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 9

SANTA ANA, CALIFORNIA

TUESDAY, JANUARY 29, 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 MERYN GRANT LATHAM AND WATKINS LLP 12670 HIGH BLUFF DRIVE SAN DIEGO, CA 92130**

INDEX

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EXHIBITS:

NONE OFFERED

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SANTA ANA, CALIFORNIA; TUESDAY, JANUARY 29, 2019; 9:00 A.M.

THE COURT: All right. We're all here at 9:00 on Tuesday ready to proceed with the trial. I understand the parties have agreed to the jury instructions which have been provided to me.

MR. CLUBOK: Your Honor, if I may, we have agreed that what you have provided reflects your rulings. We reserve our objections --

THE COURT: I think I've been pretty clear about that throughout. So I have circled in pencil the opening instructions, which counsel already numbered. The first instruction I will read I've now written in pencil as 15.

As I read them, I will number the rest of them. Does anyone want the numbered version before closing argument?

MR. COUGHLIN: I don't think I need it before I start. I think if I can have it at least for rebuttal.

THE COURT: Okay. We'll do our best to get you a numbered version as soon as possible. And I understand there's been agreement under the parameters of what the Court set forth over objection to the special verdict form, correct?

MR. COUGHLIN: Yes.

THE COURT: Okay. So we're ready to go. Shall we

call the jury in?

(Pause in proceedings)

THE CLERK: All rise.

(Open court - jury present)

THE COURT: All right. Welcome back, folks. We're in the closing lap. What's going to happen right now is I will read you jury instructions.

We will hear the closing jury instructions. Here they are. You'll get a copy of them when you deliberate. Right after the instructions, which I estimate to be about half an hour in length, the plaintiff will give their closing. Then we'll go to the defense.

The defense's closing may be broken up by the lunch hour. So then you'll go to lunch. You'll come back, hear the end of the defense closing, and then the plaintiff gets a chance to rebut the defense's close. Then you will begin deliberations.

So here are the jury instructions. When the case started, I gave you 14 introductory instructions. You'll have those when you deliberate. I now begin with jury instruction number 15.

Members of the jury, now that you've heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be sent to the jury room for you to

consult during your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not, and you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means you must decide the case solely on the evidence before you. You will recall that you took an oath to do just that.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

When a party has the burden of proving any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true. You should base your decision on all of the evidence regardless of which party presented it.

The evidence you are to consider in deciding what the facts are consists of: one, the sworn testimony of any witness; two, the exhibits that are admitted into evidence; three, any facts to which the lawyers have agreed; and four, any facts that I have instructed you to accept as proved.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain

things are not evidence and you may not consider them in deciding what the facts are. I will list them for you. This kind of repeats an earlier instruction I gave at the beginning.

One, arguments and statements by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and will say in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them or will state them, your memory of them controls.

Two, questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the Court's ruling on it.

Three, testimony that is excluded or stricken or that you are instructed to disregard is not evidence and must not be considered. In addition, some evidence was received only for a limited purpose. When I have instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

That happened quite often in this case.

Four, anything you may have seen or heard when the

court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Now, evidence may be direct or circumstantial. Direct evidence is direct proof of a fact such as testimony by a witness about what that witness personally saw or heard or did.

Circumstantial evidence is proof of one or more facts from which you can find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness has said or part of it or none of it.

In considering the testimony of any witness, you may take into account: one, the opportunity and ability of the witness to see or hear or know the things testified to; two, the witness's memory; three, the witness's manner while testifying; four, the witness's interest in the outcome of the case, if any; five, the witness's bias or prejudice, if any; six, whether other evidence contradicted the witness's testimony; seven, the reasonableness of the witness's testimony in light of all the evidence; and eight, other

factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently.

You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony. However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said.

On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testified. What is important is how believable the witnesses were and how much weight you think their testimony deserves.

The parties have agreed to certain facts that will be read to you. You must therefore treat these facts as having been proved.

I commend the parties for coming to agreement on

the facts I'm about to read in this instruction number 21. It makes things go quicker when they agree upon things.

So Puma Biotechnology, Inc., is a biopharmaceutical company with focus on the acquisition, development, and commercialization of innovative products to enhance cancer care.

Next, since acquiring the licensing right for neratinib from Pfizer in 2011, Puma's primary commercial focus has been on the development and commercialization of neratinib.

Next, HER2-plus breast cancer is a breast cancer that tests positive for a protein called human epidermal growth factor receptor two. That's HER2, which promotes the growth of cancer cells.

Since at least July 1st, 2014, Mr. Auerbach has been Puma's largest shareholder and has served as Puma's CEO, president, and chairman of the board.

During 2014 and 2015, Puma's common stock was listed on the New York Stock Exchange under the symbol PBYI. The price of Puma, PBYI, stock from May 30th, 2014, to August 31st, 2015, is accurately reflected in the chart identified as Exhibit 995. You will have Exhibit 995 with you in your deliberations.

The ExteNET trial was a randomized double blind phase III clinical trial which was generally designed to test

the efficacy and safety of neratinib in reducing the recurrence of HER2-plus breast cancer.

Data collection from the trial was to occur in three phases. Part A involved a follow-up period of two years after randomization.

Between July 22, 2014, and May 29, 2015, the market for Puma common stock was well developed and efficient. Between July 22, 2014, and May 29, 2015, plaintiff purchased 17,900 shares of Puma common stock.

After the New York Stock Exchange closed for trading on July 22, 2014, Puma disseminated to the public a press release entitled Puma Biotechnology announces positive topline results from phase III PB272 trial in adjuvant breast cancer ExteNET trial. We're going to call that the ExteNET press release.

After issuing the ExteNET press release on July 22, 2014, Puma conducted an analyst and investor conference call that was open to the public.

In preparation for a public offering of Puma stock, Puma filed a registration statement and prospectus with the SEC on January 20th and 22nd, 2015, respectively.

On January 27th, 2015, Puma announced the completion of a common stock offering of 1.15 million shares at a price of $190 per share, for net proceeds of $205 million.

On February 3, 2015, an abstract containing certain results from part A of the ExteNET trial was submitted to the ASCO for potential presentation at the 2015 ASCO annual business meeting in Chicago, Illinois.

On March 26, 2015, ASCO notified Dr. Arlene Chan that abstract number 508 was selected for presentation at the 2015 ASCO annual meeting.

On May 13th, 2015, after the close of trading, the abstracts to be presented at the ASCO conference were published on ASCO's website, including abstract number 508 which contained certain of the results from part A of the ExteNET trial.

On June 1st, 2015, between approximately 11:23 and 12:28 p.m. Eastern standard time, trading in Puma stock was halted on the New York Stock Exchange. And on June 1st, 2015, certain of the results of part A of the ExteNET trial were presented at the ASCO conference call starting at 11:24 EST. That's all in Court instruction number 21.

Court instruction number 22.

Certain exhibits are documents known as analyst reports or contain statements of analysts or investors. They are -- I'm going to list the exhibits. You'll have this instruction with you. Exhibits 254, 301, 319, 324, 479, 488, 576, 764, 766, 768, 844, 845, 883, 966, 967, 968, 969, 974, 1082, and 1083.

Analyst reports are written by market analysts generally employed by investment banks or brokerage firms who comment on Puma's business, its securities, and the economy in general. These reports and related correspondence were admitted only to show whether and when certain information was provided to the market and not for the truth of the matters asserted in the reports.

You have heard testimony from witnesses who testified to opinions and the reasons for their opinions. This opinion testimony is allowed because of the education or experience of these witnesses.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the reasons given for the opinion, and all the evidence in the case.

Certain charts and summaries not admitted into evidence, sometimes called demonstratives, have been shown to you in order to help explain the contents of records, documents, or other evidence in the case. Charts and summaries are only as good as the testimony or other evidence admitted that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.

One of the parties in this case, Puma

Biotechnology, Inc., is a corporation. Under the law a corporation is considered to be a person. All parties are equal under the law, and a corporation is entitled to the same fair and conscientious consideration by you as any other party.

A corporation can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of their authority.

Plaintiff delegated the authority and discretion to execute purchases of Puma securities to its investment advisor. Plaintiff also relied on the judgment of its investment advisor to make investment decisions. You should treat such investment decisions as if they were made directly by plaintiff.

You should also consider plaintiff as having the same knowledge as the investment advisor regarding its investment concerning the purchase or sale of Puma securities.

Congress has enacted securities law designed to protect the integrity of financial markets. The plaintiffs claim to have suffered a loss caused by the defendant's violation of certain of these laws.

There are terms concerning securities laws that have a specific legal meaning. The following definitions may

apply throughout these instructions unless noted otherwise:

A security is an investment of money in a commercial, financial, or other business enterprise with the expectation of profit or gain produced by the efforts of others.

Some common types of securities are stocks and bonds. The buying and selling of securities is controlled by the securities law. A 10b-5 claim is a claim brought under a federal statute, Section 10(b) of the Securities Exchange Act of 1934, which in essence prohibits acts of deception in connection with the purchase or sale of a security and in violation of rules and regulations that the SEC has the duty and power to enforce.

A corresponding SEC rule, Rule 10b-5, prohibits the misrepresentation of material facts and the omission of material facts in connection with the purchase or sale of securities.

A person or business entity who violates the securities laws, including Rule 10b-5, may be liable for damages caused by the violation.

A misrepresentation is a statement of material fact that is false or misleading when it is made. A statement may be misleading even if it is literally true if the context in which the statement was made caused the listener or reader to remain unaware of the actual state of affairs.

An omission is a failure to disclose a material fact that had to be disclosed to prevent other statements that were made from being misleading.

Plaintiffs allege that defendants Puma Biotechnology, Inc., and Alan Auerbach defrauded investors by making untrue statements of material fact and material omissions about clinical trial results regarding the effectiveness and side effects of the drug neratinib.

This is referred to as the plaintiffs' 10b-5 claim. On this claim plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

One, defendants made an untrue statement of a material fact or omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading in connection with the purchase or sale of securities.

Two, defendants acted knowingly.

Three, plaintiffs relied on the marketplace to ensure the integrity of the price of Puma shares in buying securities.

Four, defendants' misrepresentations and omissions caused plaintiff to suffer damages.

If you find that plaintiffs have proved each of the above elements, your verdict should be for plaintiff.

If on the other hand you find that plaintiffs have

failed to prove any of these elements, your verdict should be for defendants.

Plaintiffs must prove by a preponderance of the evidence that defendants' alleged misrepresentations or omissions were material.

A factual misrepresentation concerning a security is material if there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether to buy or sell the security.

An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to it as having significantly altered the total mix of information it took into account in deciding whether to buy or sell the security.

You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission.

A defendant acts knowingly when it makes an untrue statement with the knowledge that the statement was false or with reckless disregard for whether the statement was true.

A defendant also acts knowingly when it omits necessary information with the knowledge that the omission would make the statement false or misleading or with reckless disregard for whether the omission would make the statement false or misleading.

Reckless means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors which is either known to the defendant or so obvious that the defendant must have been aware of it.

Puma, which can only act through its employees, acted knowingly with respect to the statements at issue in this case if Mr. Auerbach made the statement knowingly.

Plaintiffs do not have to prove that they justifiably relied on the alleged misrepresentation or omission in deciding to purchase Puma stock if they meet the requirements for invoking a presumption that it relied on the integrity of the market price.

The fraud-on-the-market presumption applies where, one, the alleged misrepresentation or omissions were publicly known; two, they were material; three, the stock traded in an efficient market; and four, plaintiff traded the stock between when the misrepresentations or omissions were made and when the truth was revealed.

Before this trial began, the Court decided that elements one, three, and four have been established in plaintiffs' favor. You should treat these elements as having been proven by a preponderance of the evidence.

Therefore, the fraud-on-the-market presumption applies if plaintiffs have proved by a preponderance of the

evidence that defendant made a material misrepresentation or omission.

Defendants may rebut the presumption that plaintiffs relied on the integrity of the market price when purchasing Puma stock. They can do this by proving by a preponderance of the evidence either, A, that plaintiffs did not actually rely on the integrity of the market price when it purchased Puma stock; or, B, that the alleged misrepresentation or omission did not affect the market price of Puma stock.

For example, if plaintiffs prove Norfolk Pension Fund would have bought Puma stock at the same price even if it knew the stock price was affected by a fraud, the presumption of reliance does not apply.

Plaintiffs must prove by a preponderance of the evidence that the alleged material misrepresentations or omissions were the cause of their economic injury.

To establish causation, plaintiffs must prove that the alleged misrepresentations or omissions played a substantial part in causing the Puma stock declines on May 14th and June 1st and 2nd, 2015.

Plaintiff need not prove that the alleged misrepresentations or omissions were the sole cause of these declines. If you find for the plaintiff on the 10b-5 claim, then you must decide the amount of money damages per share to

be awarded to the plaintiffs.

You may award only actual damages in an amount that will reasonably and fairly compensate plaintiff for the economic loss it sustained. Actual damages are measured by the amount of inflation per share of Puma stock caused by the misrepresentations or omissions on which you base your finding of a Rule 10b-5 violation.

Your award must be based on evidence and not upon speculation, guesswork, or conjecture.

Plaintiffs have the burden of proving damages by a preponderance of the evidence. Plaintiffs also bear the burden of separating out the share price decline, if any, caused by factors other than the alleged misrepresentations or omissions.

Now, before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a

unanimous verdict, but, of course, only if each of you can do so after having made your own conscientious decision.

Do not be unwilling to change your opinion if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right. And do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to issues it involves.

This repeats earlier instructions because it's important. Except for discussing the case with your fellow jurors during your deliberations, do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it.

This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, via text messaging, or any internet chat room, blog, website, or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other form of social media.

This applies to communicating with your family members, your employer, the media or press, and the people

involved in the trial.

If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the Court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it, although I have no information that there will be news reports about this case.

Do not do any research such as consulting dictionaries, searching the internet, or using other reference materials. And do not make any investigation or in any other way try to learn about the case on your own.

Do not visit or view any place discussed in this case, and do not use internet programs or other devices to search for or view any place discussed during the trial.

Also, do not do any research about this case, the law, or the people involved, including the parties, the witnesses, or the lawyers until you have been excused as jurors.

If you happen to read or hear something touching on this case in the media, turn away and report it to me as soon as possible. These rules protect each party's right to have this case decided only on the evidence presented here in court.

Witnesses here in court have taken an oath to tell the truth, and the accuracy of their testimony is testified through the trial process. If you do any research or investigation outside the courtroom or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial process.

Each of the parties is entitled to a fair trial by an impartial jury. If you decide the case based on information not presented in court, you will have denied the party a fair trial. Remember, you've taken an oath to follow these rules. It is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings and a mistrial could result that would require the entire process to start over. If a juror is exposed to any outside information, please notify the Court immediately.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal or the bailiff signed by your presiding juror or by one or more members of the jury.

No member of the jury should ever attempt to communicate with me except by a signed writing. I will communicate with any member of the jury on anything

concerning the case only in writing or here in open court.

If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question.

Remember that you are not to tell anyone, including me, how the jury stands numerically or otherwise until after you have reached a unanimous verdict or have been discharged.

Do not disclose any vote count in any note to the Court.

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror should complete the form according to your deliberations, sign it and date it, and advise the clerk that you are ready to return to the courtroom.

That concludes the jury instructions -- almost exactly 30 minutes.

Now, I think we should take a five-minute break. Let me excuse the jury. We'll take a rest out here. We'll come back and hear plaintiffs' closing. Just five minutes or so.

THE CLERK: All rise.

(Open court - jury not present)

THE COURT: As the jury leaves, please be seated. Court Instruction No. 29, I read the word alleged which

didn't previously appear. Plaintiffs must prove by a preponderance of the evidence that defendant's alleged misrepresentation or omission was material. I decided to add that partly as consistent with my ruling on a similar issue concerning the verdict form.

Any further comment on that?

MR. CLUBOK: No, Your Honor.

MR. COUGHLIN: No, Your Honor.

THE COURT: Any further comment on anything else?

MR. COUGHLIN: No, Your Honor.

THE COURT: Okay. Get ready to set up your show.

Let's give our court reporter a break, and we'll see you in just a few minutes.

(Recess taken from 9:42 a.m. until 9:54 a.m.)

THE CLERK: All rise.

(Open court - jury present)

THE COURT: Folks, welcome back. That took just a little longer than I thought because we were xeroxing the jury instructions I just read. We are now ready to go forward.

Mr. Coughlin.

PLAINTIFFS' CLOSING ARGUMENT

MR. COUGHLIN: Good morning, ladies and gentlemen.

Integrity. As the Court just said, Congress enacted the securities laws to protect the integrity of our

financial market, integrity in our securities market -- structural integrity, so to speak. It's what makes buildings stand straight. It's what the securities laws are all about. That's why there is a cause of action here, a claim in this case. It's why you're here today.

Integrity in our securities market is critical for our economy, for pushing innovation and development. If investors lose confidence in the fairness and integrity of our markets, capital dries up, businesses flounder, unemployment increases, and development of new drugs, high-tech, brick-and-mortar businesses, and everything in between suffers.

So this is a securities case. You wouldn't know it, but it's not really about neratinib or how good or bad it is, or whether it's a good, safe drug or not, although we need it to look at all those things to see if what investors were told, investors in the market, whether they were misled about its efficacy and its safety so that they could make an informed judgment and to see whether or not they were deceived.

This case is about information to investors and whether that information was deceptive.

If a public company such as Puma which runs on and is funded by investors such as Norfolk lies in order to raise capital, investors are harmed. Capital is improperly removed

from the markets. It impacts investors' confidence. It has a ripple effect.

If investors feel it's a rigged game, investors won't invest in our capital markets. We have the most robust markets in the world, and it's in part because of our securities laws and the integrity in our markets.

Mr. Auerbach was a sell-side analyst for nearly six years at Wells Fargo. He covered biotech startups and saw a market opportunity. Line up investors, in-license a drug already developed like neratinib, pick it, and flip it.

He shut down the study with Pfizer, put patients at risk, gathered just under 30 investors to raise 25 million at three seventy-five a share. Pfizer still owns this drug. Puma licenses and marks it.

Pfizer helped fund the clinical cost even after the initial license was granted to Puma. Auerbach renegotiated the licensing deal just at the beginning of this class period with Pfizer so he could flip Puma easier with the clinical trial results and when they came in.

However, a problem arose. The results weren't going to live up to market expectations, expectations that Mr. Auerbach created. Mr. Auerbach then embarked on a series of lies and coverups to raise money and continue his free ride.

You see, Mr. Auerbach had little initially invested

in the company. He put up $400 to get four million shares at .0001 per share. That was his initial investment. He took a salary at least around this time of over $500,000 a year.

Before we started the evidence -- and we'll take a look at it, and this is part of the evidence -- I wanted you to take a look at a little segment that I think spoke volumes about the deception here, and you watched it actually occur in the courtroom before your eyes.

We have an FDA document, an official FDA document that was altered and passed on to the underwriters to get out a $218 million offering. I want to take a look at literally the stories that Mr. Auerbach told in the course of having his depo taken, his first day on the stand, his second day, and then his final statements about that document.

So let's take a look at what Mr. Auerbach first says when he was deposed about that document and whether he altered it.

(Clip of videotape recording played)

MR. CLUBOK: Objection, Your Honor.

THE COURT: Hold on just a moment. You need to stop the video.

MR. CLUBOK: I hate to object during this, but this hearsay deposition testimony was never played in court. Mr. Auerbach was not even --

THE COURT: Hold on. I get it.

MR. COUGHLIN: It was played, Your Honor.

THE COURT: All right.

MR. COUGHLIN: We played it.

THE COURT: Get close to a microphone.

You know, in closing argument reference can be made to any evidence that came out during the trial. There's been an objection that this was not played at trial.

All right. How can we prove that one way or another?

MR. COUGHLIN: I think Ms. Johnson knows that we played it.

MR. CLUBOK: I apologize. Ms. Johnson has a better memory than I, and she says it was played. I apologize, Your Honor.

THE COURT: I think it's appropriate that we start it at the beginning. Thank you for that concession. It was a long trial, and we will now move forward.

Can we start from the beginning just to get the drift of what's going on?

(Clip of videotape recording played)

MR. COUGHLIN: That's what Mr. Auerbach first said. That was his first claim about those minutes, that he didn't change them and there was no way to change those meeting minutes.

But when he got here at trial, of course, the

metadata showed that in fact he had received a Word document and that he was the author of the pdf and that he had changed that Word document at 11:15 at night on January 6, 2015, before sending them to Mr. Hicks, who is the lawyer for the due diligence for the offering.

Let's see what he said when I asked him those questions here in court about that document and whether he had changed it. If you look up here, because it happened in front of you, we don't have an audio of it. That was a deposition that you heard before. So we actually have the transcript:

"Question: Is it your testimony you didn't remove that chart?" You know, those were the charts that were moved out of the FDA document that went down from a ten- to a six- or seven-page document.

