UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ANDREW J. GUILFORD, JUDGE PRESIDING

HSINGCHING HSU,	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
	)	
	)	
Vs.	)	**No. SACV15-0865-AG**
	)	
	)	
	)	
PUMA BIOTECHNOLOGY, ET AL,	)	
	)	
	)	
	)	
Defendants.	)	
	)	
_____	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL, DAY 7

SANTA ANA, CALIFORNIA

FRIDAY, JANUARY 25, 2019

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A P P E A R A N C E S

IN BEHALF OF THE PLAINTIFF, HSINGCHING HSU:	**TOR GRONBORG JASON FORGE SUSANNAH R. CONN PATRICK COUGHLIN ROBBINS GELLER RUDMAN & DOWD LLP 655 WEST BROADWAY, SUITE 1900 SAN DIEGO, CA 92101**
IN BEHALF OF THE DEFENDANT, PUMA BIOTECHNOLOGY, ET AL:	**COLLEEN SMITH MICHELE JOHNSON ANDREW CLUBOK SARAH TOMKOWIAK JORDAN COOK KRISTIN MURPHY LATHAM AND WATKINS LLP 12670 HIGH BLUFF DRIVE SAN DIEGO, CA 92130**

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EXHIBITS:

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SANTA ANA, CALIFORNIA; FRIDAY, JANUARY 25, 2019; 8:41 A.M.

THE CLERK: All rise.

(Open court - jury present)

THE COURT: All right. Welcome back, folks. The -- let's see. Where are we? With the defense.

Troy Wilson, Defendant's witness, previously sworn

DIRECT EXAMINATION RESUMED

BY MS. TOMKOWIAK:

Q. Good morning, Mr. Wilson.

A. Good morning.

Q. So at the end of yesterday, we were talking about Puma's July 22nd, 2014, conference call. Do you recall that?

A. I do, yes.

Q. Was Mr. Auerbach authorized to speak on the company's behalf on that call?

A. He was, yes.

Q. And do you understand that the plaintiff in this case is suing Mr. Auerbach and Puma for certain statements regarding the ExteNET trial data that Mr. Auerbach made on that call?

A. Yes, I understand that to be the case.

Q. Did you listen to that conference call on July 22nd, 2014?

A. I didn't listen to it at the time. I read the transcript sometime later.

Q. And have you compared the statements made by Mr. Auerbach on that call with the ExteNET trial data?

MR. FORGE: Your Honor, I'm going to object to even this question because it's -- under 401 and 403.

THE COURT: Not to this. You're a little early. Overruled.

MS. TOMKOWIAK: Would you like the question read back?

THE WITNESS: Could you repeat the question, please?

BY MS. TOMKOWIAK:

Q. Have you compared the statements made on that July 22nd, 2014, conference call with the ExteNET trial date?

MR. FORGE: Objection. Vague as to time.

THE COURT: Sustained.

BY MS. TOMKOWIAK:

Q. Mr. Wilson, since Puma has been sued in this matter, have you compared the statements made on that July 22nd, 2014, conference call with --

MR. FORGE: Objection. Vague as to time, Your Honor.

THE COURT: Sustained. Since is a long time.

BY MS. TOMKOWIAK:

Q. Mr. Wilson, have you compared the statements made on that July 22nd, 2014, conference call with the ExteNET trial

data?

MR. FORGE: Objection.

THE COURT: How does that get around the vagueness for time? Sustained.

BY MS. TOMKOWIAK:

Q. Mr. Wilson --

THE COURT: Hold on. Just so we're on the same wavelength, he said vague for time. You try it again. You said since the meeting. I said that's way too long a time. Then you dropped every reference to time. I'm not understanding -- just so we're on the same wavelength.

MS. TOMKOWIAK: Sure.

THE COURT: The objection is sustained.

BY MS. TOMKOWIAK:

Q. Mr. Wilson, when did you compare the statements made on the July 22nd, 2014, conference call with the ExteNET trial data?

A. So I -- probably the first time I read the transcript was in preparation for my deposition for this trial, which would have been, I don't know, nine months to a year ago.

Then I have reread the transcript several times and I've looked at the ExteNET data several times in that -- you know, over the past year.

Q. And now that you've had a chance to review that transcript and compare the statements made by Mr. Auerbach on

that call with the ExteNET trial data, putting your director hat on, were Mr. Auerbach's statements regarding the ExteNET data true?

MR. FORGE: Objection, Your Honor, 401, 403, 701, 702. This is the question for the jury here. And 602.

THE COURT: Sustained.

BY MS. TOMKOWIAK:

Q. Mr. Wilson, you testified yesterday that one of your duties as a director of Puma is to ensure that Puma has the right leadership in place. Do you recall that testimony?

A. I do, yes.

Q. And now that you've had a chance to review the transcript from the July 22nd conference call, again putting your director hat on, is there any question in your mind whether Puma has the right leadership in place?

MR. FORGE: Objection, Your Honor. Same objections, 401, 403, 701, 702.

There's no relevance to whether they presently have the right person in place. Ms. Tomkowiak is just trying to get in through the back door what she couldn't get in through the front.

THE COURT: Overruled on that question.

You may answer, sir.

THE WITNESS: Thank you.

I had no question at the time. I have no question

now that we have the right leadership in place for Puma.
BY MS. TOMKOWIAK:
Q. Why not?
A. Because when I read the --
MR. FORGE: Objection, Your Honor. This is the --
THE COURT: I didn't actually hear the end of that last answer. Just a moment.
Overruled. But I -- please interrupt him if I don't. It's a narrative. Feel free to interrupt.
MR. FORGE: Your Honor, I was just going to say he started -- I don't know if it showed up in the transcript, but he started to say when I read.
So what he was trying to do is get into a comparison as some sort of basis for his view, and that's why I stood up when I did.
THE COURT: Okay. You started your answer, because when I read the... What comes after the word the?
THE WITNESS: Transcript.
THE COURT: Sustained.
Thank you. I didn't catch that last portion.
That will be sustained.
BY MS. TOMKOWIAK:
Q. Why do you believe Puma has the right leadership in place?
THE COURT: Sustained. I think you already asked

that, and he started, because when I read the transcript.
BY MS. TOMKOWIAK:
Q. Mr. Wilson, plaintiffs' attorneys have asked several questions during this trial about whether certain shareholders expressed concerns about Mr. Auerbach after ASCO.

How, if at all, does that impact your view as a director about whether Puma has the right leadership in place?
A. It doesn't affect my view. You know, it's a -- it's a difficult job to be the CEO of a public company. The stock goes up one day and, you know, people want to carry you out on their shoulders.

MR. FORGE: Your Honor --

THE COURT: Calls for a narrative. Sustained -- among other things.
BY MS. TOMKOWIAK:
Q. Mr. Wilson, do you recall when you first learned of the DFS rates and the diarrhea rates in the ExteNET trial?
A. It would've been in the spring of 2015.
Q. And who showed you that data?
A. Mr. Auerbach.
Q. Did you ask to see that data sooner?
A. I did not.
Q. Why not?

A. Typically, you know, it takes time for data to be ready and to be prepared. We knew that the data would be presented at the appropriate time, and you want to see it presented in context.

Q. When you saw that data, what was your reaction?

MR. FORGE: Objection, Your Honor.

THE COURT: Sustained.

BY MS. TOMKOWIAK:

Q. Mr. Wilson, how do biopharmaceutical companies raise money?

A. They either sell stock in the company or they'll sometimes borrow money. They'll raise debt.

Q. When do biopharmaceutical companies raise money?

A. There's an old joke that they raise money whenever they can.

Q. Is it common to raise money between the release of topline results and the release of the full results at a medical conference?

MR. FORGE: Your Honor, I'm trying not to object too much, but this is getting into expert testimony. So 701 and 702.

THE COURT: First of all, let me say it's perfectly for you to be objecting. I'll make that statement. I'm anxious to hear your objections. If I overrule your objections, don't be shy about making further objections.

This objection is overruled.

THE WITNESS: It's not uncommon for companies to raise money between the release of topline data and the ultimate publication of the data in a medical conference, no.

BY MS. TOMKOWIAK:

Q. I want to turn to Puma's January 2015 stock offering.

A. Okay.

Q. Now, before that offering what, if anything, had Puma disclosed publicly regarding the anticipated timing for the filing of its NDA for neratinib?

A. In December 2014, Puma released that the time that they anticipated submitting a new drug application would be delayed because the FDA requested additional preclinical data.

In particular, the FDA wanted to see -- you know, there's a fairly standard mouse carcinogenicity study, and the FDA wanted to see that data before they would accept the application for the drug. So Puma issued a press release that said they thought the ultimate NDA or the new drug application would be delayed by about a year.

Q. Did Puma's board of directors approve the January 2015 stock offering?

A. We did, yes.

Q. If you could turn to what's marked as Exhibit 147 in your binder.

MS. TOMKOWIAK: Your Honor, this exhibit is not in evidence. I believe there are no objections. I also believe it was on our original trial exhibit list, and I would move it into evidence.

THE COURT: Any objection to 147?

MR. FORGE: No, Your Honor.

THE COURT: Thank you. 147 is admitted on January 25.

(Exhibit 147 received.)

BY MS. TOMKOWIAK:

Q. Mr. Wilson, Exhibit 147 is the minutes of a meeting of Puma's board of directors dated January 21st, 2015. Do you see your name here?

A. I do, yes.

Q. And I see above your name Mr. Auerbach's name. We know who that is. And who is Mr. Thomas Malley?

A. Mr. Malley and Mr. Moyes were two of the other members of the board of directors.

Q. And in the third paragraph here, if we could turn to that, it says here: Following discussion upon motion duly made, seconded, and unanimously approved, the members of the board unanimously approved the resolution set forth on Exhibit A hereto.

MS. TOMKOWIAK: Then if we could go to Exhibit A.

BY MS. TOMKOWIAK:

Q. Does this exhibit accurately reflect the Puma board of directors' unanimous approval of the January 2015 stock offering?

A. I believe it does, yes.

Q. How did Puma use the money that it raised in the January 2015 stock offering?

A. The company, with all of the moneys that the company has raised, it invested in not only the research and development activities to push the ExteNET trial forward, but, you know, there are multiple trials under way for neratinib. Then that's all of research and development. There's also all the supporting people that support the company.

And so the company used the proceeds from this offering in January 2015 to continue to fund the advancement of neratinib toward what we hoped would be to get it across the goal line with the FDA.

Q. Who participated in that offering?

A. It was a mix of what we call institutional investors and retail investors. It was -- the vast majority were institutional investors. These are large, you know, pension funds. You would know their names. They manage hundreds of billions of dollars in assets.

And there's a long list of investors that participate, but the vast majority are institutions.

Q. Had Puma conducted stock offerings prior to January of

2015?
A. Yes, it had. Several.
Q. Has Puma conducted stock offerings since January 2015?
A. It has, yes.
Q. Are you aware that Puma raised money in October of 2016?
A. We did. That's correct.
Q. How did Puma use the money that it raised in the 2016 offering?
A. The same as before. We -- Puma used all of the funds raised in that offering to try to advance neratinib toward, you know, what the company hoped would meet NDA approval.
Q. Prior to joining the board, had you made any investments in Puma?
A. I had. I purchased 900 shares for my little girls who were both under the age of five at the time.
Q. Have your daughters sold any of those shares?
A. They haven't. They're still Puma stockholders.

MS. TOMKOWIAK: No further questions.

THE COURT: All right. Thank you.

Mr. Forge.

CROSS-EXAMINATION

BY MR. FORGE:
Q. Good morning, Mr. Wilson.
A. Good morning.
Q. Mr. Wilson, you're represented by the same lawyers

representing the defendants in this case, right?
A. Are you asking as a member of the board?
Q. I'm asking as an individual.
A. As an individual -- as a member of the board of directors, the board of directors of Puma is represented by Latham & Watkins, correct.
Q. You are also individually represented by Latham & Watkins, right?
A. That's a good question. I actually don't know the answer to that question.
Q. Okay. Well, you met with them for several hours so they could help prepare you for your deposition last year, right?
A. That's correct.
Q. Okay. Nobody from the plaintiffs' side was at that meeting, right?
A. I don't believe I've met with Latham & Watkins prior to this trial.
Q. Okay. Now, is that --
A. I'm not sure I understand your question.
Q. Sure. Is it your testimony that you did not meet with lawyers from Latham & Watkins for several hours prior to your deposition last year in April?
A. Oh, no, no. Now I understand what you're asking. No. We met to prepare for the deposition, yes. That's correct.
Q. For several hours, right?

A. It would've been for several hours, yes.
Q. Did you meet with them for any more hours to prepare for this testimony?
A. I have met with the attorneys from Latham & Watkins off and on over the past year, yes.
Q. So for several more hours to prepare your testimony for today, right?
A. That would -- yeah. That's a fair statement.
Q. In fact, at times you've even rehearsed your testimony with them, right?
MS. TOMKOWIAK: Objection, Your Honor.
THE COURT: Give me a -- try vague.
MS. TOMKOWIAK: Vague, 403.
THE COURT: Sustained.
BY MR. FORGE:
Q. You've practiced questions and answers with the defense lawyers prior to testifying, right?
MS. TOMKOWIAK: Objection, Your Honor.
THE COURT: Sustained as phrased.
BY MR. FORGE:
Q. Mr. Wilson, how much did you pay for those 900 shares of Puma stock?
A. I'll give you a guess. It would have been $40 a share maybe.
Q. And do you have additional options in Puma?

A. I do. My options are all under water, yes.
Q. Okay. How many thousands of options do you have?
A. So when I initially joined the board, I received a grant of 40,000 options. Then in the every year typically at the end of the year, we would receive an additional grant of 10,000. So in all total, it's maybe 80,000 options.
Q. Now, if I get the chronology right, you did not know the results of the ExteNET study prior to July 22nd, 2014; did you?
A. I did not, no.
Q. Now, you mentioned you were on your honeymoon in Bora Bora. At the time when you left for that trip in July of 2014, you had no idea Puma was going to have an analyst call on July 22nd; did you?
A. I did not know that, no.
Q. Still married?
A. I am.
Q. All right.
A. Yes.
Q. Since you're still married, I assume you didn't interrupt your honeymoon and listen to that call on July 22nd; is that fair to say?
A. That's fair to say, yes.
Q. All right. Now, is it true, Mr. Wilson, that Mr. Auerbach has such a good memory that he can remember what

he had for dinner with someone six years ago and the exact place they were sitting in a hotel room together?

A. I have said that, yes.

Q. You've said it under oath, right?

A. I've said it under oath, yes.

Q. And it was honest when you said it, right?

A. It was. Absolutely.

Q. Now, Mr. Wilson, the jury in this case has seen --

MS. TOMKOWIAK: Your Honor, what exhibit is this?

MR. FORGE: I'll say it for the record.

BY MR. FORGE:

Q. Mr. Wilson, the jury in this case has --

THE COURT: Hold on. Is this in evidence?

MR. FORGE: Yes, it is, Your Honor. I was going to state for the record what it is.

THE COURT: I'll take your word for it, then.

BY MR. FORGE:

Q. The jury in this case has heard testimony about these altered FDA minutes that are an attachment to Exhibit 491.

Mr. Wilson, please don't take any negative implications from this, but did you alter official FDA minutes when you were associated with Puma?

MS. TOMKOWIAK: Objection, Your Honor. Vague.

THE COURT: Overruled.

You may answer.

THE WITNESS: I did not, no.

BY MR. FORGE:

Q. Now, when Mr. Auerbach was asked that question several times throughout this trial, he stated that, quote, I have no recollection, close quotes, of altering the minutes. And, quote, I have no recollection, close quotes, of asking anyone else to change the minutes.

Can you, Mr. Wilson, remember what you had for dinner with someone six years ago and the exact place they were sitting in a hotel room when they were with you?

A. Depends on who it was. My girlfriend at the time who is now my wife, yes, absolutely.

Q. But generally speaking, no?

A. Generally speaking, no.

Q. Fair to say Mr. Auerbach has a better memory than you do?

A. Mr. Auerbach has a good memory, yes, a very good memory, particularly for people and places, yes.

MR. FORGE: Thank you.

Nothing further, Your Honor.

MS. TOMKOWIAK: Just one follow-up question.

REDIRECT EXAMINATION

BY MS. TOMKOWIAK:

Q. Just to be clear, have you ever exercised a single option of your Puma stock?

A. I have not.

MS. TOMKOWIAK: That's all, Your Honor.

THE COURT: All right. Thank you.

You may step down, sir.

So the defense will call its next witness.

I assume there's no rebuttal to that single question?

MR. FORGE: There's nothing further. I'm just going to retrieve the binder.

THE COURT: Very well.

MR. CLUBOK: Your Honor, we have a deposition video to play for the jury. The total video adds up to 23.5 minutes. The parties have agreed on the allocation of time. The video is of Mr. Bradley Wolff, 10.5 minutes to be allocated to defendants, 12.7 minutes -- -

THE COURT: Hold on. Start again. Total allocation to the defendants for this?

MR. CLUBOK: 10.5 minutes.

THE COURT: And?

MR. CLUBOK: 12.7 minutes will be allocated to the plaintiffs.

THE COURT: Okay. Very well.

MR. CLUBOK: And at this time we would like to play the deposition video of Mr. Bradley Wolff.

MR. COUGHLIN: Your Honor --

THE COURT: Yes?

MR. COUGHLIN: We had three objections to this depo. We worked to get the other 25 resolved. And so --

THE COURT: Now, just a moment. I've read numerous transcripts. Did I read this transcript?

MR. COUGHLIN: Not so far.

THE COURT: Okay. How would you like to proceed, then?

MR. COUGHLIN: We asked them to switch the order by one so you could look at the three objections. They want to go forward with Mr. Wolff. We understand that. It's their case. But we need these three -- they're literally three paragraphs.

THE COURT: Okay. I'm wondering why I didn't get it earlier. Let me take a look at what's at stake here.

Bring it forward.

MR. COUGHLIN: Red tabs -- Your Honor, the red tabs are if the objection is overruled. Then the purple tabs --

THE COURT: That's okay.

MR. COUGHLIN: Then the purple tabs --

MR. FORGE: If it's sustained.

MR. COUGHLIN: Then the purple tabs which are two, come in.

THE COURT: I don't know what that means, but I'll look at the red tabs.

(Court reviewing deposition).

THE COURT: I think we can handle them. They're brief. Let's just take a look at page 194. Objection, hearsay.

Response?

MR. CLUBOK: Response is it is not being offered for the truth, and we're happy to have a limiting instruction. It is being offered to show the reason why the underwriters went on to authorize the filing without making any changes. And it is --

THE COURT: You've established your point.

Any response to admitted with a limiting instruction?

MR. FORGE: Your Honor, so long as the limiting instruction explains to the jury that Mr. Wolff's testimony about what Mr. Hicks saw is not being offered for the truth of the matter asserted, then we're fine with it.

THE COURT: Yes. You stated that very well.

It keeps coming up, folks. You know, a lot of this trial is about information and people knowing information or not knowing information. So we're often making this limiting instruction. That means that we're not offering to prove that it was true. We're offering to prove that it was in his mind that he told it -- that he was told that or some other thing. I think you said it more clearly than I.

But it's not offered to prove the core truth of the fact. It's just offered to prove that's what he thought at that time or that's what he was told at that time. That's a big difference.

MR. FORGE: With that, Your Honor, I think we're fine with the defendants just playing.

MR. CLUBOK: Okay. With the other objection as well?

MR. FORGE: Yes, Your Honor. They're all related.

THE COURT: Well, those were fair objections. I chided you a bit as to why I'm getting there. It looks like you worked on a lot of objections to be resolved. These are the remaining one.

Now, what do I do with the purple?

MR. FORGE: Nothing, Your Honor. The purple were just in the event that the red ones came out. So we're all good to hit play.

THE COURT: Okay. So we're ready to roll on that.

I'll return this to anyone who likes it. After we spent some time yesterday after hours going over a transcript, I heard there was some question about what the yellow stickies were.

The yellow stickies were me putting them at the bottom of the transcript when I sustained an objection. I don't know if that got to you, but there we have it.

Okay. With that, we are ready to play.

MR. CLUBOK: Thank you.

Please, we will play now the video deposition of Bradley Wolff.

(The videotape deposition of Bradley Wolff played.)

MS. SMITH: Your Honor, just for the record, to make clear, that video included designations both by defendants and by plaintiffs.

We jointly move Exhibit 567 into admission.

THE COURT: Is there any objection to 567? Hearing none --

MR. FORGE: No, Your Honor. But I would just add that --

THE COURT: Just a moment. Go ahead and add.

MR. FORGE: No objection. Additionally, Exhibit 559.

THE COURT: Let's take it a step at a time. It's hard for me to respond to long lists, and I don't know how long the list is going to be. So 567 actually was admitted on January 17th. Next.

