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UNITED STATES DISTRICT COURT.

DISTRICT OF CONNECTICUT

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United States of America	)	
	)	
Plaintiff.	)	NO: 3:14cv1558(JCH)
	)	
vs.	)	November 22, 2016
	)	3:06 p.m.
Ajay S. Ahuja, M.D.	)	
Defendant .	)	

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141 Church Street  
New Haven, Connecticut

HEARING

B E F O R E:  
THE HONORABLE JANET C. HALL, U.S.D.J.

A P P E A R A N C E S:

For the Plaintiff	:	Alan M. Soloway David Nelson U.S. Attorney's Office 157 Church St., 25rd floor New Haven, CT 06510
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For The Defendant	:	Glenn Allan Gazin Law Office of Glen Gazin 24 Hoyt Street Stamford, CT 06905
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Court Reporter : Terri Fidanza, RPR

Proceedings recorded by mechanical stenography, transcript produced by computer.

1 THE COURT: We're here this afternoon in the matter  
2 of United States versus Ahuja, Case Number 3:14CV1558. If I  
3 can have appearances please.

4 MR. NELSON: Alan Soloway and David Nelson for the  
5 Government, Your Honor.

6 MR. GAZIN: Attorney Glenn Gazin on behalf of the  
7 defendant, Ajay Ahuja, MD.

8 THE COURT: I would note the presence of your  
9 client.

10 MR. GAZIN: My client Dr. Ahuja, yes.

11 THE COURT: And someone else is with you?

12 MR. GAZIN: Acting in the joint capacity of both  
13 advisor to my client directly and as my unofficial associate  
14 attorney in this case and official paralegal Nicholas Ahuja  
15 as well.

16 Before you proceed further, your Honor, I brought  
17 them in, but I did not presume the Court would permit them.  
18 It is entirely a matter of the Court's discretion.

19 THE COURT: I sometimes do these in the courtroom.  
20 I sometimes do them in my chambers. Obviously I assume they  
21 know they were not playing a speaking role this afternoon.

22 MR. GAZIN: Yes, Your Honor.

23 THE COURT: That's fine.

24 (Discussion Off the Record.)

25 THE COURT: So we're ready for trial. Jury

1 selection on the 5th.

2 MR. SOLOWAY: I think the 5th for jury selection and  
3 the 6th for testimony.

4 THE COURT: Can we start evidence on the 5th? Is  
5 there any reason --

6 MR. GAZIN: Your Honor, I haven't been given an  
7 opportunity to answer the question. Plaintiff is giving  
8 their answer. It is now my turn, if I may, Your Honor.

9 THE COURT: For the date of the trial?

10 MR. GAZIN: No, regarding -- I won't be coy. I will  
11 get to it. My client is prepared to plead guilty to the  
12 issue of liability on this matter. So, therefore, obviate  
13 the need for the jury trial.

14 THE COURT: Okay. Which leaves just the issue of I  
15 will call it the remedy for the government. I don't know  
16 that's technically the right now.

17 MR. GAZIN: Remedy. Damages. Whatever.

18 THE COURT: You can't object, Attorney Soloway.

19 MR. SOLOWAY: No, not in the least. The only thing  
20 that I have to say with regard to that is that the witnesses  
21 were prepped as to testimony --

22 THE COURT: Sure, for trial.

23 MR. SOLOWAY: We wouldn't be able to go forward --

24 THE COURT: We'll talk about that I guess, but my  
25 first question to you and to Dr. Ahuja is are you prepared to

1 do that today because otherwise the jury is getting called in  
2 and coming in and we'll pick a jury.

3 MR. GAZIN: You mean going on the record and  
4 pleading liability? I understood the court would expect us  
5 to make that declaration on the record today. Otherwise how  
6 could they postpone and then we change our minds, so I  
7 understood it is fish or cut bait.

8 THE COURT: Okay. Then I think I do need to have  
9 Dr. Ahuja play a speaking part today because I want to be  
10 sure he knows -- understands what he's doing. I can  
11 obviously take your representation. It is a civil matter.  
12 He's bound by it. It has also a punitive feel to me this  
13 consent of what gets assessed after in this case if it is an  
14 admission, so I would feel more comfortable if I can ask him  
15 if you don't mind, Doctor, answering a few questions.

16 THE DEFENDANT: If my lawyer allows me.

17 MR. GAZIN: We discussed this prior to coming today.  
18 To the best of my ability, I prepared him for it.

19 THE COURT: If you have any questions or you don't  
20 want to answer a question, you can say I don't want to answer  
21 it. I don't know how to answer it. I need to talk to my  
22 lawyer.

23 MR. SOLOWAY: Your Honor, I don't mean to interrupt  
24 the Court. Would it be appropriate to have the witness  
25 sworn?