"Answer: I have no recollection of removing that chart, and I have no recollection of asking anyone to remove that chart."

Where do you hear an answer like that? Where do you hear an answer like that from a guy who has a memory that he can remember somebody he had dinner with six years before, where they sat, and maybe what was going on in the next room? Where do you hear that?

You heard it in this courtroom, and it changed from the original one.

"Question: I'd like to go to question number two in the document. In the original document -- in the original document, here's the question. Let me get them both up first. Question number two from the one, the document that you sent Mr. Hicks on January 7th, the question seems to have been changed. Did you change that?

"Answer: Again, I have no recollection of changing that, and I have no recollection of asking anybody to change it."

No. I want to go back.

"I have no recollection of making any of these modifications." That was his story when he first testified in this trial, that he had no recollection of making those changes.

Then the next thing that he said was -- and let's look at this:

"Answer: My understanding of this is that the metadata shows I am the author of the pdf."

That's like 180 degrees from what he first said in his deposition the year before.

"But it is not showing that I am the author of the Microsoft Word document that is located toward the bottom there."

So now he's acknowledging he has a Word document and that he changed it into a pdf form. Okay. And so that's

180 degrees from what he said before. And remember, the metadata shows he was the author of the pdf at 11:15 p.m. on January 6th, the day before sending it to Mr. Hicks.

Finally, we're going to complete the circle. Now Mr. Auerbach later in testimony here, I think the next day, he now remembers that they were out of an internal version of the notes. "We took them out because when we attempted to discuss with the FDA the clinical data, they made it easier -- they made it clear to us that this was a nonclinical meeting." You can read the rest of that.

Now his story is because they were going for nonclinical meeting on some nonclinical studies, that they didn't need these.

I think you will remember the evidence and will actually see it again. The people submitting these studies to the FDA thought it was critical that they include the clinical studies to help bolster their safety claim, because they were asking for an extraordinary relief. They wanted to do their new drug application while they were doing the carcinogenic studies, and they wanted to go forward, and they needed all the help they could.

When the FDA sent it back, Mr. Auerbach says the FDA didn't care at all about that clinical information, made it clear -- in fact, he said: Ask anybody else that was there at the meeting.

You know, they didn't bring a single soul in here that anybody else -- and nor could they. Those studies, those charts, those clinical charts were in that FDA document when it came back from the FDA. If the FDA didn't care about that, they would have just marked those up, taken them out.

None of what Mr. Auerbach now says -- we're all the way back to we did create it. It's an internal version. Could we ever find that Word document on their system? No. There's not a single altered document of these FDA minutes on their system.

Let's take a look at the next slide. Where is the internal version that matches the altered FDA minutes? Why is there no internal stamp? Why is there no redline? Where is the e-mail where Auerbach received the internal minutes? Who sent the internal minutes to Mr. Auerbach? Where is the e-mail to the FDA where Puma disagreed with the official minutes of the FDA? You know what? Nowhere. They don't exist. That is deception.

Next. And we're going to see that throughout this trial. And as we go through the evidence, you're going to see that there is zero evidence of these things. There is zero evidence that the centrally confirmed DFS rates which they're hanging their hat on -- and we'll show you that they weren't created until 2015 -- were available July of 2014.

We'll show you that the three-year Kaplan-Meier

curves that he talks about that were 3.5 percent, again, another document that we have to take his word for it. Nobody else remembers creating it. Maybe it could've. The Excelion log doesn't have it on it. Just another document missing. And what is that document? That supports his widening curves, that he had that. Does he send that to Pfizer? He says he showed it to them.

None of this adds up. He had to keep Pfizer in the dark. He had to keep the underwriters in the dark because he had lied on that conference call. And that's what's going on. That's why we have so many missing documents.

The grade-three results being unreliable. Is there any indication that number changed ever? This validation thing is like a red herring. He had numbers in front of him that had been validated by an outside huge company that does this for a living.

If he thought he had to do something and was worried about them internally, then he should have just said, hey, we haven't been able to validate them internally, and that's it. No. He gave out numbers. He gave out numbers, 29, 30 percent, versus the 40 percent that he had sitting in front of him that day, right in front of him. That's deception. That's a lie. That's a lie to the market. Okay? That's not okay.

Pfizer seeing the DFS rates and KM curves, what is

going on with that Pfizer stuff? Pfizer is asking and asking. They own the drug. They have a right to look at this information. There are two documents in this case, ladies and gentlemen, that have all of this information. Mr. Auerbach said, well, they asked for a lot of stuff. It would take us a long time to collect it.

And he keeps writing in there to Pfizer to push them back. He's got to keep pushing them because if he sends them that real stuff, they'll know he lied on that call. They're asking for that information from that call. Why? Because he doubled the absolute benefit, and he doesn't want them to know that's not what it is.

He wants to get his offering out before the market learns of his deception. That's what's going on with the Pfizer stuff. Pfizer requesting the KM simulations, does that make sense? Maybe. Let's see what they look like going out. That was his story.

That's not what they're labeled, and they're the optimistic version. The pessimistic version actually has the current trend where that line, that KM curve -- and we saw that document -- is crossing the placebo. It's gone up to 1.5. It's violated -- it's violated the parallel coordination system.

It is not okay for that to happen, and they know it. So he creates a simulation to send to Pfizer that goes

out three years. Why not just send them the 3.5 percent curve that he says takes into account? Well, there's a number of reasons for that. They never had that curve. They only had eight events going out past year two.

They had a number of patients, but 50 percent of those patients had not had any -- they hadn't pulled those physical exams in with the amendment that stretched out again from three, four, and five. They don't exist. They never exist.

How about Mr. Werber interpreting Mr. Auerbach's July 22nd, 2014, statements to mean a range of one percent, one to six? Mr. Auerbach testified that Dr. Werber, that he knew -- he actually said, I know what Dr. Werber is thinking. We were analysts together. We met at conferences together. We talked.

Well, Dr. Werber didn't write a range. You saw his analyst report. He mimicked the same numbers that Mr. Auerbach gave. He said 86 to 91. That is what he said in his public report right after this call.

And you'll see that he lined up the call and that the three friends that he had been analyst friends with that he testified to, they were the first three people to be lined up.

I just kind of wanted to put that FDA document and some of the other documents that are missing into context as

we start looking through the evidence here. If you don't mind, I'll just take a quick sip.

Puma was founded in 2010, and here you have the shares that were issued to Mr. Auerbach, his initial investment of 400 bucks. Now, Norfolk has 3.6 million when they invest in this company, and he has 400 bucks. And he's paying himself when there is no revenue 500,000 during the 2014-2015 time frame. That was his investment in the company.

Next. This is Norfolk Pension Fund. You heard about it, the 90,000 beneficiaries, average annual pension, 6,000 a year. They actually had more liabilities. They're under water, like, probably 65 percent of pension funds in the world. They can't afford to be cheated.

Capital International managed ten percent of their assets. They make a big deal that, well, Skye Drynan says that she bought. She didn't believe she was defrauded. Skye Drynan also testified that she had no nonpublic information. She relied on the securities price when she made her purchases, and she had no reason to believe that he lied to her.

He did lie. She didn't know what he had sitting in front of him, and she didn't undertake an investigation. We did when the real information came out, and that's how it was revealed. This is how much Norfolk had invested, 3.6 million

in Puma. Loss due to fraud, over a million dollars.

This is Mr. Auerbach talking about his closeness to the analyst and Dr. Werber: We used to know, run into each other at conferences. And when I'm talking to him, I kind of know where the conversation is going. Well, you certainly should have been more straightforward with him. So again, I've known Yaron for a long time. When I'm talking to him, I always know where his question is going.

He's trying to condition us for this range argument, but it doesn't work because he said: I'm comfortable with that number. And that was the 86 percent on the placebo arm.

Again, I've known him for a long time. I know where he's going. Oh, and he's not the only one. Matt Roden at UBS and Howard Liang at Leerink as well. We're going to look at this conference call. Mr. Auerbach picks the analyst to talk first and who to ask questions with -- his old buddies from the sell-side.

That's what's going on here. He's taken over this company. He's trying to enlist his buddies to get out the information that he wants. He wants to renegotiate the Pfizer thing so he can flip it easier to Merck and Celgene or some other company, and he wants to get out of Dodge.

But he gets held up. He can't quite get through the due diligence and get the information out before. When

people finally learn about it, the interest in the company drops.

This is the lineup of the call that he sets: Werber, Matt Roden, Liang. When Mr. Auerbach gets the results, he knows it's not a blockbuster drug. This is the most important chart in the case. It's Exhibit 123, the top line.

The top line here has the topline results, DFS. That's the 93.9 and 91.6, and that's how you get your 2.3 absolute difference or absolute benefit. That's where those numbers come from, and that's Exhibit 123. Exhibit 123 and 124 are the two most important exhibits in this case. There's that .67 hazard ratio.

Keep that number in mind anytime you hear another absolute benefit or some KM curves. This .67 or 33 percent improvement only applies -- only applies to this number here. It only applies to these two numbers here. So it can't apply to any of the subgroups that they're now trying to escape liability using or putting out there. It only applies to this topline.

Now, I don't know if the defense talked about how this is basically, if you get another cancer reoccurrence, that it's essentially a death sentence. I think those were his words. If you take a look at this third line here, this is distant disease-free survival. And if you look over here

(indicating), the hazard ratio goes up .75.

And when we look at that document a little later on, you're going to see that's the type of cancer that kills you. And in this study that was not statistically significant. Neratinib was not statistically significantly better than the placebo. So they can't make that claim.

Four people died taking neratinib and two in placebo, and that's the reality of this study, because it was basically local reoccurrence for the most part that took place, not a death sentence. In fact, neratinib in real world performed poorly as far as the most deadly cancers.

This is the absolute benefit, the KM charts. They give you the 2.3 percent absolute benefit. This is the safety study that he received. The studies before had just been received the day before the efficacy, and here we are looking at the -- looking at the diarrhea rates of 39 percent when he discussed on that phone call 29 and 30.

And if you notice, the placebo is 1.6 percent. That's what the diarrhea rate of grade three was in the placebo. Treatment discontinuation. They keep saying it's, oh, well, you're misusing that. People were really worried about the dropout rate. No, that's not what people wanted to know, at least the analysts on that call.

What they wanted to know was how many people quit taking the drug. They're making a financial analysis, so

they wanted to know the discontinuation rate. That is what the doctor asked at the ASCO conference, and that was the question if you look at the call when the analyst says: I think you're referring to discontinuation. And Mr. Auerbach again gives the five to ten percent dropout.

He was referring and wanted them to believe that that -- that that was what they expected the rate to be. He had this sitting in front of him a couple of days before that July 22nd call.

Finally, adverse events. They want to know how many people dropped out, leading to discontinuation. How many people discontinued due to adverse events? Discontinuation, 27.6. They're going to make the dropout argument. We don't think it holds water, and we can show you and we will show you, three, four, five, ten different times that that doesn't hold water. It's the discontinuation rates that they were asking about.

This is kind of critical for the central testing. It says central testing discontinued after amendment nine. That means that three years before this phone call, they quit testing for that central confirmation that they've been talking about. So they have less -- they have 60 percent of that data or less than 60 percent of that data.

So any claim -- any claim that this data -- that they can put this data out there and draw the conclusions

they want you to do, that is an over four percent benefit, is based on incomplete data.

In any event, he certainly didn't have it before the phone call on July 22nd. He starts searching the subgroups to try to come up with absolute benefits that support his range, but he didn't give a range. He gave an actual number, and it has an actual hazard ratio associated with it.

This is the conference call July 22nd, 2014. And this is the transcript that we've examined. Here's what he knew. He knew the results. He knew the topline results, and he knew the 2.3 percent absolute benefit. But here's what he said: You're thinking that, if I'm correct, that the DFS is probably around mid to high 80s.

Then he says, around 86 percent or so in the control arm. I would be comfortable with that number, says Mr. Auerbach. And one would imagine you could probably had to show around 90, 91, is that reasonable? That would in the neratinib arm.

Yes, I think you can do a 33 percent improvement in DFS and come up with that calculation given the numbers. In other words, that means if it's 86 and you take 33 percent of that, you get about a 4.7. And that's the range that he guided them, in between four and five percent.

That's what the market took away from that, and

that's what all the analyst reports started printing. He didn't show them this curve, and he didn't tell them it was 2.3 percent.

Here's where he's talking to them and the analysts are asking about whether the curves going out going forward, whether they continued to separate. And he says that it is increasing year over year.

He doesn't have any of that data. None of that data has been produced to us beyond the two-year truncated curve that we saw of those results right before that call. So the idea that he has -- well, he doesn't have simulations. We can't see the 3.5 percent. It just doesn't exist.

It's just Mr. Auerbach saying that he saw that and can't reproduce it now.

Now we're talking about adverse events. Here at the bottom is the 39.9 percent. It's hard to read, but it's Exhibit 124. Mr. Auerbach stated to everybody that he thought -- that he didn't have the safety results in front of him, although he did.

It says they were validated. He says that they have to get validated. He says, we would expect them to be in the 29 to 30 percent range, when the number sitting in front of him was 39.9 percent.

These are the other things he knew. He knew that overall the adverse event discontinuation rate was 27.6 and

that the discontinuation rate for diarrhea was 16.8. That's all in Exhibit 124. And he says that that range is five to ten percent.

Here's what Dr. Werber reports in his analyst report right after the call: We estimate that neratinib treated to two-year DFS rate of about 90 to 91 percent versus 86 percent for placebo. Those are hard numbers. He came away from that call, the doctor did, with hard numbers, and he printed them. And that's what the market saw.

This is double the absolute benefit that was sitting in front of Mr. Auerbach. There is no question that was validated, the 2.3 percent. However, the dropout due to side effects is likely five or ten percent. That's what he writes about the dropout rate. Yet the discontinuation rate was 27.6 and 16.8 to diarrhea alone.

This is the UBS. His friend at UBS talks about how the curves apparently widen over time and neratinib appears active in all subgroups. That is what also was said on the call. According to management, again here's another analyst, his buddy, he is writing that it suggests a four percent absolute benefit. And again according to management, separation of the DF curves [sic] persisted and appears to widen over time.

The street took away the actual numbers that Mr. Auerbach gave. They did not take away a range.

Mr. Auerbach knew it was not a blockbuster drug. That's what the stock did. That was the rise in one day from $59 to $233.43. That's what the market believed had been communicated to it during that conference call. It was double the efficacy that the drug actually was and didn't properly disclose the safety hazards.

It was not the blockbuster drug that Auerbach led the market to believe. It only had a 2.3 benefit. It's not a lifesaving benefit. The DDFS not statistically significant in trial, that's that third line. It didn't pass muster.

In fact, four neratinib patients died versus two placebo. It had a 40 percent grade-three diarrhea and a 27 percent discontinued due to side effects, and 16.8 versus diarrhea alone. This is what was really going on. He doubled or cut down by a third each of these key numbers, the 2.3 to four to five, the 40 percent versus 29, 30; the 27.6 and 16.8, five to ten.

And there was no evidence that the curves were separating at two years where they end. And separating at two years and continuing to separate through years three and four is what Auerbach led the market to believe.

What happens then? Bankers flock to the company to see if they can get a sale, to see if they can sell this company to people like Merck and Celgene. And this is the presentation, the profile that was given.

You can see right here number six is the 7/22/14 conference call. That's what shot the price of this stock up, and these are the documents that the bankers were showing to various interests that might be interested in purchasing this company.

One of the things that was embedded in this document is in fact -- and this is Exhibit 576 -- is it talks about the three-year DFS benefit. Okay. Now, Mr. Auerbach writes back and corrects them. It was really a two-year benefit that we were announcing. Okay. And they tell him -- in this document it says translates into an absolute five percent absolute benefit, is what they're talking about there.

Mr. Auerbach writes back and corrects part of this paragraph. He writes back -- and this is Exhibit 499. He writes back and says: Hey, you know, you could tell them -- you've got to clarify this little -- it was two years, not three. And you might also put in that the curves were separating in the years going out.

Again, he doesn't have that information. What happens with that? He gets approached by Celgene. Celgene wants to sign a nondisclosure agreement immediately and hopefully proceed with the purchase of this drug.

It is a $10 billion offering that Celgene approaches the company with. You know what the problem is?

He can't sign the non -- he can't go along with Celgene and then show them the data. They will know that he lied. So he can't move forward with the deal. Mr. Auerbach testifies that they lost interest.

Is that what happens? A company comes across the country to meet you in L.A., makes a $10 billion proposal, and then quits calling you the next day. No. He could not go through -- he could not sign the deal and move forward with it.

I want to start talking about the evidence of what they actually knew. They talk about curves that go out three years. This is Mr. Bin Yao. I think Mr. Auerbach said he would be able to explain the curves to me better when he came and testified. I don't think that we saw him.

It says -- Mr. Bin Yao said we probably had eight events the past two years, and they were not included in the primary DFS analysis. That's a couple of days after the call. They don't have very many events. They weren't included in the primary analysis. They had no basis to talk about those curves widening and separating, going out in time. No basis whatsoever.

In fact, if we look at it, this is Mr. Alvin Wong who I think we were also supposed to hear from. Look what he says: Because of amendment nine where follow-up was cut off at two years, there's a lack of data. And he says:

Approximately 15 percent have some exams after the two-year.

They quit following these people years ago, and they don't have the data going out. And they're just now scrambling to get some of that data, but that's not what they led the market to believe on July 22nd.

Here's where they're talking about the proportional hazard assumption. And this is key. This is whether the curves are continuing to separate. When the assumption is violated, in other words, when they crossed each other, the interpretation of the single hazard ratio may not be adequate.

And what does Bin Yao do? He does a study, and what he shows is that when he estimates at five- or six-month intervals what's happening with these two curves, this bottom curve, the neratinib arm, crosses the placebo in the last five and six months of the study.

That's the worst result that they could have hoped for. They know those curves are not separating, and Bin Yao does the analysis and shows them that they're not.

Another -- this is another -- we're going to now talk about the subgroup analysis. This is October 13, 2014. Okay. And this is -- he's asking, do we have these curves for the HR-positive and HR-negative subgroup? This is a couple of months after this call.

And Claire Sherman, who you saw, said the forest

plots we have, I can modify the programs to produce the Kaplan-Meier plots. Requested. I will get those to you tomorrow. This is months after the call, so they certainly didn't have those on the call. I will create the curves, the three-year DFS/DCI curves and the Kaplan-Meier curves. That's what she tells him the very next day.

But they're not created at that time. And now the centrally confirmed. He's asking Bin Yao, hey, I know we talked about this centrally confirmed group, this all-important group. He asked them, could I see the curves? And Bin Yao says -- think of how central this becomes to their story. Bin Yao says: We didn't do it. I just started -- I just asked it to be generated.

In other words, they hadn't done it because they had stopped testing -- they had stopped gathering information three years before. They were missing 40 percent of the data, okay. Now we're seven months after that July call, and they're just now trying to do that curve.

And that curve they hit a jackpot on. With the limited data that they have, it gets over a four percent benefit. He didn't have it at the time, but I'll tell you what. When he tries to keep the stock up from going in the tank when we go to that ASCO conference, he starts calling his buddy and saying, well, we have this centrally confirmed group and we've done very good in the HR-positive.

The HR-positive is a much smaller population, and the centrally confirmed group they don't have the data. That's the problem he has. And that's why the stock still goes down when the announcement is made later. There's the data that they had as of December 11, 2014, on the central confirmation, central testing. They're missing 39.7 percent of the data.

This is the diarrhea rate. We had an interaction here where 84.7 percent of the people on neratinib were on some type of antidiarrheal medicine. That high number was not disclosed. Was it deceptive not to disclose that when they just talked about how they were going to introduce it before people even started taking it?

That's not a claim that we have made, but I think it was deceptive that it was omitted from the market exactly from day one -- and we saw what Y said. From day one they should be on Imodium -- day one. So they knew that it was a problem.

The primary goal here was to get out that offering, and he pursued it immediately. But what was happening? Pfizer started to make those requests that we saw. They started requesting the documents, any slides, any written -- the primary efficacy analysis. This is September 2014.

Now, he had that data, that 123, Exhibit 123, at least before July 22nd, and he still hasn't given it to

Pfizer even though Pfizer -- even though he says they flew across the country in August and they showed them all the data. He didn't give it to them -- he could have pushed a button and sent the results over to Pfizer.

There was no need for all of this traffic back and forth about what he had and when he could get it. This is what he sent Pfizer. Okay? Exhibit 481 is what he sent Pfizer, and this, Exhibit 123, is what he had. Let's see what he did.

Five pages is the actual report when the real report is 23 pages. These are the tables that are the key. This is the heart of this case, these tables here. This is it. This is where all the data after all those years, this is where it's collected. But it only shows the 2.3 percent benefit.

What does he do with this heart of this chart? That's the heart. He takes it out. He sends -- that's another deceptive act. He sends Pfizer, the owner of this drug, a chart. His explanation, hey, we were a small company. They were asking for a lot, you know, so we were trying to send them what they were asking for.

