IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 1:15-CR-004-AT
LINDA WORTH	:	

ORDER

I. PROCEDURAL BACKGROUND

On January 6, 2015, a federal grand jury returned an Indictment charging Linda Worth with conspiracy to accept a payment of gratuity by a public official, in violation of 18 U.S.C. § 371 (Count 1); receipt of a gratuity by a public official, in violation of 18 U.S.C. § 201(c)(1)(B) (Count 2); and conflict of interest by a government employee, in violation of 18 U.S.C. § 208(a) (Count 3). (Doc. 1).

The parties agreed that the Government would dismiss Counts One and Two and that they would proceed with a bench trial solely on Count Three.[1] (Tr.[2] at 5; Govt. Ex. 1 at ¶15[3]). To further narrow the issues, they entered into a stipulation that all elements of Ms. Worth's violation of 18 U.S.C. § 208 had been established. (Gov. Ex.1 at ¶15). The parties therefore agreed to limit the trial to the issue of

[1] The Government confirmed at the pretrial conference on January 28, 2016, that it would proceed only on Count Three of the Indictment at the bench trial and would dismiss Counts One and Two. (Doc. 35).
[2] The transcript of the trial is contained in Doc. 50 in the docket.
[3] All exhibits referenced here are the trial exhibits.

whether Ms. Worth willfully committed the violation of Section 208, thereby making the violation a felony rather than a misdemeanor under 18 U.S.C. §216(a)(2).[4] (Tr. at 5; Govt. Ex. 15).

The Court proceeded with bench trial on February 3, 2016 after confirming Ms. Worth's consent to the waiver of her right to trial. (Tr. at 6; Docs. 39, 40). The Government called as its sole witness Ellen Hastings, a staff attorney at the VA Office of Regional Counsel who served as the designated agency ethics official at the VA Medical Center ("VAMC"). Ms. Worth presented no witnesses. The Court admitted the parties' trial exhibits and stipulations into the record. After the trial, both parties submitted proposed findings of fact and conclusions of law that the Court has considered in conjunction with the trial evidence and stipulations.

II. FINDINGS OF FACT

A. Linda Worth's Work at the VA Medical Center and use of Procellera

Linda Worth was a Physician Assistant at the "VAMC" in Atlanta, Georgia from 1994 through February 2010. (Govt. Ex. 1, Joint Stipulation of Facts, ¶ 4). The VAMC, a medical facility located in the Northern District of Georgia, provides health care services to veterans. It is a component of United States

[4] A finding of willfulness would authorize a sentence up to the five-year statutory maximum under Section 216(a)(2), whereas a violation without such a finding would involve a misdemeanor under Section 216(a)(1).

Department of Veterans Affairs, which is a department within the executive branch of the United States Government. (*Id.* ¶ 1). During her 16 years at the VAMC, Ms. Worth established the hospital's Vascular Wound Clinic, where she treated patients recovering from serious wounds She also served on leadership committees within the VAMC, and as an educational resource for her colleagues. (*Id.* ¶ 4). As part of her official duties, Ms. Worth had the authority to request orders of medical products for her patients at the VAMC, which would then be processed for purchase. (*Id.*)

In April 2008, Ms. Worth learned about the medical product Procellera while attending a dinner presentation with the manufacturer of Procellera, Vomaris Wound Care, Inc. ("Vomaris"), and the distributor of Procellera at the VAMC, Intermed Resources LLC ("Intermed"). (*Id.* ¶ 5). Vomaris produced Procellera, an antimicrobial wound dressing for the management of a variety of acute and chronic wounds. (*Id.* at ¶2). In 2008, Intermed, a company operated by Richard VanNoy, entered an Exclusive Distribution Agreement to be the sole distributor of Procellera in Georgia and other states. (*Id.* ¶ 3). As a result of this Agreement, Intermed received income based on orders of Procellera in its sales region, including any orders of Procellera at the VAMC. (*Id.* ¶ 3).

Following the dinner presentation, the VAMC began using Procellera in mid-2008, and Ms. Worth used the product with her VAMC patients. (*Id.* ¶¶ 5, 7).

Ms. Worth began "regularly communicating with [Vomaris] personnel . . . and was invited to present her results at a major wound care conference" in April 2009. (Govt. Ex. 3 at 2–3). She requested and ultimately received written permission to present her research findings at the conference from the VAMC institutional review board. (*Id.* at 3). Ms. Worth reported to the VAMC Office of Regional Counsel that Vomaris reimbursed her expenses for the trip but did not pay her any other monetary compensation. (*Id.*) She indicated in other correspondence that she was "impressed" with Vomaris' attributes and had recorded "some truly incredible results in patients with both chronic wounds that have been unresponsive to traditional methods AND in some very high risk wounds that failure to heal would have resulted in amputation or threat of life." (Govt. Ex. 3 at p. 2).

In mid-2009, the Equipment and Supply Committee at the VAMC decided not to approve Procellera for use as a recurring item at the VAMC. (Govt. Ex. 1 ¶ 7). As a result of that decision, Ms. Worth's department at the VAMC could only order Procellera as a specialty item upon the specific request of a VAMC employee. (*Id.*) Following the Equipment and Supply Committee's decision, Ms. Worth requested that the VAMC order Procellera on eighteen different occasions between July 24, 2009 and February 1, 2010. (*Id.* ¶ 8). While Ms. Worth made these recommendations as a clinician, she apparently played no role in the actual

procurement process or in the ultimate approval process as to these recommendations. (Govt. Ex. 13, p. 2). Based on Ms. Worth's requests, the VAMC ordered Procellera and paid Vomaris for the product. (*Id.*)

Ms. Worth resigned from the VAMC on February 10, 2010 and joined Vomaris as its National Director — Clinical Affairs the following month. (Govt. Ex. 1 ¶ 12).