1 THE COURT: I don't think so.

2 MR. SOLOWAY: It is just because --

3 THE COURT: It is civil.

4 MR. SOLOWAY: It is civil, but as the Court noted,  
5 it's a peculiar animal.

6 MR. GAZIN: I have no objection to him being  
7 sworn.

8 THE COURT: Do you object?

9 MR. GAZIN: No.

10 THE COURT: I don't have Diahann. I don't have the  
11 oath but if you will raise your right hand, do you solemnly  
12 swear that your answers to the questions you are about to  
13 give to the Court will be the truth and nothing but the truth  
14 so help you God?

15 THE DEFENDANT: Yes.

16 THE COURT: The record should reflect that Dr. Ahuja  
17 was sworn. It should be in the minute entry.

18 MR. GAZIN: Before you begin the canvass, my  
19 client's English is good, but it is not great, so you've  
20 already instructed him if he has any questions. I would seek  
21 an interruption or a chance to say something only in order to  
22 help clarify the question he was asked but not to influence  
23 or obstruct.

24 MR. SOLOWAY: Dr. Ahuja has some difficulty hearing  
25 that's compounded by the circumstances.

1 (Discussion Off the Record.).

2 THE COURT: Can you hear me when I speak like this?

3 THE DEFENDANT: Yes.

4 THE COURT: I will try to remember to speak like  
5 this. Before I ask you any questions, though, I need to ask  
6 the Government's counsel a question. I had asked you to  
7 clarify the statutory support for your claims and you  
8 responded by saying that the correct citation should be 21  
9 USC 841(a) and 842(a)(2). 841(a) is a criminal statute.

10 MR. SOLOWAY: It is also applicable, as I understand  
11 it. I don't have that pleading in front of me, but it also  
12 deals with the questions of the civil penalties, Your Honor.  
13 I will report back with a further clarification for the  
14 Court. I was not prepared to address that this afternoon.

15 THE COURT: Okay.

16 MR. SOLOWAY: I know the pleading the Court is  
17 referring to. I will make it as clear as I can.

18 THE COURT: 842(a)(1) is I believe the correct cite,  
19 the cite you are wanting to cite. You said (2) but that also  
20 may be a typo.

21 MR. SOLOWAY: It may be. I will go back and clarify  
22 that for the Court.

23 MR. GAZIN: For reference, Your Honor, if I may,  
24 could I ask Attorney Soloway to state which count it is that  
25 the rule that's been raised is cited. It will save me going

1 through all 23 counts.

2 MR. SOLOWAY: I don't have that right now. I have  
3 the Complaint. I will copy you obviously on whatever I  
4 supply to the Court.

5 THE COURT: Give me one moment.

6 The question arose in context of Counts 19 through  
7 22. They cited 841(a)(1) but the trial memorandum cited 829  
8 and 842(a)(1). So I asked them to clarify and they filed  
9 Docket 91 which is called Clarification of Statutory Support.  
10 But as I say, there's still I think some confusion. I  
11 believe there is a cite which supports the counts, but it's  
12 just not properly cited.

13 MR. SOLOWAY: I will clarify that for the Court,  
14 Your Honor.

15 THE COURT: Dr. Ahuja, I know you are aware that in  
16 2014 on October 22, the Government filed a Complaint against  
17 you. And in that Complaint in 23 counts, they make various  
18 allegations about your failure to comply with the law --  
19 federal law with respect to dispensing of certain types of  
20 drugs and the appropriate recordkeeping.

21 THE DEFENDANT: That's correct.

22 THE COURT: If you think I'm mischaracterizing,  
23 that's just a general. And then so there's a number of these  
24 counts which relate to different times and different patients  
25 who were receiving medication or prescriptions as to which

1 the Government claimed proper records were not kept.

2 THE DEFENDANT: Okay.

3 THE COURT: Agree?

4 Okay. And as I know also you are aware, we, the  
5 Court, is prepared to provide the Government the opportunity  
6 at a trial. That's what a trial is. To give the person who  
7 brings the case the opportunity to prove the claims that they  
8 made against you. Obviously you, through your lawyer,  
9 answered these claims and denied them at the beginning of the  
10 case so that sets up a trial. And we're set on December 5 to  
11 call in about 40 or 50 citizens from whom we would pick a  
12 jury, who would listen to the evidence the Government offers.  
13 You, through your lawyer, at that trial, have the opportunity  
14 to confront the Government's witnesses, ask them questions,  
15 to challenge the Government's exhibits that they offer. You  
16 have the right to call your own witnesses including issuing  
17 court orders, your lawyer has this power, but a court order  
18 it is called a subpoena which requires a person to come to  
19 court and testify for you if you want to have that person  
20 come testify for you. And lastly, you yourself could testify  
21 at this trial. Do you understand that all of that can happen  
22 at this trial?

