Q. And can you tell me why it has not happened?

12 MR. SPROUSE: I'm going to object. It

13 mischaracterizes the witness' testimony.

14 MR. DRAKE: Your objection is on the

15 record.

16 **A. I don't have a -- any answer as to why it has**

17 **or has not been done.**

18 Q. (By Mr. Drake) Do you know whether as CEO and

19 CRO of the debtor whether you intend to instruct anyone

20 to conduct such an investigation?

21 **A. At this time I don't have that intention. I**

22 **have no information that would lead me to believe that**

23 **that would be an appropriate action.**

24 Q. What is your view having now reviewed

25 historical documents, interviewed former officers and

161

1 directors, of whether the hospital was managed properly

2 from the time it opened to the time you took the

3 position as CEO?

4 **A. I'm trying to formulate a responsive answer.**

5 **Can I ask for clarification?**

6 Q. Sure.

7 **A. "Properly managed" is such a broad concept**

8 **that I'm not certain how to respond to your question**

9 **with that broad a concept.**

10 Q. Sure. You've operated various hospitals and

11 been involved with various hospitals over the years.

12 Correct?

13 **A. Yes.**

14 Q. And you've developed an opinion as a result of

15 that when things are well run and when they're not well

16 run. Is that right?

17 **A. Sometimes, yes.**

18 Q. In your opinion, based on what you've learned

19 about El Paso Children's Hospital, in your opinion,

20 from the time it opened in 2012 to the time you took

21 over in the end of February 2015, do you believe that

22 El Paso Children's Hospital was well run?

23 **A. I'll answer this way in an attempt to give you**

24 **a direct answer. Given the resources they had, given**

25 **the development of the entity, the presumptive trust of**

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1 the developing organization, and the skills of the  
 2 hired individuals, and the closeness of the  
 3 relationships among board members intra UMC and EPCH,  
 4 El Paso Children's Hospital, the management did the  
 5 best they could. So within that context it was as well  
 6 managed as they were capable of managing.

7 Q. Do you believe that you could have, based on  
 8 your experience and abilities, managed it better than  
 9 they did?

10 A. Again I'm trying to formulate the answer,  
 11 because it's conditional upon the preset conditions,  
 12 namely the CEO hired by -- the founding CEO hired was  
 13 hired under a one vote difference among the board  
 14 between two candidates. That's an awkward position for  
 15 anyone to come into.

16 The development of the Children's  
 17 Hospital -- the building, construction, opening, so  
 18 forth -- came with such trust among the parties and  
 19 such enthusiasm for the dream that was coming into  
 20 reality that that overshadowed what might otherwise be  
 21 considered more prudent decision making processes.

22 So I'm not quite certain how to answer  
 23 your question because of those preset conditions.

24 Q. There's five board members. Is that right?  
 25 A. Presently, yes.

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1 Q. At one time there was, what, 11?  
 2 A. Yes, voting members.

3 Q. Have you spoken with any of the former voting  
 4 members of the board?  
 5 A. Yes.

6 Q. Okay. Which ones?  
 7 A. The ones that have just been -- have just  
 8 stepped off the board, Sam Legate, Chris Kleberg, Judge  
 9 Spieczny and Dr. Guggedahl.

10 Q. Do you know why they resigned?  
 11 A. I have seen their letters of resignation.  
 12 Chris Kleberg resigned because he left the area, he  
 13 took a job in San Antonio, and he had just moved his  
 14 home and family the same week we filed. The week  
 15 before we filed he had closed on his home here.

16 Sam Legate, one of his partners suffered  
 17 a medical illness and was incapacitated, so that the  
 18 business practice of his law firm required more of his  
 19 time and attention than he could devote.

20 Judge Spieczny did not give a reason, was  
 21 very articulate and complimentary of his service time  
 22 as well as the members of the board.

23 And John Guggedahl also simply stepped  
 24 off the board and did not cite any specific reasons, so  
 25 I don't know their specific reasons.

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1 Q. Did you do anything to talk to any of those  
 2 resigning board members to encourage them to stay on  
 3 the board?  
 4 A. I did not.

5 Q. Have you spoken to any of them since their  
 6 resignation?  
 7 A. I have not.

8 Q. Were you part of the decision to file the  
 9 bankruptcy?  
 10 A. As CEO of the organization I was involved in  
 11 the board meetings where the decision was discussed and  
 12 made, yes.