MR. FORGE: 559.

THE COURT: 559 I don't have on my list. Is there any objection to it being admitted?

MR. CLUBOK: Your Honor, it's not on our list either, so we object until we see it.

MR. FORGE: We'll get that clarified, Your Honor. I'm sorry. I thought it was on the list.

THE COURT: We get different versions of the list. When I say list, I mean --

MR. FORGE: Your Honor --

THE COURT: Just a moment. Hold on. I was speaking. When I say list, I mean this list. Sometimes when you say list, you mean this list with all the half a dozen backups.

Okay. Who wanted to say something?

MR. FORGE: I wanted to say I was confused. I apologize, and there are no other exhibits.

THE COURT: Okay. All right. Very good.

Then the defense will call its next witness.

MS. SMITH: Thank you, Your Honor.

The next witness is Alvin Wong. This will be a deposition video which contains designations by both plaintiffs and defendants. The parties agree that 11.5 minutes of the total time will be allocated to defendants, and six minutes will be allocated to plaintiffs.

THE COURT: Very well.

MS. SMITH: And just so the Court is aware, there were two days of deposition testimony, so there will be two clips.

(The videotape deposition of Alvin Wong played.)

THE COURT: While it plays, someone spell his last name.

MR. FORGE: W-o-n-g.

THE COURT: W-o-n-g. So I'm not seeing that on the plaintiffs' -- on the defense list. Is it on the plaintiffs' list?

MR. FORGE: The witness list, Your Honor?

THE COURT: Yeah. So this is Alvin Wong?

MR. FORGE: Yes, sir.

THE COURT: Okay. And he's on the plaintiffs' list?

MR. FORGE: Yes, sir.

THE COURT: Okay. Continue.

(Playing of videotaped deposition resumed)

THE COURT: That went a little longer than the timing allocations you provided to me, but call your next witness.

MS. SMITH: Thank you, Your Honor. I just wanted to note for the record that there are no exhibits to be moved in, and the parties will lodge copies of the deposition transcript.

THE COURT: Very well.

MS. SMITH: Your Honor, the defense calls Judy Segal.

THE COURT: Very well.

Please stand for a moment.

Judy Bebchuk Segal, Defendant's witness, sworn

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

THE WITNESS: Judith Bebchuk Segal, J-u-d-i-t-h, B-e-b-c-h-u-k, S-e-g-a-l.

THE COURT: Proceed.

MS. MURPHY: Good morning, Your Honor. Kristin Murphy of Latham & Watkins on behalf of Puma and Mr. Auerbach.

THE COURT: Welcome, Ms. Murphy.

DIRECT EXAMINATION

BY MS. MURPHY:

Q. Good morning, Dr. Segal. Thank you for being here today.

Would you introduce yourself to the jury, please.

A. My name is Judith Bebchuk Segal. I'm a director of biostatistics at Puma Biotechnology.

Q. If you could get a little closer to the microphone so the court reporter can hear you. Thanks.

All right. And just repeat your title for the record. I'm not sure everyone heard.

A. Director of biostatistics at Puma Biotechnology.

Q. Thank you. So can you tell the jury a little bit about your educational background?

A. I did my undergraduate degree in mathematics and statistics and a business degree in actuarial math at the University of Manitoba in Winnipeg, Canada. I did my master's in biostatistics at the University of North Carolina in Chapel Hill and my doctorate in biostatistics at the Harvard School of Public Health in Boston.

Q. And how did you come to work at Puma?

A. After grad school I started a job at the University of Minnesota where I was working clinical trials, and --

THE COURT: Hold on. Just slow down a bit. Okay? We need to record it all. We have a lot of efficient speakers in this trial by now.

All right. Go ahead.

THE WITNESS: -- where I started working in clinical trials. And I really enjoy clinical trials, being in that field. When I moved to Southern California, I had a job with Kaiser Permanente, and it was my first time not working in clinical trials.

So when the job at Puma opened up, I was very excited to get back into the world of clinical trials.

BY MS. MURPHY:

Q. And how long have you been at Puma?

A. Since March of 2014.

Q. And where do you currently live?

A. I live in Minneapolis, Minnesota.

Q. But you still work out here for Puma?
A. I do. My husband got a job in Minnesota in the spring of 2016, and Puma allowed me to become a remote employee.
Q. All right. So you said that you're currently the director of biostatistics. What was your title during the 2014-2015 time frame?
A. When I was hired, I was hired as associate director of biostatistics.
Q. And what were your responsibilities in that role?
A. I was hired to work with Claire Sherman on the efficacy analysis for the ExteNET study, and then to work on the safety analysis.
Q. All right. So let's first talk about the efficacy analysis. When did you receive the topline efficacy results for the ExteNET trial?
A. I received them in mid-July of 2014.
Q. Do you recall what your reaction to that data was?
A. It was very positive. We were very excited about the results of the study, and we were looking forward to working with the regulatory agency in terms of getting approval.
Q. I'd like to show you Exhibit 123, which is already in evidence. This is an e-mail from Alvin Wong dated July 17th, 2014. The subject is topline efficacy results. And if you see, there's an attachment there that says efficacy summary study 3004, 17 July 2014.

Do you recognize that attachment?

A. I do. I was involved with doing the programming to create the tables and figures for the attachment, as well as reviewing the draft document prior to sending it to the executives.

Q. All right. So if you could turn with me to page 10 of the attachment.

A. (Witness complies.)

MS. MURPHY: If you could blow that up a bit on the screen. Thank you.

BY MS. MURPHY:

Q. Is this one of the images that you had a role in programming?

A. Yes, it is.

Q. Can you explain for the jury -- they've heard a bit about these curves, but if you could just tell them in your own words what this graph means.

A. Sure. It's the Kaplan-Meier or survival curve for the primary end point of the ExteNET study which was disease-free survival. It depicts the probability of being disease-free on the Y axis, over time, which is on the X axis.

MS. MURPHY: And at the very bottom of the image there, there are two rows of numbers and there's a heading that says number at risk. If we could blow that up?

BY MS. MURPHY:

Q. Can you explain what these numbers represent?
A. Sure. They're what we call in statistical terms the risk set. Really what it is, it's the number of subjects that are still on study at the given times and are used to calculate the Kaplan-Meier curves.

If you see at the far left-hand side the numbers 1409 and 1412, those are the number of subjects that started the trial in each of the two treatment groups, the neratinib arm and the placebo arm.

Over time the risk set decreases as subjects either have a disease recurrence, which is your primary end point, or they've had their last physical exam on the study and have no more data and follow-up. So that's why you see the numbers decreasing over time.

Q. Thank you. And then if you look at the far right of the curve, the image itself, the top arm of the curve, the red line appears to sort of dip down at the very end. Can you explain why that is?
A. Sure. Inherently the tail end of a Kaplan-Meier curve always has more variability in them than earlier parts of the curve. You can see with this study between month 20 and month 25, the numbers in the risk set in those last two rows along the bottom decrease substantially.

That's because the subject -- it was a two-year follow-up for this particular analysis. The data was

truncated to two years. And so when the subjects came in for that last two-year visit at month 24, they had a window around it so they could come in anytime between 23 and 25 months. They would be removed from the risk set after that last final exam.

That the creates more variability, and you can imagine that one event in 350 subjects is going to have more of an effect on the curve than one event in 409 subjects.

Q. So as the statistician who programmed these curves, how would you interpret the tail end of the curve there?

A. I would actually disregard the little blips at the end due to this variability. So then I would look at the curves in more totality and say that they are maintaining to separate.

Q. All right. I'd like to show you Exhibit 103 which is already in evidence. It's a transcript of Puma's July 22nd, 2014, conference call. Are you familiar with this transcript?

A. Yes, I am.

Q. I'd like to direct you to page 7, please. There is a request asked by Howard Liang, an analyst from Leerink. He says: I assume you have seen the curves for the two arms. Can you give us a sense as to whether the separation is widening over time, or how would you describe the curve separation?

And then Mr. Auerbach responds and he explains: So the trial started in April of 2009, and this data cut is as of October 2013. So that's essentially the last patient was followed for two years. So from those numbers you can see we have a lot of patients who have been in for much more than the two-year cutoff. If we look at curves going out beyond that, it looks like the curves are continuing to separate.

Do you have an understanding of whether it is true that Puma had data for beyond two years at this point?

MR. GRONBORG: Objection. Foundation, Your Honor. There certainly is no explanation of what the familiarity is with the transcript, how that familiarity came about.

THE COURT: Sustained for now.

BY MS. MURPHY:

Q. So what are you --have you reviewed this transcript before?

A. Yes, I have.

Q. And in your role at Puma, did you have an understanding of what data was available to Puma as of July 22nd, 2014?

A. Yes, I did.

MR. GRONBORG: Again, vague as to when the transcript was reviewed or what it has to do with the questions regarding the curves.

THE COURT: Okay. Often people seem to be objecting to the line of questioning. I look at each

specific question as it comes in.

The objection to that question is overruled.

Next question.

BY MS. MURPHY:

Q. Okay. Do you talk about -- thought so. Sorry.

THE COURT: You got an answer to the last question, which was: And in your role at Puma, did you have an understanding of what data was available to Puma as of July 22nd, 2014? She said: Yes, I did. She says she has an understanding. I still might wonder how she got that understanding, but she has an understanding.

BY MS. MURPHY:

Q. So what is that understanding based on?

A. When we received the data snapshot on July 7th, it included all the data for all the subjects while they were on study. And since there were subjects that were randomized earlier on in 2009 and 2010, we have beyond two years of data for those subjects in that snapshot.

Q. And do you know whether Puma maintains that snapshot today?

A. Yeah. At the time of the topline analysis, we archived that snapshot so we would always have it for future use if it was needed.

Q. Have you needed to access that data since that time?

A. Yes, I did, in --

MR. GRONBORG: Objection, Your Honor. Relevance for the post-class period use of the data.

MS. MURPHY: Be happy to respond.

THE COURT: Just a moment. I'm going to sustain for vagueness on what, quote, that data, end quote, is. In other words, have you needed access to that data? Does that mean the data during relevant time periods, or is that a more general reference to this type of data?

MS. MURPHY: I'll rephrase.

BY MS. MURPHY:

Q. Dr. Segal, have you since July of 2014 gone back to access that July 7th, 2014, snapshot as it existed at that time?

MR. GRONBORG: Vague as to time.

THE COURT: Overruled.

THE WITNESS: Yes, I have. In November and December of 2017 we retrieved the data --

MR. GRONBORG: Objection, Your Honor, to the extent she's testifying about what was done in November and December of 2017.

THE COURT: You may finish your answer.

The objection is overruled.

THE WITNESS: -- in order to transfer that data to our attorneys.

THE COURT: In order to what?

THE WITNESS: Transfer the data.

THE COURT: To what?

THE WITNESS: To the attorneys.

BY MS. MURPHY:

Q. What exactly --

THE COURT: Hold on just a moment. I'm sorry.

MS. MURPHY: Okay.

THE COURT: Okay. Overruled.

You can continue.

MS. MURPHY: Thank you, Your Honor.

BY MS. MURPHY:

Q. What exactly did you do with that July 7th snapshot in order to provide it to counsel?

A. We retrieved it from the server and we worked with counsel's tech people in terms of transferring it.

Q. All right. So from the materials that you've identified and collected and provided to counsel, would it have been possible to generate Kaplan-Meier curves based on the data available to Puma in July 2014, including beyond the two years?

A. Yes, it would.

MR. GRONBORG: Objection, Your Honor. Lacks foundation. Calls for speculation. Again refers to a period long after the class period.

MS. MURPHY: I'd be happy to respond.

THE COURT: The objection to that specific question is overruled.

THE WITNESS: Yes, it would've been possible, using the data that was transferred, to create the Kaplan-Meier curves.

BY MS. MURPHY:

Q. Including beyond two years?

A. Yes.

Q. Let's go ahead and switch gears to safety data. Do you recall when you received the topline safety tables for the ExteNET trial?

A. We received those in mid-July of 2014.

Q. All right. I'd like you to please take a look at Exhibit 124 which is already in evidence. This is an e-mail from Alvin Wong, again dated July 18th, 2014. Subject is topline analysis 3004. So first I'd like to take a quick -- do you recognize this e-mail?

A. Yes, I do.

Q. Can you explain what it is?

A. Alvin is sending around the executive summary of the safety as well as the tables that we received from Rho, which is a contract research organization that was hired to do the safety analysis.

Q. All right.

MS. MURPHY: If we could just take a quick look at

slide five, please, of the attachment, the slide that reads most frequent AEs.

BY MS. MURPHY:

Q. You'll see the diarrhea rate listed there of 39.9 percent. Do you recall whether there were any concerns form you and other team members about the rate of grade-three diarrhea at the time?

THE COURT: Repeat the question. At the end you blurred the words, at least for me.

BY MS. MURPHY:

Q. Do you recall any concerns at the time that you received this e-mail regarding the rates of grade-three diarrhea in the trial?

THE COURT: Hold on -- the rate for stage-three diarrhea at the trial?

MS. MURPHY: Grade-three diarrhea.

THE COURT: Okay. You may answer.

THE WITNESS: No. There were no concerns regarding this as there was no diarrhea prophylaxis specified in the study. And we know from other studies that when you do use prophylaxis, you can reduce the rates of the grade-three diarrhea.

BY MS. MURPHY:

Q. Okay. Let's go back to the e-mail, please. So Mr. Wong's e-mail, he says he's attached the tables as well.

They are now validated. Do you have an understanding of what Mr. Wong meant when he said they are now validated?

A. My understanding was that they had been validated internally at Rho as they would have their own procedures in terms of how to validate tables or figures or any deliverable prior to sending it to their client as a deliverable.

Q. Had the data been statistically validated internally at Puma at this time?

A. No, they had not.

Q. How do you know that?

A. Because I was working on the validation effort, and we hadn't even started until August or September 2014.

Q. Could you just briefly explain what that validation process entails?

A. Sure. Internally our goal was to program all of the safety tables independently of the work that Rho did to make sure that all of our numbers that we were getting in our tables matched what Rho provided to us and to make sure that all of the definitions and assumptions that are used in the analysis were accurate and how we would like them.

Q. When was that process complete?

A. The end of January 2015.

Q. All right. If I could show you Exhibit 291.

MS. MURPHY: This is not in evidence yet, Your Honor. I don't believe there are objections to this. I'd

move to admit it.

THE COURT: Without objection 291 is admitted.

(Exhibit 291 received.)

MR. GRONBORG: No objection.

MS. MURPHY: If you could blow that up a little bit. Thank you.

BY MS. MURPHY:

Q. This is an e-mail chain between you and Bin Yao and employees at Rho, I believe.

MS. MURPHY: If we could go to the bottom e-mail in the chain and blow up that bottom e-mail.

BY MS. MURPHY:

Q. So this is an e-mail from Adela Pina to you. And who is Adela?

A. She was the lead statistician for the ExteNET study at Rho.

Q. And this e-mail is dated January 30th, 2015, and she says: I just sent to your Rho mail safety and QOLCSR displays rerun after incorporating validation comments from Puma. And then she lists four zip files there; is that correct?

A. Yes, it is.

Q. Can you explain what's going on in this e-mail?

A. Yes. It's common practice that at the end of a validation effort, once all the discrepancies have been

rectified, that you will rerun all of the tables and figures and listings to make sure everything is being run off the appropriate data with the correct definitions and assumptions.

Q. And did this include rerunning the topline tables that were received in July?

A. Yes. It included all the safety tables.

Q. So was this in your view the time at which the safety validation was complete?

A. Yes.

MS. MURPHY: No further questions.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. GRONBORG:

Q. Good morning, Dr. Segal. You've previously testified under oath twice before this regarding Puma and the ExteNET trial; is that right?

A. Yes, it is.

Q. And you testified again today. Each time were you represented by Puma's lawyers, the defendant's lawyers, Latham & Watkins?

A. Yes.

Q. Okay. Prepared each time for what you were going to say?

A. Yes.

Q. And have you paid for any of these lawyers to assist you?
A. No.
Q. You still work at Puma, right?
A. Yes, I do.
Q. Mr. Auerbach is still your boss?
A. Yes, he is.
Q. I take it you don't want to displease your boss; do you?
A. I try to do the best job I can.
Q. Okay. Including today?
A. Yes.
Q. I want to talk about Exhibit 123 briefly. Do you recall that was the topline efficacy analyses?
A. Yes.
Q. And you said you had some involvement in putting that together?
A. Yes, I did.
Q. At any time before July 22nd, 2014, did you tell Mr. Auerbach that any of the information in that efficacy analysis was false?
A. No.
Q. All right. Did you tell him that any of those topline analyses were incorrectly done?
A. Not for the efficacy, no.
Q. And are there any Kaplan-Meier curves in that efficacy

analysis that go beyond two years and 28 days?
A. No, because the top --
Q. No is fine.
And you talked about data that you had helped transfer in 2017; is that right?
A. Yes.
Q. And what could possibly be done with that data; is that right?
A. Yes.
Q. But you yourself, you have no firsthand knowledge of whether there were any Kaplan-Meier curves that were created for beyond the two-year period prior to July 22nd, 2014; is that right?
A. I did not create any.
Q. And you have no knowledge -- you didn't see any?
A. No.
Q. And if I can turn to Exhibit 124, the topline safety tables. This is an e-mail you received; is that right?
A. Yes.
Q. Did you ever reply to all and say the e-mail was wrong?
A. Nope.
Q. Do you ever reply to Mr. Auerbach and say the e-mail was wrong?
A. No.
Q. All right. Did you ever tell Mr. Wong that his e-mail

was wrong?
A. No.
Q. Did you tell him that any of the contents to the attachments were wrong?
A. No.
Q. Did you ever tell Mr. Auerbach that any of the contents to the attachment were wrong?
A. No.
MR. GRONBORG: No further questions.
THE COURT: Redirect.
MS. MURPHY: None, Your Honor.
THE COURT: Thank you. You may step down.
Defense will call its next witness.
(Pause in proceedings)
THE COURT: Would you like a break now? Is that what you're saying?
Actually, let's take a five-minute or so break and get the next witness ready and be ready to go at 10:20 or so.
Thank you for asking. Don't be shy.
(Recess from 10:15 to 10:21)
(Open court - jury not present)
THE COURT: All right. We're back on the record here. I understand there's issues?
MR. COUGHLIN: There are, Your Honor. As we had mentioned yesterday, there are a couple of exhibits at issue

with the next witness.

THE COURT: Okay. Let's describe the issues. We have 295, correct?

MR. COUGHLIN: No, no, Your Honor.

THE COURT: Exhibit 295? I'm wrong on that?

MR. COUGHLIN: It was 985, is the exhibit number.

THE COURT: Okay. We have Exhibit 985.

MR. COUGHLIN: And the exhibit before that that was tied to that was 818. And let me provide a little history of those --

THE COURT: Let me ask -- again, I want to know what the issues are. Are these the only issues we have to deal with while the jury is waiting?

MR. COUGHLIN: Yes.

THE COURT: Now, I'm wondering. Gosh, we took 20 minutes yesterday and I thought we resolved it. I thought we resolved that I couldn't make a determination until I heard how the documents were prepared from the witness to see if they made the witness a percipient witness or an expert witness.

I thought that's where we were going. So are we repeating what we said yesterday, or is there new information that will help me?

MR. COUGHLIN: There's a little new information, is that this witness didn't prepare these documents. Another

witness did. Janine Lu is the author of the programming. We could not replicate --

THE COURT: May I ask? Gosh, we spent 20 minutes, 15 on this yesterday. Why didn't I hear this yesterday?

MR. COUGHLIN: Because I didn't realize -- I thought the new document had been prepared by Bin Yao, and it turns out he did not prepare the programming that had gone into preparing these documents.

THE COURT: Okay. So what would you like me to do right now?

MR. COUGHLIN: I'd like you to know that he didn't prepare it, so he's not a percipient witness and these documents should not be offered through him. If he starts explaining how somebody else prepared or directed, you know, that really is the subject of expert testimony. The objections are hearsay, 701, 702, plus notice of an expert witness under Rule 26.

We didn't get any of that. We couldn't replicate these. And there's an indication that there is information in these that was from 2015, at least the program shows that.

So the fact -- the idea that we're going to get in a program that is 15 pages that is attached to his declaration that he submitted to summary judgment --

THE COURT: Hold on just a moment. The program is 15 pages?

MR. COUGHLIN: Yes, the program itself.

THE COURT: In what code?

MR. COUGHLIN: All kinds of codes. SAS codes --

THE COURT: What --

MR. COUGHLIN: A computer code.

THE COURT: I know, but there's source code and there's other codes. Anyway, it's 15 pages. Got it. Complex. All right. How does that go to 818? Is 818 the previous version of 985 where you objected and --

MR. COUGHLIN: Yes.