23 THE DEFENDANT: Yes.

24 THE COURT: I want to be sure you understand that at  
25 a trial, a defendant doesn't ever have to do anything,

1     though, because the burden is on the person who brought the  
2     lawsuit. In this case, the Government. The burden is on  
3     them to persuade the jury and in this case, it is a civil  
4     case, so it is a preponderance of the evidence burden and  
5     that's a fancy phrase that means more likely than not so it's  
6     50 plus percent the Government has to persuade the jury to  
7     that extent, to that level of evidence that you, in fact,  
8     committed -- violated the law as the Government has claimed.  
9     And so it is their burden, not yours. You don't have a  
10    burden to prove you're innocent or you didn't do it or they  
11    are wrong. It is their burden to prove that what they said  
12    you did wrong is correct or is more likely true than not  
13    true. Do you understand all of that?

14           THE DEFENDANT: Yes.

15           THE COURT: Do you have any questions about anything  
16    at this point? You can talk to your lawyer at any time.

17           MR. GAZIN: Can we go off the record?

18           (Discussion Off the Record.)

19           THE COURT: It is always the Court in this type of  
20    cause of action. That's unusual, Dr. Ahuja. Normally if the  
21    Government or anybody sues another person in a civil case,  
22    not a crime, but a civil case, usually the jury decides both  
23    is the plaintiff going to win. If they are, how much money  
24    do they get. This cause of action that the Government is  
25    proceeding on is a little different.

1           You have a right to a jury to decide did you do  
2 something wrong as they claim, but if the jury answer is yes,  
3 you did something wrong, then the jury's done. It comes to  
4 me to say how much should you pay to the Government as a  
5 penalty, a fine. I'm not sure exactly how it is  
6 characterized in the statute, but how much money should you  
7 pay because the jury found you had done something wrong.

8           THE DEFENDANT: But I don't want to pay anything.

9           THE COURT: I understand that.

10          THE DEFENDANT: I'm sorry. Just kidding.

11          MR. GAZIN: He does understand he's at risk to  
12 having to pay something.

13          THE COURT: Absolutely. I will cover that in a  
14 minute. I'm trying to get through the trial part of it  
15 first. So you have the right to this trial and obviously if  
16 we had that trial, whether you spoke or whether you  
17 testified, whether you called witnesses, whether you  
18 challenged the Government's evidence or not, either way at  
19 the end of the trial, the jury would come back with a  
20 verdict. I would tell them what the law was and they would  
21 look at the evidence and decide in light of the law I tell  
22 them to apply, whether they think the Government has proved  
23 you did something wrong or not.

24                 If they come back and said no, Dr. Ahuja, didn't do  
25 anything in violation of the law, then that would be the end

1 of it. Judgment would enter for you. However if they came  
2 back and said yes, the government carried its burden. In  
3 fact, Dr. Ahuja on at least one, if not all of these counts,  
4 they could decide some and not all. It could be a mixed  
5 verdict, but if they say just one count, then, they would be  
6 discharged. They would have done their duty, the jury. At  
7 that point, then I would have to have the duty of deciding  
8 what penalty should be imposed, what amount of money should  
9 you have to pay.

10 So that's what could happen in this case. Now, your  
11 attorney has indicated and I think you agreed he was correct  
12 that you have decided that you want to admit that you made a  
13 mistake. I will put it in a colloquial way. You want to  
14 admit what the Government said you did in failing to keep  
15 proper records, et cetera. You will admit it.

16 THE DEFENDANT: Yes.

17 THE COURT: Then you will leave me as you would if  
18 it had gone to the jury, the question will still remain what  
19 penalty or what amount of money would you be required to pay  
20 because of your now admitted to violation of the statute.

21 THE DEFENDANT: Would you consider my income as part  
22 of making the decision?

23 MR. GAZIN: May I answer? I beg your pardon. You  
24 can't ask her that question. I will not permit you to. It  
25 is improper.

1 THE DEFENDANT: Withdraw.

2 THE COURT: I can tell you the process I would  
3 expect. The Government would have the right to offer  
4 evidence to the Court, and if there isn't agreement on the  
5 evidence, then you can challenge the evidence in the sense  
6 that your lawyer, if a witness the Government wants to put on  
7 or if they want to submit an affidavit to me and your lawyer  
8 says no, you have to see this witness. You won't believe him  
9 if you had to hear him live. I want him on the witness  
10 stand. I guess we would have a hearing then. But it would  
11 be focused more. It would focus on the violations in the  
12 sense of that's what the dollar figure is being imposed to  
13 rectify I guess is how I would view it. But there would be I  
14 think, unless the Government wants to disagree with me, it  
15 would be relevant, other facts beside facts limited solely to  
16 the violations would be relevant at the time of the  
17 determination or hearing on the amount of penalty to be  
18 imposed.