Does that absurd reason make any sense to cut out of the heart of the chart? They have a right to look at all the data. They're the licensor. It doesn't make any sense. It only makes sense if he's trying to keep from them what's

actually happening.

Takes out the other charts. Takes out the KM curves. Page after page is taken out. Pfizer writes back to him and says, hey, we still want the topline results. We want the DFS results. We still haven't got it. When you were on that call, okay -- Mr. Vatnak, who Mr. Auerbach said he went to see, he said he was able to review the data very quickly and there's -- and we believe what we have been provided is less than what's available now.

And if you take a look, he's quoting -- Pfizer is quoting back to him in response to a question by Dr. Werber regarding DFS rates, Alan implied that he knew the DFS rates of the active and control arms. Well, he certainly gave that information out, and Pfizer wants to see it. But he keeps taking the information out of what he's sending them because he doesn't want to send it to them.

Okay, to the question about long-term follow-up, Alan implied knowledge of DF rates beyond two years and alluded to continued separation of the curves. They heard the call. They want to see the data. They just want to see the data of a drug that they own, that they licensed to Puma.

This is Bin Yao. He does the simulations that Mr. Auerbach asked him. You'll look at this Exhibit 396, and you'll see that these simulations -- this is what he did for that truncated curve that crossed the line -- that the hazard

ratio violates the proportional hazard ratio and goes above one. And then down in the bottom here, the two-year, it goes up to .94.

That's the hazard ratio when you break it out. It's .50. All the benefit is in the first year, and he doesn't want people to know that they don't continue to separate. Okay.

So when he asks Bin Yao to do the separation, he's going to ask him do the most optimistic, which is not where the curves are going. Let's see. The pessimistic Mr. Bin Yao says, hey, the hazard ratio is .947, the same as the hazard ratio for the second year in the 12-month hazard rate table.

The pessimistic is the real. The real number is pessimistic. Is that what he sends over to Pfizer? No. He wants to print out the optimistic scenario. He wants to send the optimistic scenario to show what the hazard ratio p-value are for these curves. That's what he sends Pfizer.

He doesn't indicate anywhere on the document that it's a simulation. That's not what he says. He says these are the DFS intent-to-treat population curves. Nowhere does it say that it's a simulation.

I think this is the most telling document. This is Mr. Auerbach writing to himself, documenting to himself that he has not shared any information with Pfizer regarding the

disease-free survival data from the ExteNET trial. That's the trial that we're talking about.

Pfizer has not seen the disease-free survival data, nor has Pfizer seen the Kaplan-Meier curves for the ExteNET trial. This is in October. This is months after he testified -- after he testified here that he showed them all the stuff in August. It's just another deception. It's like the FDA document. It doesn't make sense except for he has got to keep away from the market and people that might tell on him what the real numbers are.

So he doesn't send them the real numbers. He applies for breakthrough request designation. Puma applies for that, and they put in that request. Mr. Auerbach says it didn't mean anything because we had already gone through phase III.

No. It speeds up everything. You want that. What does the FDA say? Ms. Segal notes, testified here before you, that a 2.3 improvement in DFS is not enough for breakthrough. That is what she says at that meeting that Mr. Auerbach was at and others. That's what she writes down about that meeting.

Mr. Auerbach has always got a different story for what happens at the meeting: I didn't care about the clinical trials. No, it wasn't the 2.3 percent absolute benefit of the topline results. He's always got a reason

that doesn't jive with what the FDA is doing or what Pfizer is doing or other people are doing. And you know what? There's never any backup.

After they get the notice of the no backup, they're moving forward with the NDA, the new drug application treatment. The person at Puma who is in part responsible for what they're going to submit starts talking about, hey, we have to submit. This is an exceptional request, to be able to submit your NDA application, okay, without finishing your exploratory tests, cancer tests on rats, mice, and rabbits that Mr. Auerbach talked about.

And so he says, we need to submit the clinical data. And they do. They do. They determine that that's the best business decision to try to get the FDA on their side.

The FDA says, no, not right now. We're not going to let you waive -- we're not going to let you submit your new drug application without starting those trials. Later they let him do one year versus two, but at this juncture right here, right at late 2015, they say no.

They send them -- they send Puma a copy of the official minutes. Ms. Woods sends it around to Alan and everybody else. And there's the official minutes, 12 pages. They have an electronic signature at the end of the FDA person. They have the actual results that if the underwriters saw these, they would know that Mr. Auerbach had

lied on that July 22nd call that sent the stock skyrocketing, which would allow them to get out an offering selling a lot of shares.

This is his problem. The official minutes showed the absolute benefit. He had to provide the FDA minutes to the banks for their due diligence. Here's the banks asking for recent FDA correspondence. They want to see it.

He's got a problem. What does he do? On January 6th at 11:15 at night, he alters the official FDA minutes. There's the official. Takes out five pages of those. When first questioned, as we saw, he said, well, you can't alter them. They're in pdf form.

Then he changed his story. He had no recollection. Then he changed it again that he was the author of the pdf. And finally, now they're altering an official FDA document to use internally because the FDA just didn't care about those clinical results.

If they didn't care, why did they include them in their minutes? They did care, and he started marking out stuff, different tables throughout. You'll have both documents 491 and 773 back with you, and you can make your own comparisons.

He deleted everything that was important from the clinical trial. He even changed some answers. Is that what you do to get an internal document that you're just working

with just to see what -- so you could pare down? And the reason -- the reason that they changed this no to yes is they didn't want the underwriters to think there was anything in the way.

He took out this part of the sentence up here where Puma says, hey, we don't have to do anything else, right? And the FDA said, no. He changed it to an S and shortened the sentence. So the idea that these are, quote, accurate is false also.

In the metadata that we talked to, and you can see that he is the author late at night creating this document to send to Mr. Hicks for the next day. It's attached, Exhibit 491: Hi, Bill. Happy New Year. Best wishes. Please find attached the minutes from our recent meeting with the FDA.

He doesn't say please find attached the pared-down minutes that we got from the FDA because they were only interested in X, Y, or Z. Nothing like that. He says, here you go. Then they asked, is there anything else? Is there anything else we need to see? Any other correspondence since November? Nope. You've gotten everything.

He consistently hid the benefit, whether it was an FDA document, whether it was correspondence with the FDA, on the conference call, concealed the DFS rates from Pfizer. And when they're doing the due diligence and they're setting

out the offering, they point to the spike on July 22nd that shot that stock up.

Look at that stock chart. That's what was happening with the stock when they were trying to get their offering out. They get the offering out. Nobody sees the phony minutes before they raise the $218 million to go forward with the additional clinical trials that the FDA wants to see.

The next thing is the presentation at ASCO. At some point they have to present these studies to the medical community. ASCO is one of the bigger places to do it. But, of course, there's a lot of people involved in these presentations, and there were a lot of doctors involved.

Those doctors were not on those investor calls. Those doctors were not following whether they were getting out -- whether Puma was getting out an offer or not. They were looking at the results.

And what do the doctors disclose in the ASCO abstract that was never out in the market before? The diarrhea rate, the most common adverse event, at 40 percent never changes from those first results to now. And the absolute benefit is 2.3 percent.

That is what this abstract discloses. What does Alan do, Alan Auerbach? He calls his buddies, some of the same buddies you saw before, some of his buddies that he used

to meet at the conferences. And what does he do? He starts telling them about subgroup populations, and these numbers are not disclosed in the abstract because the committee the doctor is putting together did not think they should be in the abstract.

They disclosed the hazard ratios for those two populations but not those numbers. Another -- this is another whisper campaign for Mr. Auerbach. This is another analyst on the street. He's concerned that those numbers have appeared in those analyst reports, because they weren't in the abstract. And he wonders how those other analysts got those numbers.

This is Mr. Auerbach internally talking to Dr. Chan, who is going to make the presentation at ASCO. He acknowledges internally that the 40 percent diarrhea rate is extraordinarily high, so he wants to put in the other studies that were discussed in and around the 40 percent diarrhea rate.

What those studies show, according to Mr. Auerbach, is that you can control the diarrhea from -- get it down to as low as 0 to 17 if you immediately use Imodium prior, prophylactically prior to taking this drug. Take a look at the patient populations of those drugs. Those patient populations have six, eight, go up to 43, I think is the biggest one of the three or four studies that are in there,

and those are the studies he's using to try to counter what's happening.

He is trying to get all the good information he can out on the market to fight what the market is going to react to when they see this abstract.

So let's see. If we compare what he said in July -- and this is what the actual rates were, 2.3 absolute difference, absolute benefit. And this is his 86 percent and 91, 90, 91 percent that he told Dr. Werber. Okay? And this is the 29 to 30 percent and the 40 percent grade-three diarrhea that we have.

That's the contrast. What does that do to the market? The stock craters as a result of the release of this information. The Stifel analyst report talks about the difference: We expected the DFS for the Herceptin arm, which is what you take before you take neratinib, to be about 86, suggesting the reported hazard ratio of 67, okay, for the ExteNET trial. And then he says: You would get a 91 percent. Okay. And he talks about how in reality it was quite different.

The analysts that are not talking to Alan ahead of time, that are just, probably straight up from the information that they're getting, the public information, are saying what a contrast it is. The difference is half.

Look what this analyst notes. He notes that, in

other words -- and you heard Dr. Jewell testify -- in other words, one in 43 women will see a benefit. Up here at this five percent, that would be one in 20. It would be half the number. It would be that much better. It would be double.

This is the Cowen analyst who had just stopped following, and they go through a litany -- this is Exhibit 324 -- of what they think the problems are. They talk about the -- they talk about the subgroups. They're not enamored with the subgroups. They're not sure about the subgroup analysis.

They talk about the significant diarrhea, the Imodium needed and what that will cost. They go through all of those things. And, that's right, you don't accept this for the truth of the matter asserted, but those are some of the concerns that the street had in light of what was being disclosed.

Then we go to June 1st and the ASCO. Again, further new information. For the first time we now know that 16.8 percent discontinued due to diarrhea and that 39 percent of the neratinib patients did not complete one year of the drug.

In contrast to his earlier statements about the 29 to 30 percent for diarrhea, in contrast to his statements about discontinuation and dropout rates, these are big differences between five and ten percent and 39 percent, the

numbers that Mr. Auerbach got.

They made a big deal in their opening that you would hear -- that you would hear from the people, from Capital. You would hear and they would come forward and say, oh, no, I would buy anyway. That's not what they said. They didn't know of any fraud. They didn't think Mr. Auerbach, at least Skye Drynan said she didn't think Mr. Auerbach had committed fraud, but that if he had violated securities laws, she would want to know about it.

Yes. Would that have been relevant to your investment decision? Yes. For example, would you have wanted to know whether Mr. Auerbach's statements regarding the ExteNET trial in 2014 were false? I would want to know if they are true or false. Would that have been relevant to your investment decision? The answer: Of course.

On May 14th when you were recommending buy Puma stock, were you recommending to buy it at what was then the market price? And the answer is: Yes. She didn't know of any fraud. The stock dipped. She thought it was a buying opportunity and recommended it. That's what was going on there.

Was the ASCO information relevant? Yes. Did you consider that along with other publicly --

THE COURT: Hold on. That's too fast. When you read, sometimes you get too fast. Slow down. Okay?

MR. COUGHLIN: And did you consider that along with other information? Yes. All right. At the time you were making your stock recommendations --

THE COURT: I really --

MR. COUGHLIN: Sorry.

THE COURT: I didn't hear you slow down. If --

MR. COUGHLIN: All right.

THE COURT: Do what you like. The record may reflect that you're not following instructions.

Go ahead.

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

The answer: Yes.

These investment advisors, they were relying on the stock price to accurately reflect the information in the market. And this is an efficient market, and it would reflect the information that was in the market at the time.

And this is Darcy Kopcho, the other advisor at Capital: Well, I -- I -- I'd rather put it that if I knew the executives were altering documents to hide important information, that would be unethical.

Mr. Forge: And you would not invest in such a company? That's right. So they didn't know that at the time they were making these decisions.

Would you have purchased shares in Puma in May 2015 if you believed Alan Auerbach had made misrepresentations about Puma's trial results?

No.

Would you have purchased shares of Puma stock in May of 2015 if you believed its stock price was tainted by fraud?

No. No, I would not have.

Would you have purchased those shares of Puma stock if you believed the share price was artificially inflated?

No, I would not.

That's what the investment people -- that's what they believed at the time that they were investing Norfolk's money into Puma stock. And what happened May 13th and 14th when the information of that abstract came out? The stock dropped a residual return -- and you saw Dr. Feinstein testify -- to 40.96. It dropped straight down. There was market volatility.

It came up a little in between that time. When they presented at ASCO on June 1st and 2nd, the stock dropped another 46.24. The total losses were 86.78 for the two days. The total drop was 141.5.

They had their loss causation analysis person come in, and he listed the five things that you should do, identify alleged misrepresentations, the five things that

Dr. Feinstein did. He was asked: Did you do these? Even though he was saying you should do these, he didn't do any of them.

Of these five things that were asked of him, he didn't do any of them. He doesn't remove any price impact, any confounding price impact at all. So he talked about there were possibly confounding information out there, but he didn't do any tests.

There is no evidence in this record that any, quote, confounding information, whether it be node-negative or other information, negative information that they assert came out, that that impacted the damage and causation analysis that Dr. Feinstein did.

He said -- now, this is very important. If you take a look -- they don't even say on the left-hand side, they say -- they don't even talk about any confounding information as to the first drop with the ASCO.

They say -- they talk about this confounding information over here, the node-negative subgroup, the limitations on data, doctors' reactions, investor meeting. That was after the full presentation. And they say some of those things could be confounding.

Did they find a -- do a study and look at the impact of any of those things? The answer is no. No. None of them. And these two are not touched at all. There is

nothing about the May 13th disclosure that dropped the stocks $40 that is in any way confounding or anything.

What they're hoping you do is find one out of the two statements versus the two and say, oh, gotcha. No. There's nothing in the market except that abstract that day, and that's what happened to the stock. It was $40 down.

This is out of the instructions. Since the Court just read that, I won't go over it right now. The only thing I want you to concentrate on is, because we've got to prove -- it's our burden of proof by a preponderance of the evidence -- that it was a material misstatement.

And whether it's a material misstatement or an omission, we have to prove by a preponderance of the evidence that it was more likely than not that we were correct. If you take a look at here, a statement may be misleading even if it is literally true if the context in which the statement was made caused the listener or reader to remain unaware of the actual state of affairs.

Mr. Auerbach is constantly hiding behind that phrase during this trial. Although that was true, that it was true -- some of those things might have been literally true, not the four statements at the heart of this issue. They weren't even true at all. But he tries to hide behind that when he says other things.

So take a look at omissions. An omission is a

failure to disclose a material fact that had to be disclosed to prevent other statements that were made from being misleading. That's the standard that you will evaluate these statements in the back.

You will get this jury form, and you'll have to decide what did mr. Auerbach know and when did he know it. And all of the information here on the left is what he knew before July 22nd on the conference call.

You'll have to say whether we proved that defendants made materially false or misleading statements or omissions on July 22nd, 2014. There's a category for each one of these.

And here you contrast it with what we assert he actually said -- 4.5 percent, 29 to 30 versus 40, separating at two years, not separating, five to ten percent, 27.6. We think that all four of these should be circled yes.

I'm going to save some time after we hear the defense talk and come back to you and talk to you about some of the things that they might say or explain about some of the evidence, and then it will be time for you to retire.

But this is where we think that we have proven our burden beyond a preponderance of the evidence that Mr. Auerbach was deceptive on July 22nd, 2014, when he said those numbers; that he continued to deceive the market until May 13th and June 1st, 2015.

Thank you, ladies and gentlemen.

THE COURT: All right. Thank you, Mr. Coughlin.

Let's take another five-minute break and let the defendants set up their presentation.

We'll see you back in five minutes.

(Recess taken from 11:06 a.m. until 11:20 a.m.)

THE CLERK: All rise.

(Open court - jury present)

THE COURT: All right, folks. Welcome back. I believe Mr. Clubok won't finish until -- we'll take our lunch break in the middle of his closing. We will be taking the break maybe a little bit after noon, and then we'll come back and hear the rest of what he has to say.

So, please begin.

MR. CLUBOK: Thank you, Your Honor.

DEFENSE CLOSING ARGUMENT

MR. CLUBOK: Good morning. Again, I'm Andy Clubok. I spoke to you at the beginning of this case, and I tried to preview for you what I thought you might see in the course of this trial. And what matters is what you actually did see.

What matters is what facts and what evidence you saw and what you thought about that, what you thought about the witnesses, what you thought the exhibits meant. Our argument doesn't really matter except if it helps guide you.

The other thing that matters a lot is the judge's

instructions. The judge spent a lot of time explaining exactly what the law is in this case. Then you're given a pretty hard task but a pretty awesome one, which is you get to decide what the facts were as you saw them and how they fit in and apply to the law that the judge told you about.

Before you do that, I'm just going to walk through and I'm going to highlight some of the facts that I suggest you might consider when you're doing your job. The most important fact that is absolutely true and that cannot be disputed is that this drug, neratinib, it saves 33 percent of women whose HER2-positive breast cancer would have otherwise come back within two years.

Stop right there. For women who had this particularly bad kind of breast cancer, this human -- I can't even say the word -- human epidermal growth receptor in the cancer. If it tests positive for that, it means their cancer is HER2-positive.

For a test program that involved 2,800 women, just about 1,400 on each side, those who just got the treatment that was then available versus those who got the new treatment, neratinib, they were compared and it showed that if statistically nine women would have had cancer return within two years with the old kind of treatment, with neratinib now that is reduced by 33 percent in the real world.

That's what the results of the ExteNET trial proved, and that's why everyone at Puma and all of the doctors that they shared this information with were so excited, because they had done something that no other drug manufacturer had done in at least ten years, which is advance the standard of care for treating HER2-positive breast cancer.

Now, you heard from Dr. Schwab explain how this drug works. And again, no expert, not even Dr. Adelson, came in here and disputed this or could have disputed this. Dr. Schwab showed how for women who have breast cancer, the problem is this, what Dr. Schwab referred to as the -- the blue or the teal, I think he called them -- receptors you see.

It's these receptors that are the HER2 receptors. What they do is they basically feed off the cancer cells. And when they feed off the particles, it ends up multiplying the cancer and you get more and more cancer throughout your body.

What neratinib does is neratinib is simply a small molecule that fits in right there like a good hockey goalie, I guess, and basically it blocks those receptors from feeding, disperses those signals, and it results in the cancer cell, instead of multiplying, decreasing and basically dying.

That's what neratinib does. That's what Dr. Schwab explained. Nobody can dispute that. So that's why there was reason for excitement at Puma and throughout the medical community when the ExteNET trial was concluded in July of 2014.

Now, in court we have -- you sometimes hear things that you don't hear in the real world. What we have here is a slide that I've entitled: The truth about neratinib. You know, you can contrast for yourself some of the things you heard in this court case versus what you actually know or what you actually saw in terms of how neratinib works in the real case.

I think I talked about this trial versus the ExteNET trial, the litigation world versus the real world. So in the litigation world, at least the one that the plaintiffs have brought, this was the story you heard in their opening statement. You heard that you were going to hear about debilitating diarrhea. That's what they told you the facts would show.

Their first witness that they put on the stand talked about financial toxicity and how people could lose their homes. That's serious. That's not something to joke about. It's also not something that's relevant to this case. But you were told about financial toxicity.

Most importantly, maybe you were told -- and this

was just, I think, in opening statement, the statement of the lawyers which, as the Court has instructed, you are not to take as evidence. But you were told that this drug trial wasn't so good. It just had a 2.3 percent marginal benefit.

What good is that? It's essentially the impression you were given. So what about the real world? In the real world there are real doctors. And there were dozens and dozens of doctors who reviewed the ExteNET trial data even before it was presented to ASCO. Let's not forget that.

You heard from just a few of the real-world doctors in this case. And on some things even they, even the one that was paid by the plaintiffs, did not disagree. So what about this debilitating diarrhea? You heard that you were going to hear about debilitating diarrhea.

It turns out we now -- at least the facts have shown and you can decide for yourself what to believe. The facts have shown that the diarrhea is manageable. It's a short-term issue. And for most women it can be prevented entirely if you simply do what Dr. Schwab does in the real world when treating patients who he prescribes neratinib to.

What about financial toxicity? You heard about -- and by the way, Dr. Adelson never once said that neratinib has caused financial toxicity. That's because she couldn't say that, because Puma has set a policy from day one that says if you can't afford the drug, you're going to get it.

Dr. Schwab explained how in the real world, insurance pays for it in his experience. If you have Medicaid, that's going to pay for it. If you have a high copayment and you can't afford it, Puma will cover the copayment. There's not a single patient who was here to say, nor a single doctor who will tell you about a single patient, whoever needs neratinib who can't get it because of cost.