THE COURT: Hold on. We've got to really not talk over each other. So 818, the previous exhibit that the defense was putting forth that the defense [sic] raised objections to which led to the production of 985, correct?

MR. COUGHLIN: Yes.

THE COURT: Ms. Johnson.

MS. JOHNSON: Your Honor, Mr. Yao is not here to testify as an expert. There are two issues he will testify on. One of them I would submit should not even be charged to the defense because it is not at issue whether the information has been provided to the plaintiff. There have been suggestions --

THE COURT: Two issues. One is raw information. Another is a computer program that processes it through algorithms or whatever. And just because the actual numbers

are available does not mean you get to throw whatever algorithm you come up with to produce a chart. That's not percipient. That's expert.

MS. JOHNSON: There's no dispute that the program was provided to the plaintiffs as well. That's the first -- I will talk about the second issue second, if that's acceptable.

The first issue is the plaintiffs' counsel has raised, including in front of the jury, a question as to whether they even had the raw data set, the program to evaluate it, and all of the codes they would need to themselves run that program.

We know those have been produced. We know their experts have run them. Their experts have testified that they've used the data. Their experts have submitted Kaplan-Meier curves run with the data.

The plaintiffs have argued in opposition to Daubert motions that their experts had access to the data. That, Your Honor, should not even be an issue.

THE COURT: What is that?

MS. JOHNSON: Whether that, all of that information has been produced to the plaintiff and their experts have been able to use.

THE COURT: The -- when was 985 produced to the plaintiff?

MS. JOHNSON: 985 was produced a week and a half ago because it was part of the meet-and-confer process where plaintiffs raised an objection to 818. So we provided 985 which, to be responsive to Mr. Coughlin's concern, was in fact created by Bin and his team. It's like, you know, any person who works at a company with a team, they will together work on projects.

Mr. Yao is the supervisor. Ms. Lu is one of the programmers. They do this in the ordinary course of their business. This is information that they access regularly and run programs, the same programs that plaintiff and its experts have access to.

On the actual is this expert testimony, I would just say, Your Honor, if all of this data were contained in, let's say, a file cabinet and we provided the file cabinet, the key, and the code for understanding the filing system, that would be the equivalent to saying here's all the data in the database. Here's the key, which is the program, and here's the code for understanding it.

They have all of that. That is what Mr. Yao did. He collected that information. He pushed run to run the program, and out came the curves that are 818, the curves that are 985. I can explain the difference between the two, or the witness can, but their criticism of them are the subject of cross-examination, not foundation or 701.

MR. COUGHLIN: Your Honor, it's not so simple as pushing a bottom. They had to create program. Our experts estimate --

THE COURT: Let me stop you right there. When was the program created?

MS. JOHNSON: December 2017. We provided it in discovery.

THE COURT: If the program was created in December 2017, why isn't 818 correct?

MS. JOHNSON: It is January 2018. I'm being corrected, not December 2017. But a year ago.

THE COURT: Then why isn't 818 correct?

MS. JOHNSON: It is correct. There's a slight difference in the number --

THE COURT: I said -- there's a slight difference what?

MS. JOHNSON: In the number of patients who were included in the run. It's a difference of 19 patients. The curves look the same. The curves have the same numbers. It's exactly identical except for the number of patients in the data set at the very beginning is different by 19 patients.

Because the data set used at ASCO included those 19 patients, the data set that Ms. Sherman was working with in July of 2014 did not include those 19 patients. It is an

immaterial difference. But 818 was produced back in January 2018, together with the identification of Mr. Yao.

Any suggestion that they did not know this witness or what he was going to testify about cannot withstand scrutiny. We have e-mails saying here are the curves. Here's how they were created. Here are the programs. Here is the code for unlocking them.

And Mr. Yao is the custodian of those curves. They've known that for more than a year. Mr. Yao has been on our witness list since the beginning. In direct examination of Mr. Auerbach about Exhibit 818, plaintiffs raised an objection and Mr. Coughlin said --

THE COURT: I've heard that a lot. You're repeating yourself on that.

MS. JOHNSON: I want to -- I just wanted to point out that Mr. Coughlin said Mr. Yao will be here to testify and he can lay the foundation. So any objection that they did not have disclosure of this witness is not supported.

THE COURT: When was the program written?

MS. JOHNSON: January 2018.

THE COURT: So why is the results of a program written in January 2018 -- that's how long?

MR. COUGHLIN: I've got 15 pages.

THE COURT: I don't know source or object code, but it's 15 pages long. Why is a program written well after the

misrepresentations producing a chart well after the actual chart in controversy? How is that relevant? I mean, what does it prove?

MS. JOHNSON: It proves what could have been run in 2014. What was run in 2014 was on a closed system. When Ms. Sherman left the company, the closed system was dismantled.

We did provide to plaintiffs the code and the programming from that closed system, but there was a concern that once the closed -- once the data were taken out of the closed system, that program doesn't run anymore. There is a dispute about whether that's true, that you could change some of the code and run the program even though the data were outside of the closed system.

But we ran -- we provided a new program that would run on the data now that it exists on the Y drive of the company's server. That's where it exists today -- same data set, same patients, same everything. But it exists in a different place in Puma. So that's why the revised program was created, was run, and was provided to plaintiffs.

THE COURT: All right. Let's move down from 30,000 feet to ground level.

What does it prove that a program created well after the relevant time period, producing a graph for the first time well after the relevant time period, what does

that prove that's relevant to this case?

MS. JOHNSON: What the data showed as of July 2014.

THE COURT: But we don't know that that program is the same as the previous program.

MS. JOHNSON: The way we know -- and it will be in Mr. Bin Yao's testimony -- is that the program written later produces the same results for the two-year, 28-day analysis, exactly the same.

THE COURT: For the what analysis?

MS. JOHNSON: The topline analysis, the two-year, 28-day analysis.

THE COURT: Doesn't that take expert testimony to say this program is producing the same results? I don't think that can be revealed by someone's eyes, nose, ears, feeling, et cetera. That involves some pretty complex technology, trying to recreate a previous program to produce the same number, and we start to get into 403 issues.

Just how provable is it -- as well as all the other objections. I just don't think you can do this without it being expert testimony. I'm very uncomfortable -- also, I'm still not pleased that there is not even a tab for 985 in the books that you had plenty of time to prepare, and I kind of sent out a notice in October saying what I expected.

So let me give a negative twist on it, and then you poke holes in it. We have Exhibit 985, which is not in the

exhibit book that was prepared for October and then reprepared at any urgings which reflects a computer program that didn't exist in -- didn't exist at the relevant time that produces a chart that didn't exist at the relevant time, all to be provided to this jury through someone who is not an expert and wasn't subject to the expert cross-examination that is very important before we allow expert testimony to come.

There's so many steps there that I think supports the plaintiff. Go ahead.

MS. JOHNSON: Your Honor, Mr. Yao was disclosed and the subject of his testimony was disclosed --

THE COURT: I think in the statement I just made, I didn't really mention Mr. Yao, the gentleman being disclosed or not. I went to much more than that. And you can't say we disclosed the percipient witness, so now we can use him as an expert.

I'm trying to look at analogies. You know, hybrid expert witnesses, you know, such as the doctor in the operating room. What did you see? I saw blood. I saw the heart. I saw this. That's all percipient. But then he can quickly move into expert testimony.

I allowed the previous witness to kind of give evidence of numbers that were available. But, boy, when you process them through a newly created program to create a

chart that suits your purposes, even if it were reliable, there are expert testimony issues and there are 403 issues.

MR. CLUBOK: Your Honor, may I just respond, please? There was a data -- there's evidence in the record that there was a data snapshot taken of data as it existed July 7th, 2014, that has been preserved at the company.

THE COURT: Just for the record -- you seem disappointed I'm interrupting you, but I get to do that since people do that to me so often.

MR. CLUBOK: I know.

THE COURT: I've heard that a million times. I know that. You're repeating yourself. But continue, and try to make a new point to the points I made. Go ahead.

MR. CLUBOK: It was misrepresented to the jury that that data set has not been provided to the plaintiffs. That is a demonstrably false statement. I assume it was a mistaken statement, but it was provided. That exact snapshot was provided in or around December of 2017 to the plaintiffs.

A suggestion -- mistaken, I'm sure -- that that was not provided is inaccurate. That's step one.

THE COURT: I don't understand how that relates at all to my statement, so try and tie it together. Go ahead.

MR. CLUBOK: That data set contains all of the data. The program is simply a filter to say just print, just truncate it to two years, or just truncate it to three years.

It's no different than the kind of thing you would do when you have a database internally, and when we get discovery requests, we program such that a subset of a data snapshot is produced.

It's not creating some new data set or creating something. It is effectively in electronic age the equivalent of getting your librarian to figure out which shelf of massive books to provide instead of the entire library.

So they have the data set. This program that they've made something mysterious out of is just the way to truncate the data so that if you want to look at it just two years or three years or you put in two and a half years, you put in five years, whatever you want to do, it lets you print out that slice of the data.

And because the data had originally existed on the closed system and the snapshot was moved, there were just macros that may or may not still have worked if you're going to macros. Like when you get a -- you know how sometimes you get files and it says -- an Excel spreadsheet, and it's got internal macros, this happens all the time.

If we produce an Excel spreadsheet, the macros are no longer live because they link to the server. So in discovery we give them sort of a new version to make it so that they could do the same thing as if they were operating

in our system.

That's all that happened here. It happened in discovery. If there was a problem -- I understand Your Honor's ruling is that discovery motions could have been made, but it's not a problem because they've admitted in many pleadings that they used it to do this analysis.

THE COURT: Used what?

MR. CLUBOK: Used the same data set, the same program --

THE COURT: Program.

MR. CLUBOK: The same program.

THE COURT: They used your program?

MR. COUGHLIN: No.

THE COURT: No.

MR. COUGHLIN: No.

MR. CLUBOK: They never used our program?

MS. JOHNSON: This particular program they did not use. Dr. Lavin said he chose not to run that analysis.

MR. CLUBOK: So he chose not to push run because he -- well, we don't have Dr. Lavin to cross-examine why he didn't just push run on that program, but --

MR. COUGHLIN: He's right here. He would be more than happy to tell you we had to do our own program to try to replicate it because we couldn't verify different things that were brought into this new program. It --

THE COURT: All right. Let me just say, I posed a question to Ms. Johnson. She spoke. Mr. Clubok spoke. I still don't have a core question of relevancy. How is this actually relevant?

MR. CLUBOK: So if it is the case that all this program is is the way to display the data or to show it, then it is just a question of with the data set, and any competent statistician could run a program to say spit out the Kaplan-Meier curves based on two years or three years or all the data. That's -- the program is just the tool --

THE COURT: I still haven't heard a question -- an answer to my question --

MR. CLUBOK: All right.

THE COURT: -- what this proves. I can give you a few alternatives, but I'd rather hear it from you what it proves.

MR. CLUBOK: What it proves, it is circumstantial evidence that what some witnesses have testified is true, that they have -- they have argued that it was not possible to have just taken off the two-year filter and run the three-year curves in July of 2014.

With this data snapshot and with any program you want to just run the Kaplan-Meier curves, it will demonstrate that what Mr. Auerbach has testified and now what Mr. Wong has testified but which plaintiffs have cast a lot of doubt

on is true. It is certainly circumstantial evidence at least, if not direct evidence, that what they are saying is true, that they're not making it up when they say they saw a three-year curve and it showed something, because we can recreate it very simply by using that exact same data set with just essentially the code to display the data at two years, three years, two and a half years, whatever date cutoff you want to write.

THE COURT: So the defense wish to offer me any other reasons why this is relevant other than what we've just heard?

MS. JOHNSON: No. That's the relevance.

THE COURT: I find it expert testimony.

MS. JOHNSON: Can I respond on that point?

THE COURT: Your clock is ticking, but sure. And we've been at this for quite a while, including yesterday. It's just to me clearly expert testimony.

I deal with experts a lot, particularly in patent cases, and I know the difference between expert testimony and percipient witnesses. You know, you can get down to basics about percipient, which I touched on before. Is it revealed by your eyes, nose, tongue, ears, touch? A 25-page program of code is not revealed by that.

There are, I would guess, maybe probably hundreds of decisions about how to set up that code, and some of those

decisions are quite significant in what outcome is produced.

MS. JOHNSON: Understanding the Court's ruling on that issue, 26(a)(2)(C) would say that defendants for this witness should provide a statement of the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions, if you call them opinions, to which the witness is expected to testify.

Rule 37(c)(1) provides that even expert testimony should not be excluded for lack of that disclosure if the lack of disclosure is substantially justified or harmless. And the case law provides that a disclosure -- not having a disclosure of that information under 26 is harmless if the plaintiff or the other party had notice.

THE COURT: You moved to disclosure from simple designation. Designating him as an expert opens up certain rules about rebuttal and examination of an expert, et cetera. You're talking to me about disclosure. Was there ever a designation that he's an expert?

MS. JOHNSON: There was not a designation with the understanding that he was not.

THE COURT: So I'm not really -- it's not helpful to me to talk about designated experts whose disclosures might be inadequate or even nonexistent. I'm going to the core issue of designation. What about that?

MS. JOHNSON: I would submit that the designation

issue is harmless. Plaintiffs knew about this witness, what he would testify about, what that -- the fact that he was affiliated with the program, the fact that he ran those three-year curves that they've had for more than a year, they were aware of all of that.

And I would submit that the case law supports that that lack of designation is harmless.

THE COURT: When were they aware of 985, which isn't even in my trial book?

MS. JOHNSON: Again, it was directly before trial in response to the meet and confer over 818.

THE COURT: Tell me how you're prejudiced.

MR. COUGHLIN: We're -- well, first of all, we couldn't recreate it. You know, we still can't recreate it because there are a lot of things that go into this code. We did take our own time to try to analyze the data.

This is a program that didn't exist back then, that then was made in January of 2018, and we're very prejudiced because we can't analyze it. We've got a right -- we've got a right -- they say that there was a curve shown to Mr. Auerbach, and he testified to it, that went out to 3.5 percent in the intent-to-treat population for three years. Okay.

Two other witnesses have testified to that. We have a right to say there is no record of that, 803.7, the

absence of such a record. We've got that right. They have been touting this to support his statement the curves are separating. They go create a program that creates a curve they want to support that testimony.

That's not okay. And certainly saying lack of notice doesn't get a new document in, created with an expert's program. It's very -- it goes to the heart of the case. That's how prejudicial it is.

THE COURT: Yes. I'm ruling in favor of the plaintiff. All right?

MR. COUGHLIN: Thank you, Your Honor.

MS. JOHNSON: Thank you, Your Honor.

THE COURT: Thank you, folks.

Let's bring the jury in.

MR. CLUBOK: Can we rearrange our witnesses? Can we have just one moment, Your Honor?

THE COURT: All right. Let's give them one moment.

MR. CLUBOK: Your Honor, we're going to call as our next witness deposition testimony of Skye Drynan. For this one, though, Your Honor, we don't have the video. We're going to do it the old-fashioned way and bring a person to sit at the witness stand and have the questions and answers read.

The parties have, as we always do, different designations. We're going to just read it together. We have

a percentage breakdown so that whatever the time is, we have agreed on the percentage of testimony that should be applied to each.

THE COURT: Is Latham reading all the testimony?

MR. CLUBOK: Latham is going to just ask all of the questions. We could go back and forth if Your Honor would prefer to do it that way. If Your Honor would prefer to do it that way, that's perfectly acceptable to us.

MR. FORGE: Your Honor, we trust counsel to be unbiased.

THE COURT: It's just difficult for me, then, to -- and it may be difficult for the jury to determine who's asking the questions.

MR. CLUBOK: It may be, and that's appropriate, Your Honor.

MS. JOHNSON: That's true for the videos, too. We each designated --

MR. CLUBOK: That's true, but why don't we --

THE COURT: You know, I don't know if you expected the court reporter to catch that, folks.

Let's move on.

MR. CLUBOK: That's fine, Your Honor. It's clear from the record which person is asking the questions, whether it was the Latham attorney or the Robbins Geller attorney. Why don't we just switch and we'll do it that way. It will

make it a little easier for the jury to understand and follow.

Is that what you would prefer we do, Your Honor? Or I will just say maybe -- I actually agree that makes sense.

THE COURT: I just want to get the timing correct.

MR. FORGE: Your Honor, what we have done is agreed on the percentage on each side of the timing. And that way --

THE COURT: Okay. So if you've agreed on a percentage, do it the way you originally suggested. What is the percentage you've agreed on?

MR. FORGE: 43 percent for the plaintiffs, 57 percent for the defendants.

THE COURT: Okay. Then do it your way and I'll make the adjustment.

MR. CLUBOK: That's great. And we're just going to put a picture up of Ms. Drynan on the screen. Does Your Honor want to -- would you prefer if we explain this process to the jury?

THE COURT: Sure. You may explain the process.

MR. CLUBOK: Okay.

THE COURT: I'm sure you'll do it fairly.

Okay. Let's bring in the jury.

THE CLERK: All rise.

(Open court - jury present)

THE COURT: Okay. That was a long five minutes.

So we had another issue come up that we have been discussing, giving you a little more time on your break. We've resolved a few important issues now, and we are proceeding, and Mr. Clubok is going to tell us what's happening next.

MR. CLUBOK: Thank you, Your Honor.

Defense are now going to call Skye Drynan. Ms. Drynan testified by written deposition as opposed to video.

So under the agreement of the parties and with the approval of the Court, we're going to have a person at the stand who is not actually Skye Drynan, but there will be an attorney asking questions so that you can see the actual give and take of the questions.

This is the normal procedure that's used in court, and the parties and the Court have agreed to it when there's no video available. We will put a picture up of Ms. Drynan if we may. This is the actual Skye Drynan. So you have to imagine that is the woman speaking in response to questions.

The other point to raise is that some of the questions were originally asked by lawyers for the defendants, and some of the questions were originally asked by lawyers for the plaintiffs. It's mixed throughout the

testimony, and we've just agreed for convenience sake not to have different lawyers jumping up and down.

One lawyer will ask all the questions even though approximately 57 percent of the questions were asked by defendants and approximately 43 percent of the questions were asked by plaintiffs at the actual deposition.

THE COURT: Thank you for that. And this is normal. On deposition playbacks, one thing to do is the video, which you've seen. Another thing is to have a witness play the role of the deponent just to make it a little clearer and more interesting.

So who is Ms. Drynan?

MS. MURPHY: We'll have Ms. Drynan to the stand, please. So this is Michelle Carpenter. She's going to play Skye Drynan.

(Whereupon the deposition of Skye Drynan was read into the record as follows:)

BY MS. MURPHY:

Q. You are currently with Capital; is that correct?

A. That is correct.

Q. So what do you do on a day-to-day-basis? What are your responsibilities?

A. I am responsible for investing in U.S. biopharmaceutical companies, which include biotech and pharma in the U.S. I will meet with companies that are U.S. based and not U.S.

based.

I also have responsibilities as a research portfolio coordinator.

Q. What do you do as a research portfolio coordinator?

A. I ensure that the ideas of other analysts who have other sectors exposure get appropriately reflected in the portfolio that also meet the objects of the fund.

Q. Okay. What is your process?

A. Do just you want to understand the nuts and bolts of what I do on a day-to-day basis?

Q. Yes.

A. Okay. So it would be different every day. So this would only be an example. Obviously with research you cannot take a single data point to make a decision. You have to take multiple data points for mosaic to try to figure out which companies, in my case, are having the best new innovations, and as result, which companies will win and which companies will lose.

That can take the shape of a variety of data inputs from doing doctor surveys to going to medical meetings to talking to the company you may or may not be interested in buying, along with the competition.

Q. Have you been covering the biotechnology sector since you've been employed at Capital?

A. Yes.

Q. What qualifies you to cover that sector?
A. I've been investing in it since the late '90s.
Q. How many hours do you think you spend researching a company before you make a recommendation to invest in it?
A. I don't know. A long time.
Q. And what about before you invest in a company? Do you always talk to the management of that company?
A. Absolutely.
Q. And why is that?
A. Because they are the people who are making the decisions on how to allocate resources for developing the drugs.
Q. Would you invest in a company if you did not trust the senior management?
A. No.
Q. Did the valuation models that you used take into account the implications of clinical trial results for FDA approval, assuming that the company doesn't have approval for their drug yet?
A. So are you asking do I incorporate probability of success?
Q. That's a better question.
A. Yes.
Q. And I think you said this, but just to be clear, those model also take into account the implications of the market share for that particular drug?