19 MR. SOLOWAY: That's correct, Your Honor.

20 THE COURT: That would be my instinct.

21 MR. SOLOWAY: The cost of the investigation, for  
22 example.

23 THE COURT: That would be your evidence to offer.

24 MR. SOLOWAY: That's correct.

25 THE COURT: The other side could offer what I would

1 call mitigating evidence, what were the nature of these  
2 violations, what harm, no other harm happened. They could  
3 offer that type of evidence. They could offer evidence I  
4 suppose of ability to pay. Seems to me if it is in the  
5 nature of a fine or a penalty, I don't know unless there's  
6 law out there that you are going to tell me. I don't know  
7 this, Doctor. You shouldn't rely on this. But I would say  
8 generally I would think you can put in evidence of your  
9 ability to pay or your worth. It could be, though, in this  
10 area that the law says I can't consider that. If that's what  
11 the law says, I would have to say to you, I appreciate you  
12 want to tell me this, Dr. Ahuja I can't hear it. It is not  
13 relevant to the type of penalty.

14 Normally when we talk about a fine in a criminal  
15 context or punitive damages in a civil case, we do look at  
16 what a person's ability to pay is because the theory is that  
17 if you are trying to punish someone -- I once had a case  
18 where I had punitive damages to award against Microsoft. The  
19 question was how much does it take to punish Microsoft. A  
20 lot more than it takes to punish me, I can tell you, right.  
21 But I can tell you and you can't decide today whether you are  
22 going to agree that you are liable on these counts, based  
23 upon any representation from me that you can introduce this  
24 kind of evidence because I don't know the law and so you  
25 can't rely on it. If it's allowed, then I will hear you on

1 it. Is that clear?

2 THE DEFENDANT: Yes.

3 THE COURT: If the law says it is not relevant, then  
4 that's the end of it, and I can't hear it, and I couldn't  
5 consider it. Is that fair enough?

6 MR. SOLOWAY: Yes.

7 MR. GAZIN: I don't want to interrupt the canvass.  
8 I would like the later part of today to discuss with you --

9 MR. SOLOWAY: Can you speak up please?

10 MR. GAZIN: I would like to speak briefly on that  
11 issue of the scope of the penalty phase. If not concluding  
12 or discussing the content, at least discussing how we'll go  
13 about addressing it.

14 THE COURT: We'll do that. So I guess you have a  
15 choice here today which is you can say to me, Judge, I would  
16 like to have a trial. I want the jury to decide did I do  
17 anything wrong like the Government says or not or if you want  
18 to, which is what I'm prepared to do. That's what we came  
19 here today to get ready for. If you want to, as counsel  
20 indicated, say to me, Judge, I want to admit that what the  
21 Government says I did or more likely failed to do in terms of  
22 the recordkeeping and those kind of allegations in each of  
23 the 23 counts, I want to say yes, that's right. I want to  
24 "admit" it is called in the law. That's your other choice  
25 today. So that choice is yours to make. I guess I should

1 ask you -- I assume you are of sound mind today, you aren't  
2 on any medication that disorients you or confuses you or  
3 anything like that?

4 THE DEFENDANT: No.

5 THE COURT: So I think it is for you to decide now  
6 if you want to talk to counsel in the hallway for a moment,  
7 if there's any questions you have for me based on what I  
8 said. You should ask me.

9 (Speaking with the paralegal)

10 THE DEFENDANT: I want to talk to him.

11 THE COURT: Go out in the hall.

12 (Whereupon, a recess was taken from 3:25 p.m. to  
13 3:33 p.m.)

14 THE COURT: Ready to proceed?

15 MR. GAZIN: We are.

16 THE COURT: Do you have any questions for me?

17 THE DEFENDANT: No.

18 THE COURT: So do you wish to admit to each of  
19 Counts One through 23 of the Complaint that the Government  
20 filed against you?

21 THE DEFENDANT: Yes.

22 THE COURT: And by doing that, you understand that  
23 that's the same as if this had been tried to the jury and the  
24 jury had said we find for the Government in this case?

25 THE DEFENDANT: That's correct.

1 THE COURT: That all. What will remain, which as  
2 your counsel eventually requested, we'll talk about the  
3 procedure here in a minute, will be whatever is necessary for  
4 the Court, me, to be in a position to make a decision about  
5 the consequences of your admitting Counts One through 23.  
6 That's what penalty would be assessed against you. All  
7 right?

8 THE DEFENDANT: Yes.

9 THE COURT: So there anything further you think I  
10 need to inquire?

11 MR. SOLOWAY: No, Your Honor.

12 MR. GAZIN: No, Your Honor.

13 THE COURT: Let's talk about how we proceed to  
14 finish the case in the sense to get to that penalty phase.

15 MR. GAZIN: I would defer to the plaintiff. This is  
16 their case. I thought they should start with what their  
17 requirements are.

18 MR. SOLOWAY: We get into a couple of different  
19 things that need to be considered. Is the Court going to  
20 want proof by affidavit?