That's just not true. So why did we hear about financial toxicity?

Then what about that 2.3 percent benefit that is, oh, just marginal? What that means, that marginal benefit, that means thousands of women in the real world will be saved, will have their breast cancer, their HER2-positive breast cancer not return for at least two years.

Now, every time we hear that plaintiffs denigrate this and say, oh, that's not a -- I think in the opening statement you heard it's not a life-threatening statistic. Then Mr. Coughlin says that's not so bad. It's not the same as other cancers that come back and kill you. It's just breast cancer returning or something like that.

Look, I think everyone knows what happens when breast cancer, particularly this kind of breast cancer, returns. And what -- even -- again, even Dr. Adelson, do you remember when Michele Johnson asked her: Isn't it true, Dr. Adelson, that originally you had claimed only 2.3 percent

might be saved, but then in fact you had to admit it's 2.3 percent will be saved? And she said: Oh, yes. I said that wrong in my deposition. I'm sorry. That's true. It's actually 2.3 percent will be saved.

And out of the 470,000 or so women who have breast cancer every year, that 2.3 percent isn't some marginal statistic. It's important, and it's one of the last steps in reaching the final cure because we've already done -- the good news is, right, with just the treatments that had already been in existence before, we were already doing -- keeping women disease free for something like high 80s to low 90s in percentage terms.

So to say it's not important to help the last few, I guess, when those few are a percentage of nearly 500,000 women per year, I think that's kind of missing the point.

It certainly misses Puma's point, and it misses Mr. Auerbach's point and Troy Wilson's point in terms of why they started this company and what they're trying to do. For them, patients are more than a statistic.

I think you've seen enough of Mr. Auerbach and his ways and how he spends his life to make your own decision about that.

Something else you can make your own decision about, but on this one, again, there's no real dispute, no factual dispute that could allow you to reach any other

conclusion. That is, simply put, neratinib changed the standard of care. The standard of care was the best available medical treatment for women with HER2-positive breast cancer.

Until 2014, from -- actually from about 2004 to about 2014, that standard of care involved surgery, chemotherapy, and Herceptin taken through IVs, and that was it. Everyone has agreed there was nothing else.

That's why it was so unexpected and fantastic when it was announced that the ExteNET trial had been a success and that, as Dr. Adelson explained, a treatment showed a statistically significant improvement over the then existing standard of care.

That is the very definition of improving the standard of care. Even the paid witness from the plaintiffs admitted that, but certainly all the other real-world doctors said the same. Dr. Schwab explained how that changed the standard of care.

And Dr. Chan, Dr. Chan is not paid by anyone. We did have to hire Dr. Schwab to come in and we paid him -- or Puma paid him, I should say, not the lawyers. Puma paid him, I think he said, $25,000 for his time so he could respond to some of the things you had heard and teach you about how neratinib really works.

But Dr. Chan, she wasn't paid by anybody. She was

the head of an academic steering committee of 16 oncologists from all over the world who reviewed every shred of data, who authored the ASCO abstract, and who submitted under their names to ASCO this remarkable new news which, as Dr. Chan put it, changed the standard of care.

So how does lifesaving medicine get to patients? The first step is a successful phase III trial, and that's what ExteNET was. But it's not enough. There's two more important steps in the process.

One step I talked about in the opening, and that was the step of presenting these results to the tens of thousands of oncologists who attend these cancer conferences. You all heard how important it is, and that's the only way, the main way that real-world doctors from all over the country or all over the world actually find out about these new treatments.

In fact, before this lawsuit ever started -- well, Dr. Schwab knew about the drug because he had done some clinical studies even before ExteNET. But he heard about the ExteNET results at a breast cancer conference.

Dr. Adelson, same thing. That's where she first learned about ExteNET, not at first from the lawyers who paid her but from a breast cancer conference. That's where all these doctors hear about it. And every witness said the same thing on that.

That's why it's so important, not -- it's important if you care about getting this lifesaving medicine to patients. You've got to present it at a cancer conference, and everyone knows it.

The other step that's important, of course, vital to prescribe it to anyone, is to get FDA approval. Of course, at the time of the ExteNET trial, back then Puma didn't know for sure that they would be getting FDA approval one day, but Alan Auerbach and all of the other Puma witnesses sure testified as if they believed it.

They issued a press release. They issued a press release announcing the results that gave them -- that announced results that gave them every right to believe that this would receive FDA approval.

Now, we spent this whole trial not talking to you about what happened in the future until the very, I think, last five minutes of questioning of Dr. Schwab. Ms. Conn asked him point blank: Has it been approved? And he told you it has been now.

At the time they didn't know it. At the time they didn't know it was going to be. But it sure was reasonable for Mr. Auerbach to believe it would be.

So what are the keys to the case? At the beginning I said I thought that these facts, these four categories, would ultimately be the keys to the case because I thought

that when you heard those four facts or those four sets of facts, you'd be able to apply them to the legal instructions that Judge Guilford gave you.

The first set which I think is vitally important, although now the plaintiffs say, oh, that's not -- that's really beside the point. But it actually is the point, and that is, Puma developed an effective and safe breast cancer treatment. Those are facts that cannot be seriously disputed.

So what are the other facts that matter here in the litigation world? It matters that Puma told the truth about this exciting new development, and we'll walk through in detail exactly what they said and exactly why everything they said was the truth as best as they could say it at that time.

You heard a lot of evidence from the plaintiffs about this motive, something about getting out of Dodge, you know, striking quick, raising money for cancer research and then hustling out of Dodge, I guess. It was all presented to you as some motive to commit securities fraud.

Well, you've seen and heard the facts that will allow you to figure out what the motivations were and whether or not there was good faith involved. And you can apply those facts to the law when you -- if you get to that part of the jury instruction. We'll talk about that in a minute.

Finally what we're left with, and this is really

what the plaintiffs would hope you just get to, is, well, if all of that is true, if the drug was safe and if Puma did tell the truth about it, and if they didn't mean to commit securities fraud and certainly had no motive to do so, and they acted in good faith, gosh, why could the stock have dropped?

Why could this stock that is about as volatile as any stock could be, both during the class period and then after, volatile, as you can see, why in the world could the stock have dropped about $40 a share here in May and about $46 a share in June, on those particular days?

Well, at some point both sides have said you all don't need experts to tell you what you can see with your own eyes. Both sides have said that in one fashion or another.

By the way, the judge has a jury instruction on what you should do with witnesses who came here to give you their opinions. You don't have to listen to their opinions. You can take into account who is paying for those opinions, and you can take into account how you witnessed them testify on the stand.

If their opinions are helpful, great. Follow them. But if they're not, you all are the ones who make the final decisions about the facts and about what actually caused this stock to drop, and whether, as plaintiffs would have you believe, it's about some details that Mr. Auerbach was

actually trying to be careful not to give during this conference call, and whether that somehow leads to the stock drop. We'll talk about those.

So let's start with the most important one here, which is, simply put, Puma told the truth. I'm going to show you a document that you also didn't hear too much about from the plaintiffs during this case, but I think I showed it to you in my opening statement.

This is the press release. This is the, I guess, one-page, two-sided press release that announces the most important thing that could be announced about Puma and about neratinib and about the standard of care on July 22nd, 2014. That is, that the neratinib phase III trial was successful, that it did lead to a 33 percent improvement in disease-free survival, that Puma would be seeking FDA approval.

They didn't promise when or how quickly it would come, although, as you will see, it came more quickly than -- than for many other drugs, and that the full trial results would be presented later at a medical conference. We're giving you the topline results from the phase III trial. The rest to follow.

And this, you can use your common sense, is why the stock jumped so much. You don't need experts to tell you what happened. You don't need analysts to tell you what happened. This was a big deal because what it means is

there's going to be a drug on the market that's going to change the standard of care.

Now, I say you could use your own common sense, but you don't have to because we also have a lot of contemporaneous evidence that you can also look at. And I ask you to look at every bit of evidence.

So why did the stock go up? There's a lot of witnesses who either testified here or that you saw their contemporaneous reports. Start with Dr. Schwab. He explained to you that what a phase III trial means for these kinds of drugs or for any drug is that there's basically an agreement with the FDA before you even start that if you pass the phase III trial, you're very likely, highly likely to get approval.

Why is that? It's because the FDA has signed off on all of the protocols in advance. It's because the FDA knows the plan for the test, signs off on the statistical plan for analyzing the results, has certified that you've already passed phase I and phase II.

So when you do a phase III trial for years, as Dr. Schwab explained, that's basically -- you basically know it's highly, highly likely that it's going to get approval.

And that's why if you're an investor and you see that they just passed a phase III results and you could still buy the stock at whatever it was the day before, 60 bucks,

you rush out and buy the stock if you want to gamble, knowing everything you know, still no guarantee. But if you want to gamble, this becomes a pretty good gamble because of the phase III primary end point.

Now, think about what Troy Wilson did. And by the way, think about what so many of the other Puma employees did. Troy Wilson, to be fair, he was on his honeymoon. But he's a director. He cares a lot about cancer. All he reads, like probably most other folks, all he reads is the press release.

This press release that goes out widely, he sees. Thank goodness we hit our primary end point. We have a successful trial. And, holy cow, 33 percent improvement in disease-free survival after ten years of trying and failing by other companies.

So what does he do? He -- he's on his honeymoon. He jumps in the lake. He never even listens to the conference call. At some point in this case, somebody asked a question or something, and we talked about burying the lead. That's kind of burying the lead if you're not focusing on the topline results, which is they passed the trial.

Yaron Werber is the one they point to and they claim that he supposedly was misled by Alan Auerbach during that minute or two exchange that they had. What does he say? His report is headlined: Always expect the unexpected. This

is the report that he issues the day after. The ExteNET trial hits.

The ExteNET trial hits. That's what he's focusing on. He calls it a game changer for the stock, and he raises TP, maybe target price, to $292. He is expecting a takeout. I guess he's expecting some big company to come swoop in. Nothing that Mr. Auerbach has said on this phone call.

Now, Yaron Werber has supposedly just been misled and supposedly doesn't understand what Mr. Auerbach was talking about when he was given this range and Mr. Auerbach kind of agreed with stuff. We'll get to what Mr. Werber really thought, and we'll talk about it.

In the meantime, though, Matt Roden, this other analyst for UBS, he issues a report -- note the date -- July 22nd. This is the date the press release comes out. It's not clear whether he even bothered to listen to the phone call. Presume he did.

What he says is, in his report, Puma Biotechnology, what's it worth? Raising PT, maybe that's price target, to $325 on positive adjuvant data.

Now, this is Exhibit 479. I think 479 has both of these reports, so you don't need to have the lawyers just pull up one little segment and tell you, look at this paragraph and not the other. You'll have those documents back there in the jury room.

You go through this one. I ask you to take a look at 479. Go through it page by page. See if -- see what he's talking about when he talks about positive data. See if there's any mention of 2.3 percent or trying to figure out the absolute end point of that Kaplan-Meier curve.

See if he gives two hoots about 30 percent diarrhea or 40 percent for purposes of this analysis. We'll get to why that is immaterial ultimately anyway. But in this headline he talks about positive data.

You know what you'll find? Don't take my word for it. Do it yourself, I ask you. You'll find that when he gets into the numbers and he crunches the numbers and he talks about the updated sales force, updated sales forecast for this drug.

He explains: We've increased our unadjusted adjuvant sales forecast based on the whopping 33 percent reduction in DFS events on the primary end point and the 37 percent reduction in DFS, including ductal carcinoma in situ, DCIS, which compares favorably to the 24 percent reduction in DFS/DCIS in the one-year Herceptin HERA trial versus observation control.

He is focusing on the thing that matters, the thing that got Troy Wilson so excited that he jumped in the ocean. The thing that got Puma employees so excited, you heard many of them didn't even listen to the phone call.

It's that they passed the trial. They had a successful phase III trial. It's a whopping 33 percent reduction in disease-free survival rates. And as a result, on that alone he's raising his price target all the way up -- it wouldn't even be on the chart here -- to $325, $325 on positive data, not the data the plaintiffs have spent the last two week trying to tell you was the be-all and end-all of valuing this drug but the data that matters that Puma put out in its press release.

What about Eric Schmidt? Eric Schmidt is somebody who they showed some video deposition from, and Mr. Coughlin kind of had a -- when he talked about him, he said, well, Schmidt cut his target before. He said something like that. I didn't get the exact words.

Schmidt initially was a believer, and he was excited like everyone else about the prospects for FDA approval. Later on he's a guy who, before the abstract is ever released, cuts his price targets and then becomes a negative person on the drug.

So you can take what he says later with a grain of salt, but let's look at what he was saying then. He was saying -- well, his headline is kind of a clever, I guess, Dr. Seuss reference, the cat with nerat-nib strikes back.

Again, this is July 23rd. He says: ExteNET looks like a home run. Last night Puma announced that the phase

III ExteNET trial of neratinib in the adjuvant setting hit its primary end point of disease-free survival. That's the headline. That's the fact.

Look, he goes on, and you can read this yourself. It's not a memory test. This is Exhibit 301. Please read it yourself. He lays out the key facts that he knows from the press release. He then goes on to estimate or speculate what he thinks the absolute disease-free rate differences will be at the end of the curve.

But he -- even for him, you can see the difference between when he's talking about facts that he was told versus his estimates that he's trying to make. But that's not what's most important here. What's most important for this is that he then goes on to explain in more detail what this all means.

And this is Eric Schmidt who later on is going to be critical, I guess, of this drug. But in this report on July 23rd, this is what he says, you know, a few paragraphs later. He says: Our consultants have indicated that a two to three percent absolute improvement in DFS is clinically meaningful as the prevention of recurrence is tantamount to a cure in this setting.

Okay. This is hearsay. You don't have to believe that it's true. The judge gave an instruction saying just because -- I mean, who is Eric Schmidt? Just because he said

it out of court doesn't mean you have to believe it. But what you do need to know is that this is what he was saying at the time. So either he's just lying, or that's what he thought at the time.

And this is certainly what the market saw when the market, like Norfolk, made a decision about whether to bet on neratinib. They were betting on whether people like Eric Schmidt were right when they talk about how clinically meaningful and how tantamount to a cure it is, which of course is what the real-world doctors say.

The only people who don't say that are the plaintiffs' lawyers and the people they hired to testify here. By the way, the other thing Eric Schmidt noticed, explains, this is why the stock jumps up so much, is because the results were unexpected.

Look, the day before the results were announced, the stock is trading, you know, somewhere in the 50s maybe or low 60s from this chart. By the way, you have Exhibit 995 which, as the judge explained, is every single day closing price throughout this whole period and a little bit before and a little bit after.

So I'm not trying to tell you what the exact numbers are unless I've written them up, but you've got them. So you can check them for yourself.

Schmidt explains that -- he was asked about whether

most analysts expected that the trial would not succeed, and he said that -- he had testified that that's what he believed. He believed that most analysts before they announced the results thought it was going to be a failure.

So he was asked: Well, why was that your expectation? Look what he says: If anything, the company had downplayed success, and the trial we thought had a very high hurdle to success. This is the same guy who one day is hyping the stock or hyping the drug, the next day downplaying it.

But Eric Schmidt, even the most negative analyst against Puma in these days and he got negative before ASCO even came out, even he had to admit that the company had been, if anything, downplaying success. And nobody was anticipating these terrific results.

And it wasn't just because what the company was saying. It was because it had been ten years since anyone had done this. He explains, what was that high hurdle. Well, just achieving disease-free survival in this setting is not an easy thing to do.

Why not?

Well, most patients do quite well on the standard of care, which was Herceptin. And getting further improvement upon on top of Herceptin seemed like a high hurdle. It sure was. It's one that Alan Auerbach has

devoted his life to.

By the way, it's been five years just since that day. He still works seven days a week. He still lives in the same apartment. He still spends all his time, except for the last couple weeks when he's been here, working to develop this drug and to overcome that high hurdle that nobody else could get over.

And I wasn't going to respond to almost anything, at least in this segment, to which Mr. Coughlin said, but he said something about how Puma and Alan Auerbach put patients at risk by taking over this study program.

You all don't have to take, as the judge told you, Mr. Coughlin's words for things like that. You don't even have to credit him at all.

You saw the facts about what Mr. Auerbach does and the kind of people he hires, the impressive credentials, the dozens of statisticians, the way he spent his money, almost all of it that the company raised, on cancer research. You can decide for yourself whether he is the one who is putting patients at risk with this lawsuit.

We heard in the opening about a character-defining day -- that was from Mr. Forge who is not here right now, but in the opening you heard Mr. Forge tell you that that day was a character-defining day, that when Mr. Auerbach --

THE COURT: May I interrupt for a second? Is Mr. Forge here?

MR. FORGE: Yes, sir, Your Honor.

MR. CLUBOK: I'm sorry. I apologize.

THE COURT: Continue.

MR. CLUBOK: I apologize.

Mr. Forge talked about it as a character-defining day. Mr. Coughlin talked about integrity. What's the evidence of Mr. Auerbach's character-defining day? His character-defining day occurred the day he lost his father and he decided he was going to stop being a Wall Street analyst and instead devote his whole life to fighting cancer. That was his character-defining day.

Capital, by the way, the research they did for Mr. Younger and his pension fund, in their document, Exhibit 22, they called him a shrewd workaholic, proven moneymaker who understands how to use capital wisely. That's sure as heck what the evidence has shown.

Troy Wilson's, whose mother was affected by cancer, he got attracted to this company because of how smart, passionate, and driven Alan Auerbach was.

And Skye Drynan. Skye Drynan, their investment advisor, the person who advises them on buying and selling stocks, she said that she believed that Alan Auerbach is a straight shooter. And I think whenever there's been

challenges, he's been forthright about those.

This is from that deposition you saw in 2017, years after this litigation had been filed and all of these accusations had been made public against him.

Now, you heard a little bit about the burden of proof. And as the judge told you, it's not a criminal trial. They don't have to prove things beyond a reasonable doubt. But they do have to prove that the claims they're making are more probably true than not to support each of the legal elements. That's what they have the burden to do.

This is kind of like them saying, well, Professor Feinstein didn't do any work, but, oh, Professor Gompers didn't either. That's not Professor Gompers' job, to not only analyze Professor Feinstein work but to also do it himself. Same thing, it's not our job to prove or disprove these things.

Having said that, we didn't just sit here and say, well, they can't prove it. We have provided you with facts that you all will decide where the truth lies.

So what does it mean to have a burden of proof? One way to think about it is, it's a bridge. It's a bridge of several different steps, each one of them they have to meet their burden of proof on to cross.

This is Norfolk. This is the damages that they're going to ask you at the end when Mr. Coughlin gets back up.

He's going to tell you to award damages to them and also on behalf of every other investor who purchased during this class period and sold at a loss.

But to get to even talking about damages, to get to even that point where he asks you to make Puma or Mr. Auerbach pay a large amount of money to his client and others, they have to prove that there was a material misstatement or omission. They have to prove that it was made knowingly.

That's why they spent so much time on the motive, to try to make you think that he had some motive to lie. And they have to prove that it actually caused the losses.

So let's talk about each one of those and the burden of proof they'll face, but I think we should do that after lunch if this is a good time to stop.

THE COURT: This would be a great time to stop.

We'll see you back here at 1:30. Now, you can't begin your deliberations yet. You've got to not discuss the case, not research the case. Keep an open mind. Very soon now it will be presented to you for deliberations.

Have a nice lunch. We'll see you all at 1:30.

Thank you.

THE CLERK: All rise.

(Open court - jury not present)

(Recess taken from 12:00 p.m. until 1:32 p.m.)

THE CLERK: All rise.

(Open court - jury present)

THE COURT: Welcome back, folks.

Please continue.

MR. CLUBOK: I hope you all had a nice lunch.

We're going to pick up right with the truth. That's what we're supposed to be here, I hope, to learn, and you all get to decide what you think is the truth based on the facts and evidence you've seen.

You're going to get a verdict form when you go back in there when we're all done talking and when we can't say anything more to you. On page 1 of the verdict form, the very first question you're going to be asked is basically, did Mr. Auerbach tell the truth on that conference call? That's basically the first question you're going to be asked.

Actually what you're going to be asked is, did plaintiffs prove that defendants made materially false or misleading statements or omissions on July 22nd, 2014? Because it's easy for anyone to come up here and say that Mr. Auerbach didn't tell the truth.

It's easy for lawyers to tell a good story or to make it seem that way, but they have to actually prove that it's more probably the case than not that the defendants made materially false or misleading statements or omissions during that conference call.

There are four specific subjects that you're going to be asked to say yes or no to. Did they meet their burden? Did they prove their case on whether or not false a statement was made? You'll take this jury form, and you'll start with number one, disease-free survival rates. It's kind of the heart of the case.

So let's talk about what was asked and what was said, and you all will determine whether or not plaintiffs have proven their case. So what was the question? The question that Yaron Werber, the first question out of the gate, was: Congrats on this fantastically and in many ways unexpected data. That's where he starts with. And he says he has a ton of questions but he just takes two.