A. Correct.
Q. When you look at the results of clinical trials, is that when you involve your biostatistician consultants?
A. Yes.
Q. And what do you ask them to do?
A. You would ask them if they thought any of the data had been cut incorrectly or if they thought it had been done correctly.
Q. Does a company's stock price factor into your recommendation as to whether to purchase or sell a stock?
A. Yes.
Q. How so?
A. If you model it and it's overvalued, you would not buy it.
Q. How do you determine if a stock price is overvalued?
A. Based on your estimates.
Q. So does that mean based on the modeling that we talked about earlier?
A. Yes.
Q. Is one of your goals to identify stocks that you are reasonably certainly are undervalued?
A. Yes.
Q. Why?
A. To make money for our clients.
Q. And then in your approach to investing, do you consider

environmental, social, or governance issues?
A. Yes.
Q. And what types of issues would those be?
A. I mean, you want to invest with a management team that to the best of your knowledge is ethical.
Q. And how would you determine if a management team was ethical?
A. Whether they told the truth or not.
Q. Did you talk to Puma's management team?
A. Yes.
Q. Who did you talk to?
A. Primarily Alan Auerbach.
Q. How long have you known Alan?
A. I don't remember if I met him before I moved to Los Angeles. But I moved to Los Angeles, it will be ten years on March 20th. It's my birthday, so it's easy to remember. So it would've been sometime after that.
Q. So you've known Alan for roughly ten years?
A. Roughly.
Q. Is that how you became familiar with Cougar?
A. I believe so.
Q. For the record, that was also Alan's company, correct?
A. Yes.
Q. What is your impression of Alan Auerbach?
A. I like him.

Q. Was it your practice to communicate often with Alan during the time period in which you were investing in Puma?
A. Yes.
Q. Are you still investing in Puma today?
A. I do not hold Puma today.
Q. Do you recall when you stopped investing in Puma?
A. I don't remember the precise date, only the context.
Q. What was the context?
A. The biotechnology sector was under a lot of pressure. And I had been at a conference, and there was a concern that potentially their competitor, Roche, could have data that would have potentially limited the size of their lead asset.

So I decided to reallocate funds in companies with more than one product whose valuations within the sector had gotten crushed. That was the context. I do not remember the timing.

Q. Okay. I believe you said that you liked Mr. Auerbach. Do you trust him?
A. Yes.
Q. Do you think he is a good manager?
A. I do.
Q. Do you think that he has added value for Puma shareholders?
A. I do.
Q. At any point while you were investing in Puma, do you

believe that he misguided Puma investors?
A. To the best of my knowledge, no.
Q. To the best of your knowledge, do you believe that he ever lied to Puma's investors?
A. To the best of my knowledge, no.
Q. Do you believe Mr. Auerbach ever lied to you?
A. I do not believe he ever lied to me.
Q. Do you believe he ever misled you in any way?
A. I do not believe he ever misled me in any way.
Q. Do you believe that he defrauded you in any way?
A. No.
Q. So I handed you what's been marked as Exhibit 22. Take a quick look at that. The second point there is: Alan's dream scenario is to be given a shovel and allowed to dig in big pharma's graveyard again.

What did you mean by that?

A. Both for Cougar and Puma, those are not assets that he ended up with a team on his own. Those were assets that the pharmaceutical companies decided to divest.
Q. Got it. So it was your impression that he wanted to do that again after Puma?
A. Correct.
Q. Was it your impression that Alan's goal was to eventually sell Puma?
A. Yes.

Q. And then the final sentence of that says: Puma's management has only summarized enough efficacy data for us to estimate 87 percent DFS for control and 92 DFS for neratinib.

My first question is, do you understand what DFS means?

A. I'm trying to remember the precise definition, because we're at a deposition. So I will say no.

Q. Sure. Does disease-free survival sound right to you?

A. Yes.

Q. And do you recall -- when you say Puma's management has only summarized enough efficacy data for us to make these estimates, do you recall what that statement is based on?

A. I do not recall specifically.

Q. Okay. Do you have a general recollection?

A. I recall that they talked about it, but I don't remember if it was in a press release or conference call, et cetera. I do not remember the particulars of it.

Q. The second bullet point says: This is an investment in the people. The CEO is shrewd and a workaholic. He is a proven moneymaker and understands how to use capital wisely.

What did you mean by that?

A. Exactly how it is written.

Q. How did you know that Alan uses capital wisely, for example?

A. It was my impression that he did not overspend when he

was doing clinical trials. He's also a very understated person. I do not know what type of car he drives today, but I do recall after he had sold Cougar and, you know, had Puma, he still, like, drove a car that was, like, beaten up and dented. So he's not an ostentatious person.

Q. And you also say in this report that you knew that Puma faced risk from positive clinical data from competitors. Was that the Roche drug that we talked about earlier?

A. To the best of my recollection, yes.

Q. One more question. On page 42 you say here under road kill: Additionally, the company will need to raise additional capital if they remain independent.

A. Uh-huh.

Q. What did you mean by that?

A. If the company was acquired, they would not need to raise capital to launch the product. If they remained independent, they would, based on my analysis of their cash flows.

Q. So despite the fact that Alan used capital wisely, as a development stage company they would need more capital, was your assumption?

A. Yes. That would be typical.

Q. So now you've been handed what we've marked as Exhibit 23. So it looks like part of the discussion items, third bullet point says SYD biotech day wrap-up, and then it

lists six companies with the notation buy.

Would that reflect your recommendation to invest in those six companies?

A. Yes.

Q. At the bottom, the last heading there talks about the biotech day that we've talked about?

A. Uh-huh.

Q. And it says that in the second sentence, first bullet point, all six companies have management teams best described as magic makers?

A. Uh-huh.

Q. What did you mean by that?

A. My interpretation of magic maker is a management team that understands their business well, understands the opportunities, and understands how to develop the drug to the best of their abilities with a full knowledge that there are no future facts in biotech. That is why you run the experiment.

Q. So with the knowledge that there's no guarantee that the result will come out as you want them to?

A. Correct. It's biotech.

Q. And here it says SYD, meaning you, knows the CEO and considers him a straight shooter, so she thinks that the data will be clean.

Do you recall saying that or what you meant by

that?
A. I do not recall saying that in particular, but I do believe that Alan Auerbach is a straight shooter to the best of my knowledge. And I think whenever there have been challenges, he's been forthright about those. I don't remember in particular, like, a particular conversation. That's just my general impression of him.
Q. And when you say data will be clean, what does that mean?
A. Approvable.
Q. In your experience, is there a typical time frame in which companies will release the full results of a clinical trial after announcing the topline results?
A. There's not a typical time frame. One of the challenges if you're a biopharmaceutical company, you would have a press release that is topline data. But you cannot actually give the full data out in the press release or you will not be able to present the data at the medical meeting.

So the answer is not -- there's not a typical time frame because it would depend on what the rules were for that particular meeting in terms of timing for acceptance. When is the next medical meeting?

So I can't answer the question with the average typical group because for my impression there's not a typical time frame, just given how the mechanics work for the

communication of data.
Q. Understood. So your expectation of when the full trial results would be disclosed might depend on when the next major medical conference was; is that fair?
A. Correct -- and the timing criteria that is required for that medical meeting organization.
Q. Because presenting too many details could jeopardize your ability to present at the medical conference?
A. Absolutely.
Q. If you turn the page number 2, this says diarrhea still a very big issue.
A. Uh-huh.
Q. Do you recall that diarrhea was the primary side effect of taking neratinib?
A. Yes.
Q. And how did you know that?
A. Because it was presented in the medical meeting. And also we had done survey work to see whether or not doctors thought that was a big deal or not. And from the research, it looked like if you used prophylactic Imodium, which is not atypical when you see this sort of side effect in other oncology trials, that that ended up reducing the diarrhea rate substantially.
And I also recall that the diarrhea was more transient in nature. It happened upfront versus being

continuous, generally speaking. I'm sure in most cases with any clinical trial, you could see potentially differences in an individual patient level. But that was my recollection of that, the data regarding that safety signal.

Q. Is it fair to say that the information regarding the high rate of diarrhea for neratinib was widely known in the industry?

A. Oh, it was widely known.

Q. Setting that aside, though, so at this point in time it was known that the diarrhea was the main safety issue associated with this drug?

A. The company spoke openly about it.

Q. In your experience in researching biopharmaceutical companies and these types of drugs, is there a higher degree of tolerability of these types of side effects for cancer drugs?

A. Look, if you're going to die, you're going to put up with more side effects than if you do not have a life-threatening disease. So in general, yes. But it's hard to say in general because it really depends on what the safety signal is and what is the quality of life of the patient.

Q. Could it also depend on -- I can't remember the word you used, but the duration of the diarrhea or the -- you used a particular word.

A. Whether it was transient?
Q. Transient, yes.
A. Yeah. I mean, that would depend. So, like, if you were going to take the drug and you had diarrhea the entire time, that would not be acceptable for a profile. But to the best of my recollection, that rate was transient.

As a result, with a combination of Imodium, it was my assessment at that time that that particular side effect would not be very limiting to the drug if the patient had the high-end medical need.

Q. Do you recall generally believing that Puma was a buying opportunity prior to releasing the full set of data at the ASCO conference?
A. Yes.
Q. Why was that?
A. Because I thought neratinib would work inside and meet a high-end medical need.
Q. Did you think the data to be released at ASCO would support that view?
A. That was my hope.
Q. So we'll hand you what's been marked as Exhibit 34.
A. Okay.
Q. So you say here at the top -- and this is dated May 14th, 2015 -- the house is not on fire. Buy. Then you talk about that Puma's trading down 19 percent on the

abstract unveiled last night for ASCO. And you provide two reasons for your belief here?

A. Uh-huh.

Q. Can you elaborate a little bit more on those two reasons?

A. I don't have anything to elaborate on. I think it speaks for itself.

Q. So number one where you say: Hate selling, because the CEO did not provide color beforehand to the investment community that there is variability between those patients that were locally versus centrally confirmed.

What do you mean by hate selling?

A. So hate selling is people don't like to get blind-sided. But the reality is, I mean, I'm not a lawyer, but I would be surprised if Alan would have been able to share that there was a difference between centrally versus non-centrally adjudicated data, because that would have been data that would be presented at the medical meeting.

So it's a knee-jerk reaction, but I don't think that would be something that would be in his control because of how the rules work, because -- which we discussed earlier, that if you -- you can press release topline data. But if you do anything beyond that, then you can get embargoed from the meeting.

So I remember the people were disappointed, but I

also remember that I just didn't think that that was a reasonable ask in light of the rules for a presentation.

Q. If you'd go to the second page to the part that's underlined.

A. Okay. Yes.

Q. So here you say that you still think that neratinib is an approvable drug, correct?

A. Correct.

Q. Did you think that Puma's stock price at the end of the day, at the end of May 14th, 2015, was undervalued?

A. Yes. That's why I suggested to buy.

Q. Did you believe that Alan always worked as hard as he could to create value for the shareholders?

A. Yes.

Q. Was that one of the reasons that you invested in Puma in the first place?

A. Yes.

Q. We've handed you what has been marked as Exhibit 36.

A. Uh-huh. Yes.

Q. So this is a summary of another call, it looks like, also within your same division?

A. Correct.

Q. And this is dated June 2nd, 2015?

A. Uh-huh.

Q. I will represent to you for the record that the ASCO

conference took place on June 1st, 2015.
A. Okay.
Q. And so this is the day after that?
A. Okay. Thank you.
Q. And if you look at the first topic of the call, it says SYD Puma Biotechnology?
A. Uh-huh.
Q. And the notes from the call suggest that the stock was down 13 percent on June 1st, but you still viewed this as a strong buying opportunity?
A. Correct.
Q. Why did you believe that Puma was still a strong buying opportunity at this time?
A. I mean, based on what I've written, I still thought that it could be a very large drug, and the valuation was compelling.
Q. Do you recall analyzing why the stock went down?
A. Of course. I don't recall specifically every thought that I had, but obviously I analyzed it.
Q. And what were your thoughts that you recall?
A. I thought that the diarrhea could be dealt with with the Imodium. So I thought that true time, that would make sense and people would gain greater clarity on that if their initial data points were reproduced in larger settings with Imodium use.

And two, when you actually look at those patients that had that particular marker, the rates were quite acceptable and quite good. So I thought it was an approvable drug.

Q. And the second bullet point says: Shorts jumping on comments regarding a longer follow-up timeline with the FDA regarding their lead asset neratinib.

A. Uh-huh.

Q. Do you recall there was some concern at the time that there would be a longer timeline in terms of FDA approval for neratinib?

A. I remember that that was the controversy. I didn't agree with it, but that was the controversy.

Q. What was the controversy?

A. I don't remember the specific time frame, but you'd need to have a certain amount of follow-up period in order to get the drug approved. And the question was, how much longer did that need to be and whether or not Puma would have that data to get regulatory approval.

But the precise timelines I just don't remember. I just remember it was a delta.

Q. So do you think that -- backing up. So you recommend -- so you recommended buying additional Puma stock, correct?

A. Correct.

Q. Do you recall if that happened?

A. I do not remember.
Q. Were you aware that Norfolk County Council is a client of Capital International in the period 2014 to 2015?
A. Not until the lawsuit.
Q. Have you ever had any communications with any representative of the Norfolk County Council?
A. Not that I'm aware of.
Q. Do you know who at Capital Group was the relationship manager for Norfolk County Council?
A. I do not know.
Q. During 2014 or today?
A. No.
Q. And to the best of my knowledge, I take it you would know if you ever had communications with that relationship manager?
A. Correct.
Q. Do you know who the Capital Group portfolio managers were for Norfolk County Council in 2014?
A. I do not know.
Q. And do I take it, then, you would not know if you ever had any communications with any of those portfolio managers about Puma?
A. I do not, no.
Q. At the time that you compiled this report, did you have any nonpublic information about Puma?

A. No.
Q. Was any of the information provided in this report nonpublic?
A. No.
Q. At any point during the time you were covering Puma, did Mr. Auerbach ever provide you with any material nonpublic information?
A. No.
Q. At the time that you were covering Puma, did anyone from the company provide you with any material nonpublic information?
A. No.
Q. And to the best of your knowledge, while you were covering the company, did Mr. Auerbach ever provide you with any information that had not previously been made public?
A. No.
Q. I'd like you to turn to page 37. It's the Puma investment thesis we looked at earlier.
A. Okay. 0441?
Q. Correct, 0441. And looking at the first of your three killer facts, it starts off -- it says: Puma is derisking with more data. What did you mean by derisking?
A. Well, they had topline data that suggested that neratinib had the potential to be an approvable drug. In my opinion, without the prior there's no data. So therefore,

with no data, higher risk.
Q. And was the data you're referring to here the data that was just released by the company in July of 2014?
A. Was that when the stock went up initially?
Q. Correct.
A. Okay. Yes.
Q. Between that first spike in the stock price following the release of information in September, had you been provided with any additional data about Puma's neratinib drug?
A. I don't remember.
Q. And then the last sentence in there, you write: Puma's management has only summarized enough efficacy data for us to estimate 87 percent DFS for control and 92 percent DFS for neratinib.
A. Yes.
Q. What is that based on?
A. I do not remember.
Q. Would that have been based on any information that was not publicly available?
A. No.
Q. And so your estimate here would have been based on publicly available information about the drug?
A. Absolutely.
Q. Now, at any time prior to May of 2015, were you ever

provided with any efficacy data about Puma's clinical trial that had not been publicly disclosed?

A. I only know public information.

Q. And in listing your killer facts to my Puma buy investment thesis, do you know why you included this information about the DFS rates?

A. Because DFS would be important for approval.

Q. Why do you believe it would be important for approval?

A. Because it's disease-free survival.

Q. And why is that important?

A. Because you would want a patient to live longer without their disease progressing.

Q. Was that relevant to your investment decision?

A. Yes.

Q. And the information that was in the ASCO abstract that day, was that relevant to your valuation of Puma?

A. Yes.

Q. Did you consider that along with all other publicly available information about the company?

A. Yes.

Q. All right. And at the time you were making stock recommendations, did you also consider what the stock price was?

A. Yes.

Q. I take it your recommendations were not -- were based on

what the stock prices were trading at at a given time, correct?

A. Yes.

Q. Were your recommendations based on where the stock price was trading at the time you made your recommendations?

A. Not solely based on that.

Q. But would that have been a factor?

A. Yes, that would have been a factor.

Q. Prior to receiving -- if you would, why don't we take a look at the ASCO abstract which was previously marked as Exhibit 32.

If you look at the back page. Prior to receiving the ASCO abstract, did you know that the DFS rates for neratinib and placebo patients was 93.1 percent and 91.6 percent, respectively?

A. No.

Q. And was that difference -- was that different from the estimate that you had provided in your prior report?

A. I do not remember what the estimate number was.

Q. Do you want to look at -- can you look at Exhibit 22?

A. That is different.

Q. And was the ASCO abstract the first time that you were apprised of what the actual DFS rates were in the neratinib trial?

A. Yes.

Q. If I can have you turn to Exhibit 34.
A. Okay.
Q. The May 14th, 2015, report.
A. Yes.
Q. You call it a discussion. At the top the report refers to the stock being down for two reasons. Do you see that?
A. Yes.
Q. And your recommendation here to buy the stock, was that based in part upon where the stock was trading after it had fallen approximately 19 percent?
A. Yes.
Q. And looking at the second topic, it says: The topline 2.9 percent end point of DFS on DCIS is below Wall Street's expectation of approximately three to four percent. Do you see that?
A. Yes, I do.
Q. And was that below the expectations that you had previously included in your report?
A. I do not know what the number is I included in the previous reports.
Q. Would you like to look at it with Exhibit 26?
A. Which page?
Q. In your report what was the difference between the placebo and neratinib DFS rate that you had estimated?
A. So, I mean, it could be at an absolute basis because

it's rounded, like, as much as five percent, as much as that.
Q. So was the information that was released on May 13th, 2015, was that lower than your prior estimates?
A. Hold on a second. So in terms of the topline for -- it was different. But then if you actually looked further down in what I had written on ExteNET, it looked like in the locally confirmed, it would have actually been a higher rate.

And if you also looked at the other ranges that I had written about, when you include rounding on the number of 87 to 92 percent, if you went into the weeds on ExteNET, then it would have been in line with my expectations.

So you're correct. It was lower than the topline. But if you look at the subsequent analysis, it would've been in line to better.
Q. And on May 14th, 2015, when you were recommending to buy Puma stock, were you recommending to buy it at what was the then market price?
A. Yes.
Q. Was your buy recommendation based on what the market price was on May 14th, 2015?
A. If you thought that you could have it be at that price but it could also end up being at a higher price, depending on what your valuation was. So I'm not quite sure I can answer your question the way that it was framed.
Q. If you'd turn to Exhibit 36, which is the June 2nd,

2015, call summary.
A. Okay.
Q. Then under Puma Biotechnology, you see it says: Stock down 13 percent, down on June 1, 2015. SYD views as strong buying opportunity. Do you see that?
A. Yes.
Q. And again, in part was that buying opportunity based on the stock price decline?
A. In part based on that, but that was because I still thought neratinib was an approvable drug.
Q. On any of the times that you recommended the purchase of Puma stock, were you aware of whether or not Mr. Auerbach had violated the federal securities laws?
A. I'm not aware of it.
Q. Is that something you would have wanted to know at the time that you were making a stock recommendation?
A. Yes.
Q. Would that be relevant to your investment decision in Puma?
A. Yes.
Q. For example, would you have wanted to know whether Mr. Auerbach's statements regarding the ExteNET trial in 2014 were false?
A. I would want to know if they are true or false.
Q. And would that have been relevant to your investment

decision?
A. Of course.
Q. And you yourself, have you ever investigated or looked into the issue of whether Mr. Auerbach violated the federal securities laws?
A. No, I have not.
Q. Have you ever investigated the issue of whether Mr. Auerbach knew but failed to disclose negative topline data about the ExteNET trial?
A. I have not.
Q. Do you know when Mr. Auerbach first became aware of the topline safety and efficacy results from the ExteNET trial?
A. I would not know that.
Q. And do you know if he was aware of those results at the time he made his statements about the trial in July of 2014?
A. I do not know.
Q. And earlier you testified that you don't believe that Mr. Auerbach lied or misguided Puma investors; is that right?
A. That is correct.
Q. Is that something that you investigated?
A. I did not investigate it.
Q. Okay.
A. It's my impression.
Q. And is that impression based on any investigation of the facts regarding Mr. Auerbach's statements to investors?