21 THE COURT: Let's start. I think that's a good  
22 question. But let's start first with the type of proof the  
23 Government would want me to hear, the type of evidence you  
24 would want to present to effect my decision on the penalty  
25 phase.

1 MR. SOLOWAY: As a beginning, we would want to  
2 present information as it relates to our costs. I ran costs  
3 and I'm not going to go into the number right now, as late as  
4 a month ago, so I would think that it would be somebody from  
5 the Drug Enforcement Administration that would talk about  
6 the --

7 THE COURT: Let's hold off on who. That might be  
8 affected if we think an affidavit would be sufficient.

9 MR. SOLOWAY: Someone from Drug Enforcement  
10 Administration would say we spent this many hours on the case  
11 since the inception in the early 2014.

12 THE COURT: You want me to hear evidence about the  
13 cost of the investigation.

14 MR. SOLOWAY: Which includes investigative time by  
15 DEA. It would include investigative time by the state drug  
16 control, include the Government's cost in terms of the expert  
17 witnesses. We went to Philadelphia to depose --

18 MR. GAZIN: Defendant's expert.

19 MR. SOLOWAY: We spent money on.

20 THE COURT: That's fine. I don't need the laundry  
21 list. I think I have an idea.

22 MR. SOLOWAY: Our costs in general. We might also  
23 seek to present information about the possibility of what  
24 happens if these drugs diverted from the legitimate means to  
25 other purposes so it might be serving as a public interest

1 argument, if you will.

2 THE COURT: Give me an idea how you would offer  
3 someone from the DEA as an expert.

4 MR. SOLOWAY: Someone from Drug Enforcement  
5 Administration or the State or perhaps even the Government's  
6 expert can talk about the public message to be sent.

7 THE COURT: Does the Government contend, I'm not  
8 saying it is not relevant as a possibility, but I'm asking  
9 would there be evidence in this case those possibilities  
10 actually happened in the case?

11 MR. SOLOWAY: I don't know for sure.

12 THE COURT: The drugs were diverted to a 14 year  
13 old.

14 MR. SOLOWAY: That's the problem we don't know.

15 THE COURT: That's fine. I'm not criticizing. I'm  
16 trying to find out would you have a theoretical risk, the  
17 public interest argument why you prosecute these kind of  
18 cases. Why you bring them. I also wanted to know is there  
19 actual evidence or evidence of actual diversion. If the  
20 answer is no, we can't, that's hard to know, that's why we  
21 would offer what the potential is, that's fine.

22 MR. SOLOWAY: I think that's a fair statement and  
23 quite frankly if there was evidence to suggest that, it would  
24 be someone from the criminal division before Your Honor and  
25 not Attorney Nelson and myself.

1 THE COURT: I would have assumed that. I want to be  
2 sure. Anything else?

3 MR. NELSON: I think that's probably it, Your Honor.

4 THE COURT: I don't want to try the case so don't  
5 misread what I'm about to say. I know I have read in some  
6 pleadings, could have been summary judgment briefs, that's  
7 awhile ago. I will forget it.

8 At some point in this process, somebody would very  
9 tightly summarize in effect what any one of these counts was,  
10 not every one of them, what it was the doctor did or didn't  
11 do as to one of these as an example say so I would have a  
12 better understanding. He's admitted it. What it says in the  
13 Complaint is that his June records weren't maintained in a  
14 certain way under the statute.

15 MR. SOLOWAY: I can think of relevant testimony from  
16 two investigators. One from a supervisory perspective and  
17 the line investigator who could actually talk about what was  
18 done in each of the 23 counts.

19 THE COURT: I don't know that I need each. I would  
20 suspect you can group them. Some seem to be under the same  
21 statute. There's a new statute, then you allege a different  
22 thing. One might be evidence enough. I don't know. Maybe  
23 it wouldn't be. I would like to put some flesh on what your  
24 claim is. I think that's true for both sides would want me  
25 to understand that.

1 MR. SOLOWAY: I think that could be done.

2 THE COURT: Again I don't need five days of evidence  
3 like the trial was going to be. As I say, I have a vague  
4 recollection something in the summary judgment briefs talked  
5 about this. What was claimed to be done and I remember  
6 particular people being mentioned on recipient of drugs. I  
7 don't have a good recollection of a sense of it so you think  
8 that might be it.

9 MR. SOLOWAY: I think that could be it. Realistic I  
10 think the direct testimony for those two witnesses maybe a  
11 couple of hours.

12 THE COURT: Okay. Before I ask you what, if  
13 anything, further you would want to offer other than the two  
14 witnesses he mentioned at the end in response to my desire to  
15 have some flesh on the bones, shall we say here, would you  
16 have any problem with doing certainly the costs of  
17 investigation by affidavit, subject to your right to have  
18 them come and you do cross-examination of them?