13 Q. And what were the reasons the debtor decided  
 14 to file for the bankruptcy?  
 15 A. The inability to negotiate a definitive  
 16 agreement consistent with the mediated terms of March  
 17 9th/10th and the timing of a March 27th anniversary  
 18 date for UMC's lien and their refusal to release the  
 19 lien to continue discussing a solution for a definitive  
 20 agreement.

21 Q. You weren't involved in the original  
 22 negotiation and execution of the master agreement and  
 23 related sub-agreements. Right?  
 24 A. No.

25 Q. Have you gone back and talked to any of the

165

1 lawyers or advisors that were involved in that process?  
 2 A. I have not.

3 Q. Have you spoken with the people that were  
 4 involved on behalf of the Children's Hospital in  
 5 negotiating and executing those agreements?  
 6 A. Yes.

7 Q. And who is that?  
 8 A. There was a consultant presently with  
 9 Discovery Healthcare Consulting Group that was  
 10 intimately involved in the formation discussions about  
 11 the structure, a working capital loan, the IGT  
 12 transfers, the hospital within a hospital  
 13 consideration, all of the regulatory -- the Medicaid  
 14 regulatory issues, who provided some background  
 15 information of the tone and tenor of the conversations  
 16 leading up to the opening of the hospital.

17 I had discussions with former in-house  
 18 legal counsel who was here presently and part of the  
 19 employees that signed the last steel beam that went  
 20 into place on the tenth floor who also was involved in  
 21 some of the drafting and reactions to drafts back and  
 22 forth.

23 And then the board members who were  
 24 involved in the board meetings and the conversations  
 25 that took place around the process.

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1 Q. Were you involved in the decision to file the  
 2 adversary proceedings against UMC?  
 3 **A. Again I want to make sure I answer your  
 4 question. If you mean was I involved in the decision  
 5 to file bankruptcy, yes.**  
 6 Q. Okay. But then in addition to just seeking  
 7 relief under Chapter 11 of the bankruptcy code, the  
 8 debtor has also filed an adversary proceeding against  
 9 UMC. Correct?  
 10 **A. Yes.**  
 11 Q. And were you involved in the decision to file  
 12 that adversary proceeding?  
 13 **A. Yes.**  
 14 Q. And was that also done in consultation with  
 15 the board?  
 16 **A. Yes.**  
 17 Q. We can talk about that later. I want to go  
 18 back to costs and reimbursements for the hospital. As  
 19 part of -- some of the reimbursements provided to the  
 20 hospital by Medicare and Medicaid and other programs  
 21 are based on the hospital's costs. Correct?  
 22 **A. Presently very few, but at the time of  
 23 opening, yes.**  
 24 Q. Okay. And which ones still remain based upon  
 25 cost reporting?

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1 **A. There are very small components and I can't  
 2 articulate them because they're almost insignificant.  
 3 I mean we're talking thousands of dollars, not tens of  
 4 thousands or hundreds of thousands.**  
 5 **Most of our outpatient services are  
 6 reimbursed by Medicaid on a fee schedule, by Medicare  
 7 on a fee schedule, by most of the managed care plans  
 8 and commercial insurance companies on a fee schedule.**  
 9 **Our inpatient services are primarily  
 10 reimbursed on a prospective payment rate, the DRG  
 11 payment rate, or on a per diem rate and more and more  
 12 of the managed care contracts have migrated away from  
 13 per diems into prospective payment except for the  
 14 smaller insurance plans who find it easier to  
 15 adjudicate per diem contracts.**  
 16 Q. And the hospital's still required to file  
 17 annual Medicaid cost reports though. Right?  
 18 **A. Yes.**  
 19 Q. Are you aware of whether -- strike that.  
 20 Who prepared -- prior to you taking on  
 21 the position you've taken on, who prepared the Medicaid  
 22 cost reports for the hospital?  
 23 **A. I'm aware that the most recent several years  
 24 have been prepared by Discovery Healthcare Group on our  
 25 behalf.**