A. No.
Q. And here you write -- you say that you haven't investigated whether or not he lied to investors about the ExteNET trial results; is that right?
A. I have not investigated it.
Q. Well, would you want to know if Mr. Auerbach was aware of materially worse results, topline results from the ExteNET trial than what he told investors in July of 2014?
A. Yes.
Q. Why would you want to know that?
A. Because it wouldn't have been the truth.
Q. And have you ever been provided with any Puma documents regarding what Mr. Auerbach knew at the time he made his statements about the ExteNET trial?
A. No.
Q. And then you also testified that Mr. Auerbach -- you don't think Mr. Auerbach defrauded you; is that right?
A. That is correct.
Q. Did you personally ever buy Puma stock?
A. No, I did not.
Q. And have you ever undertaken any investigation about whether Mr. Auerbach defrauded any of the investors in Puma?
A. No, I have not investigated that.
Q. So to the extent that an investigation concluded that Mr. Auerbach violated the federal securities laws when he

spoke about the ExteNET trial, would you have any reason to dispute that conclusion?

A. Can you repeat that, or can you simplify it? Can we just do it in, like, one sentence at a time, because --

Q. Sure.

A. One at a time.

Q. I appreciate it.

It's near the end of the day. We'll start off with a hypothetical, which is: To the extent that an investigation concluded that Mr. Auerbach violated the federal securities law when he spoke about the topline results at the ExteNET trial -- so it's a hypothetical -- to the extent that conclusion was reached, would you have any reason to dispute it?

A. I'm not involved with it, so I don't -- I'm not associated with it.

Q. And my question is, would you have any reason to dispute it, any evidence to offer that wouldn't be true?

A. I mean, I presume that he did something wrong, and I don't know anything. So I can't answer your question.

Q. When you say you don't know anything, you don't know anything one way or the other?

A. Correct.

(Reading of deposition of Skye Drynan concluded)

MS. MURPHY: That's it, Your Honor.

THE COURT: All right. Thank you.

MS. MURPHY: We'd also like to move Exhibits 22 and 36 into evidence. I believe there are no objections.

MR. FORGE: That's correct, Your Honor.

THE COURT: All right. Is that Ms. Carpenter?

MS. MURPHY: Yes, it was.

THE COURT: Thank you. All right. 22 and 36, is that right? Did I get that right?

MS. MURPHY: Yes.

THE COURT: 22 and 36.

(Exhibits 22 & 36 received.)

THE COURT: The defense will call its next witness.

MR. CLUBOK: Yes, Your Honor. We're back to the tape with a video deposition of Darcy Kopcho.

The time according to the -- what is spit out by the program is 21 minutes and 3 seconds for the defendants and 24 minutes and 57 seconds for the plaintiffs.

THE COURT: 21 and 3 seconds for the defendant. And for the plaintiffs?

MR. CLUBOK: The plaintiffs have 24 minutes and 57 seconds of the deposition.

THE COURT: Okay.

MR. CLUBOK: And while they're cueing it up, just so people know, this is the last video deposition, and then we have one more live witness remaining in our case.

THE COURT: Very well.

(The videotape deposition of Darcy Kopcho played.)

THE COURT: All right. Does that conclude the video?

MR. CLUBOK: Yes, Your Honor. And we would just like to move into evidence Exhibit 11. I think there's been no objection.

MR. FORGE: That's correct, Your Honor.

THE COURT: 11 is in evidence.

(Exhibit 11 received.)

THE COURT: Anything else?

MR. CLUBOK: Not with this witness, Your Honor.

THE COURT: All right. We're going to take a very quick break, say, five minutes, and come back and finish off the evidence.

MR. CLUBOK: Thank you.

THE COURT: All right. Let's take a five-minute break. I have 25 minutes left for the defense and 55 minutes left for the plaintiff. All right. So you don't have to take it all. That will bring us to a conclusion sometime after 1:30. Thank you.

(Recess taken from 12:15 p.m. until 12:24 p.m.)

MS. CONN: Your Honor, we have one issue before the jury comes back in.

THE COURT: Okay. What's the issue?

MS. CONN: Plaintiffs object to one of defendant's demonstratives for the next witness.

THE COURT: All right. Can I see the demonstrative?

MS. CONN: Yes, Your Honor.

THE COURT: You can put it on the screen if you would like. Ms. Johnson, what would you like to do?

MS. JOHNSON: Put it on the screen.

THE COURT: All right. Which demonstrative is in issue?

MS. CONN: It's marked DDEM80, Your Honor. It's a slide titled The Real World, and it goes -- it refers to the present-day use of the drug.

THE COURT: Hold on. Excuse me one moment.

There's a zoom-out button if you want to capture everything, which you haven't.

Go ahead.

MS. CONN: So given the title The Real World, we think this suggests to the jury that this is indicative of the present-day use of the drug. So it violates the order on plaintiffs' motion in limine number four.

It's also misleading because there are only 2,000 patients on the drug today. So to present them a slide that suggests that up to 81,000 patients are taking it would be very misleading.

That prejudice and confusion could not be corrected without further violating the order on the motion in limine number four.

THE COURT: What about that?

MS. JOHNSON: This witness has been treating patients in the real world since 2010. He was --

THE COURT: I don't know how that relates to the objection we just heard.

MS. JOHNSON: That's why the --

THE COURT: She wasn't commenting on foundation or authenticity. She was commenting on the motion in limine. So your opening statement leaves me thinking we're not on the same wavelength.

MS. JOHNSON: The real world refers to the period of time, the class period, 2014-2015. This witness had -- has experience with the drug. These data are based on his expectation at the time.

And Dr. Adelson testified about percentages of patients that she would expect would be appropriate for neratinib. We should be entitled to rebut that evidence with Dr. Schwab's expectation in the same time period about -- based on the ExteNET trial.

THE COURT: I think your -- don't bury the lead. I think your statement might be, this is the real world from the class period.

MS. JOHNSON: Correct.

THE COURT: Response? How does that violate the motion in limine? You kind of led me astray. I mean, I'm just looking at this. I don't know other than what you tell me. When you say the motion in limine, didn't that go to post class period discussions?

MS. CONN: It does, Your Honor.

THE COURT: Well, then, I'm not sure why you even brought that up if this is a -- I mean, that really made me get on Ms. Johnson saying -- I'm confused. Can you help me out?

MS. CONN: Yes. I think the -- it's not clear from the slide that we're talking about Dr. Schwab's expectations, particularly given the --

THE COURT: Are these expectations?

MS. CONN: That is what I heard Ms. Johnson to say.

MS. JOHNSON: Putting yourself into the real world as of 2014 based on the ExteNET data, this is -- these are his responses to Dr. Adelson's testimony about who she would expect.

THE COURT: All right. Anything further?

MS. CONN: No, Your Honor.

THE COURT: Okay. I'll allow the demonstrative. It's the sort of thing I could see a witness putting on a piece of butcher paper. And you can say what you want on

cross-examination.

So let's bring the jury back.

THE CLERK: All rise.

(Open court - jury present)

THE COURT: All right. Folks, we're in the last stretch, and a three-day weekend awaits you if not us.

Ms. Johnson, call the defense next witness, please.

MS. JOHNSON: Thank you, Your Honor.

Defendants are pleased to call their last witness, Dr. Richard Schwab, to the stand.

Richard Schwab, Defendant's witness, sworn

THE CLERK: For the record, please state and spell your first and last name.

THE WITNESS: Richard Bruce Schwab, R-i-c-h-a-r-d, S-c-h-w-a-b.

DIRECT EXAMINATION

BY MS. JOHNSON:

Q. Good afternoon, Dr. Schwab.

A. Good afternoon.

Q. Could you please introduce yourself to the jury.

A. Absolutely. My name is Richard Schwab. I'm a clinical professor of medicine at UC San Diego. I'm a medical oncologist.

Q. Have you prepared any materials to assist your testimony here today?

A. Yes. I have some slides.
Q. All right.
MS. JOHNSON: Your Honor, we've marked for identification Exhibit 1122. The pages are marked DDEM50 through 55.
Let's put up the first slide, which is Exhibit 1122, DDEM50.
BY MS. JOHNSON:
Q. Can you please tell the jury about your educational background.
A. Certainly. Just briefly I did my undergraduate work at UC Berkeley. My major was molecular cell biology. I received my medical degree from Albert Einstein College of Medicine. I did an extra year of research there, so I graduated with distinction in research for molecular pharmacology, so research developing new medications.
Since that time I've been at UC San Diego. I did all of my post-graduate medical education there for six years. Then I've been on the faculty ever since, gradually being promoted over the years. And now I'm a full professor.
Q. What does a medical oncologist do?
A. Medical oncologists give medications to treat cancer.
Q. Do you specialize in a particular type of cancer?
A. Yes. In clinic I only see patients that have breast cancer.

Q. And briefly what are your responsibilities at UC San Diego?

A. So it's sort of a long list, but I mainly just take care of patients. So I see patients four full days a week in clinic. As part of that I would also put them onto clinical trials, so there's a fair bit of clinical research.

I collaborate with a lot of different scientists, epidemiologists, so scientists that study disease in populations. I sit on the IRB, which is a federally mandated committee that reviews all the clinical trials that we are opening at the university.

Q. Just quickly, what is IRB?

A. Internal review board.

Q. Do you also do any teaching?

A. Yes. Most of the teaching I do is with doctors in training rotating in clinic with me. I would have an oncology fellow with me at least one morning every week and often more. And then I give lectures about once a year.

Q. Do you also conduct research?

A. Yes. Again, most of the research I do is in the setting of clinical research. So opening trials, enrolling patients on trials. I am a part of a large national study called I-SPY 2.

So in that study, in addition to just treating patients at UC San Diego, I also sort of help run the study

at the national level. So I co-chair the safety committee and I act as a medical monitor for the study. So when there are severe adverse events at other sites, I take on that sort of FDA-mandated role of rereviewing what the local physician believes has happened to the patient and just providing a second set of eyes to make sure we're treating patients safely on the study.

Q. What drug is in the I-SPY trial?

A. The I-SPY 2 trial is what we call a platform trial. It opened back in 2010, and we serially test different drugs in the study. So each medication that is in the study is its own arm.

So when we first opened back in 2010, we had two arms. Then those medications finished and we graduated them, and we brought in new drugs. So over the last nine years, we've tested about a dozen different medications in the trial. And the trial continues to this day.

Q. About how many clinical trials have you been involved with?

A. Over my 13 years on the faculty, we've probably had between 50 and 100 different trials for breast cancer patients.

Q. And what has your role been in those clinical trials?

A. I'm always at least a co-investigator. So that means I have the right to enroll patients on the study and treat them

on the study. But for some of the studies, I have taken on the larger role of being the site PI, principal investigator. That means I take on really total responsibility for the activity of the trial at UC San Diego.

Q. So you started telling us about your experience by saying, I treat patients. How many patients do you see in a week?

A. An average week I would see between 60 and 70 patients in clinic.

Q. And how about not in clinic?

A. Right. So I have a much larger group of patients who are under treatment at any given time. Probably between 100 and 200 patients total would be receiving injections or infusions at our infusion center.

And then there's probably close to a thousand patients that I have on therapy with medications, pills that they take at home.

Q. Dr. Schwab, have you ever served as an expert witness before?

A. I have -- I've testified in court on two previous occasions.

Q. And in those cases were you retained by the plaintiffs or the defendants?

A. In both of the previous cases I was retained by plaintiffs.

Q. Who has retained you in this matter?
A. Puma, the defendant.
Q. And are you being paid for your work here?
A. Yes.
Q. How much so far?
A. Yeah. My total just surpassed 25,000, which I know because that requires me to disclose it for the clinical trials I participate in.
Q. And did you review the testimony of Dr. Adelson in this case?
A. I did.
Q. Let's talk about the standard of care for HER2-positive breast cancer.

MS. JOHNSON: If we can go to the next slide, which is Exhibit 1122-DDEM51.

BY MS. JOHNSON:
Q. Would you explain to the jury what HER2-positive means?
A. Sure. HER2-positive breast cancer is a breast cancer that expresses too much of the HER2 protein, and it makes a more aggressive cancer.
Q. Prior to the ExteNET trial -- you're familiar with the ExteNET trial?
A. I am.
Q. Prior to that trial, for a patient who has been diagnosed with HER2-positive breast cancer, what was the

standard of care, again prior to ExteNET?

A. Right. We have it on display here. So historically and prior to the ExteNET trial, the first treatment for breast cancer was always surgery. It was the first treatment that was invented.

Then after surgery, even though the patient is cancer free, we know that they have a high risk of recurrence, particularly with aggressive cancers like HER2-positive cancers. So we give them additional treatment after surgery.

Q. And what does adjuvant mean?

A. Adjuvant is a helper, right? So this is an adjunct to the main treatment of surgery. So we can give them adjuvant chemotherapy, which for HER2-positive breast cancer is very helpful. Even chemotherapy alone dramatically reduced the risk of recurrence for HER2-positive patients.

Then, as you can see on the slide, more recently we've added Herceptin. So this is the first anti-HER2 therapy that was also given adjuvantly and also had a very significant benefit in reducing recurrences.

Q. When did Herceptin become available for patients in the adjuvant setting?

A. Right. So Herceptin was already approved for metastatic incurable patients when in December of 2004 at the big breast cancer meeting they announced the results of the adjuvant

trials. Everyone who was -- I was at that meeting. Everyone at that meeting basically went back and started calling their patients who were in this situation and said, you need to come in and get your Herceptin.

Q. Again talking about the standard of care before ExteNET, how long would patients take Herceptin?

A. The current and previous standard is one year of Herceptin.

Q. For HER2 patients when does the risk of relapse after surgery peak?

A. For high-risk disease, about two years after surgery.

Q. And prior to the ExteNET trial, did those patients who finished their treatment with Herceptin have any other options to target the HER2-positive protein?

A. No.

Q. All right. Let's talk about neratinib for a few moments. Do you know how neratinib works?

A. I do.

MS. JOHNSON: If we can go to the next slide, Exhibit 1122-DDEM52.

THE WITNESS: So you can see here on the left we have a cancer cell. It's obviously simplified. Those teal pluses at the top there represent the HER2 receptor. Obviously in a real cell there would be many, many copies of HER2, but we've simplified it to just those two receptors

which come together to actually lead to signaling. That's called dimerization. You can see the nucleus of the cell which is labeled. That's where the DNA is, and that's what controls the growth of the cell.

Then we have these blue dots which are sort of just simplification of the signaling cascade that can transmit a signal from the surface of the cell where the HER2 receptor is to the nucleus.

So it can show how those blue dots, when they get to the HER2 receptor, they become activated. And here we depict that as red. Then they make their way to the nucleus, and that tells the cell to grow more quickly and divide.

Now, here we show just two -- one cell becoming two. But, of course, in a patient this is an ongoing process, and the divisions keep happening and you get exponential growth of the cancer. And those millions of cancer cells cause harm and death.

BY MS. JOHNSON:

Q. And if a patient does not have the HER2-positive protein, is neratinib likely to work? You can finish with the slide if you like.

A. In general we wouldn't expect neratinib to work in a HER2-negative patient, no. There's obviously -- in medicine there's always rare exceptions.

In terms of how neratinib works -- I apologize.

Working my slides here. Here you can see that when neratinib is present, and it's displayed as this little yellow bar, it's able to -- when a patient takes neratinib, it's a small molecule and it's able to get inside of the cancer cell.

That's unlike other anti-HER2 therapies which are big proteins that only act on the outside of the cell. They get into the cell and they block that enzymatic activity of the HER2 protein.

You can see that when the signaling molecules, the inactive molecules, reach that area, they're not able to be acted upon. And instead of activating, they just do nothing. Interestingly, HER2 is such a strong signal that the HER2-positive cancer cells tend to be very addicted to that signal.

When we take it away, we see in general very good responses with rapid killing of the cancer cells.

Q. So with that explanation for how neratinib works, how do you as a practicing physician know if a patient actually has HER2-positive?

A. So HER2 testing is complicated. There have been sequential updates to the HER2 testing guidelines. Over my entire career the last update was just either 2017 or 2018. Basically we run two different types of tests, one that looks for the HER2 protein and one that looks for extra copies of the HER2 gene in the cancer cell.

At a large center like UC San Diego, that's done at our local lab. We probably test about a thousand patients a year for HER2. At smaller centers where they test fewer than a hundred patients, they're not able to maintain their accreditation with the national bodies that make sure pathology departments are doing this correctly.

So those centers will normally send their samples out to a reference lab. In the context of a clinical trial, that would be called central review. In the context of clinical care, we would just call it reference testing.

Even at UCSD, if I get a weird result from my local lab, I'll send it out to an expert in the field, to a reference lab to be sure.

Q. And when you use the term reference lab within your practice, in a clinical trial that would be called what again?

A. I think they use the term central confirmation.

Q. Thank you. Let me ask you, when did you first learn been neratinib?

A. So when we opened the I-SPY 2 trial in early 2010, neratinib was one of the first drugs in the trial. So that's when I first learned about it.

Q. And did you participate in that trial as a co-investigator?

A. Yes. I enrolled patients on the trial, and I had the

opportunity to treat them with neratinib.
Q. With respect to neratinib, what were the results of that trial?
A. It was positive results. The study graduated neratinib for efficacy.
Q. And were there any side effects observed in that trial?
A. Yes. We were warned about the diarrhea as we were opening the trial. The protocol, the I-SPY 2 protocol, didn't dictate that you had to give preventative Imodium, but on the investigator calls we were advised that that would be a good idea, and we did that.
Q. And when did you first learn about the ExteNET trial?
A. I remember -- and it's hard to remember because you're constantly hearing about these things. But I definitely remember in December of 2015, again, at the big breast cancer meeting, seeing a presentation, one of the presentations about ExteNET at that time.
Q. And let's talk about the efficacy results of the ExteNET trial. Can you explain to the jury what the ExteNET trial showed in terms of efficacy?
A. Absolutely. So I think that you've been over this a few times, so I'll be brief. These are the two different ways that I and clinicians in general look at these efficacy results.
The absolute risk reduction is the simplest way to

look at it, particularly if I'm talking to a patient. So for a patient who is exactly like the patients on the ExteNET trial -- which obviously doesn't really exist, but that imaginary patient who is exactly like the patient on the ExteNET trial -- I can tell them that if they're treated again exactly as they were on the trial, we can expect a reduction in the risk of cancer recurring at 2.3 percent.

So for every thousand patients, just like that, 23 of them avoid their cancer coming back by taking the medicine. And then when we think about the field more generally as a population of patients we want to cure all of, that's where I think about the relative risk reduction.

So relative risk reduction is only concerning the patients who are destined to recur. So for any given patient, I don't know who's destined to recur, but, of course, as a field, as we keep inventing new drugs with the goal of curing everyone, we want to keep track of how much of this disease burden are we chipping away at.

The ExteNET trial was impressive. So of those patients at risk of recurring, a third of them were prevented from recurring with the addition of the neratinib.

Q. You've been speaking from Exhibit 1122, page DDEM54. If we can translate what you've just said into real-world numbers given the results of the ExteNET trials as you learned about them, can you translate the 23 women out of a

thousand into real-world numbers?

A. Absolutely. So breast cancer is not a rare disease. In the United States every year about 270,000 women are diagnosed with breast cancer, and about 25 to 30 percent of them will have HER2-positive disease. The number is a little bit of a moving target because of the constant updates to the guidelines.

So with that range, we can just do the math and see at the low end there would be about, I don't know, 67,000 patients a year. The high end is a little bit over 80,000 patients a year with HER2-positive invasive breast cancer.

Then if we just applied that 2.3 percent without doing any further strategizing to give it to the highest-risk patients, we would see that between 1,500 to about 2,000 women would be saved from a cancer recurrence with this medication.

Q. And based on what you learned on ExteNET at the time, did you have a view about the potential for FDA approval?

A. Absolutely. When you open a phase III trial, it's very expensive and you have to meet with the FDA in advance. The FDA requires it. And, of course, sponsors want to do it.

There's basically an agreement before you even start the trial. You know, if we hit our primary end point which our study is powered for, the drug is expected to be FDA approved unless there is some surprising safety signal --

or, of course, if you don't hit the target that you agreed on.

Q. And in your practice, what kinds of patients would you expect to recommend take neratinib?

A. Yes. It's a little bit complicated because the field has evolved over time. Even back during this time period we're talking about, there was a new approval for a new anti-HER2 drug, pertuzumab, also known as perjeta, in the neoadjuvant setting where we give it before patients have surgery. So it is sort of a constantly evolving area.

Q. Would you want all of your patients to know about neratinib?

A. I certainly think that any patient who would have been considered eligible for the ExteNET trial has the right to know about those results. If I was a patient in that situation facing a life-threatening disease, I would want to know what was available.

And, you know, given the side effects and the efficacy, I would expect many, many of those patients to want to take it.

Q. And what about the cost? The jury heard Dr. Adelson talk about her patients being responsible for about 20 percent of the cost of their prescription drugs. Is that consistent with your experience?

A. No. In my experience I see -- we take all different

types of insurance at UC San Diego. So I have a lot of underinsured patients who are funded through Medicaid. Then I also have patients with really good insurance. And then there is a population of patients sort of in between, particularly Medicare patients who maybe don't have a supplemental insurance.