The first one -- and we'll get to his second one later. His first one is, he says: Give us a little bit of a sense what was the DFS on the control arm first.

Now, note he doesn't say tell me the exact numbers, because he knows he can't. He knows the deal is Puma is not going to say it. But he says, give me a little bit of a sense. What is Mr. Auerbach's reaction, response? What was it? Mr. Auerbach says: Okay. So in terms of the DFS of the placebo arm of the trial, it was in line with other reported trials. So it's in line with the Herceptin adjuvant studies.

Have plaintiffs proven that that was a materially false statement? What were the previous Herceptin studies?

We put evidence in about four recent studies, unrebutted; that the last four studies involving Herceptin had shown using Herceptin, you were able to have disease-free survival at a comparable time of anywhere from 85.8 percent in the study that had taken place at that point nine years before, all the way up to 92 percent.

What matters here is that this was the test arm in Herceptin. In other words, when they gave women Herceptin along with the chemotherapy and after surgery, this is the percentage that remained disease free for those four studies.

The ExteNET placebo arm are women who just got the same old standard of care, just the Herceptin. When Mr. Auerbach says our placebo arm is in line with the results from the previous Herceptin studies, this is what he knows and this is what he says. And you all have to decide whether that's materially false or misleading.

By the way, all these other Herceptin studies, they had all been centrally confirmed. So that's another thing to keep in mind, because they were centrally confirmed data. We'll come back to that.

So Dr. Werber goes on to keep pressing, and this is where he has this exchange which you've seen a lot about. Dr. Werber says: You're thinking that, if I'm correct, the DFS is probably around mid to high 80s, around 86 percent or so. Mr. Auerbach says he would be comfortable with that

number.

And then Dr. Werber is imaging what then they would have to show on the test arm of the neratinib trial. He's trying to figure out what's the difference between the placebo and the test so he can get this little bit of sense. He knows he's not supposed to get the exact number, but he wants a sense.

So Mr. Auerbach does the math in his head or at least tries to answer it best he can. If you look at Yaron Werber, his mid to high 80s compared to the low 90s, it comes to a one to six percent difference. In fact, for every person in the study, it was 2.3 percent.

But for those women who were centrally confirmed in the study, it was four percent. That's it. That little exchange is pretty much the heart of the commits securities fraud and six months later raised a lot of money to fund cancer research and then get out of Dodge, except actually stay and continue to work at this company for years after, continue with the mission.

That's the heart of plaintiffs' theory, that he didn't tell the truth. You can see that that is a truthful statement. Now, plaintiffs have a bunch of responses. They say, well, it turned out that the centrally confirmed data was four percent, but Mr. Auerbach just got lucky and when he said it, he guessed. Their theory is he didn't really know

that the centrally confirmed was that good.

Mind you, the 2.3 percent number is within Mr. Werber's range. So that would've been fine. But Mr. Auerbach is thinking about all these things. He knows because the centrally confirmed analysis was part of the original -- and that date if you can't read it says July 3, 2014 -- statistical analysis plan that had been entered into weeks before this, that they were going to be checking a centrally confirmed subset. That was known from the beginning of the statistical analysis.

And indeed in the abstract, when later on the final numbers for centrally confirmed are published, they talk about the preplanned subset analysis and how the centrally confirmed numbers are great.

Now, plaintiffs want you to say that Mr. Auerbach lied at the time. He just got lucky, and it turns out the data was very good. That's their theory. You all decide if that makes sense.

But you also know that Claire Sherman came in here, and Claire Sherman has not worked for this company since, like, December of 2014. She was the woman who actually plaintiffs brought her and brought her in during their case. They brought her down from San Francisco. She's moved on, working somewhere else.

They tried to get her -- well, they asked her

questions and you all could see her answers. She has no reason to lie. She's not making any money from Puma. She hadn't even seen Mr. Auerbach in years, and she talks about this preplanned subset analysis relates to the analysis they had been planning from the get-go.

She talks about how right before the conference call she had been doing many, many -- she couldn't even count how many -- ad hoc analyses with the data in addition to the numbers for the topline results. They were taking early looks at it. They were initially running numbers.

There were many, many analyses done which she shares with Alvin Wong who has the office next door to her. She takes her computer home and is doing a bunch more. She shares that with senior management who requested them.

Now, let's go back to Dr. Werber. Remember, the plaintiffs keep showing you that Dr. Werber on July, I think it was, 23rd, right after the conference call, had been estimating based on that exchange he had that the range could be, I think it was, four or five percent disease-free survival rate.

What they don't ever -- I don't believe they ever highlighted, but it's Exhibit 766. You can look at it for yourself, is what Dr. Werber says a few days later. And I -- we've moved the stock chart over there. I don't know if it's easier for you all to see.

You note that the stock jumped, and this is why I'm not a surgeon, because my hands are shaking. You note that the stock jumped. Then after just a few days, it kind of settles down after all the excitement, right, of the press release, the great news. Everybody jumps on the stock, and then in a couple days it sort of settles down here just below $200 a share. You'll have the data and you can check me, but I think it's about 198 or so.

When Dr. Werber has had a few days to think about things and when he's been able to talk to another doctor -- he's a doctor, but he calls in another doctor. This is the exchange that Ms. Johnson showed to Mr. Auerbach.

The plaintiffs hadn't brought this up, but Ms. Johnson reminded Mr. Auerbach that what Dr. Werber -- and remember, he's the guy who asked the question -- he has this little exchange that he reports in his analyst report a few days later. He talked to a doctor and he said, Doctor, help us interpret what was said on the call.

The doctor said, well, based on what I read, I'm assuming you're probably talking about a baseline risk of 90 percent. With the hazard you would get a two to three percent improvement in disease-free survival.

That's what this doctor just does based on the press release, based on just what he read about the results of the trial. So Werber then says, well, we've actually

asked on the call -- and he starts to kind of explain what he asked on the call. He says, let's assume that the object kind of 86, 87 was showing 90, 91. He's shorthanding it, but this doctor knows what he means. And he says, is that reasonable? And the answer was yes. So again, we'll have to wait.

First of all, this tells you that Werber knows what he doesn't know. He knows that he hasn't been told it's 86. He's been given a range, and he knows that they have to wait for the final numbers.

But look at how this doctor responds, hearing this. The doctor says, well, that's seems credible. I wasn't on that, you know. I didn't listen in on that call, but that just -- that seems, you know, that's very much in line with the numbers we just came up with; isn't it?

This is the definition of material, or this is a demonstration, I should say, of how Mr. Auerbach's answer, even if it was not as precise as giving the exact numbers, is not materially inaccurate because any reasonable investor who is investing in this space and reads information about the stock and looks at Mr. Werber's report, the guy who had asked the question, they would see by July 28th that you might expect two to three.

Maybe you would expect a little more. It's all in line with what numbers you can come up with just from reading

the press release, even knowing the answer to that question.

That's why you know that Mr. Auerbach told the truth the best he could to a kind of confusing question, but to one that he gave information that any reasonable investor who -- by the way, it doesn't -- reasonable investor, you all can decide if that means someone can just place their bet and not even have any idea what anyone is talking about.

I think what you have to take into account is that a reasonable investor who has looked at -- if a reasonable investor has taken the time to read the transcript, they certainly should take the time to read Dr. Werber's explanation of what happens just a few days later when he consults a doctor and they say what was meant here, what was meant with this. Exactly. Exactly what Mr. Auerbach told him.

That's not even taking into account the terrific centrally confirmed data. That's -- that's understating the results, just like Mr. Schmidt accused Mr. Auerbach of having done in the past.

So when you are asked to answer this question, did plaintiffs prove that all of this was some materially false and misleading statement about disease-free survival rates, you should circle no.

Then you can turn to the second question, and the second question relates to the grade-three diarrhea rates.

On this one Mr. Auerbach, by the way, starts with a statement before he gets asked a question, and he does refer to previous studies. He talks about grade-three or higher diarrhea was seen in approximately 30 percent or more, and he notes that the diarrhea was typically a first-cycle event, meaning he's talking about the past and he's talking about how in the prior neratinib trials, usually in the first month approximately 30 percent of patients got diarrhea.

By the way, he's not saying, oh, good news, only 30 percent of women get grade-three diarrhea. He's saying this in the context of that's a high right; that would be bad. But the good news is we can use Imodium. And we'll get to that.

Anyway, he says this. Then he second of all talks about how -- well, he says that. Then when Dr. Werber asks him his question, he's already said this and he now answers: Our anticipation is the main AE we're going to see is what we've historically seen with neratinib, which is the diarrhea. And again we would anticipate it will be in line with the 29 to 30 that has been seen.

Their big claim is that this was a materially false and misleading statement because he had some unvalidated data that suggested it was going to be 39 percent. Let's take a look.

First of all, the data he had, this is a slide that

shows how much of that grade-three diarrhea was a first-cycle event. On that one I think Mr. Auerbach testified it was something in the high 20s. I can't remember if he said 25 or 28, but this is a plot that shows rates of grade-three diarrhea, and it shows how most of it was a first-cycle event. That's where you're in this, like, high 20s range.

In the neratinib -- I'm sorry. In the ExteNET trial, time goes on. And without the prophylactic treatment that should have been done, more women -- it eventually gets up to 39 percent -- experience it at least once before they start using prophylaxis.

But what Mr. Auerbach makes clear is that the data is being validated, and he says this no less than three times. He keeps saying the data is still being validated. We haven't yet fully validated it. It's part of the stuff being validated.

Was it true? Well, you bet, because we know that because six months later, that's when the validation is completed. January 30th, Rho sends to Judy Bebchuk -- that's Judy Bebchuk Segal who testified -- and they've got the CSR safety Puma 3004. That's the ExteNET trial. They finally finish the validation comments from Puma.

Rho, the outside entity, had done its validation before July 22nd, and both sides had completed the efficacy validation. But with safety, it hadn't even started yet,

that process of checking between what Rho has done and what Puma has done.

Mr. Auerbach said this. They tried to get you to believe it wasn't true, but the documents don't lie. Nor did Judy Segal or Claire Sherman. Judy Segal said the reason she knew it hadn't been validated yet is because she didn't even start until August or September 2014 that months-long process of validating the data internally at Puma and comparing it to what Rho had done.

Claire Sherman, she left the company. We put brackets there, December 14, because I think that's roughly when she said: I had been working on the validation of the safety tables. She was still doing it when she left the company. And there had been some had errors and they were sorting it out.

And to be sure, those errors had been fairly minor, she says, and ultimately the numbers turn out to be about the same, that 39.9 percent. But what did he know at the time? All he knew was that his team hadn't validated it. It seemed like the rates were a little high. And, by the way, they were high in the placebo arm, too.

So that seemed a little weird, and he said, hey, we haven't validated yet, but we expect it will be in line with other studies. Is that a materially false or misleading statement that a reasonable investor is going to bet the

pension fund on?

Look what happens, by the way, on February 12th, 2015. Mr. Auerbach testified that about two weeks after the data was actually verified, the next time he speaks publicly, what does he say? Now that the data has been verified, he says, so the grade-three diarrhea rates are in line with what we've expected, similar language, but now he's saying 30 to 40.

He's still in this box that this is before ASCO, so he can't put the precise number. But now he's making sure that people know it's more like 30 to 40. What happens with this startling news, that the diarrhea rates could be as much as 40 percent? On February 12th, 2015, the stock actually went up that day after he announced this or he says this publicly at the conference.

You can check Exhibit 995. I think it's $5 or $6 that the stock actually goes up. This is when the news comes out. There's no, holy cow, you said 30 and it's 40. Fraud. No. It's a, so what? And why is it a, so what? It's because the topline number, the 30 or 40 percent, that's not material at all. Because, good news.

Whether it would have been 30 or whether it would have been 40, all you have to do is take Imodium prophylactically -- and by that, we mean before the first dose of neratinib -- and then the rates are going to drop to

0 to 17 percent.

There were studies done that supported this, and nobody has come in here, even Dr. Adelson, to say this is not true. You heard Dr. Schwab explain and talk about how in the real world, as long as you give the Imodium before the first dose, the rates drop to 0 to 17.

If I tell you there's one drug where you're likely to -- 30 percent of you are likely to have grade-three diarrhea, but don't worry. If you take Imodium, it goes to 0 to 17.

And I tell some other people, hey, there's a drug where 40 percent of you are likely to get grade-three diarrhea, but don't worry. If you take Imodium, it drops to 0 to 17, is there any material difference to that? What matters is that as long as you use the Imodium prophylactically, it's going to be 0 to 17.

That's why the market doesn't react a bit to this. Skye Drynan, she knows this is meaningless, and she's their investor. She's their investment advisor. She says: I thought the diarrhea could be dealt with with the Imodium.

RBC, that -- by the way, Mr. Auerbach testified that after Leerink, within a couple of weeks of that, he also said at RBC the rates now he is saying 30 to 40. Again, he's in this window after the data has been validated but before the ASCO precise numbers can come out.

The precise numbers, by the way, do come out on May 13th. We've moved this chart over here. I don't know if it's easier for you to see. But May 13th is this date where the 39.9 percent exact number gets released to the public, and the stock goes down. The plaintiffs' theory is the market heard that and somehow sold off the stock, right?

The problem is, look what RBC is doing. This is May 27th, a couple weeks later. They don't even get it right. They're saying it's approximately 30. They haven't changed -- they haven't updated their report to say approximately 40 because it's a big so what. Why? Because when high dose loperamide prophylaxis is used, the incidents of grade-three diarrhea declined significantly.

And the oncologists they spoke with view it as very manageable, especially for this patient population which is young and very motivated. Is it really going to materially affect the sales of neratinib if without Imodium 30 percent or without Imodium 40 percent of women get grade-three diarrhea?

Either of those would be bad, but the good news is neither of those will actually happen when you take the drug in the real world because all you have to do is take Imodium. That's why it's not material to reasonable investors.

Norfolk on this is trying to misled you. Make no mistake. This whole case is about how Mr. Auerbach's words

weren't parsed properly or the questions, you know, asked something and he didn't answer it exactly right. They say that's securities fraud.

What are they doing here on this diarrhea issue? We pointed out the fact that the loperamide prophylaxis was not used in the study, and what was the original game plan? They said -- and they tried to get witnesses to say, oh, loperamide prophylaxis was used in the study. And they pointed to some data that showed that some women, lots of women actually, in the ExteNET trial took what was said to be prophylaxis Imodium.

What they didn't tell you is that it was only used after the first incidents to protect against the next recurrence. What they didn't tell you was that primary prophylaxis -- that is, using Imodium before the first dose is taken -- was never done, zero times that the plaintiffs have been able to demonstrate in the ExteNET trial.

That's what Mr. Auerbach testified to, and that's what even their paid witness admitted. This was the beginning of the trial before they started down this road of claiming that prophylaxis has been used and misleadingly trying to convince you that that somehow proved that Mr. Auerbach was lying.

But remember Dr. Adelson. Patients in ExteNET were allowed to receive loperamide. That's fair. They just

weren't started on it prophylactically. That's what Dr. Adelson, the very first witness in this case, testified to, and that -- they just weren't able to use it prophylactically is the whole thing. As long as they can use it prophylactically, you're not going to get 30 or 40 or 50 or anything like that. You're going to get 0 to 17.

So when plaintiffs trying to whip you up into thinking there's some material difference in 30 to 40, when they try to tell you that our response doesn't make sense because women did use this Imodium prophylactically, they're omitting a pretty important fact; that is, no one in the study used it before the first dose.

Look, you heard testimony that patients will suffer a lot of side effects or tolerate a lot of side effects in exchange for a cure. You heard Dr. Adelson talk about all these terrible things that happen to you when you take cancer drugs.

And I'm sure everyone knows people who have experienced these. All of these terrible side effects, none of them, none of them, zero long-term side effects have been associated with neratinib based on the results of the trial.

Herceptin, the wonder drug, it is a great drug. It has something called has a black-box warning, Dr. Adelson explained, that warns you with a big black box on the label that it can cause cardiomyopathy, infusion reactions,

embryo-fetal toxicity, pulmonary toxicity.

None of that is associated with neratinib. It's diarrhea, which is bad. But good news, it doesn't matter because Imodium takes care of it.

When Darcy Kopcho and Skye Drynan were making the investment decisions for Norfolk and their information is charged to Norfolk, as the legal instruction tells you, they did so thinking that women who have breast cancer want to live, and I believe they'll go through a lot to stay alive, meaning severe diarrhea.

Of course, in our case it only lasts two days and it doesn't really happen to most women who take the drug. But even assuming bad diarrhea, Darcy Kopcho and Skye Drynan say, look, if you're going to die, you're going to put up with more side effects than if you did not have a life-threatening disease.

That's the way they were thinking about this drug. That's the way a reasonable investor and any reasonable person outside of a courtroom in a case like this would be thinking about this drug.

There aren't patients here claiming that this drug doesn't work or that causes life-threatening side effects. Just the lawyers in this case and their paid witnesses. Actually, I should say, to be fair to Dr. Adelson, even she didn't tell you that neratinib would cause all those terrible

things. She just said, hey, these terrible things happen with other cancer drugs. So even she wouldn't say that.

So when you're asked to answer the question, did plaintiffs prove that defendants made materially false or misleading statements or omissions on July 22nd regarding grade-three diarrhea rates, You should apply the facts and the law as the judge instructed you to answer no.

How about Kaplan-Meier curves? Kaplan-Meier curves -- you know, again, precision matters here. I'm not going to reread this. You guys have seen this. You can look at it for yourself. He's asked a question about what happens after two years or if they see any indication of what the curves are doing after two years.

He makes it clear that they have a lot of patients who have been in more than the two-year cutoff. Remember, this study was started in, like, 2009. It's now 2014. Women get enrolled over time, so not everyone started the drug in 2009.

But it goes back many years before 2014 and before even 2013, so there are lots of patients who have been enrolled. And Auerbach simply says, if we look at the curves going out beyond that, meaning going out beyond two years, it looks like the curves are continuing to separate.

He refers to the prior Herceptin studies and he talks about the same preliminary trend. Plaintiffs want you

to believe they've proven securities fraud because of this statement. Well, again, they're trying to mislead you. The fact of the matter is they tell you Puma didn't have enough data for Mr. Auerbach to even say these words.

They claim that Dr. Sherman hadn't really run these curves even though they can't prove it, and they claim that the three-year curves are not separating. They just say it. The truth is, as we've demonstrated although it's not our burden to do so, is that Puma did have the data. They had the data for many patients.

Remember, Mr. Auerbach -- it's also common sense -- there were hundreds of patients who went through year 24 [sic]. They didn't just all disappear -- I'm sorry. I'm sorry. Month 24. Those hundreds of patients, over a thousand, didn't just disappear on month 25 and 26. They were continued to be followed.

So what Mr. Auerbach says is for women after month 24, for the next few months we have hundreds, and it drops down to dozens as you get out to three years. But we do have preliminary data. Remember the cross-examination?

The cross-examination was, ah-hah. When you go out many months, you only see eight events. So that must prove that there is not that many events. Events are incidences where disease comes back. So the cross-examination proved that if you followed these women out many months, there's

only eight more reoccurrences of cancer.

As Mr. Auerbach explained, yes, and the good news is many, many more patients, hundreds in the first few months down to dozens in the later months, did not have events. And that's the data he was looking at, and that's what he testified to.

Dr. Sherman talked about many, many analyses being run. They certainly haven't proved that she didn't run it. Dr. Segal testified that she gathered that snapshot of data that still exists, as she said, for production to the plaintiffs.

Did the plaintiffs ever come in here with Dr. Jewell or with any other statistician to say, oh, we've looked at the data and we can prove that it didn't exist? No. Of course not. That's what they would have had to do to show you that -- to prove this didn't happen when Mr. Auerbach has explained how it did.

Claire Sherman has explained about all of the analysis she can, and she explains that she didn't save all these ad hoc analyses because they have the data snapshot. It's just like if you have a database and you print something out. You can always go back and print it out again.

They had it locked down. She saved everything for the topline results, and there is a one-page Excelion log that maybe you'll hear about in the rebuttal where they will

tell you that, oh, this is the complete list of everything she did.

No. This, as she testified, is all the backup for the topline results. But for those many, many informal analyses, no reason to save it. That's why we don't have that piece of paper today, as they explained. They certainly haven't proven there's anything unusual about that.

Judy Segal and Claire Sherman both testified this happens all the time. Alan Auerbach testified to it. Judy testified to it, and Claire Sherman talked about these ad hoc analyses. You saw all this with your own eyes.

You'll hear another story undoubtedly from plaintiffs' lawyers in rebuttal, but remember what you actually saw. And remember when Claire Sherman testified, did she seem like a liar to you? Did she seem like she had any reason to lie?

I mean, Mr. Auerbach has done great things, but apparently he yelled at her at some point during her work and she left in December of 2014. She hasn't seen him since except to say hello literally on the way in. What motive would she have to come in here and lie about this? Is she part of the conspiracy, too, along with all the analysts who are all in on this together?