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1 Q. And what is the purpose, as your  
 2 understanding, of having to file a Medicaid cost  
 3 report?  
 4 **A. Regulatory compliance.**  
 5 Q. And what type of costs are reported on a  
 6 Medicaid cost report?  
 7 **A. All costs from the trial -- we start from our  
 8 trial balance, all of our costs are reported.**  
 9 Q. And when you say "all costs," is that costs  
 10 incurred and paid? What do you mean by "costs"?  
 11 **A. All of our expenses as -- in accordance with  
 12 generally accepted accounting principles are reported  
 13 and our audited financial statements are attached as  
 14 part of the annual filing.**  
 15 Q. And have you reviewed the Medicaid cost  
 16 reports for 2012, '13 and '14?  
 17 **A. No.**  
 18 Q. Do you know if Mr. Adams has?  
 19 **A. I don't know.**  
 20 Q. Are you aware of whether or not the costs  
 21 associated with the lease payments were reported on the  
 22 Medicaid cost reports?  
 23 **A. It's my understanding that they have been.**  
 24 Q. They have been?  
 25 **A. Yes.**

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1 Q. Does that include the lease payments where the  
 2 hospital didn't actually pay UMC?  
 3 **A. It's consistent with the audited financial  
 4 statements.**  
 5 Q. The cost report is consistent with the audited  
 6 financial statements?  
 7 **A. Yes.**  
 8 Q. And does that include lease payments for the  
 9 entire year of 2014?  
 10 **A. It includes the accrued costs of the lease as  
 11 invoiced by UMC.**  
 12 MR. DRAKE: Why don't we take a quick  
 13 break and see where we are. We can go off the record.  
 14 (A recess was had.)  
 15 Q. (By Mr. Drake) Mr. Herbers, a couple of  
 16 questions. We reviewed your declaration, which was  
 17 Exhibit, I believe, 1 to your examination today. Did  
 18 anyone else from the debtor review your declaration to  
 19 determine whether it was accurate?  
 20 **A. I don't recall.**  
 21 Q. You offered the declaration in support of the  
 22 first day motions. Correct?  
 23 **A. Yes.**  
 24 Q. Did anyone -- are you aware of whether anyone  
 25 from the debtor besides you reviewed the first day

170

1 motions?

2 **A. Again, I don't recall. There was so much**

3 **activity going on that I'm not certain who might have**

4 **reviewed it or who didn't review it.**

5 Q. And we went over some of the sources for the

6 information in your declaration. As you remember a lot

7 of it predated your role here. Correct?

8 **A. Correct.**

9 Q. And we went through that this morning. I

10 don't remember what you said, if I even asked you, but

11 did you interview or speak with Sam Legate in

12 connection with preparing your declaration?

13 **A. Not directly, no.**

14 Q. Okay. When you say "not directly," did you go

15 through someone to get information from him?

16 **A. No. I received information from him that was**

17 **not within the interview context.**

18 Q. In the form of documents and things?

19 **A. No, discussions.**

20 Q. Discussions. Okay. So you had -- did you

21 have discussions with him about your declaration?

22 **A. Specifically, no.**

23 Q. Did you speak with Mr. Legate when you first

24 got hired?

25 **A. I don't have a specific recollection. I know**

171

1 **he was on the interview schedule, but our schedules may**

2 **not have coincided within that context and we had the**

3 **discussion at or around the board meeting.**

4 Q. Do you recall how many times you had

5 discussions with Mr. Legate?

6 **A. I do not have a specific number.**

7 Q. Do you believe --

8 **A. We had a lot of board meetings that he was**

9 **present at.**

10 Q. So, Mr. Herbers, earlier sometime today,

11 before or after lunch, you mentioned that Mr.

12 Dzieszinski had talked about an agreement relating to

13 2015 lease payments. Right?

14 **A. Yes.**

15 Q. Okay. And you, I think, said that wasn't

16 anything you were involved in personally as it predated

17 you. Right?

18 **A. Correct.**

19 Q. And everything you know about that you've

20 learned from your conversation with Mr. Dzieszinski.

21 Right?

22 **A. And other documents that were contemporaneous**

23 **around the time.**

24 Q. Are you aware of an actual written agreement

25 signed that demonstrates the parties reached an

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1 agreement with respect to the lease payments?