B. September 2009 Ethics Training

From 2001 through 2010, Ellen Hastings, a staff attorney at the VA Office of Regional Counsel, served as the designated agency ethics official at the VAMC. (Tr. 51:7–18, 54:18–21). As the ethics official, Ms. Hastings provided responses to employees' ethics questions, which generally involved post-employment restrictions and gift questions. (Tr. 55:1–5). In issuing her opinions, Ms. Hastings relied on employees to provide accurate facts relevant to their ethics questions because ethics advice is fact-specific to each case.[5] (Tr. 55:15–23, 91:9–13).

[5] Defendant argues that Ms. Hastings in effect held herself out as counsel for the individual employees who contacted her for advice and that the attorney – client communication privilege should therefore apply to her communications with Ms. Hastings. The Court overruled this objection at trial, ruling that Ms. Hastings' consultations with employees in her capacity as the VAMC's ethics counsel did not create any attorney client communication. *See* 5 C.F.R.§ 2635.107 (providing that disclosures to federal executive agency ethics officials are not protected by the attorney client privilege). Nevertheless, the Court gave the Defendant the opportunity to elicit evidence that would have demonstrated that Ms. Hastings gave her assurances of confidentiality in their communications and that any such representations should be factored into the analysis of whether in this specific case the communications were privileged. (Tr. 16:8-22). No such evidence was produced. Ms. Hastings did acknowledged that she personally had no recollection or record of explaining to Ms. Worth that she was not functioning as her private counsel in connection with their communications. (Tr. 78:8-19). The Court found that evidence

On September 9, 2009, Ms. Hastings gave an ethics training session to an audience at the VAMC entitled "Ethics and Integrity in Government," lasting approximately one hour. Ms. Worth attended this session. (Govt. Ex. 1 ¶ 10; Govt. Ex. 2 at 1; Tr. 57:24–58:25, 126:12, 21-22). The Government maintains that this one training session, lasting approximately one hour, could have given Ms. Worth sufficient information to serve as a predicate for inferring her willful, culpable violation of the conflict of interest provisions of 18 U.S.C. § 208(a). Ms. Worth disagrees.

During the large group training, Ms. Hastings explained some of the conflict of interest rules applicable to VAMC employees, including the restrictions in 18 U.S.C. § 208 and "implementing regulations for section 208." (Tr. 59:21–60:1). Ms. Hastings highlighted the conflict of interest rule in Section 208 through a series of hypothetical scenarios identified during a Power Point presentation. (Tr. 62:13–18). The Power Point presentation included fifty-one slides, excluding the title page of the presentation. (Govt. Ex. 2).

In two of the Power Point slides, Ms. Hastings provided a factual scenario to illustrate restrictions that apply when VAMC employees were negotiating job offers with prospective employers. (Govt. Ex. 2 at 30–31; Tr. 66:6–19). In the hypothetical illustration, a VAMC employee working on a VA outreach project

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of this failure alone was insufficient to establish affirmatively the existence of an attorney – client relationship. (Tr. 82: 22-25; 83: 25; 84:1-9).

with a commercial partner of the VA is offered a job by the commercial partner. (Govt. Ex. 2 at 30). The printed information in these two slides concludes that VAMC employees "cannot participate in matters . . . that will have a direct and predictable effect on the financial interest of a person with whom she is negotiating for employment or has an agreement for future employment." (Govt. Ex. 2. at 31). Through these two slides, Ms. Hastings sought to teach the attendees that the employee offered the job in the hypothetical "need[ed] to disqualify herself and get off the project during the time that she is negotiating employment." (Tr. 67:14–22). Ms. Hastings testified that "the point of the slide" is that "even if you are not the person who asked for the job, if they offered a position, then that is still within the broad definition of seeking employment." (Tr. 68: 2-5).

Ms. Hastings also used a hypothetical fact scenario contained in two other slides to explain ethics rules prohibiting receipt of compensation or anything of value from a company that does business with the VAMC. (Govt. Ex. 2 at 20–21, Tr. 63:4–14). In the illustration, a medical supply company seeking a contract with the VAMC offered two concert tickets to a VAMC employee. (Govt. Ex. 2 at 20). Ms. Hastings used the illustration to instruct attendees that VAMC employees could not accept "anything of value" from a "prohibited source," which she explained was "any entity that is wanting to do business with the VA, seeking to do business with the VA, does business with the VA" or otherwise "is substantially

affected by the policies and the work of the VA." (Govt. Ex. 2 at 20–21; Tr. 63:14–64:4). Ms. Hastings explained that there were limited exceptions to this rule when the value of the gift was worth $20 or less and when the entity provided discounts to all government employees. (Tr. 64:21–65:15). She testified that she communicated to the audience "that as a general rule, it is best not to accept anything" from an outside source doing business with the VAMC, and if there were any questions about receiving anything of value from a prohibited source, they should call the Office of Regional Counsel. (Tr. 65:19–66:5).