Alvin Wong and Alan Auerbach both remember clearly an in-person meeting where they discussed the preliminary

analysis and it showed continued separation. Alan Auerbach testified about how that preliminary separation did show continued separation past two years. He was questioned, well, you haven't produced any documents. And he says -- and Mr. Auerbach responded, we have produced a document that shows that the data from July 2014 that we had in our possession as of July 2014 showed a DFS benefit of 2.3 percent at two years and 3.5 percent at three years.

This was in response to Mr. Coughlin's question, not a question we asked. It was a question Mr. Coughlin asked. He doesn't like the answer, but he hasn't provided any proof that it's untrue, nor could he.

So on the Kaplan-Meier curves, Puma told the truth.

Finally, we get to discontinuation rate, and this is one of the most misleading things of all in the case perhaps. It's hard to pick. But on this one, dropout rate means something very specific, and discontinuation rate means something different.

If you have a dropout rate that's super high -- and that was a concern, by the way, because the study had gone from Pfizer over the years to Puma, and they were worried that there just wouldn't be enough data left to get FDA approval.

So some people are really focused on dropouts. Others are focused on dose discontinuation. And when we talk

about that, you'll see why that actually, the higher the dose discontinuation rate, the better news it is for Puma because it means even with less dosage, women still get the same benefit.

But plaintiffs have mixed all these concepts together to try to create an appearance of some materially false, misleading statement or omission. Yet they omit to tell you or to share with you or to even highlight for you all of the facts.

So this was Matt Roden -- by the way, I think I said before, and I checked this at the break -- Matt Roden is the fellow who after all this -- Matt Roden I think is the guy. He's the guy from UBS who after all of this discussion, he focuses only on the 33 percent disease-free survival rate. That's the data that he says supports his price target of $325.

I said, well, maybe he didn't even listen to the call. No. He was on the call. He asked a question on the call. He just didn't care about that exchange with Yaron Werber because it was immaterial. Okay? But back to discontinuation rates. He asked a question. He says, how -- he says, another way of saying it after his lengthy question is, how much missing data is there from the DFS analysis?

Does it look to you like he's talking about dosage discontinuation, or is he talking about missing data?

Auerbach says, in terms of patients who dropped out due to AEs, like I said, historically with neratinib that should be somewhere in the five to ten percent range.

Then Roden goes on, because he really just cares about the dropouts. He doesn't really care about why they're dropping out. He wants to know about the missing data. He says, do you have a sense for dropouts for any reason? Auerbach says, no. The main one we would expect is AEs.

Again, he's estimating, it turns out, pretty high here, five to ten. Could the data that he had at the time -- the data he had at the time showed that for actual dropouts it was only showing up as about 1.6.

Now, this is unvalidated. It's early. Mr. Auerbach testified that he expected this to at least double, and he added a little bit to be safe. But his prior studies showed five to ten percent. He estimates five to ten percent.

The plaintiffs want you to believe that when he is answering about this number, he meant this number. And the analysts, when they were asking about this top number, they meant the bottom number or something like that.

If you go back and forth through all the analyst reports, to claim that Mr. Auerbach made a false statement in response to this question is something that you're being asked to do by the plaintiffs. And not just that he did it,

but that they've proven he did it.

Well, you saw the truth for yourself. But guess what. This is another one where even the folks they paid to come in here and even Dr. Jewell, who has been excluded in two other court cases, he said two or three, but two that we asked him about where he had done the results driven analysis.

Remember this guy where Courts had said his opinions shouldn't be considered because of his results driven? Even he admitted the discontinuation rate can be different from a dropout rate where patients have completely withdrawn from the study. He said that's correct. Both, of course, occurred in the trial, and the numbers are known for both of those characteristics.

What about Adelson? She also says that discontinuation does not mean one way or another whether they dropped out of the study. To the contrary. If you discontinue your dose or you reduce your dose but you're still in the study, that's good news because what it means is, as you'll see, it means, as Dr. Schwab said and as others have said, you just need less dosage.

This drug works so well, you don't need as much dosage. Or it tells you that, well, because of the diarrhea, without the Imodium prophylaxis, maybe women were not tolerating the drug so well. Imagine if we gave them the

Imodium from day one so they wouldn't have the diarrhea issue. Now you wouldn't have to discontinue your dose. In the real world you're going to get even better benefits. That's what Schwab explained.

This high -- the fact that they got these great results even with a high dose continuation, that's good news. By contrast, if there had truly been high dropout rates, that would've been bad news because it would have suggested that the FDA might not approve the drug because there is not enough data to support it.

Two totally different concepts that only the plaintiffs in this courtroom have said is there any confusion over. No investors have said it. The analysts don't say it. That's -- Skye Drynan, Norfolk's actual investment advisors, never even heard of this theory. This is something that was purely invented for this courtroom.

Dr. Schwab explained. He was asked again by the plaintiffs, well, it was a pretty important fact that over a quarter of those patients couldn't tolerate the drug. He explains simply, no, actually it's not. That's already contained within the 2.3 percent benefit.

In other words, he said -- I can't remember which he said. You've taken the number out of the enumerator or the denominator incorrectly. The bottom line is with all of the women in the study, including all of those who

discontinued dose and including the dropouts, you still get a 2.3 percent benefit.

So Schwab explained why that suggests the drug works even better as long as you do the smart thing that he does, which is give women Imodium before the first dose and then monitor their dosage and work with them. Then they're going to be able to stay on the drug for the whole year and get the full benefit.

By the way, if you also centrally confirmed that they actually have that HER2-positive receptor, then it really has the real benefit, because it's never supposed to work on women who don't really have HER2-positive. The whole thing it does is put that shield up to block the HER2 receptor.

Anyway, that's a long-winded way of saying Puma told the truth. And certainly when you're asked to fill out this verdict form and your question is, did plaintiffs prove that defendants made materially false or misleading statements or omissions regarding discontinuation rate due to adverse events, AEs, the answer should be no.

Here's the good news. If the facts appear to you the way I've just described them -- and this is your job, not mine. You're just getting arguments from lawyers. But you saw the witnesses. You read the exhibits.

You're going to read the judge's legal instructions

maybe again or a number of times to make sure you're applying the facts properly to the law. But if you do all that and you circle no on this first question to all four of these, it says if you circle yes, you go to section two. We'll talk about section two.

But if you don't believe plaintiffs have even met their burden of proving materially false statements, then you proceed -- what happens is, and this is our bridge, that link in the bridge falls. They can never get to damages because what they have to show is material misstatements, plus knowingly, plus causation before they ever even get to ask you to give them money.

So if they can't even prove the material misstatements for those four or for all of those four, then on the jury verdict form it says proceed to section six. Section six is the signature page. That's where you just write your names or sign your names to this, sign it, date it, and --

THE COURT: I'm sorry. You may -- excuse me. You may have said names?

MR. CLUBOK: I'm sorry.

THE COURT: Wouldn't the presiding juror be enough?

MR. CLUBOK: I apologize, Your Honor. Yes, the presiding juror. I appreciate that.

You will have chosen a foreperson, and the

presiding juror who is your foreperson will sign the jury verdict if you have concluded the answer to question one is no for each of the four supposed false statements and that the plaintiffs haven't proven their case. You just say no to those four. Your foreperson signs, and you let everyone know.

THE COURT: Gosh, I hate to interrupt you, but I do see the verdict form we submitted has all those signature lines. It would be my policy that just the foreperson, just the presiding juror needs to sign, although the rest of the jury is sometimes asked if they agree.

Is that acceptable?

MR. CLUBOK: That is, Your Honor. This is the one that I was given.

THE COURT: That's fine. Completely understand.

MR. CLUBOK: Yes. Thank you.

So the Court will decide whether they give you a verdict form that just the foreperson signs or if others want to sign.

THE COURT: No. No. I've decided. Just the foreperson will sign.

MR. CLUBOK: I appreciate it.

THE COURT: We may remove the other lines. We may not. We'll see.

MR. CLUBOK: Understood. Thank you.

If you're still considering things, the next step that the plaintiffs have to prove after proving all of that is knowingly. This is why they spent so much time trying to create a motive, about a moment of easy money and striking it rich, and getting out of Dodge, and whatever other phrases they use. They want you to believe there was some motive that would have caused Mr. Auerbach to knowingly try to lie in that two-minute exchange with Dr. Werber or with the other people on the call.

And you will read the jury instructions, and you will understand what it means to act knowingly. But the question really is, if you get this far, have plaintiffs proven this motive theory that they've told you, or do the facts suggest the good faith that you can apply when you read the judge's instructions about what to do on motive.

Now, Mr. Auerbach explained right up front what he was doing. He didn't have to because everyone knew, but he said, look, I don't want to comment too much on the data because I don't want to jeopardize it being presented.

And by the way, that's good for the shareholders. No shareholders except Norfolk apparently wanted him to give more data because it would've kept them out of the medical conference. Every reasonable investor at the time would have been -- should have been happy that Mr. Auerbach drew that line and wouldn't give the precise data, which would have

prevented this drug from being presented at a major medical conference.

And indeed every single witness has been consistent on this. Troy Wilson explained that the whole idea is to get the news out to as much doctors as possible. You heard from Dr. Schwab that that's how he heard about the ExteNET results, and he's somebody who had actually used neratinib for years in other trials, and even he didn't hear about the great new ExteNET news until he went to a medical conference.

If Dr. Schwab hasn't heard the latest on neratinib, how is any of those 30,000 doctors going to hear about it other than being able to present it at a medical conference?

Skye Drynan, she knows this is right. She's investing in the stock. Do you think Norfolk wanted, when they were investing in Puma, for Mr. Auerbach to ruin the chances for the stock to be presented -- I'm sorry, for the drug to be presented at a medical conference? Imagine the lawsuit that would have entailed.

She says you cannot actually get the full data out in the press release or you'll not be able to present the data at the medical meeting. Again, even Mr. Schmidt, the guy who does not seem to like Puma or he bet against Puma, I should say, before any of these details are released, even he had to admit if they give away too many details in advance, they're not accepted for presentation at the conference. No

evidence on the other side on this one.

And indeed we know, just like Mr. Auerbach said, they end up presenting at ASCO. Now, this is the other thing that's pretty funny. It would be funny actually if it wasn't so serious. Norfolk's theory makes no sense. And you don't have to listen to me. I watched Claire Sherman, who was one of the most, you know, sort of authentic, off-the-cuff responses.

Again, it was to questions being posed to her by the plaintiffs' lawyer. I don't know if you all caught it. She was asked, well, personally do you believe it's appropriate to make misstatements or lie about the results of a clinical trial such that they can be presented at a conference later? They're basically going to say it's not okay to lie just to get into a conference. Okay. And of course it isn't. That's not what we're saying.

And Claire Sherman, her face was just incredulous. She's, like, I guess I don't understand. Why would somebody make misstatements if the data is going to be presented at a later date? This would be the dumbest get rich quick, get out of Dodge, plan in history.

Here's the plan. We're going to give all this data to the FDA. We're going to give all this data to dozens of doctors so that 16 of them who we don't pay can help us get into a medical conference so we can release the full data.

In the meantime, we're going to lie about it so it will be obvious to everyone that we've lied in just like about two months from now. That's the plan that plaintiffs have said Mr. Auerbach hatched on that character-defining moment when he's answering a couple questions on the conference call. That's their theory of the case.

If you believe that makes sense as a motive, you'll decide the case one way perhaps, but you can apply your common sense to that theory and you can apply what you saw Claire Sherman say.

By the way, what else did Claire Sherman do? She was asked -- she exercised stock options when she left the company. Did she seem like she had committed fraud? She just said, I left the company, so I exercised my options, you know.

And they said, well, at the time you exercised, did you do so because the data was bad? She said, I know it wasn't because the readout was in July. That was just her authentic response. She said, we disclosed all the material information in July with the topline numbers, with the press release.

She doesn't think these details are material nonpublic information. That's why when she left the company, she was okay doing what you do when you leave, which is exercise your stock options. That's common.

You know what else is common? Raising money between a press release and a medical conference. Every single one of the witnesses who talked about this said this is the way it is done commonly throughout the industry. It's not some master plot that Alan Auerbach came up with to just raise some more money in 2015. This is the way it's done all the time.

One of the reasons is it takes months to validate the data after you have the topline results. Another reason is it takes months to get into ASCO. You know, they submitted the abstract months before ASCO. They had to get approved. They had to publish it. This stuff takes months and months. Okay.

And so in that meantime, when you have a company that doesn't have any products, what do they do? They continue to raise money. It happens all the time. And by the way, what did they use this money for, this grand conspiracy to commit stock fraud?

Let's remember in 2014 before any of this stuff happened, back when the stock price was $123 a share, they raised $129 million, and they spent about 122.9 million on cancer research that year.

Now we get to January 27th, 2015. This is the supposed get out of Dodge, get rich quick scheme where they raised 205 million. And that year they spend 208 million on

cancer research. They had a little bit left over from the prior year. They had made a little bit of money on interest. That was the only revenues they had. So they're actually able to spend more money in 2015 than they raised in this supposed get rich quick scheme.

But here's the thing. They don't get out of Dodge. They are working to release all of the data at ASCO so that they can then get approval from the FDA and continue the work they're doing to fight cancer. So guess what. The next year, no doubt the stock is down, and it goes down for other reasons like competitors and things we'll talk about. But they're still able to raise 162 million.

And guess what. That year they spend 222 million, because now they've got some revenues and they spend even more on cancer research. Does this look to you like a fraud scheme?

The plaintiffs said here's all the things, all the questions they raised. Where is this? Who is this? Why didn't this person show up? Does any of this look to you like a securities fraud scheme that someone knowingly planned in a get out of Dodge, get rich quick, whatever phrases were used, easy money, all the things the plaintiffs' lawyers have said but not a single live witness or shareholder has said?

By the way, look at this, May 28th, 2015. Let me flip that back. This is the date of the secondary -- this is

the date of the stock offering that's supposedly the big fraud scheme. And because Mr. Auerbach hadn't released the data, plaintiffs will tell you, he was able to do a stock offering at $190 a share and make 205 million.

Remember, they had this one expert who said, well, he timed it perfectly. He just was trying to time the fraud, or something like that. What's the date that they release all the data on the abstract? It's May 13th.

The plaintiffs would have you believe that on May 13th when that 39.9 percent number comes out and that 2.3 percent number comes out, that suddenly there's fraud and the stock market reacts and the stock drops $40 and you should pay them back $40 a share for the stock they had.

The problem is, amongst many, is look what happens just a few days later. By May 28th the stock is already back up to $200 a share. This is that dip that I asked Professor Feinstein about, this peak right here. This is after -- my hands are shaking again. You see why I didn't go into medicine.

That peak, that $200-a-share price, is after the ASCO abstract is released. So the whole theory that he was hiding the data because if the data gets released, he won't be able to raise money for his cancer drug trials, doesn't make much sense given that he could have raised it an even higher price if he had done his secondary after the data is

released.

Maybe some other shareholder would have sued then. It's too soon. It's too late. Whatever. By the way, this thing about him only putting $400 in. They conveniently forgot to tell you that he spent hundreds of thousands of dollars. He spent hundreds of thousands of dollars when he was first looking for the next new drug.

None of that got charged to the investors. He just paid that on his own and didn't even put it into Puma's liabilities. He did spend $150,000 which he put into the company specifically. When the plaintiffs say that he only put $400 of his own money, even that is misleading. They can't even tell you the truth about that.

How much did he profit from the scheme? This is one they can't touch. Even they can't come up with a way he profited from this. Not a single share of stock has ever been sold by Mr. Auerbach.

The idea that he's going to temporarily boost the stock with intentional securities fraud for a couple of months so that, A, his options will be set at a super high price; and, B, after the truth is revealed, the stock will go down and he's going to somehow get out of Dodge, how is that? It's been almost -- it's been four and a half years.

So now we get to the sideshows. And, look, the plaintiffs spent most of their time on it. It's not

surprising. You may have remember that kind of funny exchange where Mr. Coughlin said the FDA minutes is the most important document in the case to him. Ms. Johnson jokingly said it was the least.

The fact of the matter is it's a sideshow because it doesn't have anything to do with this case. However, we're going to address it because I'm sure you've got questions, given the questions they've raised.

So what happened with the FDA minutes? First of all, they were sent only to Mr. Hicks. They were sent six months after this conference call. And they were accurate, it turns out. The internal version that was accidentally sent turns out to be accurate.

How do we know? Because Puma had sent clinical data to the FDA. By the way, this is another one where I don't know which way to present evidence to you. Supposedly Auerbach is hiding all the data, but they hustle to get all of the clinical data to the FDA because they're so proud of it.

I'm not sure how those two are reconciled, but I'm sure we'll hear some new theory perhaps in rebuttal. But, look, Puma had sent the clinical data to the FDA in September because they wanted to talk to the FDA about the clinical data because they were so proud of it.

This is when the FDA -- and by the way, that

included the hazard ratios. It included all of the percentages that they say were supposedly hidden. It included the Kaplan-Meier curves. All of that information was sent to the FDA.

And then there was a meeting, okay. And remember, Mr. Coughlin himself said the FDA's response to that clinical data was, no, we don't want to talk about your clinical results. We need to first talk to you about rat studies. That's the thing.

The FDA said, we don't want to talk about your good clinical data. First you need to tell us, are you going to need to have two years or one year of rat studies? What's the rat study for? Not for the clinical stuff of how well the drug worked. It's to see if the drug causes other cancers in rats.

So they're going to either put a lot of drugs in rats and kill them after a year, or they're going to put a lot of drugs in rats and kill them after two years. And depending on what they choose, that's how soon they can file the new drug application with the FDA.

So the FDA minutes come back, and it turns out in the official version it says the clinical data was discussed. We know it wasn't. The meeting heading said nonclinical meeting. And even Mr. Coughlin in that version of theory said the FDA said no to clinical data.

THE COURT: Okay. Hold on. Take a deep breath. It's a little bit fast.

MR. CLUBOK: I have gotten a little faster, Your Honor. I'm going to try to slow it down.

THE COURT: Go ahead.

MR. CLUBOK: The fact of the matter is the clinical data was not discussed. Puma's internal minutes were right. What about the two-year carcinogenicity study? The FDA minutes said that was going to be required. Puma's internal minutes said, nope, it's going to be one year.

Who was right? The FDA agrees we can file based on one-year data. Again, this is another example of either Mr. Auerbach is the luckiest man alive because every time the truth, when it comes out, matches up with his recollection or what he said, or plaintiffs' theory doesn't add up.

The reason we call it a sideshow here, and I don't want to minimize it because, of course, it would be serious if this really was something done intentionally. You heard Mr. Auerbach. He hadn't even -- he didn't even know about this until years later when he's confronted at his deposition and he's kind of scrambling to say, I don't know. I haven't seen this.

He goes back. He realizes he stupidly sent the wrong version. He regrets not double-checking it before it was sent. But the fact of the matter is none of that goes to

any investors. It doesn't go to Norfolk. It doesn't go to Capital. It's not discussed on the call. What does it have to do with this case? It all happens around January of 2015, nothing to do with the so-called fraud alleged in this case.

By the way, what does matter is that you didn't hear much about this in the opening presentation. Mr. Auerbach provides all of this data to Mr. Hicks. He is careful not to freely provide it to every banker who, by the way, has other clients and he's worried about leaks.

But he agrees if the lawyer meets me, if we do it face to face, if I can share with him the exact same information I just shared with the academic steering committee -- remember, he talked about he had just come from the San Antonio Breast Cancer Conference where I think he estimated about 50 doctors were assembled to look at the data -- he's happy to show Mr. Hicks this because it's great news.

And sure enough, in this presentation there's the absolute DFS rates. There's the Kaplan-Meier curves. There's the safety data. You can look at it for yourself. There's even forest plots in there. Remember when forest plots was a big thing in this case? They claim that Mr. Auerbach hid forest plots. You can check. You'll see they're in there.

The underwriters explained that this was the way

they agreed the due diligence would be conducted. They'd have their regulatory lawyer do this. They also said, by the way, it's not uncommon. And Mr. Hicks, he had one job, as they say. His one job was to meet Mr. Auerbach, look at the ExteNET data, make sure it's not material nonpublic, negative information before that secondary offering.

And he's been doing this for 20 years. He's the guy who is trusted. He told Mr. Wolff that he saw the full data. Now, there's a limiting instruction. Mr. Hicks didn't testify. Neither side ended up calling him. But Mr. Hicks at the time was sent into a hotel by two different sets of bankers, given one job. Look at the full ExteNET data.

He comes out after a couple hours and says, I saw it all. You can believe that Mr. Hicks is in on some conspiracy, too. You can believe that Mr. Hicks is lying. I guess that's the only explanation. Or you can use common sense and assess what you heard and the facts.

The underwriters go forward with the deal. Afterwards when ASCO happens, does Mr. Hicks or anyone else say, oh, my gosh, you tricked us. I can't believe it. For that matter, does Pfizer do that?