So the underfunded Medi-Cal patients get their prescriptions covered. They don't have a share of cost. The patients with really good insurance usually have basically no share of costs or minimal share of costs. And it's that middle group who sometimes do face a share of costs.

In my experience the drug companies are very good at providing co-pay assistance. To be honest it's not really altruistic. It doesn't cost them that much to make the drug. So if they provide the difference, they're still making money by selling the drug and getting the non co-pay part of the payment.

So in my practice I really haven't had problems getting patients the drugs they need.

Q. Would you expect that any of your patients would have to decline treatment with neratinib because of how much it might cost?

A. No.

Q. All right. Let me ask you about safety. You mentioned the diarrhea side effects. Is that a temporary or a

long-term side effect?
A. It's temporary.
Q. Does neratinib have any long-term side effects?
A. No.
Q. And you have been -- you have had experience treating patients with neratinib going back to the I-SPY 2 trial; is that correct?
A. Correct. So my patients who were treated way back in 2010, they still follow up with me. So I have not seen any long-term side effects from any of those previously neratinib treated patients.
Q. And based on your experience treating patients with neratinib, are you aware -- would you expect patients to stop treating, to stop taking neratinib because of the diarrhea side effects?
A. I think the simple answer is no. On the study there were very strict rules about how much diarrhea you had to have and for how long before you could start to reduce the dose of the drug.

So on I-SPY 2, I did have one patient refuse to try it a second time. Because she only had horrible diarrhea for a couple days, the study was going to require her to go back on full dose. And, of course, we both knew she was going to have the same diarrhea, so she decided not to continue on study-directed therapy.

Outside of the trial, if I had access to the drug, I would have just given her a lower dose and she would have been happy to do that. So in my experience I don't think it would be an issue.

Q. And based on that same experience with neratinib, would you expect any of your patients to be hospitalized with diarrhea?

A. No. I don't think I've ever had a patient hospitalized for diarrhea.

Q. Dr. Adelson testified about some side effects that other cancer treatments may cause, a parade of things -- hair loss, joint pain, high risk of infection. Does neratinib have any of those side effects?

A. No.

Q. And what about other cancer treatments that may end up in early menopause which may lead to weight gain, anxiety, sleep disturbances? Does neratinib cause any of those side effects?

A. No.

Q. And what about patients who are going through those other cancer treatments who might have to take time off from work or be hospitalized? Would you expect neratinib to cause any of those effects?

A. No.

Q. All right. And based on your knowledge of the ExteNET

trial, is neratinib a safe and effective drug for the treatment of HER2-positive breast cancer?

A. Absolutely.

Q. Would you expect the results of the ExteNET trial to change the standard of care for HER2-positive patients?

A. Yes.

MS. JOHNSON: Thank you, Dr. Schwab.

THE COURT: Right on time.

All right. Cross-examination.

CROSS-EXAMINATION

MS. CONN: Thank you, Your Honor.

BY MS. CONN:

Q. Good almost afternoon, Dr. Schwab.

A. Good afternoon.

Q. I think you probably remember me as the person who took your deposition earlier this year, correct?

A. Yes.

Q. You understand that this case is not -- this jury is not being asked to decide whether or not women should have neratinib available as a treatment choice, right?

A. I actually am not a legal expert, so I would defer to you and the other counsel to make those determinations.

Q. So you don't know that this case is about statements that Mr. Auerbach made on a July 22nd, 2014, conference call with investors?

A. I know that that's --

THE COURT: I saw the defense look like they wanted to object. Your objection is?

MS. JOHNSON: That counsel is mischaracterizing --

THE COURT: By putting the word so in front of it, it's not what he said. So...

MS. CONN: Okay. I'll rephrase, Your Honor.

BY MS. CONN:

Q. Dr. Schwab, you were retained in this case to provide opinions to support the defendant's position in this case; is that right?

A. No.

Q. You were retained in this case to provide opinions on the standard of care in breast cancer; is that right?

A. Yes, among other things.

Q. And you were retained by Puma Biotechnology and Mr. Auerbach; is that right?

A. No. Just retained by Puma Biotechnology.

Q. Okay. And you understood when you prepared your opinions in this case that Puma Biotechnology would use them in furtherance of their case, correct?

A. I assumed as much.

Q. Okay. And did you have an understanding at the time you were retained that this case was about statements that Mr. Auerbach made on a July 22nd, 2014, conference call with

investors?
A. I think the way it was explained to me was investor fraud, was the term that I recall.
Q. Okay. You didn't listen to that conference call at the time; did you?
A. No.
Q. But you did review the transcript in preparation of your materials in this case; is that right?
A. Yes.
Q. You just didn't refer to those statements at all in your testimony today, right?
A. Correct.
Q. You agree that the ExteNET trial showed a 2.3 percent absolute benefit in DFS for all patients, right?
A. Correct.
Q. I want to turn back to your demonstrative, which for the record is Exhibit 1122, slide DDEM54. So here you've described some of the results of the ExteNET trial, correct?
A. Yes.
Q. And you say here that if a thousand patients are treated with the drug, 23 fewer women will have a recurrence of breast cancer after two years; is that right?
A. You read it correctly, yes.
Q. Okay.
THE COURT: I wonder if you turned the light on --

it's always good to see if the exhibit squares up with the video image. That would help a little bit, yeah.

BY MS. CONN:

Q. And that's simply a different way of saying there's a 2.3 percent benefit in DFS, correct?

A. That's the way of saying absolute risk reduction in DFS, yes.

Q. Okay, but there were some other numbers from the trial that you didn't include on your slide of ExteNET trial results, right?

A. There is an enormous number of results both from this time point and other time points, yes.

Q. And you didn't include any safety results on this slide; did you?

A. No, I did not. The slide is titled benefits of neratinib, so I don't think it would fit.

Q. Okay. It's true, though, that if you were to take a thousand patients -- if you were to treat your hypothetical thousand patients here, treated with the drug, based on the results of ExteNET, 952 of those women would have had diarrhea, right?

A. I think there's a few points to make about it. Going down to grade-one diarrhea, I'm not sure of. And that would require that I treat them exactly the way they were treated on the ExteNET trial, so with no prophylactic anti-diarrheal.

Q. Right. And we're just extrapolating the results of the ExteNET trial. We're just multiplying them by ten instead of expressing them as percentages here, right?
A. Yes.
Q. Okay. So taking the results of the ExteNET trial, how about grade-three diarrhea? Do you know that result? That's 399 out of a thousand women, right?
A. Correct.
Q. Okay. And you are also aware that if you were to take this group of a thousand patients, 276 of them would have stopped taking the drug due to side effects, correct?
A. Yes, but there's an important point about that, which is that discontinuation rate is included in the DFS benefit. We assume if all of them took it, we would've seen another 25 percent benefit.
Q. Right. And you agree that patients don't benefit when they can't tolerate the drug and have to stop taking it, right?
A. By definition, to get the benefit, you must take the drug, yes.
Q. So it's a pretty important fact that over a quarter of those patients couldn't tolerate the drug, right?
A. No. Actually it's not. That's contained within the 2.3 benefit. All right? If they all were able to take it, we would've seen a bigger benefit.

The benefit we see includes the discontinuation rate. That's the real-world result from the trial.

Q. You're also aware that 168 of those thousand women would have discontinued the drug due to the diarrhea side effect alone, correct?

A. Yeah. On the trial, that's what happened, yes.

Q. Again, your slide is extrapolating the ExteNET results into multiples of a thousand, right, or multiples of ten?

A. On that line, yes.

Q. Whether we're using percentages or groups of a thousand, you agree with me that none of these results were disclosed on that July 22nd call, right?

A. It's been a while since I read the call, so I would have to go -- it's a pretty long call. I would have to go back through all of that to know exactly what was or wasn't disclosed.

Q. Are you aware from your review of the materials in this case that Mr. Auerbach knew all of those results before July 22nd, 2014?

A. I mean, I read a lot about -- I looked through a lot of material in preparing for the case, and to be honest with you, I wasn't really tuned in to that part. It wasn't what I was asked to review.

Q. So your answer is no?

A. At this point I'm actually not even sure what the

question was, but I guess the answer is no.
Q. Let's look at Exhibit 1122, slide DDEM55, the one titled The Real World. Do you remember talking about this slide?
A. Yes.
Q. Okay. And you call it The Real World, but it's actually just your hypothetical expectation when you learned the results of the ExteNET trial in 2015; is that right?
A. I -- well, certainly the 270,000 women per year diagnosed with breast cancer in the United States is very much the real world.
Q. Okay. And you estimate there's -- 25 to 30 percent of those HER2-positive cancers -- or those cancers are HER2-positive; is that right?
A. Yeah. Again, that data is a little harder to come by because of the changes to the guidelines over time, but I think that that's a correct number.
Q. Okay. So just this part down here is your hypothetical expectation of how many women would have benefited from neratinib based on the ExteNET results you learned in 2015; is that right?
A. No. To get the first set of numbers, you just have to multiply the number of women with breast cancer per year by the percentage who are HER2-positive. So those numbers are very robust. The 67 and a half thousand to 81,000 number is definitely robust.

Q. Would you agree with me, Doctor, that this right here is the market for Herceptin?
A. Yes. Almost all HER2-positive patients with localized or metastatic breast cancer will take Herceptin at one point or another.
Q. And you're saying here in this slide that as of 2015, you expected neratinib to have the same market that Herceptin did?
A. We were talking about the potential use of the drug.
Q. Yes?
A. Yes. The potential use would be the same because of the way the drug was studied. It was studied in patients who had completed a year of adjuvant Herceptin and then they went on to take neratinib.

So, yes, it was that -- not the exact same population because Herceptin is also used in metastatic patients. But in the adjuvant setting it would be available after they finished their year of Herceptin.

Q. You agreed with me at your deposition, correct, that there were certain subgroups in ExteNET who did not show a benefit? Is that right?
A. What we were talking about --

MS. JOHNSON: Objection, Your Honor, to the improper impeachment.

THE COURT: Sustained. Improper use of a

deposition.

BY MS. CONN:

Q. You're aware, Dr. Schwab, that there were subgroups in the ExteNET trial who did not show a benefit from neratinib, correct?

A. Yes.

Q. And based on those results, you would have -- well, first of all, you would not use neratinib in a patient who had stage IV cancer, right?

A. Correct.

Q. Based on the eligibility criteria of the ExteNET trial?

A. Correct.

Q. Okay. So you're going to take out stage IV, which is about five percent, right?

A. Correct.

Q. And you also are aware that ExteNET did not show a benefit in estrogen-receptor negative patients, correct?

A. Yes.

Q. And I think your estimate of that was about 50 percent of the HER2-positive population is also ER negative, correct?

A. Correct. Fifty percent of HER2-positive patients will be ER negative. But in this context that reduction only comes from the denominator, from the total number of patients who would be potentially treated.

By eliminating them, the benefit actually gets

refined down into that ER-positive population. So we would get the same number of patients saved from recurrence, but we would reduce the number of patients who needed to be treated with that knowledge.

Q. You're also aware that ExteNET did not show a benefit for node-negative patients, correct?

A. Again, when you say didn't show a benefit, it didn't reach statistical significance. The lower the risk of population is, the harder it is to show significance, of course.

Q. So is that a yes or a no?

A. So --

Q. Are you aware that the ExteNET results did not show that lymph node negative patients benefitted from neratinib?

A. It did not reach statistical significance for benefit in the node-negative population, correct.

Q. So that's another 75 percent of the population, right?

A. Correct. Again, those would be patients we would potentially not need to expose to the drug, and we could refine the treated patients to the highest-risk patients and still get that benefit but by treating fewer patients.

Q. Now, you've just done some math here to get to 81,000 patients, correct?

A. Correct.

Q. That was your expectation in 2015, that 81,000 patients

would be eligible for treatment with neratinib?
A. Again, we're talking about the way the trial was conducted.
Q. Correct.
A. So it's a -- it's an estimate. I agree with your point about the five percent of patients who are primarily metastatic. So I overshot by five percent, but we're still within the range.
Q. You exaggerated; didn't you?
A. I made a mathematical error. I am certainly fallible in that regard.
Q. You said earlier that -- well, let me ask you this. You've talked a lot about your experience with neratinib. How many patients have you actually treated with neratinib?
A. To date, including after the period of time that we're talking about, about 20 now.
Q. About 20. Okay.

So your opinions based on those 20 patients, you're aware that the ExteNET trial enrolled 2,800 patients, correct?
A. I apologize. For the previous answer, the 20 doesn't include the patients I treated on I-SPY 2. So my estimate for how many I treated on I-SPY 2 might have been another ten. So maybe 30 overall. So those were early patients treated on I-SPY 2 and the later treatment now.

Q. Later treatment now. So you've prescribed neratinib to 20 patients?
A. Correct.
Q. Okay. And do you know how many patients your colleagues have prescribed neratinib for?
A. I don't keep a running total, but the more junior colleagues at UCSD do talk to me about their patients. So since my deposition, probably a few more. And I think there had been a few by the time of my deposition.
Q. Do you know nationwide how many prescriptions have been written for neratinib?
A. I heard you over -- I was in the audience earlier, so that I heard state a number earlier. That's the first time I heard you state a number earlier. But that's the first time I've actually heard a number for how much neratinib is currently being used.
Q. Did it surprise you to hear that only 2,000 patients are on neratinib today?
A. No. You know, the field is in constant flux. So since the ExteNET trial was presented, or even before we had the FDA approval of pertuzumab in the neoadjuvant setting and then since ExteNET, we got the results of the pertuzumab adjuvant trial where we give it afterwards.
Then just last December, so just last month, T-DM1 or Kadcyla, which is a special version of Herceptin that has

chemotherapy added to it, now that can be given to patients who don't have a complete response to the standard treatment before surgery. So --

Q. Doctor, is your answer no?

A. Maybe you better repeat the question.

Q. Okay. I asked you, does it surprise you that to date roughly 2,000 prescriptions have been written for neratinib?

A. No. In medicine nothing surprises me. It's complicated.

Q. But you would agree with me, wouldn't you, that 2,000 is significantly less than 81,000?

A. Oh, I apologize. I didn't mean to imply that all 81,000 patients would end up taking it. But if we're good and we pick the right 2,000 patients, we actually might save the 1,800 patients. That would obviously be amazing. I don't think we're that good, but I think we are much better than 2.3 percent.

Q. But again, based on -- there's no evidence about that greater benefit based on what you learned in 2015. Correct?

A. Okay. So now if I'm going to now forget everything from after 2015, no, there still is reason to believe, because even in the 2015 data, we knew that the ER positive, HER2-positive patients were the ones who were benefiting.

So just by focusing on that group, we could basically double the benefit. And then by focusing on the

lymph node positive population, we could also enhance the benefit. It's hard to know exactly how much, but it's quite clear we could do a lot better than 2.3 percent.

Q. Doctor, I'm just going to move on to the next question. You said you learned about the ExteNET trial at San Antonio, right?

A. That's the first time I can be sure of hearing about it. It's hard for me to remember all the different medications I hear about at different --

Q. So that was --

A. -- time points, of course.

MS. JOHNSON: Your Honor --

BY MS. CONN:

Q. That was the three-year analysis, correct?

A. Yes, the three-year analysis.

Q. And you're aware that the DFS benefit of the three-year analysis --

MS. JOHNSON: Objection, Your Honor. Objection.

THE COURT: Hold on. I think she needed to complete the question.

Did you get the whole question, Ms. Baird?

Would you repeat the question.

BY MS. CONN:

Q. You're aware that the DFS benefit as presented at San Antonio in 2015 was 2.1 percent, correct?

MS. JOHNSON: Your Honor, I object based on motion in limine number four. We have been precluded from putting on quite a bit of evidence --

THE COURT: Response.

MS. CONN: He testified to this as the basis of his knowledge and opinions of an increasing benefit for neratinib.

MS. JOHNSON: We have been -- you're asking me? The defendants have been exceedingly careful about the time period that Your Honor viewed. We would have put in a number of other pieces of information about this drug, and plaintiff is cherry-picking one out of thousands that reflect the true benefit of this drug.

THE COURT: The objection is sustained.

Next question.

BY MS. CONN:

Q. At any rate, Doctor, you learned about neratinib -- you did not learn about neratinib at ASCO in 2015; is that right?

A. I did not attend ASCO 2015, and I don't remember seeing the slides. Sometimes I do look through the slides. I just don't remember.

Q. Okay. And yet you managed to hear about it and prescribed it at least 20 times through today, correct?

A. Wait. I heard about it at the San Antonio Breast Cancer Symposium before it was approved, yeah.

MS. CONN: That's all I have.
THE COURT: All right. Thank you.
Is defense ready? Actually --
MS. JOHNSON: I'm out of time.
THE COURT: Indeed. So the defense rests?
MR. CLUBOK: Yes, Your Honor.
THE COURT: All right.
MR. CLUBOK: The defense rests.
THE COURT: Is there any rebuttal from the plaintiff?
MR. FORGE: Yes, Your Honor.
How much time do we have?
THE COURT: You have 30 minutes -- a little less than 30 minutes.
MR. FORGE: Your Honor, we are going to play the video deposition of Mr. William Hicks.
THE COURT: Is that your last witness?
MR. FORGE: Yes, Your Honor.
MR. CLUBOK: Your Honor, we would object to this on two grounds. One, Mr. --
THE COURT: Have we already discussed this outside the presence of the jury?
MR. CLUBOK: I do not believe so, not the first ground.
THE COURT: Not this one?

MR. CLUBOK: Yeah. The first ground is that Mr. Hicks was available here. At plaintiffs' request he was here for several days waiting to be called during their case-in-chief. He was an available witness, and therefore the deposition --

THE COURT: Let me cut short. Gosh, I always like you to lead with the nature of your objection.

So you're saying?

MR. CLUBOK: The witness was not unavailable, and therefore the deposition is hearsay.

THE COURT: Thank you. Very well stated.

Response?

MR. FORGE: Stated in the past tense, Your Honor. The witness is unavailable. He's on the east coast. His attorney never returned my calls to appear. We only have the video to play. If he was here, I would be happy to put him on the stand live.

MR. CLUBOK: We just --

THE COURT: All right. This -- gosh, this is an interesting issue at this late hour. I believe if he was in court -- was he in court during the plaintiffs' case?

MR. CLUBOK: He was not in court because of the witness exclusion rule, but he was in the building waiting to be called or at the hotel nearby. He was standing by for several days waiting to be called.

Every day the witness list kept changing. They finally told us they were not going to call Mr. Hicks. He still stayed here anyway until their case-in-chief rested. I advised them of that. Yesterday we said, okay, I guess we'll send Mr. Hicks home. We did.

This is the very first time, including last night when we have our witness identification rule, that I've ever heard a suggestion they were going to call Mr. Hicks. So they waited until he went home, and now I guess they're claiming he's unavailable.

It's hearsay. The witness was available and should have been called when he was here.

THE COURT: All right. Do you add to your list of objections failure to provide advance warning, advance designation?

MR. CLUBOK: We do, Your Honor.

THE COURT: Okay. Gosh, I'm very open to accommodating witnesses' schedules, and I'm inclined to go along with the defense.

Anything further?

MR. FORGE: Yes, Your Honor. We did provide advance designation of the deposition excerpts. We had an agreement on it. Mr. Hicks' schedule was such that at one point he was not going to be available, and this is all I'm getting secondhand. I could never get a return call from his

lawyer, so we wound up not being able to call him when we wanted to. We weren't going to call him.

There was many changes going back and forth on witness lists, as Your Honor knows. We were planning on calling Ms. Kopcho in our rebuttal. The defense then pulled her in.

And because they played Mr. Wolff's testimony which refers so much to Mr. Hicks, we would like to play Mr. Hicks's video deposition which has already been agreed upon back in the time when we were going to play it in our case-in-chief.

MR. CLUBOK: Your Honor, we would have happily examined Mr. Hicks when he was here live in cross-examination. As soon as -- right after their first witness was called, Mr. Hicks was here and available, and he waited until yesterday. I specifically told Mr. Forge we were sending him home. Heard nothing about that he might be called today.

It's well past the 36-hour notice that we -- I think there's an order that the parties -- a stipulation.

THE COURT: It could have been an oral order, but you did inform me of the stipulation. You didn't object.

MR. CLUBOK: Yes. And the parties had agreed to give each other 36 hours' notice. Mr. Hicks was sent home because the plaintiffs rested and also did not tell us that

they might even possibly call him in rebuttal.

I asked repeatedly yesterday what other witnesses could possibly be called. In fact, I even asked a couple hours ago if they had any witnesses left to call, and I wasn't advised that Mr. Hicks was.

We would have probably -- well, I don't know what we could have done to get him back this morning by magic, but we certainly, if we had known this even last night, We would have done something to get him here. He could have flown this morning from Boston and been back.