In a separate section of the presentation, Ms. Hastings discussed unique ethics restrictions applicable to "duly-appointed providers" ("DAPs"), which are VA medical providers affiliated with universities. (Govt. Ex. 2 at 11–16; Tr. 127:9-23; 179:4–25). Five of the Power Point slides dealt with conflict of interest issues that arise in connection with DAPs' university relationships, a subject more fully covered in the VHA Handbook Section 1660. (Tr. 179:17–25). Ms. Hastings testified that this Handbook section did not apply to Ms. Worth's situation or position, although Ms. Worth did supervise Emory University PA students as part of her duties. (*Id.*) Still, Ms. Worth elicited some testimony from Ms. Hastings that the handbook might arguably have some application to Ms. Worth based on the information available to Ms. Hastings, and that Ms.Worth did not engage in the

specific prohibited activities identified in the VHA Handbook relating to duly-appointed providers. (Tr. 127-182).

The Power Point presentation also covered a broad range of other ethical issues, including: contributions and donations; gifts between employees; state and federal kickback laws; and collections for veteran care. (Govt. Ex. 2).

The Government neither contended nor offered evidence to show that Ms. Hastings ever provided attendees with a copy of the Power Point slides that constituted the bulk of her ethics presentation. Assuming no substantial detours in Ms. Hastings' one hour presentation and the audience's questions, the average amount of time allocated for discussion of each slide would have been approximately one minute. (Tr. 126: 24-25 -127:1). Ms. Hastings pointed out that she spent more time on some slides than others, but did not clarify whether she spent more time on the conflict of interest hypothetical questions at issue in this case. (Tr. 127: 3-8). Finally, the government presented no evidence that Ms. Worth had received any ethics or conflict of interest training prior to the September 9, 2009 one hour program led by Ms. Hastings.

Given the complexity and range of ethics topics presented en masse in a short time frame on September 9, 2009, via a compressed fifty-one slide presentation that Ms. Hastings clicked through, the Court cannot find as a matter of fact that the September 9, 2009 one hour ethics presentation was sufficient to give

Ms. Worth clear guidance of federal conflict of interest provisions under 18 U.S.C. §208. This finding is buttressed by the absence of any evidence that Ms. Worth had received earlier similar ethics training. In light of this finding, the Court also finds that the evidence in connection with this one presentation is insufficient to demonstrate that Ms. Worth willfully engaged in conduct that violated the conflict of ethics guidance contained in the September 9th compressed ethics instruction.

C. Offer for Travel Reimbursement From Vomaris

Ms. Worth consulted with the Office of Regional Counsel on ethics issues arising from her relationship with Vomaris. Vomaris is the manufacturer of the Procellera product she requested and medically used at the VAMC, from September 2009 through January 2010. (Govt. Exs. 3, 12 & 13). As Ms. Worth knew that Vomaris was the manufacturer of Procellera. she concedes that she understood that Vomaris had a financial interest in the VAMC's orders of Procellera. (Govt. Ex. 1 at ¶ 6).

Ms. Worth first approached the Office of Regional Counsel in September 2009 to seek advice about "whether or not she could accept Vomaris' . . . offer to pay for her travel to Washington, D.C." (Tr. 69:19–21). On September 8, 2009, Ms. Worth sent an email to Office of Regional Counsel staff attorneys Ellen Hastings and Deborah Morrell to address the scope of her wound work with VA patients and seek advice about her ability to go on a "trip to Washington D.C.

[that] would be funded by Vomaris in order for [her] to meet with" a military surgeon to discuss the effectiveness of Procellera and to "attend an educational conference at Georgetown University." (Govt. Ex. 3 at 3). Ms. Worth also inquired whether she could receive an honorarium for her work. (*Id.*)

Ms. Hastings responded on September 8th by email, stating that the Office of Regional Counsel was "not as comfortable with Vomaris paying" for her meetings with military personnel because "[g]ifts of travel from non-federal sources may be accepted only for events sponsored or co-sponsored by non-Federal sources." (*Id.* at 1). Ms. Hastings also told Ms. Worth that "[i]n general the Standards of Conduct permit federal employees to accept honorarium for teaching, speaking and writing during non duty hours," but that it was impermissible to "accept honorarium for teaching, speaking and writing that relate to [her] official duties." (*Id.*) Ms. Hastings asked Ms. Worth to send more details if she would like an ethics opinion regarding a specific teaching offer. (*Id.*)

In a follow-up email two days later on September 10, 2009, Ms. Hastings sent Ms. Worth the ethics regulation on teaching, speaking, and writing, which provides that an employee "shall not receive compensation from any source other than the Government for teaching, speaking, or writing that relates to the employee's official duties." (Govt. Ex. 4). The Government neither contends nor

offers evidencethat Ms. Worth ever accepted travel related payments from Vomaris for any meetings she may have held with military or other government personnel.