2 **A. Yes.**

3 Q. And what agreement is that?

4 **A. It's a schedule listing all of the services**

5 **and the fiscal '15 budgeted amount with signatures on**

6 **the bottom by Michael Nunez and Ray Dzieszinski and**

7 **dated.**

8 Q. And is this -- this is a schedule with

9 signatures on the bottom of the --

10 **A. Schedule.**

11 Q. -- of the schedule. And it's sometime in July

12 of --

13 **A. That's to the best of my memory, yes.**

14 Q. And is it just a one page schedule?

15 **A. It's a big schedule.**

16 Q. A big schedule signed at the bottom.

17 **A. But it's one page, yes.**

18 Q. Okay. Do you know if you've filed that

19 document with the court in this proceeding?

20 **A. It was made available to UMC during its due**

21 **diligence process and specifically between counsel**

22 **following the note -- the notice of cancellation of**

23 **services with 30-day notice. Well, 30-day notice of**

24 **cancellation of services.**

25 Q. When you say "made available," was this in the

173

1 data room?

2 **A. It was exchanged between counsel I know for**

3 **sure because we were contesting the 90-day requirement**

4 **on the amended agreement which was later reasserted to**

5 **say, "No, the agreements are expired and there are no**

6 **agreements." So that was the context under which my**

7 **memory serves.**

8 Q. Is this a -- have you seen it -- is this a

9 paper document?

10 **A. Uh-huh.**

11 Q. But it's a bigger than just eight and a half

12 by 11?

13 **A. Yes. I think it's 11 by 14 -- I mean it's**

14 **bigger than 11 by 14. It's probably 14 -- this big.**

15 Q. Yeah. And is it black and white or color?

16 **A. It's color.**

17 MR. DRAKE: And do you know -- I'm not

18 sure what he's talking about -- do you know if it's

19 produced, if there's a Bates number?

20 MR. SPROUSE: I don't know what's been

21 Bates labeled. I think it has been exchanged.

22 Q. (By Mr. Drake) I understand, though, this is

23 actually signed. Right?

24 **A. Yes, sir.**

25 Q. Like with a signature?

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1 **A. Yes, sir.**

2 Q. Someone took an ink pen and signed their name

3 to it?

4 **A. Yes.**

5 Q. So it wouldn't just be an Excel file. Right?

6 **A. Well, it's both, but the Excel file obviously**

7 **isn't signed.**

8 Q. Yeah. So is it like an Excel file that's

9 printed out and then someone signed the bottom of it?

10 **A. Correct.**

11 Q. Okay. We'll track it down, I guess. But

12 again that's not something you have any personal

13 knowledge of anyway. Right? I mean the actual

14 discussion, how it was signed, et cetera.

15 **A. Correct.**

16 Q. You just know Mr. Dzieszinski asserted that he

17 had entered into some type of agreement?

18 **A. And his signature was on the document.**

19 Q. Sure. And you say Mr. Valenti?

20 **A. No, Michael Nunez, the CFO.**

21 Q. Yes. And do you know if Mr. Adams has seen

22 that document?

23 **A. I don't know if he has.**

24 MR. DRAKE: Have you-all come to any

25 resolution on the sale process and the identity of the

175

1 parties? I don't know if you've had a chance to review

2 the protective order.

3 MR. SPROUSE: We haven't had a chance to.

4 MR. DRAKE: Okay.

5 Q. (By Mr. Drake) I'm just going to ask you --

6 your lawyer can make instructions, that's fine -- just

7 for the record, you know, who the parties are that

8 you've talked to as far as being potential strategic

9 partners since Miller Buckfire was retained?

10 **A. I'm not going to answer that.**

11 Q. And on what basis?

12 **A. Counsel's advice.**

13 MR. DRAKE: And I'm willing to seal or

14 enter into whatever -- I mean we've got a protective

15 order. We can keep it confidential.

16 MR. SPROUSE: I appreciate that, but

17 we're going to keep that information confidential as of

18 today.

19 MR. DRAKE: Okay.

20 MR. SPROUSE: We're not going to offer

21 any testimony about it today.

22 MR. DRAKE: Is there an order -- are you

23 aware of an order from the bankruptcy court?

24 MR. SPROUSE: I'm not aware of an order.

25 We have objected to your 2004 motion on that basis, so

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1 we've lodged the objection and I'm renewing it now.

2 MR. DRAKE: Objection to our -- you say

3 the objection. Objection to my question or objection

4 to our motion for 2004?