THE COURT: Anything else from the plaintiff?

MR. FORGE: Yes, Your Honor. We did not think we would not have enough time -- given the listing of witnesses that we were exchanging late into the evening last night, we did not think we would have enough time.

As Your Honor knows, there were objections to portions of Mr. Wolff's deposition. We worked those out. We wound up having enough time to play it. This is not -- we specifically told the defense to reserve time for rebuttal.

They declined to do that, so it wouldn't make a difference if he was here live or not. There would be no time for cross-examination. And like I said, we cleared these designations with them at a time when we thought we were going to be playing it in our case-in-chief.

So there's nothing I could've done to be in a

different position than we're in right now. They pulled two witnesses that they told us they were going to call today. We did not think we would have time for this.

THE COURT: The objection by the defense is sustained. Who would the plaintiff now like to call?

MR. FORGE: Your Honor, we would rest our case, our rebuttal.

THE COURT: In that case, ladies and gentlemen, we are concluded. So the attorneys and I are going to be sticking around today working on jury instructions that we'll give to you, and then we will see you Tuesday at 9:00.

I will probably begin by reading the jury instructions. I estimate maybe 45 minutes. Then we will have the attorney arguments which I think will conclude by noon. If not, maybe a little after noon. Then you'll begin your deliberations.

So I appreciate all your patience. Have a nice weekend. Tuesday at 9:00. Thank you.

THE CLERK: All rise.

(Open court - jury not present)

THE COURT: All right. As they're leaving, why don't we take a quick break and then come back and discuss instructions. Thank you.

MR. COUGHLIN: Your Honor, before you leave the bench, can we just have a quick second? We just have our

50(a) motion for judgment as a matter of law as to the rebutting of the presumption of reliance that I'll hand up for Your Honor's consideration. You can read it.

THE COURT: Actually, why don't you come all the way around here. Come this way.

Has the defense seen these papers?

MS. JOHNSON: No, Your Honor.

MR. COUGHLIN: No. We just prepared them, Your Honor. They're for the conclusion of the case. We don't think that the efficient market hypothesis has been rebutted. Gompers didn't do an event study. Nobody challenged Feinstein's numbers.

Gompers provided no evidence that there had been actual impact on the stock. The defense has failed to show that Norfolk didn't rely on the integrity of the market price. Ms. Skye Drynan and Kopcho both expressed that they actually relied on the price in making the purchases of the stock.

So I think that we've established an efficient market and showed -- should get the benefit of the reliance on that market. We've also established that Norfolk relied on the market price.

THE COURT: All right.

Mr. Clubok, this is significant, and you haven't been given much time. So I will not be ruling here without

giving you more time. It does affect the jury instructions we are about to discuss.

Do you have any general comments? Again, this isn't dispositive.

MR. CLUBOK: Well, generally speaking, I would say the evidence did show that the plaintiff purchased the stock at the --

THE COURT: Maybe you need to gather your thoughts.

MR. CLUBOK: I think I would like to gather my thoughts if that's okay.

THE COURT: I'll make some quick observations, which are always dangerous and they might not be applicable.

You know, the Basic versus Levinson case does present a strong burden that I've wondered about.

Folks, you may or may not have noticed that a day or two ago I was suggesting a judicial ruling on that. The response from the plaintiff was: In your summary judgment, Judge, you said it would go to the jury.

Therefore, I'm a little surprised by this motion. It's kind of what I was hinting at. I'm just saying. Or maybe you picked up on my hint. Do you wish to speak?

MR. GRONBORG: I believe it was separate issues. It was not with regard to the reliance we talked about. It was specifically with regard to materiality, the falsity of materiality of the statements. That was what we said went to

the jury.

So if we back up there, there are four elements --

THE COURT: Okay.

MR. GRONBORG: -- with respect to the efficient market. This is specifically tied to the defendants' burden and their burden to rebut. So that is separate from what we were discussing the other day.

THE COURT: I'm not sure of that, but maybe there was a miscommunication.

Mr. Clubok.

MR. CLUBOK: Yeah.

THE COURT: I don't expect this to be complete or even an answer at all, but what evidence did you provide concerning the fraud-on-the-market theory?

MR. CLUBOK: Your Honor, we provided evidence that lead plaintiff Norfolk purchased the stock not in reliance or even frankly in consideration of the market price.

To the contrary, Norfolk's research showed that the market was mispricing the stock, had significantly undervalued the stock and their own independent analysis without regard to the market price except to take advantage of what they thought was an inefficient market that had significantly undervalued the stock.

They jumped on, for example, on May 14th, a buying opportunity because they thought the market had misunderstood

the abstract. It turned out the market corrected for that a few days later, and Norfolk benefited from that. But that's just one of many examples.

THE COURT: One of many. We'll see how many many are. Good argument on your feet right there. And I noted a lot of time was spent asking the witness, you thought you were smarter. You thought the market price was wrong and you were betting it was wrong.

Doesn't that prove too much? People are always betting the market is wrong. People are always betting that Gurley's not going to play and more than 20 snaps in the Super Bowl, so I'm going to beat Vegas with my odds. All sorts of things.

So people betting against the market or the Super Bowl doesn't mean that Vegas is wrong or that the market theory is wrong. So what about that? I was wondering about that.

MR. CLUBOK: Well, for --

THE COURT: Wouldn't it prove too much? Wouldn't it prove that there's never a fraud-on-the-market theory because people are always betting differently?

MR. CLUBOK: Well, there's a presumption that the information is incorporated into the market. One way to rebut that presumption is to show specifically that a plaintiff did -- believes that the market did not incorporate

the information.

That period where we had an admission from Professor Feinstein that from May 14th to May 27th the stock was volatile in that period. Remember that admission I spent so much time on?

That alone demonstrates an indication that the market was not operating efficiently and was not quickly incorporating the price, but instead took several days to incorporate it. And that was a very small measure of the volatility throughout the class period as compared to the rest of the class period which experienced even greater volatility.

So as Professor Gompers said --

MR. GRONBORG: Your Honor --

THE COURT: One at a time.

Did you finish?

MR. CLUBOK: Well, I was going to tie it to some of Professor Gompers' testimony. With more time I'm sure I could expand on this. I don't know how much of my sneak preview arguments I should be saying here, and I don't want to repeat myself later. I'm doing this, you know, obviously with some quick reactions.

THE COURT: Did you know this motion was coming?

MR. CLUBOK: No. Maybe I'm not as good -- I should have anticipated it perhaps, but I certainly did not have any

idea it was coming.

THE COURT: Response?

MR. GRONBORG: The market efficiency for Puma stock has been admitted as fact in the case. It's in the pretrial order. So I'm not sure what --

THE COURT: I'm going to repeat it. The market efficiency for Puma stock is admitted, period. It's in the pretrial order?

MR. GRONBORG: Yes.

THE COURT: Written by who?

MR. GRONBORG: The parties submitted the joint pretrial order.

THE COURT: Is that true?

MR. CLUBOK: My team is conferring here and I'll find out.

THE COURT: All right.

MR. CLUBOK: Your Honor, what I'm also -- I'm getting shakes of the head, so I'm not sure. I will say that --

THE COURT: You know, you said shakes. I observe nods. But go ahead. Go ahead.

MR. CLUBOK: Your Honor, the fraud on the market allows us -- and I think -- I believe Your Honor gave us in the pretrial motion phase several different ways, that we certainly identified several different ways to rebut the

fraud on the market, one of them being materiality and, you know, the other ones that we discussed at that pretrial motions hearing on this issue.

I would very much like to take some time today to review plaintiffs' motion, review our pretrial pleadings, review what was said at the pretrial hearing.

THE COURT: Hold on. That means we might have to have alternative jury instructions prepared for Monday, if you get my drift.

MR. CLUBOK: Yeah.

THE COURT: Okay. So let's take a break now. We've obviously worked through the lunch hour and I appreciate it. Let's take a 15-minute break, and we will be concluding today sometime before 3:00. It depends on how we progress.

Let's take a 15-minute break.

MR. GRONBORG: Thank you, Your Honor.

MR. CLUBOK: Thank you.

(Recess taken from 1:29 p.m. until 1:45 p.m.)

THE COURT: Are we ready to begin?

MR. GRONBORG: Yes, Your Honor.

THE COURT: The first thing is I'm going to ask Melissa to hand each side this document.

Now, let me explain what this document is. This document is your original list of exhibits. You'll see it

has date identified and date admitted. What I think necessarily we have to do is you need to sit down with my clerk and agree on the list, agree that I didn't miss something, and then put together a package to give to the jury.

Now, one of the confusions we'll have is all the documents given to me that aren't on the list. And, you know, I've already said the reason I like one list and the reason I urge you to pare it down and give it to me is it's difficult for me to deal with half a dozen revised lists -- I hope you're listening and not talking to each other -- half a dozen revised lists, because then I just don't know which list I'm working off of and I've got things admitted on other lists.

I try to keep it on the one paper. It doesn't work to give me a revised list and then a revised list and then a revised list, because I need one list. So if you look at, for example, Exhibit 319, there's no list. It's not on the list. So I stuck it on the list. For the record, when it says 122, 122, it means it was identified and admitted, but that only goes to 319, not to 321, if you see what I mean.

Same thing for 324. That goes to 324, not to 322. It's just what I had to do to keep up with things.

Then we get to 475R. I put five pages. What I introduced we agreed upon would be five pages. And then 486,

it looks like it was identified on the 17th, and I would interpret that to mean I introduced a revised version on the 22nd. I could be wrong about that.

Then it looks like, for example, 701 I never admitted. And you can read through and see what you think. At times, it was a bit confusing what the parties were doing.

Finally, let's turn to page 18. Page 18 says 994 was admitted. It doesn't mean 196 and 486 were admitted. Those were copies someone was telling me had relevance to 994. Perhaps I should have erased that.

Then you see kind of the mess we have on page 20 where I kept trying to see where we're going. I added things. You can see I got very tight with no room for 180 and 181, so I had to do that on its own and stick it in there like you see there.

You'll see there's two columns in those demonstratives, like at 1100, were not introduced -- were not admitted though they were identified. Then those lists also don't identify the document. Actually this is the first time I've gone through a case and not gotten identifications for each document.

So they aren't identified. I think they need to be identified, what each of them are. The identifications probably are in the half a dozen or so supplemental exhibit lists I got, but they aren't on this sheet.

Then on the last page, boy, it just looks like random additional documents, and it looks like none of them were admitted. Huh. Yeah, maybe I'm wrong, because it started to get confusing there. But I see none of those documents handwritten on the last page were admitted.

One of the things you folks need to do between now and Monday at 10:00 is get together -- listen carefully. Get together, agree on a final list with all the descriptions. The descriptions likely come from the supplements you gave me. I don't know. Agree on my notations here of identified and admitted.

I am concerned that none of those on the last page I have down as admitted. Maybe I just missed it. Maybe those were all demonstratives coming at the end. All right. Just come to agreement. And if there are some that you just don't agree upon, raise that on Monday and we'll see what we do.

I hope you come to agreement on just about everything because this will be the package that goes to the jury. Okay. So that's the exhibits.

MR. GRONBORG: Your Honor, can I ask just one for clarification?

THE COURT: Uh-huh.

MR. GRONBORG: When you're referring to identification, are you simply referring to the last page, or

are you -- for the document description, or are you looking for Bates numbers or some other identification beyond the document description?

THE COURT: Now you've used a word that I used twice. One is the date identified column. You're not talking about that?

MR. GRONBORG: No, no, no.

THE COURT: We're talking about the description, and your question about the description is what?

MR. GRONBORG: I understood you wanted the parties to include a description, and my question was is that just for these documents on the last page?

THE COURT: No. It's for every document that doesn't have a description.

MR. GRONBORG: Okay.

THE COURT: For example, let's go to 319. Wasn't it 319? Turn to 319. You see it doesn't --

MR. GRONBORG: I understand now. I understand what you're talking about now.

THE COURT: So there's lots of them in there that weren't described. In fact, everything that's not on the original list wasn't described, so it needs a description. First time that's ever happened to me.

Okay. Then let me just say I appreciate the defendant's motion for directed verdict. It's on record. I

understand your arguments, and I'm going to deny it.

MR. CLUBOK: May I just say one thing?

THE COURT: Sure.

MR. CLUBOK: Technically we'd like to renew it now that our case has closed, before the case goes to the jury. So we would like to now renew that motion.

THE COURT: Good. I think that's appropriate.

I still deny it. Stated differently, I don't see anything in the actual defense case that would change my ruling.

Then we have plaintiffs' motion for judgment as a matter of law, and I'm taking that under submission. I think it may affect what we do with the jury instructions, but we need to look at it.

Okay. Then, looking at my witness list, who was the last witness?

MR. CLUBOK: Richard Schwab.

THE COURT: Yeah. Okay. Then on the jury instructions, let's make sure we're on the same wavelength. On Monday at 10:00 o'clock I need us to finalize the jury instructions. The final version will be jury instructions that go to the jury and say Court's Instruction No. without reference to subject matter or anything.

I gave you a few redoes by me where I put Court's -- no. Let me stay away from that. It should simply say

Court's Instruction No. with a blank. You need to put together the preliminary instructions I read at the start of the trial. You need to include the first instructions we read at the close of the trial about selecting a jury. And then we need to get into the substantive instructions.

What I'd like to be working off on Tuesday is -- before I get to that, let's see how far we get today reviewing these matters. First of all, as I said before, you need to make sure they're all consistent on using a plural version of plaintiff.

Second of all, I will give joint instruction number one, which has been agreed upon. Next we have Securities Exchange Act instructions pages 5 to 12. I told you that I'm going to include an omissions-based theory. You've already made your argument. I'm going to include an omissions-based theory.

Next we get to elements of 10(b) claim pages 13 to 24. Now, a big issue there is whether we add the word justifiably before the word relied. I understand we need not add justifiably before the word relied because that is based on a market fraud theory and plaintiff has said if they haven't proven market fraud, they lose. So we don't put justifiably there.

But we have to make sure that what we do say leads to plaintiffs' loss if market fraud isn't established in the

later instructions. Does that all make sense? Yeah. So, you know, I redid some instructions. I'm not sure they're clear that if market fraud -- you know, particularly the fourth element of materiality -- isn't established, that the plaintiffs would lose.

The plaintiffs are so confident of it they basically have given me a motion on it. We'll look at it. We just have to make sure that the instructions lead to that conclusion.

So in that regard, I'm going to give plaintiffs' instruction number four.

Then we get to materiality, pages 25 through 37 in the briefs.

MS. SMITH: I'm sorry, Your Honor. One point of clarification. You said plaintiffs' instruction number four for the last instruction. I think you meant plaintiffs' instruction number three.

THE COURT: I did. Thank you. I appreciate that.

MS. SMITH: Thank you.

THE COURT: All right. So now on materiality, we get a bit to the Omnicare issue and the question of opinion. I previously stated that I believe Omnicare is deeply rooted in the issue of opinion, clearly stated throughout and clearly agreed by everyone in the case. And I'm not convinced that this case parallels that in that regard, which

leads me to conclude at this moment that I would not include an opinion instruction.

Yesterday I believe Ms. Johnson, arguing quickly without pre-advance, said that the misstatements included the word believe.

MS. JOHNSON: And that I would check.

THE COURT: Do they?

MR. JOHNSON: No, Your Honor.

THE COURT: Okay. Thank you for that. I didn't see it either. Maybe I'm relying too much on the statements in the jury instruction and I just didn't see it. So I'm not inclined to give the opinion portion of the instruction.

Further argument on that?

MS. JOHNSON: We understand your ruling, Your Honor.

THE COURT: Okay. So I would give plaintiffs' instruction 4.1. Next is plaintiffs' instruction -- I'm sorry, defendant's instruction five. Yeah, I think that's what we've been talking about. I would not give defendant's instruction five.

That gets us to state of mind, which is on pages 38 through 67 of the brief. I would give plaintiffs' instruction number five, replace the fourth paragraph with defendant's instruction number six. So let's see that through a bit here.

So I'm looking at the argument beginning on page 38 of the joint statement, which for the record is document 687. By the way, Ms. Johnson, I don't know what your statement was just now. I don't want you to be waiving anything. I think your statement was, we understand your ruling and not we agree with your ruling.

MS. JOHNSON: That's correct, Your Honor.

THE COURT: Sometimes you slip into we agree, and I again don't want that to be a waiver. If I mess up, I want clarification from higher powers than I.

Okay. That would be what I would do, is give plaintiffs' instruction number five but replace the fourth paragraph which concerns corporate knowledge with the third paragraph of defendant's instruction number six.

So we're going to have to decide, if I stick with that ruling, who's going to put all this together. But what do you say about that ruling?

MR. GRONBORG: That's fine, Your Honor. The only point I would make is the second use of the word statement in that paragraph. It should be plural. It's obviously a fix we can make. And plaintiffs are happy to take the laboring oar on putting these together.

MS. SMITH: Your Honor, if we may be heard on this instruction briefly?

THE COURT: Just a moment.

So when you say you're concerned about the use of the word singular statement on page 40, line 15?

MR. GRONBORG: I've got it printed out separately. So on mine it's line 13. It just says acted knowingly with respect to the --

THE COURT: Hold on. Slower.

MR. GRONBORG: Acted knowingly with respect to the statements at issue in the case, if Mr. Auerbach made the statements knowingly.

THE COURT: Yes. That should be statements with an S.

And you wanted to argue about this whole thing. Go ahead.

MS. SMITH: Not the whole thing, Your Honor.

THE COURT: I'm with you.

MS. SMITH: So first of all, we believe that the language regarding recklessness should refer specifically to the deliberate recklessness standard that comes straight from Ninth Circuit authority, including the Ninth Circuit's most recent case on this issue, Webb versus SolarCity, which is --

THE COURT: Just a moment. Hold on one second.

All right. It looks like the plaintiffs have given me the agreed instruction language found at 556 of the model jury instructions dated 2017. And you want to change it how?

MS. SMITH: In two ways, Your Honor. First of all,

we believe the standard is deliberate recklessness rather than recklessness. And while the model instructions were revised in 2017, there's actually a 2018 Ninth Circuit case, Webb versus SolarCity, 884 --

THE COURT: I have the cite.

MS. SMITH: Okay. Thank you, Your Honor.

THE COURT: Just a moment. Let me read what you say on page 41.

(Court reading document)

THE COURT: Okay. Next point.

MS. SMITH: The other portion of the jury instruction we would propose to add to the model is the single sentence in the second paragraph of our proposed instruction, which reads: It is not enough for plaintiff to show that Mr. Auerbach acted accidentally, negligently, or merely made a mistake.

That's a critical modifier for the jury to understand exactly what state of mind is required for scienter. That language appears in the Fifth Circuit, Seventh Circuit general pattern jury instructions for each of those Courts as well as it's been used in all of the major securities cases or many of them -- the Mark Cuban case, the Goldman Sachs case.

And it was also used in the JDS Uniphase case. This is particularly critical here because we believe

plaintiffs will argue that Mr. Auerbach had scienter simply because he had the topline results. We do not believe it would be appropriate to exclude this language. It's critically important that the jury understand that something more is required for scienter as opposed to just having the results. He must have a state of mind to commit securities fraud.

By informing the jury that it's not enough that he acted negligently, we think that's an appropriate decision.

THE COURT: Argument.

MR. GRONBORG: So the two points, the addiction of the word deliberate we find is not in the instructions because it's not necessary. That is simply the shorthand that the Ninth Circuit uses in addition to conscious recklessness.

THE COURT: Or longhand, as the case might be.

MR. GRONBORG: Or longhand, as the case may be. So certainly for the jury, the way reckless is defined, there's no dispute that that is legally the way the standard of recklessness that is appropriate.

So whether it's conscious or intentional or deliberate, there's no need to add or modify as to what is there. There's certainly no change in the law about what standard of recklessness is necessary.

On the second issue, again defendants are simply

trying to redefine or add additional definitions with respect to knowingly and reckless. The sentence they want to add doesn't appear anywhere in the Ninth Circuit model instructions. It is not based on any new law or any change in the law.

They listed a few other cases where they think it involves the SEC. You know, there's probably a litany of cases that don't use it because they use the model instructions. I'm not sure that adds anything.

THE COURT: Okay. I understand the argument. Reading through the decision, sometimes the Ninth Circuit throws in words, sometimes significant, and sometimes other words are sufficient. I'm going to stick with my ruling to give plaintiffs' instruction number five but replace the fourth paragraph, re, corporate knowledge, with the third paragraph in defendant's instruction number six, including that pluralization where needed.

Now, here's something we have in defendant's instruction 7 through 11. I said it before and I'll say it again. Defendant's brief reminds me that the model instructions are not in tablets down from on high. They're merely from the jury instruction committee. They can be overruled, just like BAJI and CACI can be overruled.