D. Part-Time Job Offer From Vomaris Followed by Full-Time Job Offer and Ms. Hastings' Course of Advice

On September 11, 2009, Ms. Worth sent Ms. Hastings an email requesting advice "regarding conflict of interest regulations" for a new opportunity "for her to make speaking engagements on behalf of Vomaris." (Govt. Ex. 5 at 2; Tr. 92:6–9). Specifically, Ms. Worth stated that she had "been offered a position as 'Subject Matter Expert' for Vomaris Innovations to teach wound care principles that [she had] developed in [her] 26 yrs as a Vascular Surgery PA." The position would include travel for presentations, and would be conducted on her "personal time." (Govt. Ex. 5 at 3). Ms. Worth informed Ms. Hastings about her work experience so that Ms. Hastings could understand Ms. Worth's duties and her subject matter experience at the VAMC. (Tr. 191:21-25). Ms. Hastings recognized that unlike Ms. Worth's initial question regarding travel expenses, this new part-time job opportunity raised different ethics concerns as to whether Ms. Worth could "have an outside activity, outside employment . . . that conflicts with her Government duties." (Tr. 92:16–21). Ms. Hastings told Ms. Worth that "it would be several weeks before an opinion could be rendered." (Govt. Ex. 5 at 2).

Following Ms. Worth's request for an ethics opinion, Ms. Hastings had no substantive contact with Ms. Worth for more than two months, although Ms.

Worth continued to seek information on the status of Ms. Hastings' opinion letter. Specifically:

- On October 1, 2009, Ms. Worth asked Ms. Hastings for the status of the opinion letter that she sought from her. (Tr: 193: 14-21).
- On November 24, 2009, Ms. Worth emailed Ms. Hastings, once again asking about the status of her opinion letter regarding Ms. Worth's opportunity to teach "wound care". (Tr: 192: 3 – 193:15; Govt. Ex. 6). (" . . . Just wanted to f/u with you to see if you have been able to address the letter I sent in September re: my opportunity to teach for wound care. Please let me know if decision is not ready, perhaps some feedback or timeframe as to resolution . . . ") (*Id.* at 3). Ms. Hastings responded by email the next day that she had "not yet the opportunity to work on your opinion." (*Id.* at 2). Ms. Hastings also asked Ms. Worth if she served on any committees listed in a document transmitted to Ms. Worth as well.

On December 8, 2009, Ms. Hastings emailed Ms. Worth with a few questions about her vascular experience to assist her in writing the opinion letter. (Tr. 194:3-5). She also inquired as to how much of Ms. Worth's vascular surgery experience was gained at the VA and how she would be compensated for the part-time job. (Govt. Ex. 6. at 1). Ms. Hastings needed to know if Ms. Worth's "expertise was developed while [she] was employed with the VA" to "evaluate

whether or not . . . the content of the speaking relates to [her] official duties." (Tr. 95:3–10). According to Ms. Hastings, VA employees generally could not receive payment for discussing their work experience at the VA or non-public information gained during their VA employment. (Tr. 96:9–18).

Ms. Worth responded on December 11, 2009, stating that she had been at the VAMC for 15 years. (Govt. Ex. 7 at 1). Ms. Hastings testified that she thought Ms. Worth's experience at the VA was important to Ms. Hastings's analysis because it indicated that Ms. Worth had not developed a "subject matter expertise, which she obtained over at another facility." (Tr. 97:1–15). However, Ms. Hastings' own email indicates she was already aware that Ms. Worth had 26 years of experience in vascular surgery as a whole, with 11 of those years of vascular experience pre-dating her time at the VA. (Govt. Ex. 7 at 1). Regardless of Ms. Worth's relevant vascular experience pre-dating her work at the VA, Ms. Hastings concluded Ms. Worth would face additional restrictions on receiving compensation for discussing her wound care experience because it involved her work at the VAMC. (Tr. 97:1–15). Ms. Hastings testified that if an employee had additionally gained relevant subject matter at another "healthcare agency or private entity," this other subject matter non-VA experience should factor into the analysis. (*Id.* at 96:22-24; 97:1-15). Nevertheless, Ms. Hastings did not consider or seek any information regarding Ms. Worth's prior 11 years of potentially relevant vascular

surgery non-VA experience (also apparently dealing with wound related issues). The Court notes that Ms. Hastings' communications with Ms. Worth about this issue were confined to short email inquiries that lacked context or opportunity for dialogue.

Ms. Worth also told Ms. Hastings on December 11, 2009, that she needed to discuss compensation with Ms. Hastings "because there are new facts and opportunities." (Govt. Ex. 7 at 1).

On December 15, 2009, Ms. Hastings spoke with Ms. Worth regarding a draft opinion she had been preparing regarding the part-time job opportunity. (Govt. Ex. 13 at 10; Tr. 102:22–103:5*)*. Ms. Hastings testified at trial that she discussed the draft letter with Ms. Worth, but did not actually send it to her. (Tr. 102: 22-25; 103:1-7; 107:4-7; Govt. Ex 13 at 10). Although Ms. Worth testified that she thought Ms. Worth understood her phone advice regarding the restrictions that would apply to her activities[6], the Court cannot determine in what detail Ms. Hastings actually reviewed the letter with Ms. Worth or what precisely Ms. Worth

[6] The draft opinion stated that Ms. Worth could not accept compensation for lecturing on wound care because she developed her expertise in the field "through [her] VA position as a vascular physician assistant," and instruction on wound care thus "relate[d] to [her] official duties." (Govt. Ex. 8 at ¶¶ 5–6; Tr. 99:22–100:9). The draft opinion also instructed Ms. Worth that she could not "disclose or misuse any information that [she had] acquired as part of [her] official duties and which is not generally available to the public." (Govt. Ex. 8 at ¶ 7). Accordingly, Ms. Worth could not accept compensation for disclosing information that was "private VA material" because "it would be using her public office for private gain." (Tr. 100:20–25). The draft opinion concluded that her "wound care presentation relates to [her] official duties because its subject deals in significant part with [her] experience treating VA patients." (Govt. Ex. 8 at ¶ 10).

understood based on their phone conversation. The Court does not give any weight to Ms. Hastings' notes summarizing the conversation cited by the Government (Govt. Ex. 13 at 10), because the verbiage of the communication is inconsistent with the language of Ms. Worth's communications in the record and instead, more typical of Ms. Hastings' verbiage and viewpoint. Moreover, Ms. Hastings' notes do not conform fully with her testimony at trial.