5 MR. SPROUSE: Both.

6 MR. DRAKE: Okay. So you're saying your

7 written response to our motion?

8 MR. SPROUSE: Yes.

9 MR. DRAKE: You're relying on that

10 objection?

11 MR. SPROUSE: And what I've said today on

12 the record, yes.

13 MR. DRAKE: Correct. Okay. And just to

14 save everybody time, if I ask 100 more questions about

15 that subject matter, you're going to give him the same

16 instruction?

17 MR. SPROUSE: I would object 100 times,

18 yes.

19 MR. DRAKE: Okay. So to save time can I

20 just not ask my questions?

21 MR. SPROUSE: I think that's best.

22 MR. DRAKE: Okay. Very good.

23 Q. (By Mr. Drake) And then just a couple of

24 questions on the motion we mentioned briefly. You said

25 you were aware of the motion filed last night to extend

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1 exclusivity until January of 2016. Correct?

2 **A. Yes.**

3 Q. Okay. And why in your opinion as CEO of the

4 debtor would it be beneficial to the debtor's

5 operations if you have the exclusive right to offer a

6 plan?

7 **A. Doing a plan is going to be complicated enough**

8 **without trying to compete with an alternative plan for**

9 **which you don't understand the basis or premises. We**

10 **are making progress towards a plan that I believe will**

11 **be a realistic plan for consideration by the court.**

12 **So it's more of efficiency to not be**

13 **complicating the process with an alternative plan that**

14 **you're both -- one, you're building your own and then**

15 **trying to respond to another.**

16 Q. And so the plan on which you're making

17 progress that you believe will be a realistic plan, you

18 know, what generally does it include for the debtor's

19 restructuring or is it even a restructuring?

20 **A. In the global sense, yes, but how has not yet**

21 **been determined. We're still evaluating options.**

22 Q. Is there any other reason that you think it

23 would be beneficial for a debtor to have exclusive

24 rights to promote a plan?

25 **A. For the timely resolution of this dispute, I**

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1 think it's in everyone's best interest to allow a  
 2 single plan to be heard first rather than competing  
 3 plans.  
 4 Q. And are you able to offer a plan without  
 5 knowing how the lease dispute is resolved?  
 6 A. I believe it will be possible to do so if  
 7 things develop along certain lines.  
 8 Q. What things need to develop along what lines?  
 9 A. Well, we have interested parties and their  
 10 views on how this might work will influence some of  
 11 that.  
 12 Q. And when you say "interested parties," do you  
 13 mean strategic partners?  
 14 A. I mean interested parties.  
 15 Q. What do you mean by that?  
 16 A. Anyone who has an interest in assisting the  
 17 Children's Hospital emerge from this process.  
 18 MR. DRAKE: Mr. Herbers, appreciate it.  
 19 Pass the witness.  
 20 MR. SPROUSE: I'll reserve my questions  
 21 for trial. Thank you.  
 22 (The deposition concluded at 4:40 p.m.)  
 23  
 24  
 25

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1 CERTIFICATION

2  
 3 I, the officer before whom the foregoing  
 4 deposition was taken, do hereby certify that I  
 5 personally recorded the testimony of the witness whose  
 6 testimony appears in the foregoing deposition; that  
 7 said deposition is a true record of the testimony given  
 8 by said witness; that I am neither attorney for,  
 9 related to, nor employed by any of the parties to the  
 10 action in which this deposition is taken, and that I am  
 11 not a relative or employee of any attorney employed by  
 12 the parties hereto, or financially interested in the  
 13 action.  
 14  
 15  
 16  
 17 Teri C. Finnegan  
 Certificate No. 2911  
 Expires: 12-31-2015  
 Firm No. 734  
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1 CHANGES AND SIGNATURE

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I, MARK C. HERBERS, SR., have read the foregoing  
 deposition and hereby affix my signature that same is  
 true and correct, except as noted herein.  
 \_\_\_\_\_  
 MARK C. HERBERS, SR.  
 SUBSCRIBED AND SWORN TO before me this the  
 \_\_\_\_\_ day of \_\_\_\_\_, 2015.  
 SEAL:  
 \_\_\_\_\_  
 NOTARY PUBLIC  
 EXPIRES: \_\_\_\_\_

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