But I do think I need a strong reason to overrule them because I know how carefully the committee looks at

these. So 7 and 11 face those observations, and I don't think any are necessary.

So I'll turn to the defense. And tell me -- pick any or all of 7 through 11 and tell me why I need them.

MS. SMITH: We understand the Court's ruling with respect to 7, 8, 9, and 10, without waiving any of our arguments. We acknowledge --

THE COURT: Wait. So let me just -- is 111 good faith?

MS. SMITH: 11 is good faith.

THE COURT: Let me just tell you my notes on good faith. You know, I think it's been rejected in this district and the Ninth Circuit, United States versus Shipsey, a 2004 case, no right to any good-faith defense when the jury is adequately instructed with regard to intent.

So I am impressed you want to focus on 11. It's important for you. I focused on it, too. Let me hear what you have to say.

MS. SMITH: Thank you, Your Honor. Not having looked at the case that Your Honor just cited that's unclear to me, I would want to look in that case to see how the good-faith proposed instruction interacts with the knowingly instruction that the Court had given. So there might be some component of the knowingly instruction there that would be relevant.

More importantly, this instruction, actually the one that we proposed for good faith, was given by Judge Selna right next door in a case also involving 10(b) claims almost verbatim in the SEC versus Moshayedi case. It has also been given in again JDS Uniphase, in SEC versus Toray, in the Avendi case.

And I would add, Your Honor, as Your Honor knows, these cases do not often go to trial, the securities class action cases.

THE COURT: You know -- hold on. That's a very good point. They are not constantly being tested by the creation of jury instructions. Poor Judge Selna. Poor Judge Guilford. Go ahead.

MS. SMITH: In many of the cases that have gone to trial, Courts have given a good-faith instruction. It is consistent with Ninth Circuit law. And again, this is critically important for our case where we anticipate that the jury could be confused should it conclude that the mere possession of information by Mr. Auerbach is sufficient to establish scienter.

His good faith is a defense to scienter, and we believe that the jury should be instructed. And I would -- if Your Honor would like to review any of these authorities, we'd be happy to provide them.

THE COURT: Like to review what?

MS. SMITH: Any of the jury instructions, additional jury instructions that have been given in other securities cases.

THE COURT: No. You give a good list of citations, and that's sufficient.

What does the plaintiff have to say?

MR. GRONBORG: Your Honor, in addition to the Shipsey case that you noted and that we cited in our papers, there's an entire litany of Ninth Circuit cases that have very, very consistently held --

THE COURT: And District Court, but apparently not Judge Selna.

MR. GRONBORG: Not Judge Selna. There was another District Court judge I think we noted who did. I think it was you, you know, who had basically rejected -- this is the Schultz case where it was the same -- you rejected a very, very similar good-faith instruction on the same basis that the Ninth Circuit has, which is, it's not necessary.

THE COURT: Well, I'm trying to decide whether I hold in higher esteem the judge in that court or this court. You know what? I'm leaning against the defense. But when we show up Monday, just have that Court instruction, boom, with that, and we'll withhold final judgment. I want to look at this a little bit further.

MS. SMITH: Thank you, Your Honor.

THE COURT: By the way, I hold Judge Selna in the highest possible esteem.

Okay. So then that gets us to reliance. On reliance I have put together an instruction that pretty much mixes defendant's and plaintiffs' fraud-on-the-market instructions, plaintiffs' number six and defendant's number 12.

So I'm looking at this. I hope you all have it. It's what I typed it up and handed out to you all. And I'll turn to the plaintiff and ask what is your response to my proposed reliance instruction.

MR. GRONBORG: In general we're fine with it. There's one, the very last sentence, which begins: If defendants successfully rebut the presumption of reliance by Norfolk Pension Fund, plaintiffs must then prove that they justifiably relied directly on the alleged misrepresentations or omissions.

We don't think it's necessary, given the point that we made previously that the plaintiffs are not relying on a direct reliance case.

THE COURT: Say that last sentence.

MR. GRONBORG: Plaintiffs are not relying on direct reliance. If they lose on the fraud on the market, they lose.

THE COURT: Got it.

MR. GRONBORG: And then I have one other.

THE COURT: Okay. What else?

MR. GRONBORG: Recognizing that the rebuttal issue may be moot by Monday, the only other point is there's the -- there's the either/or, how you can rebut the presumption as to Norfolk itself if it didn't rely on the integrity of the market price. Or you can rebut it as to the class as a whole if the alleged misrepresentations and omissions did not affect the market price of the stock.

And I'm not -- I don't know if it changes the instructions, but we want it clear for the record that what the law says is if you rebut the presumption as to the individual plaintiff, that does not rebut the presumption as to the class. These are distinctive. So you can rebut it as to an individual plaintiff. The class would still get that presumption unless you satisfied part B.

THE COURT: Okay.

MR. GRONBORG: Does that make sense?

THE COURT: Yes.

What does the defense say?

MR. CLUBOK: That may be true if there was another plaintiff for whom their presumption was not rebutted. In a case where there's only one plaintiff who is typical and the presumptions are rebutted against that plaintiff, that applies to the rest of the class.

Certainly without a live plaintiff here who successfully withstands the rebuttal of the presumption, there certainly cannot be a finding for the rest of the class.

THE COURT: Okay. Any other objections to the Court's proposed instruction?

MR. CLUBOK: Well, our other objections, but we understand your ruling.

THE COURT: Very good.

Then here's what I would like us to do. I am going to require both sides to meet between now and Monday at 10:00 and give me a list of questions that remain to be answered about this. Perhaps you can work out the issues you raised. Perhaps not. But on Monday I would purport to come in, work off the Court's instruction. And if you can't agree on what it should say, just present me as simply as possible what you want me to say.

Now, the defense, you don't have to revisit what I've answered by not including in this. Your objections and all that are duly noted, but work off this proposal and tell me what remaining words you would like and make it as simple as possible for me to make the decision. Add those words or subtract those words. So you need to work together on that.

Again, don't revisit everything else that led to that.

Okay. Then we get to defendant's instruction number 13, delegation to investment advisor. That's not in the model instructions, and I'm inclined not to give it.

What does the defense say?

MR. CLUBOK: I'm not sure -- well, this is a situation where there may not be many cases tried where there is an investment advisor so prominently featured. Certainly this case, where it's only one plaintiff and they've given full discretionary authority to an investment advisor, we think -- I'm not sure if any other cases -- I certainly don't think there are any other securities 10(b)(5) class action cases that I can think of have been tried where this was requested and not provided. And I think --

THE COURT: Whoa, whoa, whoa. Can I ask it the other way? This wasn't requested and --

MR. CLUBOK: That's a great way to ask it. You certainly can ask it. And I can't answer it.

THE COURT: Go ahead. Do you know of a lot of cases where it was requested?

MR. CLUBOK: No. There's only been -- as we all know, there's only been a handful of cases. In this case the sole named plaintiff entirely relied on an investment advisor. It goes right to the heart of the case. And for the jury to not understand the legal significance of that we think is -- we would object to, let's say.

THE COURT: Okay. So there we have it.

Number 13, what does the plaintiff say?

MR. GRONBORG: Well, I think the situation here is standard in the last 20 years in probably every trial where it has had a lead plaintiff, an institutional lead plaintiff.

To turn it the other way, I'm not aware of any situation where this instruction or one like it has been requested, let alone granted. So obviously the cited authority doesn't cite to any Ninth Circuit law. I think it is drawn directly just from a lead plaintiff decision, if I have it right, from the Southern District of New York.

MR. CLUBOK: Your Honor has a chance to break new ground apparently since neither side can cite a single case, but this is the heart of the case, the investment advisor's decision. And the jury should be advised.

THE COURT: Understood. I'm going to do with this what I did before. My tentative is for the plaintiff. I'm going to think about it a little more. Include it in the package and we'll revisit it on Monday.

Okay. That brings us to causation, pages 79 through 89. The Court has put together a proposal that really is a mix of defendant's number 14 and plaintiffs' number seven. What's the argument? Do you have any argument with my proposal on causation, plaintiff?

MR. GRONBORG: None. Plaintiffs are fine with it.

THE COURT: Defense?

MS. SMITH: Defendants are fine with it, subject to discussion -- defendants are actually fine with the Court's causation and damages instruction as long as the disaggregation component of the damages instruction is included in damages.

It was originally proposed business defendants I think in causation as opposed to damages.

THE COURT: I don't -- I don't have enough grasp to say what you --

MS. SMITH: Sure.

THE COURT: Are you saying you'll take this if I take the next one, too?

MS. SMITH: Yes.

THE COURT: Then I have a grasp. Okay. So causation will be as it is. That moves us to -- but there's also 15, isn't there? So defendant's 15 goes to causation. I think it's redundant and not well enough supported by authority. Let's take a look at 15.

My opening decision is not to give 15. It is found at page 87. It simply says: A recharacterization of previously disclosed facts is not corrective for the purposes of establishing causation. I'm not inclined to give that, but talk me out of it.

MR. CLUBOK: Understood, Your Honor.

THE COURT: Okay. Then we get to damages. I have a proposal on damages. It's the first two sentences of plaintiffs' instruction, and then it adds a modification of defendant's instruction number 16.

What does the plaintiff say about my instruction on damages?

MR. GRONBORG: We're fine with it except for the very last sentence, Your Honor, which reads: Plaintiff also bears the burden of separating out any share price declines that were caused by factors other than the alleged misrepresentations or omissions.

Two points. One, it's redundant. The jury has already been told that they are required to identify just the damages that are caused by the alleged omissions or misrepresentations. More problematic is the fact --

THE COURT: I don't know that they know who has the burden on that. This sentence begins with, who has the burden on that.

MR. GRONBORG: Well, certainly I'm looking above. We don't mind -- the entire section can start, plaintiffs bear the burden. There's no dispute as to that. The issue with that last sentence is simply it appears to presuppose that there were other factors, factors other than the alleged misrepresentation or omission.

By saying we have the burden to separate them out,

it is presupposing that they exist. And we don't believe that's proper.

MR. CLUBOK: Your Honor, if I may, I think the problem here -- and this really goes to our motion, which --

THE COURT: Let me say, at this moment you're winning, but go ahead and say what you're saying.

MR. CLUBOK: I'm going to stop talking.

THE COURT: Okay. I'm going to give the revision as I have it. Okay? I hear your argument.

MR. GRONBORG: That's not okay, but I understand.

THE COURT: Very good. Very good. All right. So that concludes the instructions. We now turn to the special verdict.

To do that, you folks are going to be busy with closing arguments and all sorts of other things. Who is going to be responsible for giving me the package? I could say -- well, who's going to be responsible?

MR. GRONBORG: Plaintiffs will.

THE COURT: Okay. Now, remember, Court's Instruction No. blank. Include the previously given. Include what you've already given as preliminaries, and then go through all of this. Put together a package. It should be pretty clear.

So this is -- this is all the instructions that have been given or will be given. Share it with the defense.

One of the reasons I don't put instruction numbers on is so you can rearrange order. Give some thought to the order. Obviously you've approved things that conclude: Now it's time to retire and pick a foreman. You need a foreperson. You need to put that at the back, you know.

So put it all together in your proposed order, share it with the defense, then come in on Monday and raise any remaining issues on all of that. We can have a debate about the order or anything else. So that takes care of the jury instructions.

We're now going to move to the special verdict. I have two versions, of course. I have document 680.

MR. CLUBOK: Your Honor, If I may, I don't know if this is helpful, but now that we've gotten your guidance on these instructions, I really do think the parties could come together and make substantial progress on the verdict form based on your instructions and try to conform them collectively.

THE COURT: Okay. Thank you for that. Let's just quickly go -- I'm looking at them both. Let's just quickly go through this -- this will be very quick -- and see if there is any general things I can do now.

Obviously, the first page I've added omissions. You know, the plaintiff -- the defense says statement number. The plaintiff summarizes them. Any issue on that? Do you

want me to decide? You see what I'm saying? You don't want them summarized. The plaintiffs wants them summarized. Anything further on that?

MR. GRONBORG: No.

MR. CLUBOK: We would meet and confer. That may be one that, given the other instructions, we could move towards -- I think we have the right to insist on the entire statement. I do think that's what the law -- our belief --

THE COURT: Well, it attaches an attachment.

MR. CLUBOK: Well, you could make these instructions very long. We did it just for convenience sake. But, yes, it should be where it says statement one, it should go on for however long it takes to be statement one.

I believe we have the right to require that to the extent that, you know, the summaries, for example, the plaintiffs' summary says -- sorry. Yeah. So if we're going to do summaries, I do think the parties would certainly need to meet and confer to see if we can come up with fair summaries, if that's what Your Honor is going to move to.

As I said, maybe it would be helpful if we start from the base point of whether or not the Court agrees that the defendants have the right to ask for the full statement to be identified if we do want to make these longer, you know, and kill some more trees.

But I do think that is a basic principle of law.

If we can work that out on fair summaries, we certainly would work with the plaintiffs on doing that.

THE COURT: I think you're entitled to the full statement to be clear. I think both sides acknowledge that by including it as an appendix. I mean, both sides are asking for an appendix with the full statement. Am I correct on that?

MR. GRONBORG: That's correct. There are some differences in what the statements are that we can address, we do have similar that way.

THE COURT: Okay. So you're entitled to the full statement. My preliminary notion is that a brief summary of the statement is in order. We talked about it throughout the trial -- DFS, grade three, Kaplan-Meier, you know, AEs. And I think you provide a limited, sufficient number of words, disease-free survival, DFS rates. Grade-three plus. --

I like your summaries. I agree with Mr. Clubok that they're entitled to see the whole thing, but I think the appendix gives them the whole thing. This just helps get through it. Although, you know, the way the rest of it is decided, such as defendant's at 2.1, you need to identify what each of those are. So after you say statement one, disease-free survival rate, DFS rates, but say statement one. So that if we go with the defendant's breakout -- but I'm not saying we're going with it -- go ahead.

MR. CLUBOK: Can I make just one, Your Honor. I think we would agree that if we're going to -- certainly we are willing, I think, to just accept the plaintiffs' suggestion that we just have one breakout for knowingly and not have separate individual, depending on the instruction we get for knowingly ultimately.

We would be open to that, in other words, if we have the right instruction of knowingly, to just have one instruction, if that's helpful in thinking about this.

THE COURT: So think about that. See if you can come to agreement on that.

All right. Are there any other preliminary things that would be helpful here before we meet on Monday at 10:00?

MR. GRONBORG: I would, since we are talking about the appendix -- I don't know if this is something we would want to meet and confer on. Our concern was we have a set of statements that are alleged. They are admitted in the pretrial order, and defendants have added. In their appendix of these statements, they've simply added additional language which is not anything that's ever been alleged to be a material misrepresentation or omission.

THE COURT: All right. Let's get specific, then. On the July -- obviously the July 22, 2014, statements beginning with disease-free survival rates, where does a difference arise.

MR. GRONBORG: For example, on the disease-free survival rates, you know, they've added additional parts. Part one, they've added additional parts about the diarrhea. It's not the most problematic there because that's also alleged to be a false and misleading statement. But it really doesn't apply --

THE COURT: I'm not sure where I see the diarrhea rate suggested by the defendants, document 680, page 7 of 9. Where am I missing that for the first statement?

MR. GRONBORG: I'm sorry. On the first statement they removed the full statement. I think they've removed the part about the diarrhea. But then if you go --

THE COURT: Well, now you've got me going crazy. May I say you may be arguing against yourself.

MR. GRONBORG: I flipped it around on where they have added and where they have removed.

THE COURT: Okay.

MR. GRONBORG: So on number one, they've -- they removed the full statement of the full context the way the jury has heard it the entire time, which is --

THE COURT: So now you want the diarrhea rate in statement number one?

MR. GRONBORG: Well, I think we want just the full statement, which is how it was presented at the conference and alleged as opposed to just part of.

THE COURT: A moment ago you said you didn't want the diarrhea rate. Now you want it.

What does the defense say?

MR. CLUBOK: I think this is exactly why a meet and confer might help sort all this out.

THE COURT: I agree. Meet and confer on that.

Then on diarrhea rate --

MR. GRONBORG: On diarrhea rate you can say -- and this is what I meant to talk about -- there is on the plaintiffs' version, document 677, what you have there are these statements as alleged to be false and misleading and as they stand in the pretrial order.

On the right you can see that defendants have added all sorts of other language about use of loperamide and various other statements that the company was making that go on and on. You can see just sort of by the length of it that they go on and talk about in other current ongoing studies.

These may have been statements that Mr. Auerbach made on July 22nd, 2014, but they are not statements that we have alleged to be false and misleading.

THE COURT: Hearing that, you need to meet and confer on the statements, and we'll take that up on Monday as well.

Now let's get down to logistics.

You rise to say?

MR. COUGHLIN: I just thought we were -- no.

THE COURT: When can you get your completed version e-mailed or otherwise to the defense?

MR. GRONBORG: We can do that this evening.

THE COURT: Okay. So I want you folks to talk about it. When do you propose to talk about it?

MR. GRONBORG: We had a call last night, so I think that's actually made today a little smoother. My guess is we're going to schedule another call for tomorrow so that we can --

THE COURT: Okay. I'll put it simply at this. Sufficiently before Monday at 10:00, talk about it and just tell me the questions you want me to answer. I assume we're going to have to make a few more adjustments Monday at 10:00, not many, and you're going to put them together for me to read Tuesday at 9:00.

Do the -- does either side want the jury instructions in their hand when they do closing?

MR. GRONBORG: Yes, Your Honor.

MR. CLUBOK: Absolutely, Your Honor.

THE COURT: I usually like to allow that. In fact, I encourage that for the jury's sake.

Does any side want the special verdict in hand when they do closing?

MR. GRONBORG: Yes, Your Honor.

MR. CLUBOK: Definitely.

THE COURT: So that means we've really got to limit our work Monday at 10:00 so that we can get all that together in time for you to prepare around it for Tuesday at 9:00. So do all of that.

Then, is there anything else?

MR. GRONBORG: No, Your Honor.

MR. CLUBOK: No. Well, there was just one other thing. Time for Tuesday, or --

THE COURT: Well, yeah, let's talk about that.

MR. CLUBOK: Closing argument time?

THE COURT: Yeah. You know, I really -- well, where are you now on time, plaintiff?

MR. COUGHLIN: About the same. I said an hour for the first part and then another 20 minutes. But I'll say an hour to start and a half hour at the end.

THE COURT: And you'll say?

MR. CLUBOK: We would prefer two hours.

THE COURT: Okay. So once you say two hours, we're probably going to have to take lunch. I'm just saying that. Or maybe you want to start and continue after lunch. I mean, consider that.

MR. CLUBOK: Yeah.

THE COURT: I'm thinking these are going to take -- they usually take about a minute per page. Not always.

Maybe that's when there's a lot of single paragraph instructions, which we don't have. But if you consider a minute per page, you know, I'm thinking it's going to be 45 minutes. And we won't get one hour plus two hours plus 45 minutes in before noon. I would allow you to take a break.

You know, just think about that as you put together your closing.

MR. CLUBOK: We appreciate that. Thank you for that.

THE COURT: So be ready to kind of think about all of that.

MR. CLUBOK: We'll have that answer on Monday.

THE COURT: Okay. Anything else?

All right. Have a nice weekend. We'll see you Monday.

MR. GRONBORG: Thank you, Your Honor.

THE COURT: I knew there was one other thing. Sorry. Sorry. I'm going to ask a dangerous question. Written opposition to the motion received today?

MR. CLUBOK: Yes, Your Honor.

THE COURT: That was stated with conviction and certainty. So when do I get to read it?

MR. CLUBOK: That's a fair point. We would -- when would be useful for Your Honor to read it?

THE COURT: Ten minutes from now, but let's say -- you know, just e-mail it to everyone by Sunday morning.

MR. CLUBOK: Thank you very much, Your Honor.

THE COURT: Now, can I give you my e-mail address?

MR. CLUBOK: Off on the record?

THE COURT: It can be on the record. I don't care.

MR. CLUBOK: Okay.

THE COURT: It's pretty simple. It's Andrew_Guilford@cacd.uscourts.gov. So that way, depending on where I am Sunday, I'll get my hands around it.

MR. COUGHLIN: Your Honor, I didn't know they were going to take two hours. I had heard an hour and a half before. So I just don't want to be short-changed. I won't go over farther over the time that they go.

MR. CLUBOK: Of course. I assume equal time, whatever time we agree to, I assume.

THE COURT: We'll also work that out on Monday.

Thank you.

(Proceedings adjourned at 2:40 p.m.)

CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY RECORDED PROCEEDINGS IN THE ABOVE MATTER.

FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

/s/ Miriam V. Baird 01/26/2019

MIRIAM V. BAIRD
OFFICIAL REPORTER

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