In the same December 15, 2009 conversation, Ms. Worth disclosed to Ms. Hastings that Vomaris "offered her a full-time position and she intends to accept." (Govt. Ex. 13 at 10). Vomaris made the offer in November 2009. (Govt. Ex. 1 ¶ 11). During their conversation, Ms. Worth requested post-employment guidance, expressed that she "really wanted to understand what it was," and asked for the information as soon as possible. (Tr. 115: 21-25; 116:1-3). Ms. Hastings "discussed this with her at lenth [*sic*] and followed with written general guidance."[7] (Govt. Ex. 13 at 10; Tr. 108:1–6). She testified that Ms. Worth understood that she would "preliminarily" send her general guidance on December 15, 2009, and "then give her a formal written opinion with regard to her specific situation" at a later date. (Tr. 116:15–18).

[7] Ms. Hastings testified that she never sent the draft opinion to Ms. Worth because her response to Ms. Worth's opinion letter request would change in light of Vomaris's full time job offer. (Tr. 103:9–13).

The record is somewhat murky as to whether Ms. Hastings actually mailed Ms. Worth the promised preliminary guidance. Ms. Hastings testified that she did mail Ms. Worth a general boilerplate guidance letter she had used before in similar situations with employees along with a one page pamphlet attachment. (Tr: 108:1 – 109:15; 115:4-8; Govt. Ex. 9). This would have been easy enough to do, but Ms. Hastings also noted in her subsequent December work diary record on December 29th that she "did not send post employment guidance" to Ms. Worth. (Govt. Ex 13 at 2). Ms. Hastings had already been consistently slow and even non-responsive in providing full oral advice or written guidance to Ms. Worth.[8] In the face of the contradictory evidence as to whether Ms. Hastings sent Ms. Worth any post-employment guidance in December, the Court finds that it has some real doubt as to whether Ms. Hastings actually mailed the letter marked as Exhibit 9 (dated December 15, 2009). The Court therefore does not rely upon or credit the letter's alleged transmission to Ms. Worth.

On December 24, 2009 Ms. Worth asked Ms. Hastings when she could expect to receive the written legal opinion in writing requested. (Tr:195:10-13). Ms. Hastings believed she indicated the response would be provided by January 8th. (*Id.* at 13-15).

[8] The balance of Ms. Hastings' communications with Ms. Worth were in short e-mails and a few documented telephone calls, all of which the Court has considered. (Tr. 154:8-16).

On January 5, 2010, Ms. Hastings sent Ms. Worth a formal written opinion, dated January 4, 2010 and signed by Regional Counsel W.M. Thigpen.[9] (Govt. Ex. 12; Govt. Ex. 13 at 2). The letter provided both post-employment guidance and instructions on ethics rules that would apply after Ms. Worth "secured that job and [is] still in [her] position at the VA." (Tr. 175:14–22). The opinion instructed Ms. Worth that she "must recuse [her]self from participating in any matter regarding Vomaris while [she is] negotiating for employment with Voamris [*sic*]. Please notify your supervisor of this requirement." (Govt. Ex. 12 at ¶ 10). Ms. Hastings explained that "under Section 208, the interest of an entity with whom she is seeking employment is imputed to her. And so at that point when she began seeking employment then she needed to recuse herself." (Tr. 118:16–19). Accordingly, Ms. Hastings advised Ms. Worth to recuse herself from "recommending what product to order" in connection with her VA duties. (Tr. 118:20–22). The January 2010 memo also attached a one page copy of a pamphlet titled "Understanding the Revolving Door" (Govt. Ex. 12 at 5–6). Subsequent to her receipt of the recusal instruction in the January 5th opinion letter, Ms. Worth requested additional purchases of Procellera on four occasions by the VAMC —

[9] The letter was sent by email and by regular first class mail. As the letter was sent on January 5th, though dated January 4th, the Court refers to it as the January 5th letter herein.

on January 8, 2010; January 14, 2010; January 26, 2010; and February 1, 2010.[10] (Govt. Ex. 1 ¶ 8).

Ms. Hastings acknowledged on cross-examination that she does not contend that Ms. Worth prescribed and administered Procellera for any other reason than for the quality care of her patients and that she properly executed her responsibilities at the VA to provide direct patient wound care based on her best professional judgment and in a permissible manner. (Tr. 140:1-7; 141:18-21; 142:6 – 143:3). She also acknowledged that Ms. Worth was prescribing the Procellera medication for her patients, not ordering it herself or drafting requisitions or solicitations. (Tr. 136:7 – 137:4). And, in Ms. Hastings' view, Ms. Worth was permitted to prescribe and use Procellera in the best interest of the patient. (Tr. 171:14-18). Ms. Hastings still maintained, though, that Ms. Worth's request of the Procellera medication order effectively involved her with a contractor or "particular matters" improperly. (Tr. 138:15-21).