19 MR. GAZIN: As long I have the right to cross, I  
20 can't object to an affidavit.

21 MR. SOLOWAY: I would have to talk it over with the  
22 witnesses. I can't see now why we would.

23 THE COURT: It may be, for example, he could choose  
24 not to cross at all, but he also could choose not to contest  
25 some of what you are putting in there but contest others. I

1 think I can get the value of the testimony from your offer in  
2 the form of an affidavit. And then I think to the extent he  
3 wants to cross, he can. He would have to give notice to you  
4 guys to be sure you get the witness. I assume those are  
5 different witnesses than the ones you are talking about.

6 But the other evidence I guess you mentioned the  
7 supervisor and somebody else, you know, on the flesh on the  
8 bones thing and then the possibility of diversion, that could  
9 either be those folks or could be the expert I guess you  
10 said.

11 MR. SOLOWAY: It is possible. We have to flush our  
12 argument.

13 THE COURT: If you want to offer it by way of  
14 affidavit, you could, but I think that's always subject to  
15 him saying, I've got to cross-examine them, Judge.

16 MR. GAZIN: I would state if I get the affidavits in  
17 sufficient time, I would have a chance to review them and  
18 give you an answer so you would have sufficient time. It is  
19 in my interest to accept an evidence if it speeds things  
20 along.

21 THE COURT: It's less time and less cost. I don't  
22 need to see that in live testimony to start with, somebody up  
23 there with dollars and cents and everything.

24 What about from the defense side, do you anticipate?

25 MR. GAZIN: Well, your Honor, there are four factors

1 based on the decision of USA v. Barton Butterbaugh, the  
2 Western District of Washington Seattle case decided in August  
3 2015 in which they recite four factors. So yes, I would want  
4 answers.

5 MR. SOLOWAY: What was the cite?

6 MR. GAZIN: A new case. I will give you a copy.

7 MR. SOLOWAY: That's fine.

8 MR. GAZIN: USA v. Barton Butterbaugh, C14-515TSZ  
9 dated August 5, 2015.

10 Anyway four factors, culpability; profit, if any; it  
11 was a drug case, harm to the public and financial capacity.  
12 I mention those not to make an argument on anything. That's  
13 what our evidence would be.

14 THE COURT: Who do you think you will be calling?

15 MR. GAZIN: I will be calling the defendant. He'll  
16 be putting flesh on the bones of what he did and why and how.  
17 But then I'm not sure about the others. I -- it depends on  
18 the scope of what the Court will permit us to bring on.  
19 Seems to me might be relevant to bring in the sympathetic  
20 neighbors and patients to attest to what a swell doctor Dr.  
21 Ahuja is. Not for the purpose of invoking the Court's  
22 sympathy, but rather I can't help but think it is implicit,  
23 if not explicit, in the issue of penalty just how egregious  
24 my client's manner of practicing medicine is especially with  
25 regards to Counts 19 to 22 which are a different species of

1 violations of all the other counts.

2 It is my opinion that all the other counts largely  
3 deal with record keeping and inventory. One could argue  
4 that, but I will simplify that. Whereas 19 to 22 address the  
5 issue of dispensing or prescribing controlled substances  
6 outside the course of ordinary medical practice which is the  
7 sensitive -- to me the most sensitive and most inflammatory,  
8 the most volatile counts, and it does impact or seem to  
9 address the manner which the doctor practices medicine. It  
10 seems to me if I'm wrong, tell me that a very brief and very  
11 precise summation or representations about the manner in  
12 which Dr. Ahuja practiced medicine for 33 years is something  
13 that the Court might want to weigh overall of the assessment  
14 of its penalty. But the Court will decide.

15 THE COURT: You are really talking about -- it is  
16 not a character witness, but it's sort of in the nature of  
17 that. The question is what is its relevance to, if you are  
18 right about these four factors, assuming the Second Circuit  
19 would follow those or has established those four, I mean it  
20 could be culpability, but I'm not sure. I don't want to cut  
21 you off, but I also don't want to go on for days listening  
22 to --

23 MR. GAZIN: I understand that. That might be  
24 something I'm wondering before we have this. I'm not trying  
25 to burden anyone, but the Court might want us to prepare

1 brief briefs on the issue of the range of material.

2 THE COURT: I was going to get to that as to what  
3 the legal standard is.

4 MR. GAZIN: We would know in advance what the Court  
5 wants to hear and what it doesn't want to hear. I don't want  
6 to bring a string of witnesses if the Court says -- at the  
7 hearing, the Court rules against and I wouldn't want to fail  
8 to bring one that I didn't bring and I'm sure that could be  
9 said of the opposing side, too.

10 MR. SOLOWAY: Your Honor, I can suggest that if  
11 Attorney Gazin on behalf of Dr. Ahuja were to bring those  
12 types of witnesses in, then the Government would want to  
13 bring in Dr. Perrin who had relevant testimony to give  
14 relative to the deviation from standard acceptable medical  
15 practice. There's precise language that was used. I'm not  
16 recalling it at the moment.

