



A P P E A R A N C E S

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10 IN BEHALF OF THE DEFENDANT,  
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1 SANTA ANA, CALIFORNIA; MONDAY, JANUARY 28, 2019; 10:00 A.M.

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3 THE COURT: All right. Appearances, please.

4 MR. GRONBORG: Good morning, Your Honor. Tor  
5 Gronborg on behalf of plaintiffs.

6 MR. BAKSHI: Debashish Bakshi also on behalf of  
7 plaintiffs.

8 MS. JOHNSON: Good morning, Your Honor. Michele  
9 Johnson on behalf of the defendant.

10 MS. TOMKOWIAK: Good morning. Sarah Tomkowiak on  
11 behalf of the defendant.

12 MR. CLUBOK: Andrew Clubok also on behalf of the  
13 defendants.

14 MS. GRANT: Good morning, Your Honor. Meryn Grant  
15 also on behalf of the defendants.

16 MS. SMITH: Good morning, Your Honor. Colleen  
17 Smith on behalf of the defendants.

18 THE COURT: All right. Good morning to counsel.  
19 I'm losing my voice a bit. Excuse me. I probably yelled too  
20 much at the Elton John concert Friday night.

21 Okay. So do we have a batch of documents yet, a  
22 batch of jury instructions?

23 MR. GRONBORG: We do, Your Honor. Do you want me  
24 to approach? I can give you -- we have one set of jury  
25 instructions that we've -- with a couple flagged portions,

1 but I think our disputes are now narrow enough that we can  
2 put it into one set with a flag on it.

3 THE COURT: Has the plaintiff seen this group  
4 [sic]?

5 MR. GRONBORG: We've been exchanging these all  
6 weekend.

7 THE COURT: So if you give me the whole packet,  
8 that would be good.

9 (Documents handed to the Court)

10 THE COURT: Thank you.

11 MR. GRONBORG: Jury instructions, two sets of  
12 verdict forms that are actually very similar. One plaintiff,  
13 one defense.

14 THE COURT: Okay. Thank you for that.

15 MS. GRANT: Does that include our verdict form as  
16 well?

17 THE COURT: Okay. It doesn't have the opening  
18 instructions which also need to go to the jury, which I need  
19 before I number the first one here. Are you with me?

20 MR. GRONBORG: I am with you. I actually thought I  
21 did. We'll add those right in. There's no controversy about  
22 that.

23 THE COURT: I'd just like to give the jury a whole  
24 package. So by tomorrow you need to give me those undisputed  
25 opening instructions. You know what I'm talking about?

1 MR. GRONBORG: I understand.

2 THE COURT: Looking at this, I see they are 28  
3 pages long -- 26 pages long. I estimate just a little over  
4 half an hour to read them. I just say that for closing  
5 arguments, which we will be discussing.

6 Next, what would the parties like us to discuss  
7 first?

8 MR. GRONBORG: I think the easiest would probably  
9 be to go through the jury instructions.

10 THE COURT: What about the pending motion?

11 MR. GRONBORG: We can discuss that first as well.  
12 It does actually have -- that may be better as it does have  
13 an effect on one of the jury instructions.

14 THE COURT: That is what I am thinking. So  
15 specifically I'm looking at plaintiffs' motion pursuant to  
16 Rule 50(a) for a judgment as matter of law as to rebutting  
17 the presumption of reliance, followed by defendants' very  
18 extensive opposition of 15 pages.

19 My tentative ruling on this is to deny the motion,  
20 so I turn to the plaintiff to talk me out of that.

21 MR. GRONBORG: Well, there are two parts to the  
22 motion obviously. There's the class-wide reliance and then  
23 the individual Norfolk reliance. So I'd like to deal with  
24 the class-wide reliance aspect of it first.

25 In order to rebut the presumption of reliance on a

1 class-wide basis, defendants need to prove by a preponderance  
2 of the evidence that there was no price impact from the false  
3 statements. Defendants have offered zero evidence with  
4 respect to the stock price movement that occurred immediately  
5 following the alleged false statements.

6 THE COURT: So you say zero evidence. I'd be  
7 interested in the defense responding to that. I see that  
8 your papers on page 2 say: Defendants were -- this is  
9 beginning on page 24 -- defendants were required to establish  
10 by a preponderance of the evidence that their  
11 misrepresentations and omissions regarding the ExteNET  
12 clinical trial had no impact on the price of Puma common  
13 stock.

14 You give no authority for that proposition, and I'm  
15 wondering if no impact is an excessive statement, and I  
16 wonder what the authority is.

17 MR. GRONBORG: Well, the authority is Halliburton.  
18 This is what established -- which set forth what the  
19 requirements are for rebutting the presumption, specifically  
20 say it's a very heavy burden. So what they need to  
21 demonstrate -- those cases establish what they need to  
22 demonstrate is that there is no price impact, which is  
23 different from loss causation.