This sideshow number two is Pfizer. Look, there was a flurry of documents and there was a whole bunch of confusing things on when what went to whom. If you look at the Pfizer documents, and Mr. Auerbach testified about this,

there's a lot of lawyers on those documents. So there's something going on here between Pfizer and Puma, and they're making sure that the data that is properly supposed to go to them is going to them.

You heard a statement made by counsel that because they're the franchisee, they have a right to the data. Suffice it to say that --

MR. COUGHLIN: Licensor.

MR. CLUBOK: Licensor. Thank you. You don't have any -- I don't think there's been any evidence on that in this case.

But what we do know, we know that Pfizer is the licensor. We don't know exactly what data they were supposed to see at that time. The parties are going back and forth with a lot of lawyers involved. What we do know, though, is that these hazard ratios all get sent. We know that that forest plot -- there it is -- that they made such a big deal about, we haven't heard from that.

That forest plot gets sent. We know the Kaplan-Meier curves get sent. And we know that at two years, they are the same as the two-year Kaplan-Meier curves. You can see by the way this little dip -- if you just visually look at this document, it's one of these exhibits, 475, 481, or 994. You can see that the two-year Kaplan-Meier curves are accurate. By the way, Pfizer had started --

THE COURT: Hold on.

MR. CLUBOK: Thank you.

THE COURT: You spit out phrases like Kaplan-Meier curves so fast.

MR. CLUBOK: I'm sorry about that.

THE COURT: I must now say I'm concerned that the record is going to be -- I'm concerned about its accuracy. You're spitting out a lot of phrases really fast and mumbling a little bit. I'm concerned about that. And I haven't put time limits on you, so I'm not sure why you're rushing.

Now I'm going to ask, how much longer?

MR. CLUBOK: Approximately 35 minutes.

MR. COUGHLIN: I think you only have ten.

MR. CLUBOK: I can take ten minutes. I could take 20 minutes. I could speak more slowly and probably do it in 20 minutes better.

THE COURT: All right. I've not put limits on you, but I am concerned about an accurate record.

MR. CLUBOK: I appreciate that.

THE COURT: Continue.

MR. CLUBOK: Thanks.

You could look at these documents for yourself. You can see the back and forth. You can see all the information that went to Pfizer. By the way, they had the patient and event numbers, too. They also, by the way,

conducted the study for the first two or three years of it, so they know full well how many patients were in the study.

The plaintiffs will present to you that somehow Puma is hiding information from the folks who originally ran the clinical trial. Does that make sense? When you add it all together, it sounds like, and they want to tell you, there's some common scheme of hiding stuff. But you're allowed to use your own common sense. You're allowed to look at these documents.

Most importantly, you're allowed to remember what Mr. Auerbach said and decide what makes sense. What he says is, after all this back-and-forth communication about data provided to Pfizer, was Pfizer satisfied with the information Puma provided? Answer: My understanding is that they were satisfied.

He says, I don't remember hearing any concerns from Pfizer that they were concerned because there was any parts of data that we had not sent them previously that was presented at ASCO. Go take a look at those back-and-forth documents. I think even Mr. Coughlin said this -- this is all happening in late October. It happened in September, October, November -- there's not a single peep from Pfizer claiming that they're missing any data after, say, certainly not after Thanksgiving of November of 2014.

That's months before ASCO, June. It's months

before the stock offering in January. Pfizer is not here. They're -- I'm positive they're not here. I was wrong before about Mr. Forge. I'm sorry about that. But I'm certain Pfizer has not been in this courtroom claiming that they're missing any data.

That's why -- I don't like to use these phrases, but it really is a sideshow. It doesn't have anything to do with this case. It doesn't help establish their burden of proof that there was some sort of grand intentional scheme.

Pfizer as the licensor is presumably just collecting royalties on whatever drugs are sold.

The other one, this breakthrough designation, this is the third thing. Early on in the case they first made a big thing about how somehow because Puma took a swing at seeing if it would get this new breakthrough designation, which was a new program for the FDA at the time and they didn't get it, somehow that ties into a big fraud.

The problem is the FDA has put out on their website that they -- when are you supposed to submit the request? Ideally no later than the end of phase II meeting. Puma was already well beyond phase II. They have completed a phase III study years after the end of the phase II.

The whole point of the breakthrough designation is so that you can leapfrog or you can expedite things if you're still back in phase II for a really blockbuster drug instead

of having to go through the years of phase III and the months of normal process.

The FDA explained -- and this was a new program. They had a meeting, and Puma by the way is doing everything it can to get its data out. This is during the same time when they're supposedly committing securing fraud by hiding this data.

They are keeping it confidential so they can go to the medical conference, to be sure. But they're not hiding the data. They're trying to cram it down the FDA's throat to get moving forward quickly to get this drug to market.

What did Judy Segal's notes show? They asked her about one page. Remember Mr. Auerbach said, wait. Can you flip the page? Can you put up the second page? Because he was looking at the document. The second page, Judy Segal's notes at the time, and this is with the meeting with the FDA when Puma is trying to get breakthrough. They basically say, no, you're not going to get breakthrough. You don't need it because it's a phase II thing.

But she in her notes -- and you can interpret whatever these notes mean -- she says, does not have implications on NDA, that's the new drug application, that they now know they can file because they passed their phase III test. It only affects breakthrough -- Patricia. Who could Patricia be?

Mr. Auerbach explained that Patricia is Patricia Cortazar, who is the head of the breast cancer group at the FDA. So we were quite encouraged in this meeting because they were essentially telling us, encouraging us to file our NDA, which would be the application for the FDA approval of the drug.

This is just an informal meeting where they're saying basically, hey, you have this new breakthrough thing. Should we file for that? And Patricia Cortazar, the head of breast cancer at FDA, says no. That's not going to -- don't worry about that. Just go ahead and file your NDA. Breakthrough treatment is not going to have any impact. You guys have already passed a phase III trial.

The next set of meetings is the ones where the FDA agrees to do one-year studies for rats instead of two years. Does that all sound like the FDA is unhappy with the data or that Puma had something to hide about the data? Or does it suggest that Puma is so excited about the data that they genuinely believe it's good, that they think they're going to get and they want to get it out to patients as soon as humanly possible?

So on knowingly, you can simply answer no to the question of whether or not plaintiffs proved the defendants acted knowingly in making alleged false or misleading statements. Their whole motive story is designed to have you

apply those facts to the law and make you think that somehow this was done knowingly to commit securities fraud.

You should apply the facts as you have seen them if you have even gotten to this stage. Again, you're told if you just say no to this, you can go straight to section six, which will have just one signature line, I'm told, and the foreperson will sign this.

Again, if they can't show knowingly, they can't cross the bridge to even start talking about damages. They need to show all three. If any one of them you say no to, you can stop and that's the end of the case.

Well, what about causation? To establish causation, they have to show that the alleged misrepresentations or omissions played a substantial part in causing the stock price declines on May 14th and June 1st and 2nd. Have they met that burden?

The fact of the matter is everything you've seen proves that the stock dropped for other reasons, not because of the revelation of some fraud. Look at the evidence about the May 13th ASCO abstract release. First of all, look at the authors. When Alan Auerbach said he shared this information with dozens of doctors, 16 of them from places like Massachusetts General Hospital, the Aichi Cancer Center, the Auckland Hospital.

I can't read it all with my eyesight from here, but

you can take a look at this document. You can see all of the authors, none of them paid by Puma, who put their name on this abstract to get into ASCO because of the great success of this drug.

Yes, there are some Puma employees also listed as authors. They were proud. It's a joint submission by the people at Puma who helped develop this drug and the 16 independent doctors who aren't paid a dime to put their names on this and submit it to ASCO.

It shows all of these facts about the drugs, and what the plaintiffs want you to believe is that because the 2.3 percent absolute DFS difference for ITT and because this 39.9 percent are specifically itemized there, that causes the stock to drop because it was a revelation or a corrective disclosure of some fraud that supposedly had been committed back in July.

The problem is again at the time all these analysts -- and by the way, Mr. Auerbach said he met these people a few times a year at cancer conferences. There's no evidence in the record that there's some buddy scheme where they're in on a fraud, too, and that all of their ratings, they're defrauding all of their customers because they meet Mr. Auerbach a few times a year at a cancer conference.

You heard them try to say that these are just his buddies. Well, all of these analysts say outperform, buy,

outperform. Yes, Schmidt is still saying bad things, but he had been saying bad things about the Puma stock for weeks before this, not because of this.

What does the most important analyst say, the one who doesn't do this publicly, who Alan Auerbach has no idea what she is saying privately because this is a private research memo within Capital? She says based on the abstract, the house is not on fire. Buy.

And she focuses very carefully on the centrally confirmed data set, and she talks about how after looking at the data, it's actually quite good. She says, simply put, buy. And sure enough, Norfolk bought. And guess what. As I mentioned before, the stock goes right back up.

So now just look at this. The whole theory of this case is that back here in this conference call, something is said that allegedly causes a stock fraud. But within a few days after the conference call, the stock price had settled at 198. Then it goes on this wild ride of volatility for months and months and months, including after the ASCO abstract. But then just a few days later, it's again settled at $200.

This is not what stock fraud looks like. If there had been some great revelation here, the stock wouldn't have rebounded. And by the way, Professor Feinstein, he said that he checked every single day between this and that and

determined that there was no single day where there was a statistically significant price movement. Remember how he was so careful to say that?

And then Professor Gompers who was tasked with grading his work reminded us that what Feinstein normally does is he'll do a multi-day analysis. And sure enough, later on June 1st and June 2nd, he does a multi-day analysis because it supports his opinion for those two days, but there's a statistically significant stock drop.

But for these days, no multi-day analysis to see why the stock mysteriously comes back. It's their burden of proof. To be sure, Gompers didn't do the work for them, but that's not really what Professor Gompers, who is a renowned expert in this field even by Professor Feinstein's admission, was told to do or asked to do.

So what's Feinstein's opinion? The stock was at 209 before the abstract is released. It goes down about $40, just under, and he without qualification tells you fraud. But then when the stock goes back up a few days later, without qualification he says there's a lot of volatility in the stock. That's his excuse. And he just gave that off the cuff, kind of hand-waved away the fact that it went up.

Remember when I asked him, well, if you're so able to say that that's volatile, that little movement right there, what about all the rest of the stock? Wouldn't you

agree that the stock is volatile throughout? And that's when he started saying I couldn't tell what. He said, well, I'd have to go check the math. I'd have to run a stats program. I certainly wouldn't ever say carelessly that -- what everyone can see with their own eyes is super volatile stock.

But he was able to pretty quickly snap, say it there, because it was the excuse that supported the results he was asked to provide.

THE COURT: All of right. Let me ask, you have gone longer and you've gone fast. I think we need to give staff a break if you're going much longer. I hadn't anticipated this, given previous estimates.

MR. CLUBOK: I have exactly eight minutes left, I believe, so whatever you would prefer.

THE COURT: Proceed with your eight minutes.

MR. CLUBOK: Okay.

Puma had warned investors about this volatility, so it's not like it should have been a surprise to Professor Feinstein. This warning was back in March of 2014. So the stock price has settled down.

The question you ask yourself is: Did plaintiffs prove that those stock drops were caused by some disclosure of fraudulent information? The answer will be no.

What about the KM curves disclosures that comes out at ASCO? Remember, their other theory is they get 40 more

dollars because of the ASCO conference, and they try to tie it back to fraud. The problem here is what's presented at ASCO is all this stuff, and some of it is supposedly corrective information exposing a fraud, and some of it is confounding information that doesn't expose a fraud.

What Feinstein tells you is this little piece of information, the picture of the curves and this little piece of information, the dose discontinuation rate, out of everything else that's presented at ASCO --

THE COURT: I'm sorry.

MR. CLUBOK: I'm speeding up again.

THE COURT: Hold on. The what continuation rate?

MR. CLUBOK: Discontinuation rate.

THE COURT: Continue.

MR. CLUBOK: So those two pieces of information, dose discontinuation and curves, are supposedly new information that now causes the stock to drop. The problem is, again, Professor Gompers went page by page of every single analyst report, and those two facts are barely mentioned.

When they are mentioned, it's positively or it's mentioned in a positive way. On these four pages you can see that one analyst says that the curves are in line with our expectations with clearly separated survival curves. Another analyst calls the curve separation impressive. A third talks

about the curves separating. The subgroup data is robust.

The fourth is the only one that even says the word discontinuation as far as we can tell. They say safety is in line with previous trials, and none of this matters because of the Imodium. That's it. These four pages supposedly prove that that's the basis for their proof that supposedly at ASCO they reacted with shock, and it caused the stock to drop because of the revelation of those curves and the dose discontinuation rate.

But this is the actual reaction of the market. And you don't have to listen to Professor Feinstein's opinion. You can judge it for yourself. Feinstein tells you, by the way, ignore all the other bad things or all the other pieces of confounding information.

He says all those other things that might have caused the stock to drop, he screened them out, because if you determine that any of these other things are the reasons why the stock dropped, they can't recover because that wouldn't correct any fraud. That's just new news that no one had ever given anyone any promises about before.

So if the timing of the FDA approval -- if, for example, as Cowen says ExteNET as advertised but questions remain on FDA strategy, that kind of says it all. The data was just as advertised. Nothing new here. But now we have some new questions about FDA approval, so let's wonder

whether or not we should still be investors in the stock.

If you look at all of these reports, every one of them has similar kinds of things. They talk about other factors that maybe should be balanced against the positive things. This is one of the most clear examples. Dr. Modi presented this scale, and she showed the scale tipping towards yes, meaning the FDA will approve it as a new standard of care.

And under yes, she says positive DFS data, not negative DFS data. Positive. And she says it has similar results to this other trial, which is a fancy word for Herceptin. In other words, this is good news. On the weight she talks about how there is no overall survival data. That's data that takes years because you have to follow women for years and years.

There's nothing about fraud there. It's just we have to wait for years to see how this works. She talks about a competitor, and she talks about this lower-risk subgroup, which is about the node-negative subgroup. She is saying here's some good things that came out at ASCO, the data, just like Mr. Auerbach had said. And here's some bad things. You have to weigh all that in.

And we end up with Dr. Vogl. Dr. Vogl -- remember Adelson said, well, you've been Vogl'd. He was the guy who said, you know, this neratinib sounds like a terrible drug.

What the plaintiff didn't play to you was the next thing that he said. The next thing he said was this:

(Clip of audiotape recording played)

MR. CLUBOK: He's saying after saying it seems like a terrible drug, when it turns out that you had that impressive of a response even with the dose discontinuation, maybe all that means is you shouldn't give women that much dosage, but this is actually good news.

It is a little confusing because he starts out seeming like he's criticizing, but then he says something positive. There's no wonder that the plaintiffs' lawyers or people after the fact can say they were confused by this.

But this doesn't have anything to do with anything Puma said. He's saying something positive, just like Schwab had said. They're interpreting it as a negative or they want you to believe that it's a negative.

Skye Drynan, what does she say, the most important person? She thinks this is all a strong buying opportunity. She says the shorts -- those are the people betting against the stock -- they jumped on comments regarding a longer follow-up timeline with the FDA.

They're not jumping on the 39 percent diarrhea rates or the picture of the curve or the dose discontinuation rate. Feinstein at the end of the day Professor Gompers would reject.

So when you get to the question about whether they have proved their case, the answer is no. And again you can proceed to the verdict form and the plaintiffs cannot even ask about damages.

I'm just going to spend two last minutes talking about damages because you really shouldn't have to be here if you believe the facts and the evidence suggest what I did.

But if you do get to damages, I just want to remind you of the instruction the judge gave: The plaintiffs also bear the burden of separating out a share price decline, if any, caused by factors other than the alleged misrepresentations.

Even if they could get damages, they can't just come in here and say give us the 80 bucks. They have to show you exactly how something that was said in July actually caused the stock drop and disaggregate it from all of this other confounding information.

This was the mixer of damages where Feinstein takes these four supposed bad facts. He ignores all these other bad facts that have nothing to do with fraud or at least facts that could impact the stock. He puts them all in the blender, and he just says it's fraud. Give us $80.

He doesn't help them meet their burden of proof of disaggregation, so no damages can be awarded.

If you're still working with the jury verdict form,

there's a section where you'll have to decide whether they actually relied on something other than the market price. I think we all know by now who they relied on. We know that after every one of these alleged acts of fraud, they kept buying more and more stock with full knowledge of the allegations all the way through August of 2015, months after the complaint had been filed.

And even after Norfolk, Mr. Younger's boss's boss, had signed sworn declarations trying to be lead plaintiff, their investment advisor is still out there buying stock. And that's not meaningless.

As the judge told you, you should construe plaintiff as having the same knowledge as the investment advisor regarding its investment concerning the purchase or sale of Puma securities. So it's not like Skye Drynan and Darcy Kopcho are just some random people. Their knowledge is Mr. Younger's knowledge, Norfolk's knowledge.

You need to think about that every time they tell you, ignore them. At the end of the day, Skye Drynan says it all. Was she misled? Was she lied to? Was she defrauded? No. And her knowledge and what she thinks is the same as Norfolk except for this situation where they apparently haven't spoken, that factually they may not have spoken.

But the judge will tell you legally they are charged with the knowledge even if Mr. Younger never bothered

to speak with the folks at Capital about why they continued to buy the stock after supposedly uncovering inaccurate information. Darcy Kopcho knew the diarrhea rates, the 39 percent, before she bought the stock. She was asked if any information came out at ASCO that affected her decision. She said no.

And then she meets with Mr. Auerbach in August after Norfolk from England has already sued. And she says she goes into that meeting thinking he hadn't lied at all even though she's seen all the information that came out at ASCO. That's not possible if information came out at ASCO that proved a lie.

Why did they sell their stock? It's because of competition. Skye Drynan explained that. It was because they were concerned about competition, not because they had questions about neratinib.

So when you get to the question of reliance, if you get there, that's one we have the burden on. You could answer yes if you're still filling out the form.

I'm going to end finally where I started at the beginning of the opening, the end of the opening, the beginning of today. This undeniable fact that neratinib for women who have this terrible kind of cancer is lifesaving is a fact that cannot be disproven.

On behalf of myself and Ms. Johnson and Ms. Smith

and Ms. Tomkowiak and Meryn Grant and Jordan Cook and all the other lawyers on our team who are proud to be here to represent Puma and Alan Auerbach in defense of these claims, we ask you to apply the facts that you saw in this case and apply them to the law the judge has instructed you.

Thank you.

THE COURT: All right. We'll now take a break. I'm going to need to talk to counsel. So let's come back at -- boy, it's getting later in the afternoon than I anticipated. Let's come back at 3:25.

THE CLERK: All rise.

(Open court - jury not present)

THE COURT: All right. We're outside the presence of the jury. Please be seated.

I said I wasn't going to hold you to time limits, but your time this afternoon was longer than your original estimate, not counting your time this morning. Obviously you've been up there for an hour and 35 minutes this afternoon, and this morning I think you were up for 40 minutes. So it's really got quite long.

What's the -- how long will the plaintiff take?

MR. COUGHLIN: I'm going to get done hopefully in the same time limits.

THE COURT: What time limits? Again, I don't mean to hold you to time limits, but there's other issues going on

here that I need to take care of. How much time?

MR. COUGHLIN: I'm not going to go over the two hours that we discussed for each side. I'm going to go 45 minutes. I've got 48 minutes left of my time.

THE COURT: All right. Anything further, then, from anyone?

MR. COUGHLIN: No.

THE COURT: Okay. We'll see you, then, at 3:25.

(Recess taken from 3:05 p.m. until 3:25 p.m.)

THE CLERK: All rise.

(Open court - jury present)

THE COURT: Welcome back.

Please conclude, Mr. Coughlin.

MR. COUGHLIN: Thank you, Your Honor.

REBUTTAL CLOSING ARGUMENT

MR. COUGHLIN: If I could have slide 25 up.

So Mr. Clubok went through these different numbers and tried to say while none of them, even though sometimes they were double or at least a third more or sometimes quadruple, really impacted the market, all we have to do is look at the stock chart, and we know that that is not true.

Let's take a look at number 97. Here's what the facts indicate in this case. Here's where the misrepresentations were made. That stock skyrocketed. That is a huge rise of over $170 in one day. Yes, the stock is

bumping up and down through this time period. It is a biotech stock. There is some volatility, no doubt. Okay. But when it gets in here and the information comes out in here about what the truth is, you can see where it comes down and settles down, and it keeps right on going. And the total damages are $86 a share.

So the idea that these misrepresentations did not impact those people during that time period is just false. They got out an offering right in the middle here for $218 million and slowly walked the stock down, went to different conferences. We saw some of those conferences.

You know, all those started happening in February and March. He's walking that stock down as much as he can, you know, but he doesn't want to quite reveal that he committed fraud. The ASCO presentation comes. The abstract comes out. It drops $40 in one day.