17 THE COURT: That was in the summary judgment I  
18 think, right?

19 MR. SOLOWAY: Yes. I'm not sure how relevant that  
20 is in terms of this Court assessing the amount of damages.  
21 If we were in the fact-finding stage, I think it would be  
22 relevant, but if we're in the penalty phase, I suggest that  
23 some of those factors are not relevant for this Court in  
24 terms of assessing damages.

25 THE COURT: Let's do this. Let's set a date for --

1 I think a short memo would be helpful to me where you each,  
2 you can do it simultaneously, set out what you think the  
3 standard is that I will be applying in deciding the number.  
4 Okay.

5 What are we aiming for to get this done in? I think  
6 I heard you hinting you don't want to do it in the time set  
7 for the trial. That's good time to do it in.

8 THE COURT: I'm available.

9 MR. GAZIN: I was afraid you would say that.

10 THE COURT: The case is getting long in the tooth.

11 MR. SOLOWAY: I would suggest if I might that we  
12 given that this is the holiday week, rather than set it for  
13 the date, what I will suggest is that we set it for a week  
14 after the trial date, so it would be the 12 or 13.

15 THE COURT: What's the it? The brief or the  
16 hearing?

17 MR. SOLOWAY: No, the brief. The brief brief.

18 THE COURT: The Government is not pressing me to get  
19 this done at the time of the trial?

20 MR. SOLOWAY: No, Your Honor.

21 MR. GAZIN: You will be surprised to hear that I  
22 concur. That's a reasonable period of time to submit.

23 THE COURT: The 5th was a Monday. You will do the  
24 briefing on the 12th.

25 MR. GAZIN: Yes.

1 MR. NELSON: Thank you, Your Honor.

2 THE COURT: The next thing I would like is for  
3 witness/exhibit lists and when I say "witness lists," I need  
4 three pieces of information. The name of the witness  
5 obviously and I suppose address if it is not somebody we know  
6 who it is from the trial list, a brief description of the  
7 purpose of calling this witness, so that's how I would be  
8 able to identify the witnesses you think you would like to  
9 offer that I'm uncertain, but you might tell me you would  
10 want to offer and then the length of direct examination.

11 The Government is going to list their cost people  
12 and you are going to say direct examination zero when you  
13 list them. You would say by affidavit, but you would  
14 describe who they are and why you are calling them.

15 MR. SOLOWAY: Does the Court want us to address  
16 these in the brief due the 12th?

17 THE COURT: No. We can do this a week or two after  
18 that or whenever. We can talk about when but separate but I  
19 would think we would start with you. You list who you are  
20 calling including by affidavit and why you are calling. In  
21 other words, what are they going to testify to. How long  
22 would their direct be. If it's zero, it is zero. Then we  
23 would schedule for you to in effect respond by listing -- you  
24 would have two sections. You take their list and you would  
25 put in cross-examination your estimated time, then you would

1 have a separate second section where you would list witnesses  
2 you would propose to call, the purpose of why you are calling  
3 them and how long you thought the direct would be. Then the  
4 Government, we would set a date to in effect fill in cross of  
5 their witnesses and any rebuttal.

6 MR. SOLOWAY: I take it that Court will put out  
7 something on the docket.

8 THE COURT: We'll talk about it here and it will get  
9 in the minute entry or calendar. We would stagger that, not  
10 long periods in between, could be a week in between each step  
11 of those. You would be responding. So at the end of that, I  
12 have both an idea what you think is relevant and I have an  
13 idea of the witnesses or the evidence you want to put in  
14 front of me to make that decision based on the standard you  
15 offered me.

16 I suppose I might either have a sort of prehearing  
17 conference or I might issue a short ruling. If and I'm not  
18 saying I would do this, but if I were to decide that the sort  
19 of character, the practice character witnesses were not  
20 relevant or I decided your costs weren't relevant. I'm not  
21 saying to either side that's what I'm deciding. Say I  
22 decided that, then I would be telling you we won't hearing  
23 that in this hearing so let's go forward with the hearing and  
24 put on whatever is left of the witnesses you identified.

25 Again I don't know whether I would do that in a

1 writing or I might probably more likely call you in and talk  
2 through it because it may be that let's say that I will hear  
3 some of that cost evidence, you know. I don't want to be  
4 buried in it or whatever or I think it is only this kind of  
5 cost. I'm making a hypothetical or I say to you I don't want  
6 to hear about Dr. Ahuja's decades in practice. But I will  
7 hear from a patient or two on this limited subject.

8           So that might be the reason I have you come in and  
9 do it, work our way through it that way, but if I thought  
10 there was something that was very clear legally, you know,  
11 this or isn't relevant and then I probably would do a short  
12 ruling. Like a ruling on Motion in Limine even though you  
13 hadn't made a motion. I don't know that until I see what you  
14 put in front of me. I think if you give me your standard by  
15 the 12th, let's say the Government would do their witness  
16 exhibit list -- is the 19th too soon or do you want to roll  
17 this whole thing after the holidays?