Ms. Hastings was not certain that Ms. Worth understood her instructions regarding "particular matters" at first, because Ms. Worth later called for clarification in a January 14, 2010 conversation. (Govt. Ex. 13 at 2; Tr. 120:16–122:6). Ms. Worth said that she did not understand the opinion's conclusion that

[10] In addition to these four occasions, Ms. Worth requested orders of Procellera on six occasions at the VAMC after Procellera's manufacturer (Vomaris) offered her this job in November 2009 but before the January 4, 2010 guidance letter: on December 10, 2009, December 15, 2009, December 18, 2009, December 23, 2009, December 24, 2009, December 29, 2009. *Id*,at ¶ 8).

she was participating in a "particular matter" because "she wasn't the person that actually picked up the phone and ordered the product." (Tr. 122:6–11). Ms. Hastings previously instructed Ms. Worth in the January 5th opinion letter that "the interests of Vomaris are imputed to Ms. Worth because she . . . was seeking employment. And so by ordering that specific product, that would have a predictable effect on the financial interest of Vomaris, the more product you order, the more profit you are going to have typically." (Tr. 187:3–18). According to Ms. Hastings' recollection of their January 14, 2010 conversation, Ms. Hastings explained to Ms. Worth that:

> recommending the product to the person who ordered it is considered personally and substantially involved in a particular matter. So, accordingly, if she is seeking employment with an entity whose financial interest may be affected by that particular matter, so the purchase order, the Vomaris purchase order, then she would need to recuse herself.

(Tr. 122:11–18; *see also* Tr. 138:13–21). Other than Ms. Worth's January 14th request for clarification regarding the recommendation for the order of Vomaris, Ms. Worth did not seek further clarification regarding the January 5th instruction that she recuse herself from all matters involving Vomaris. (Govt. Ex. 13 at 2; Tr. 120:25–121:16, 122:4–6). Following Ms. Hastings' January 14th clarification of what constituted a "particular matter" as identified in her January 5th opinion

letter, Ms. Worth requested purchase orders of Procellera on two more occasions, on January 26, 2010 and February 1, 2010. (Govt. Ex. 1 ¶ 8).

E. Ms. Worth's Receipt of Payments for Consulting with Intermed Regarding Procellera and Subsequent Resignation.

Ms. Worth provided paid consulting services for Intermed, Procellera's distributor, regarding the medical use of Procellera during the period she sought to promote the wound care medical benefits of Procellera at the VA and requested orders of Procellera at the VAMC for patient treatment purposes. (Govt. Ex. 1 at ¶ 9). Ms. Worth claims that VanNoy paid her to "answer questions for him on her own time" about Procellera. (Tr. 42:1–9). VanNoy wrote "consulting" or "consulting fees" on the memo line of several of these checks. (Worth Ex. 3; Tr. 146:2–16). Ultimately, Ms. Worth accepted a total of $4000 from Intermed, including a $500 check on February 9, 2009 and seven monthly checks of $500 each from July 31, 2009 through January 26, 2010. She accepted four checks from September 2009 – January 2010. (*Id.*) Most significantly, she deposited one check of $500 on January 26, 2010, despite having received Ms. Hastings' January 5th, 2010 opinion letter, when she also knew that Intermed was the distributor of Procellera for the VAMC, and thus had a financial interest in the VAMC's orders of Procellera. (Govt. Ex. 1 ¶¶ 6, 9.)

Ms. Worth resigned from the VAMC on February 10, 2919 and joined Vomaris as its National Director - Clinical Affairs the following month. (Govt. Ex. 1, ¶12).

F. Discussion of Ms. Hastings' Advice and Testimony and Ms. Worth's Actions in Response

At trial, Ms. Hastings explained that her instruction that Ms. Worth needed to recuse herself from matters involving Vomaris did not bar any other physician's assistant from ordering Procellera, nor did it limit Ms. Worth's ability to use Procellera already on hand to treat patients, whether it was in stock or ordered by another employee. (Tr. 186:16–187:2). But Ms. Worth could not "back-door[]" this recusal rule by asking a different physician's assistant to order Procellera on her behalf. (Tr. 187:19–24). No evidence was presented that Ms. Hastings actually discussed these possible distinctions with Ms. Worth.[11]

Ms. Hastings opined at trial that Ms. Worth engaged in the prohibited activity of "selecting or recommending the contractor" because "[w]hen she goes

[11] At trial, defense counsel argued that Section 1660.3 of the VHA Handbook, which addresses conflict of interest rules for university related and duly-appointed providers would have authorized Defendant's ordering of Procellera. Ms. Hastings did address rules relating to university and duly-appointed providers in her power point lecture in September 2009. However, there is no indication that Ms. Hastings or Ms. Worth ever discussed the specific exemptions under Section 1660.3 of the VHA Handbook (at ¶¶8-9) from the conflict of interest rules in their communications. Ms. Hastings testified that she never discussed the section because in her judgment "it wasn't applicable" to Ms. Worth's issues. (Worth Ex. 1; Tr. 181:19–23). Specifically, Ms. Hastings stated at trial that she did not believe that Ms. Worth was affiliated with a university pursuant to Section 1660.3 nor did her ethics issues arise in the context of a duly-appointed provider contexts. (Tr. 132:20–23, 180:5–8, 180:25–181:2). No substantive evidence to the contrary was presented.