Just as to that stock, two weeks later it drops another $46. That's fraud, ladies and gentlemen. Those are tied to the things that we went through, and I'd like to go back to number 25 and talk about what counsel said about the various numbers here.

Let's talk the first one. He said that he had given a range, that he said one to six percent. There is nothing in that phone call that says one to six percent. Nothing. And everybody -- his buddies, his three analyst

buddies that he testified to that he met at conferences and knew -- they all print the numbers 86 to 90, 91. That's what was printed. And those numbers comply with a 33 percent benefit to an 86 percent placebo. That's what the market was led to believe. That's what he led them to believe.

And what that meant is it would help twice as many women as what the real number was. And that's important. Dr. Jewell testified to that. That would be one in 20, if it was what he had said, the five percent, or one in 43, as the analyst noted when this information came out later is what the real number was.

That affected the market, and that took a lot -- hundreds of millions of dollars out of the market when this information came out and it hit the market. It's a fraud, and we know it's a fraud because he knew how important it was as he went through it. He knew that those FDA minutes better not go to those underwriters. He knew if that got out, that that would be getting to the market.

And have you ever heard of an analyst at -- have you ever heard of a due diligence person go into a meeting where he doesn't bring anything in; he's asked if he wants to e-mail the presentation that was supposedly given in San Antonio to the doctors, which would have been private, and he says, no, I'm good?

That's absurd. That's an absurd story. And we get

that every time we get into a juncture about whether he's telling the truth. Where is the 3.5 percent separating curves? We did it. It's important. Every analyst writes about it. But you know what? We have no record of it. We have no record of it in the Excelion log. We have no piece of paper about it.

You know, only Mr. Auerbach really comes in and testifies that's what he says; that's what he saw. Why? Because that's what he led the market to believe that day when he was talking to them. But there's no evidence of that. So he led the market to believe it was 4.5 percent.

Then counsel gets up and says, oh, well, the same city, Dr. Werber, he went to a -- had a doctor on this call, and that doctor said, oh, two or three percent would be something in line, something good. You know what? Two or three percent probably would have been just fine, and that's what he should have said. He should have said, hey, it's 2.3 percent. It's under 2.5. That's what he should have said, but he didn't. He led them to twice that.

When Werber corrected that doctor who hadn't listened to the call, he said, okay, if that's what he said. He said they talked to the CEO on that call. Read that transcript carefully, and that's what actually happened. There was no disclosure by the doctor who hadn't even been on the call that somehow two or three percent.

Counsel said, well, he might have heard it. Might have read it. The next paragraph says, hey, I didn't hear that call. I didn't hear it at all. So that's no -- that's -- that's not getting that information out to the market. And he agreed that four or five percent, he agreed with Dr. Werber that would be good. I could accept that.

Now, let's talk about the next thing, the diarrhea rate. They're acting like, hey, he's saying 29, 30, when you have sitting in front of you 39.9 is okay. If you don't think it's validated, then don't say anything or say, hey, you know what? We can't really talk about it.

You don't refer to other studies, and we think it's going to be in line, when you have something which Auerbach says later that's extraordinarily high. Those are his words right before the ASCO conference.

He knew it was extraordinarily high. He didn't want that information to get out. Did this rocket take off bigger than he thought it would when he gave those numbers? Maybe it did.

But he knew he couldn't sign that Celgene thing. $10 billion that company was worth overnight? It went to $6.5 billion, and somebody offered him ten, and he doesn't sign the agreement? That's absurd.

He can't sign the agreement. They would know that he lied on that conference call. He can't sign it.

So when Pfizer starts asking -- the licensor, not the franchisor but the licensor -- when Pfizer asks for that information, he has got two documents. Two. That's how simple it is. They're 123 and 124.

And does he send it to them? No. He monkeys around for months. The only testimony we have that Pfizer was, quote, okay, is his testimony here in court. I think like a lot of things that don't show up, I think you could think that's not okay.

Pfizer was not okay to be fighting to get that information for months and months for a drug that they owned. This drug does have a benefit for a certain subset of women, and it's not going anywhere no matter what happens in this litigation. Pfizer owns that drug, so that's not a worry.

They try to scare you with what could happen and what's going on. Don't be scared by that. That's not what's going on in this case. This case is about --

MR. CLUBOK: Objection, Your Honor. That is not testimony that is in the record or reflected in truth.

MR. COUGHLIN: Your Honor --

THE COURT: You'll recall the instruction I said. The arguments of counsel are not evidence. It's up to you to recall what the evidence is.

We obviously have a dispute here about what the evidence is, and it's up to you to remember or not remember

what you're now hearing.

You may continue.

MR. COUGHLIN: Thank you, Your Honor.

Let's talk about discontinuation due to side effects. Our argument is that he knew when he was asked on that call about the adverse effects, that he knew that the overall discontinue rate was 27.6 and that as to diarrhea it was 16.8. He says his number, five to ten percent, refers to dropouts.

This is very important because Matt Roden, the person counsel didn't know was on the call, off the call, maybe he was there, maybe not, he was on the call. He was asking questions, and he corrected -- he corrected Mr. Auerbach or said didn't you mean, and it says there's a typo in the transcript. You'll see it.

It doesn't say refer to discontinuation. Didn't you mean to defer? And Auerbach doesn't say anything in response, but he knows where he's going with this, and he says five or ten percent. Okay.

He had referenced some other studies earlier on, and that's where he gets some of those numbers. Okay.

Today in this court he is pointing to a 1.6 percent discontinuation of treatment, and he's saying he had that number but he reported -- he quadrupled it that day on the call and said five or ten percent.

That's not what the analysts were looking for. The analysts wanted to know who due to adverse events, who discontinued treatment. Why? Because they're analysts and they want to know who is not taking the drug and who is not paying for the drug. That's what they want to know. That's what financial analysts were doing on that call.

Finally, the curves. We know the curves were not separating. We saw them cross when they did the analysis. We know he had no information, at least none that has been produced, that those curves were separating. So I think for that point, all of these things he has a story.

He has a story for what happened with Pfizer. He has a story with why the FDA -- I mean, imagine his story now. It changed literally right in front of you. He came in here and he said, I have no recollection about changing that, and I have no recollection that I asked somebody to change it.

He didn't say, well, that was our internal thing and we were using it. He didn't say that at all. He said he couldn't recall touching it. But he wanted to point out to me that while he was the author of the pdf, he was not the author of the Word document which has never been produced.

He's able to do that and point out, and then later, another day later in this very trial, he remembers, oh, yeah, the FDA didn't want to hear anything about clinical. So

internally we took that out and were using that document.

Well, they changed the answers. They took that out. And does that make sense? If the FDA -- if the FDA didn't want to do anything, hear anything about clinical, why did they leave it in when they sent the official minutes back?

They're the ones who sent this document to Auerbach, and he gets it. He can't recall it when he first gets deposed. His recollection, he doesn't have any recall of it when he's sitting here the first day, wanted to point out, you know, where he fits in. Hey, I was a second person that created this document that went to the underwriters.

No. That doesn't fit. He is keeping the number that he is worried about getting out. He is keeping it from the market, and Norfolk is buying on a recommendation of their investment advisors, and they're buying throughout this period. They also buy when the stock goes down because people buy on dips.

There is no testimony from these investment advisors, not a bit -- and we're going to listen to just a few clips -- not a bit that they would have bought had they known about the fraud or bought even knowing about the fraud.

Okay. They would never -- they were not going to be buying if he was altering documents. We're going to listen to a few of those clips. If they had known that he

was committing securities fraud, they would not have bought. If they had known he had lied, they would not have bought.

That's the testimony. That's the testimony that is being imputed to the representative here, Norfolk. That's the type of thing. They relied on the integrity of the efficient market to absorb the information that was on the market, the information that was for a long time, for almost a year, that was false information.

From July 22nd to May 13th, the market was misled about the efficacy and safety of this drug. We're not talking about FDA approval or something like that. They were misled about essentially the market size. When they say, well, I don't really want to talk about that that way, you know. I don't want to talk about that the analysts were looking at the market size or what the drug would go for, the value of the company at that.

That's what analysts do. That's what investors do. They put their money in based on the market size because they need a return. They want a return on that money. Why? Because they have obligations, too. They have obligations to their pensioners to make wise investments.

So that's what's going on in this case with these advisors and this pension fund. There is no question -- there was no allegation that the investment advisors had done anything wrong or knew about any of this inside information

prior to making their purchases.

Even after, they had no idea when they made the purchases on the down swing that Mr. Auerbach on that day, on July 22nd, that he had in front of him those very numbers that came out at ASCO. They didn't know exactly what he had in front of him.

First of all, he had denied he had the validated safety results. And then the efficacy, they don't know. Did something happen along the way? Did they find a different number or something? They had no idea. They see the number come out. They look at the number and think, hey, it's still FDA approvable, and they buy on the down dip. Okay.

Then more information comes out at ASCO, and people really start analyzing, what is going on with this drug? Okay. The curves, as far as we can see, they're not separating.

Now we've got four things out in the market. The curves are not separating. The diarrhea rate is high. Okay. The discontinuation rate is high. And the absolute benefit, the number of women needed to treat, is 2.3 percent. That's how the market then values what this company should be worth, okay, to pay and not be deceived in the marketplace.

Let's listen to a couple of things that they had relied on. If we could turn to -- if we could turn to 123.

I know we have a lot of accountants on the jury.

So 123 is my own math demonstrative that I drew up and then I had my secretary type up. Basically if you took a 33 percent benefit at the range of every one of those numbers, you could still see that you get an absolute benefit of 3.67.

So the range that he is claiming is even false, even if you accept what he said in his testimony that he was trying to indicate a one to six percent. Well, I'll tell you what. That's a lot higher than 2.3. The bottom number there is 3.67. So that's another thing that just doesn't fit, doesn't mesh together.

If we could take a look at 117. I'm going to talk about a couple of these jury instructions before you go back. One thing I'd like to talk about, I'm going to switch to 141. There's a lot of documents that you're going to receive. I don't know if you want to take some of these numbers down, but you'll see that there are few numbers that if you look at 123 and 124 for the truth, that's what he had with him, okay, at the day of that phone call. Okay.

Document 103 is the transcript of that call, so you can go to that and look at that. The coverup has to do with the Pfizer documents, you know, and some of FDA documents. The FDA documents are 773 and 491. The Pfizer documents run in the 400s, 480, 481, 475, and 486.

And finally, the two documents, exhibits that reveal the truth, are the abstract, 503, and 176. That's

just kind of a guide to get you into the documents and get you into the issues.

We want you to look at the documents. We want you to have them in front of you and actually use them and make them accessible to you. So let's take a look at number 117.

There's a doctrine in this case that's called a fraud-on-the-market presumption. It applies in this case, and there are four parts to it. They are that the alleged misrepresentations or omissions were publicly known, impacted the market. They were material.

The stock traded in an efficient market, and plaintiffs traded stock. Plaintiffs traded stock between when had the misrepresentations or omissions were made and the Court decided the elements and then says -- before this trial began, the Court decided the elements one, three, and four.

So the elements of the alleged misrepresentations or omissions were publicly known has already been decided.

Number two, they were material is an issue for you to decide. Were these disclosures, were these falsehoods, were they material? One thing that doesn't lie is the market doesn't lie. The market took this information in, and the stock went up over $170 that day and it stayed up until the presentation of the abstract and then ASCO.

Number three, the stock traded in an efficient

market. That's agreed upon by the parties. Number four, the plaintiffs traded the stock between when the misrepresentations or omissions were made and when the truth was revealed. That is also accepted by the Court as true.

So when you get to that instruction, what you have to decide is what we go to the next slide, materiality. That's 119.

These are concepts that lawyers fight over for -- well, I guess since the securities laws really came into effect in the '30s after the Great Depression. What it means is what's material? Today if there is a substantial likelihood that a reasonable investor would consider the fact important in deciding whether to buy or sell a security, that's a material.

An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to it as having significantly altered the total mix of information it took into account in deciding whether to buy or sell the security.

So think about what was not disclosed in this case on that July 22nd. If you were buying stock, would you have liked to know that information? You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission.

What's happening in this case at different times is

that facts are thrown up here like, hey, look at this centrally confirmed curves that we did in March. That's not okay. It has to do with when that misrepresentation or omission occurred. Okay? And that was July 22nd, 2014.

Let's take a look at number 118. This is an interesting -- this is the defendants may rebut the presumption, okay. And it says the defendants may rebut it, that plaintiffs did not actually rely on the integrity of the market price when it purchased the Puma stock, or that the alleged misrepresentation or omission did not affect the market price in Puma stock.

If we start with B first, I don't think there's any question that this information affected the price of Puma stock, but you have to decide for yourselves. Then it says that plaintiffs did not actually rely on the integrity of the market.

Well, we have seen a number of clips from Ms. Kopcho and Skye Drynan, and they said they -- exactly what they did rely on was that they relied on the stock price. And they would want to have known if Mr. Auerbach had falsified anything to them, and they testified to that in their depos. And Ms. Drynan's depo was -- and part of both of them were played here.

So let's take a look at 145 and hear from Ms. Kopcho. And we can see Ms. Drynan, what she says to some

of these very questions. So Drynan is not recorded because the deposition was read here:

"Question: 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?"

And her answer is yes.

"Question: Why would you want to know that?

"Answer: Because it wouldn't have been the truth."

If he had something different, she wanted to know. She was relying on the price [sic] to set the price and not be deceived.

So let's go to Darcy Kopcho and see what she says to some of those questions.

(Portion of videotaped deposition played)

MR. COUGHLIN: That's the testimony of the advisors, the advisors that represent Norfolk here. And they want to know the truth, and they didn't know there was any falsity when they made those recommendations and made those purchases.

But let's keep going. We've got one more slide at least, 146. If we look over at Skye Drynan's side and we look at some of her answers:

"Question: On any of the times that you recommended the purchase of Puma stock, were you aware of

whether or not Mr. Auerbach violated the federal securities laws?"

She's says:

"Answer: I'm not aware of it.

"Question: Is that something you would have wanted to know at the time you were making stock recommendations?

"Answer: Yes.

"Question: Would that be relevant to your investment decision in Puma?

"Answer: Yes.

"Question: For example, would you have wanted to know whether Mr. Auerbach's statements regarding the ExteNET trial in 2014 were false?

"Answer: I would want to know if they were true or false.

"Question: And would that have been relevant to your investment decision?

"Answer: Of course."

Let's play Ms. Kopcho's.

(Portion of videotaped deposition played)

MR. COUGHLIN: You also heard from Alex Younger, who is with the fund. And if we look at 147 of his trial testimony, Mr. Younger was asked:

"Question: Throughout those 14 plus years that you've been with the fund, have you ever come across any

indication that any of the fund's investment managers would purchase the stock of a company at a time when the investment manager believed the price had been inflated by fraud?

"Answer: No.

"Question: Would that be problematic if you learned that was the perspective of one of the fund's investment managers?

"Answer: Yes. Of course.

"Question: Why?

"Answer: Because that would suggest the investment manager was in collusion with that company undertaking fraudulent activity, and clearly that would be to the detriment of our beneficiaries when the truth outed and the price returned to its true level."

And that's what Mr. Younger testified. Let's take one more look at Ms. Kopcho and a couple of quick questions, at 149.

(Portion of videotape deposition played)

MR. COUGHLIN: Final clip I'll play for you. We heard a lot about Eric Schmidt, and we played a little of his depo here. I wanted to play just one last exchange. Here's a sell-side analyst talking about what he thought about the disclosures of Mr. Auerbach, 150.

(Portion of videotaped deposition played)

MR. COUGHLIN: You couldn't get a picture of a guy

who wanted to be less there than Mr. Schmidt.

So this is the verdict form that -- it's not the verdict form that you'll take back, but it's a placard of the verdict form that you'll take back. And counsel had circled what he suggested you might do in light of the evidence presented.

Of course, we have a different suggestion. We think we -- we think we have proven fraud in this case. As to each of these four statements, we think you should circle yes. Then you proceed to the next question of whether Mr. Auerbach knowingly did this. That's a yes also.

Those two documents, 123 and 124, were sitting right in front of Mr. Auerbach when he had that conference call and gave those false statements.

As to causation, you saw what happened to the stock as it shot up. You saw what happened when the information was released. You almost couldn't have a clearer picture than that mountain when that misinformation was out in the market. So we believe we've proven that, yes, we've proven causation.

The question is, did we -- and that was for the May 13th, and this is for the June 1st. Did we prove the disclosures that were given on that day also caused the stock to decline? The first one was for $40 a share, and this disclosure was for 46.

We believe we've carried our burden, which is, is it more true than not. It's really a balancing scale like this in a civil case like this. It's not beyond a reasonable doubt like this if we're up here in a criminal case. It's not clear and convincing down here. It's more likely than not that we're right and it's true, that we proved our case by a preponderance of the evidence. We believe we have.

There's two numbers right here. For the first drop that happened on May 14th and then June 1st and June 2nd drops, 40.96 and 46.24. We believe those are the two numbers that should be put in the empty spaces there because that's what the fund suffered on those days.

Finally, there is no evidence -- and we just went through it -- that people at Capital would have purchased either knowing that the fraud was out there or irregardless of the fraud. None. You just heard them testify. They had testified earlier, but you just heard those depo clips. There's no question that they would not have. Nor did they violate their fiduciary duties to the fund.

So defendants did not carry their burden on the last two.

Thank you, ladies and gentlemen. Thank you for your attention in this case.

THE COURT: All right. There we have it.

Can our bailiff come forward, please.

(Bailiff sworn)

THE CLERK: Please state your name for the record.

THE BAILIFF: Ed Argersinger.

THE CLERK: Please spell your last name.

THE BAILIFF: A-r-g-e-r-s-i-n-g-e-r.

THE COURT: Thank you.

Any objections as we dismiss the jury? Hearing none, you may now gather and begin your deliberations.

As far as timing, I leave it up to you as to what works out for you and what doesn't work out for you. Perhaps you want to work further today. Perhaps you want to come in fresh tomorrow. I leave those sorts of decisions up to you.

So I wish you the best in your deliberations. May justice be done. Thank you for your attention here.

THE CLERK: All rise.

(Open court - jury out for deliberation)

THE COURT: All right, folks. The jury has now left. Please keep in contact with my courtroom deputy to be available on short notice if and when there are questions coming from the jury.

I believe we've copied the jury instructions. We'll give it to them. We have the exhibits to give to them, and --

THE CLERK: I don't have a copy of the verdict.

THE COURT: Timing is everything. I was just going

to say on the verdict, I believe that is in the hands of the plaintiffs. I'd ask that you use your word processor. Remove the extra signature lines and bring the agreed-upon verdict -- I think tomorrow is fine. Make sure the defense approves of it, and we will give them the special verdict first thing tomorrow.

All right. Any other comments?

MR. FORGE: Your Honor, may I ask one question -- two questions actually. The first, I believe we're all located about the same distance from the courthouse, which is approximately 15 minutes to get here. Is that adequate response time if there are questions, or would you like us closer?

THE COURT: That strikes me as a bit long. I think there should be someone much closer and able to talk.

MR. FORGE: Okay.

THE COURT: At least during the initial moments. Okay.

MR. FORGE: We will provide some extra business to downtown Santa Ana.

The other question, Your Honor, is there were two exhibits that involved audio and/or video.

THE COURT: We talked about that yesterday.

MR. FORGE: Okay. We have the computer, so it's available for the jurors to use should they wish to play it.

THE COURT: Have both sides agreed that this computer is acceptable?

MS. JOHNSON: Yes, Your Honor.

THE COURT: Okay. If both sides have agreed, then -- is this a laptop?

MR. FORGE: Yes, Your Honor. I believe your courtroom deputy has the laptop.

THE CLERK: It's right there.

THE COURT: If both sides have agreed that that laptop is appropriate, that may be provided to the jury.

Anything else?

MR. CLUBOK: Your Honor, I'm sorry. Were you saying that the special verdict form should be redone and provided tomorrow morning, or would you like us to just do it now? We have a printer right here, so -- maybe I misheard.

THE COURT: No, you didn't mishear at all. I said tomorrow. If you can do it right now, that would be best. So why don't we do it right now if you have a printer right here.

MR. CLUBOK: That would be great. We'll work with the plaintiffs.

THE COURT: Let's do it right now. That's even better. Thank you.

MR. CLUBOK: Thank you.

THE COURT: Anything else?

MR. FORGE: Not from plaintiffs, Your Honor.

THE COURT: Okay. When you get the special verdict, just confirm from plaintiff and defendant that what you have is what's agreed upon and provide it to the jury.

Okay. So make yourself available to my courtroom deputy if there are any questions. Thank you, all.

MR. FORGE: Thank you, Your Honor.

THE COURT: We're in recess for now.

MR. CLUBOK: Thank you, Your Honor.

(Proceedings adjourned at 4:03 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 01/29/2019

MIRIAM V. BAIRD
OFFICIAL REPORTER

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