18           MR. SOLOWAY: I would refer prefer that. I'm  
19 supposed to go out of town that Saturday.

20           THE COURT: Do you have any problem with that?

21           MR. GAZIN: No.

22           THE COURT: How soon in January can I count on you  
23 to do it?

24           MR. SOLOWAY: Thank you, second week.

25           THE COURT: The first is a Sunday so the second so

1 by the 9th, the Monday, or let's make it the 10th.

2 MR. GAZIN: Thank you, Your Honor.

3 THE COURT: The defendant's a week later.

4 MR. GAZIN: Okay.

5 MR. SOLOWAY: The 17th?

6 THE COURT: The 17th. The Government either to  
7 indicate cross of their witnesses and/or rebuttal that would  
8 be the 24. Those are all Tuesdays so we would avoid the  
9 holiday in January. Then I am on trial in January on a  
10 criminal case, could through go through the end of January,  
11 what I will do I will identify a time for prehearing  
12 conference I guess I will call it. I might cancel it if I  
13 don't have any purpose to it, but we'll set a date for that.  
14 Then we'll set a date for the hearing. I think I just had a  
15 trial settle that was set for the second half of February.  
16 Was that Clark versus Stop & Shop? I don't have my calendar  
17 here. It is probably going to be the second half of February  
18 at some point. I will find a day or two whatever it sounds  
19 like we'll need. Doesn't sound like more than a day or two?

20 MR. SOLOWAY: I would think not.

21 THE COURT: It will likely be then. I don't think I  
22 can get it in before. I'm at conference dead in the middle  
23 of February. I'm a little worried if I put it in the  
24 beginning of February if that criminal case in January  
25 doesn't end on time, then I will be rolling you over, then

1 having trouble finding something. Safer to put it towards  
2 the end of February and we'll get it in. All right.

3 So I will shoot for the last week in February. The  
4 pretrial conference could be early February or just before  
5 the hearing. I will try for early February in case that  
6 affects your witnesses or whatever. Anything else I should  
7 do to get this ready?

8 MR. GAZIN: Sort of related. This case is scheduled  
9 for second settlement conference tomorrow morning at 9 a.m.  
10 with Judge Merriam and I thought I would raise it now. I  
11 don't wish to say anything about what happened last time. I  
12 won't.

13 THE COURT: I don't want to hear anything since I'm  
14 the only finder of fact. I don't want to hear about  
15 settlement.

16 MR. GAZIN: Let me put it this way. Do you feel  
17 there's any point to going?

18 THE COURT: You are going whether you think there's  
19 a point or not. Judge Merriam expects you to be there.

20 You can swing by her office if she's available. If  
21 you want to tell her you don't think it is fruitful.

22 MR. GAZIN: I wouldn't dream of it without  
23 consulting opposing counsel first.

24 THE COURT: I have no idea whether it is useful or  
25 not useful to have this conference. In the end, no matter

1 what I thought it was wouldn't matter. It is her conference.

2 MR. GAZIN: I wasn't going to get out of it. I  
3 asked for this initially.

4 THE COURT: I don't want to waste her time, but I  
5 think that's her call.

6 MR. SOLOWAY: So afterwards.

7 THE COURT: You can go up to the third floor. Tell  
8 the law clerk what's happened, if anything.

9 MR. SOLOWAY: Because if we are successful with  
10 Judge Merriam and again without getting into specifics, it  
11 moots this out.

12 MR. GAZIN: I realize that.

13 MR. NELSON: Judge, I have a trial before Judge  
14 Arterton the early part. I don't think I have a conflict.

15 THE COURT: Check that and let me know. I don't  
16 have her schedule.

17 MR. NELSON: I was a late add on to the case. I  
18 haven't gotten it under control, Your Honor.

19 MR. GAZIN: Thank you.

20 THE COURT: How long a trial?

21 MR. NELSON: Short. I don't think it is going to  
22 go. Quite frankly it is not great for us.

23 THE COURT: That's unusual for the Government to be  
24 of that view.

25 MR. NELSON: It is an employment case. Some of them

1 are good.

2 (Discussion Off the Record.)

3 THE COURT: Anything else. Any questions, Dr.

4 Ahuja?

5 THE DEFENDANT: No.

6 THE COURT: All right. Thank you all very much.

7 (Whereupon, the above conference adjourned at 3:57

8 p.m.)

9

10

11 COURT REPORTER'S TRANSCRIPT CERTIFICATE

12 I hereby certify that the within and foregoing is a true and

13 correct transcript taken from the proceedings in the

14 above-entitled matter.

15

16 /s/ Terri Fidanza

17 Terri Fidanza, RPR

18 Official Court Reporter

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