to the business manager and says I need this many supplies of a Vomaris device . . . that is recommending the contractor, Vomaris is the contractor pursuant to the purchase order, she is recommending a specific vendor, this specific contractor." (Tr. 137:5–14, *see also* 138:13–21). In Ms. Hastings' view, while a VA employee could request an order of a wound dressing, the employee could not request an order of a wound dressing manufactured by a specific company if the employee has "a financial interest or one is imputed to [her]." (Tr. 184:22–185:10). Again, there is no evidence that Ms. Hastings discussed this distinction or rationale with Ms. Worth. Still, Ms. Hastings' opinion letter of January 5th clearly flagged in a written instruction that Ms. Worth should recuse herself from participating in any matter relating to Procellera. (Govt. Ex. 12, ¶10). Thus, once Ms. Worth had the opportunity on January 14, 2010 to discuss her questions about the January 5th opinion letter with Ms. Hastings, the instruction should have been totally clear. (Govt. Ex. 12, ¶10). While the Court finds that Ms. Worth reasonably could have believed her medical recommendations for the VAMC's ordering of Procellera was permissible and consistent with her performance of her medical duties and professional judgment prior to January 5, 2010, the four orders after that date — and the two in particular after January 14th — cannot be innocently explained.

Looking at the broader picture, the Court notes that Ms. Worth sought prompt advice and complied with Ms. Hastings' explicit directions with respect to the acceptance of travel funds, outside teaching regarding wound care, and engaging in the part-time activity of making presentations addressing wound care and clinical results involving Procellera. These latter activities would have involved Ms. Worth in serving as a subject matter expert in wound care to the United States military and other groups while still employed at VAMC. (Tr. 167: 7-20; 169: 4-13). The record is clear that Ms. Worth anticipated that the written opinion she sought to obtain from Ms. Hastings from early September 2009 forward would guide her as to her ability to publicly promote Procellera as a wound treatment that she deeply believed was far more effective than other treatments based on her own clinical results and data. And her requests for advice to Ms. Hastings indicate she also knew she would need approval to receive compensation for her proposed teaching and presentations that would be funded by Vomaris.

The sequence of events and communications here makes Ms. Worth's failure to disclose her receipt of monthly checks of $500 for consulting with Intermed after she became engaged in ethics communications with Ms. Hastings troubling and suspect — and most particularly so, after Ms. Hastings' opinion letter of January 5, 2010. (Tr. 123:22–124:4, 153:14–24).

The Court can appreciate that Ms. Worth may not have intentionally flouted the law for some of the time period she consulted with Intermed, as she may not have appreciated the full legal implications of her conduct or her legal obligations of recusal at the time. Yet, from September 2009 forward, Ms. Worth never asked for Ms. Hastings's advice regarding her payments from Intermed.

Ms. Hastings testified that payments for outside activity related to VA employees' official duties violated conflict of interest rules established "in order to be able to keep [VA] employees using their unbiased, objective medical judgment." (Tr. 157:13–16). Specifically, Ms. Hastings opined at trial that if a vendor offered a VAMC employee $500 a month "to consult . . . on the very thing that you do all day at the VA," such an arrangement violated federal conflict of interest rules because "you are getting paid to do something that the Government is already paying you to do, it is using your public office for private gain." (Tr. 157:18–23).

As a fact finder, the Court must wrestle with the question of why Ms. Worth did not disclose her receipt of Intermed's monthly checks after her first contacts with Ms. Hastings in September 2009. Did she seek to avoid hearing advice on this specific topic from Ms. Hastings because she truly thought that she was promoting the best medical care possible for veterans' wounds and her receipt of the funds had no bearing on her recommendations and professional activities? Did

she fail to fully comprehend the legal bar on receipt of such funds and her obligation to observe this bar? Did Ms. Hastings' long delays in communication and bureaucratic mode of communication impede Ms. Worth's grappling with her legal obligations and ethics conflicts posed by her consulting fees and later, her employment offer from Vomaris? Or did Ms. Worth simply willfully ignore her obligation to comply with the requirements of the law upon learning of the legal bar's broad reach and command as to the handling of conflicts of interest?

In considering the issues presented here, the Court finds that there is evidence that, to some degree, could support any of the possibilities above. Most importantly, though, the Court finds that for the period *after* her receipt of Ms. Hastings' advisory opinion of January 5, 2010, Ms. Worth was in the indisputable position to understand her legal obligations under 18 U.S.C. §208(a) — and all the more so after her phone discussion with Ms. Hastings on January 14, 2010. During this last period of her VAMC employment after January 5th, the evidence establishes that Ms. Worth deposited one check from Intermed and that she made several requests for VAMC orders of Procellera (two of which were made after January 14th). In this same time frame, she was negotiating full-time employment with Vomaris. Ms. Worth willfully took these actions in January 2010, when she was on full and fair notice of the requirements of law that required her complete recusal from activities relating to the product Procellera (whether via Vomaris or

Intermed), i.e., particular matter in which she had a present and future financial interest.

III. DISCUSSION AND CONCLUSION

Count Three of the Indictment charges that Ms. Worth participated personally and substantially as a Government employee in a matter in which she knowingly had a financial interest, in violation of 18 U.S.C. §§ 208 and 216(a)(2). (Doc. 1). To obtain a conviction for a willful violation of the federal conflict of interest law, the Government must prove beyond a reasonable doubt:

> First: The defendant was an officer or employee of the executive branch of the United States Government;
>
> Second: The defendant participated personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, or otherwise, in a judicial or other proceeding, application, contract, claim, controversy, charge, or other particular matter;
>
> Third: The defendant knew that she, an organization in which she is serving as an officer or employee, or any person or organization with whom she is negotiating or has any arrangement concerning prospective employment, has a financial interest in the matter; and
>
> Fourth: The defendant willfully engaged in the conduct constituting the offense.

See 18 U.S.C. § 208(a) and 216(a)(2); *United States v. Stadd*, 636 F.3d 630, 636 (D.C. Cir. 2011).

Based on the evidence admitted at trial and the Joint Stipulations of the parties (Govt. Ex. 1 at ¶15), the Court finds the first three elements of the offense have been met.

The Court thus focuses on whether the evidence introduced at trial establishes beyond a reasonable doubt that Ms. Worth participated in official acts or recommendations on behalf of the VAMC with the knowledge that she maintained a financial interest in particular concerns relating to Vomaris upon which she made recommendations and that she did so willfully in violation of the requirements of 18 U.S.C. § 208(a). These interests include her acceptance of consulting fees from Intermed in relation to its distribution of Vomaris product Procellera, her continuing requests for Procellera orders, and her negotiation of employment as the National Director of Clinical Affairs with Vomaris, in the last months of her VAMC employment. [12]

A defendant "willfully engages in the conduct constituting the offense," if "the act was done voluntarily and purposely with the specific intent to violate a known legal duty, that is, with the intent to do something the law forbids." 11th

[12] Vomaris had a financial interest in the particular matter at issue, the VAMC's purchase orders of Procellera, because it was the manufacturer of Procellera. (Govt. Ex. 1 ¶¶ 2, 6). Intermed also had a financial interest in the particular matter because it was the distributor of Procellera and received income based on the VAMC's orders of Procellera. (*Id.* at ¶ 3).

Cir. Pattern Jury Instructions (2010), No. 9.1B; *see also Selby*, 557 F.3d at 977 (affirming conviction under 18 U.S.C. §§ 208(a) and 216(a)(2) when Government established that defendant "acted with the purpose of violating a known legal duty"). "[P]roof of evil motive or bad intent is not required" under this heightened *mens rea* requirement. *United States v. Brown*, 548 F.2d 1194, 1199 (5th Cir. 1977);[13] *see also United States v. Pomponio*, 429 U.S. 10, 12, 97 S. Ct. 22, 23 (1976) (reversing Court of Appeals opinion that "incorrectly assumed that the reference to an 'evil motive' in . . . prior [criminal tax] cases . . . requires proof of any motive other than an intentional violation of a known legal duty"). But "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf v. United St*ates, 510 U.S. 135, 137 (1994). As the Supreme Court has explained, willfulness "differentiates between deliberate and unwitting conduct" and "typically refers to a culpable state of mind" that as a general matter is "undertaken with a 'bad purpose.'" *Bryan v. United States* 524 U.S. 184, 190 (1998).

For offenses subject to this heightened *mens rea* requirement, willfulness can be established through circumstantial evidence. *See United States v. Hesser*, 800 F.3d 1310, 1330 (11th Cir. 2015) (affirming conviction for tax evasion when Government presented "substantial circumstantial evidence that [defendant] acted

[13] The decisions of the former Fifth Circuit before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

willfully"). The willfulness requirement of 18 U.S.C. § 216(a)(2) can be established through circumstantial evidence that the defendant acted contrary to ethics advice provided by an agency ethics official. *See Selby*, 557 F.3d at 971, 976–77 (concluding that there was sufficient evidence defendant "willfully violated § 208" when agency ethics official required defendant to disclose her financial interest in an outside vendor within the agency and "to recuse herself from . . . matters" involving the vendor, but defendant nonetheless "promoted extensive additional use" of the vendor's products); *see also Stadd*, 636 F.3d at 632, 638 (affirming defendant's felony conviction under 18 U.S.C. §§ 208(a) and 216(a)(2) when defendant recommended earmark benefiting his consulting client after exchanging emails with NASA ethics advisor agreeing to avoid meetings that affected his outside business activities).

Based on its consideration of the evidence and factual findings, the Court concludes that the Government has proved beyond a reasonable doubt that Ms. Worth violated the legal requirements with respect to avoidance of conflicts of interests set forth under 18 U.S.C. § 208(a), as charged in Count Three of the Indictment.[14] The Court further finds that the Government has proven beyond a reasonable doubt that Ms. Worth acted willfully in violation of these conflict of

[14] Count Three incorporates paragraphs 2 - 5 of the indictment. As paragraphs 2 - 5 contain conspiracy and other allegations related to the offense conduct charged in Counts One and Two that the Government has agreed to dismiss, the Court construes Count Three here to exclude any offense conduct other than Ms. Worth's specific violation of 18 U.S.C. ¶208(a), described in this Order.

interest requirements of law for the final period of her employment after January 5, 2010. Accordingly, the last willfulness element of Count Three is established as to Ms. Worth's conduct after January 5, 2010, but not for the period before that date. For the foregoing reasons, Ms. Worth is hereby adjudged guilty of Count Three of the Indictment, pursuant to 18 U.S.C. §208(a) and §216, subject to the limitations as to willfulness specified herein.

IT IS SO ORDERED this 2nd day of December, 2016.

Amy Totenberg
United States District Judge