24 Defendants' brief is long, but most of it is  
25 suggesting that plaintiffs have not established loss

1 causation. But this is not an area where it's our burden,  
2 and the Supreme Court has made it clear that price impact is  
3 not loss causation.

4 So defendants have a burden. Their burden is to  
5 demonstrate a lack of price impact, and they have done  
6 nothing. We've heard their expert. Their expert was here.  
7 Their expert offered no opinions on what caused the stock  
8 price movement when it went up on July 22nd. That could be  
9 the end of the story right there because there is no dispute  
10 the stock price movement went up immediately following the  
11 alleged false statement.

12 Their expert also offered no opinion on what  
13 actually caused the stock price movement to go down, and it  
14 is not evidence for their expert to come in and say  
15 plaintiffs' expert hasn't done enough. That's maybe relevant  
16 for loss causation, but price impact is defendants' burden,  
17 and they don't satisfy their burden by saying plaintiffs'  
18 expert didn't do enough.

19 THE COURT: All right. Continue.

20 MR. GRONBORG: With respect to the individual -- so  
21 I think that takes care of class-wide.

22 With respect to the individual plaintiff, again  
23 defendants have a heavy burden. The primary argument they  
24 made in their brief was, well, the only way -- there's not  
25 just one way to show that we've rebutted the presumption.

1 There's the clearest example, which is would the plaintiff  
2 have bought the stock even if they had known it was tainted  
3 by fraud. That is clear in the Supreme Court literature.  
4 That is the most common example.

5 Clearly defendants haven't met that standard. I  
6 mean, that is close to they need to get the plaintiff to say  
7 they did it. The representatives from Capital both testified  
8 they would have wanted to know about -- that price mattered.  
9 They would have wanted to know about the fraud before they  
10 bought. Neither one, neither Ms. Drynan nor Ms. Kopcho,  
11 certainly not Mr. Younger, said that they would have bought  
12 the stock even if they had known that the stock price was  
13 tainted by fraud.

14 The only evidence that they have put forward is  
15 saying, look, after some of the truth came out, the  
16 Norfolk -- Capital on behalf of Norfolk still purchased. But  
17 that does not come close to meeting what their burden is on  
18 price. That is simply not a sufficient basis from which any  
19 jury could determine that therefore they have rebutted the  
20 presumption of reliance.

21 The authority they rely on over and over is the  
22 Gamco case from the Southern District of New York and the  
23 Second Circuit. In this case Judge Scheindlin after a bench  
24 trial, she lays out just how rigorous it is to show that an  
25 individual would not have purchased even if they had known

1 about the fraud.

2 So in that case, with a plaintiff who she found  
3 unbelievable on the stand, even with that unbelievable, that  
4 plaintiff admitted essentially we would have bought the stock  
5 even if we had known. There's no such admission here.  
6 There's no evidence that's anywhere close to that here.

7 And Judge Scheindlin made clear, the Second Circuit  
8 made clear, and the Supreme Court made clear in Halliburton  
9 that purchasing the stock after disclosure of a fraud does  
10 not satisfy any burden of showing a lack of reliance.

11 The Supreme Court used the example of the value  
12 investor. It says, yes, of course, value investors think  
13 stock prices may go up. Even after a disclosure stock prices  
14 may go up. But that's not rebutting the presumption, because  
15 the value investor, like Capital here, relies on what the  
16 stock price is at the time they're buying.

17 Instead of getting the testimony that they needed,  
18 which is, no, we weren't relying on the testimony, Ms. Drynan  
19 testified in her -- what was read, we relied on the market  
20 price. My recommendations to buy were based on the market  
21 price.

22 Ms. Kopcho testified that in addition to, you know,  
23 that she would not have bought the stock if she had known  
24 about the fraud, that she relied on the market price. And  
25 Mr. Younger confirmed that in his understanding that, of

1 course, these purchases are being made in reliance on the  
2 price of the stock. And defendants have offered no evidence  
3 from which a jury could conclude anything other than that  
4 with respect to Norfolk.

5 THE COURT: I think that's a perfect lead-in for a  
6 good defense. Do you agree with that last statement?

7 MR. CLUBOK: I -- no, Your Honor. Do you want me  
8 to go backyards in my argument, or is it okay if I respond --

9 THE COURT: Do what you think best.

10 MR. CLUBOK: Okay. First of all, Your Honor, with  
11 -- well, with respect -- I'll start with the end. With  
12 respect to the individual investor, remember, in this case is  
13 a stronger case for support for the jury to find that there  
14 was no reliance than Gamco because in this case, unlike  
15 Gamco, the decision maker who purchased the stock has  
16 specifically admitted there was no fraud in their opinion  
17 after the truth became revealed.

18 It's not just a question -- so in Gamco and other  
19 cases, sometimes you're faced with a situation where a party  
20 who claims fraud says, nevertheless I continued to purchase  
21 and here are my reasons. And in Gamco the CEO said, well,  
22 maybe ten percent of the time I wouldn't care, so I might  
23 continue to purchase. And they're explaining away why they  
24 continue to purchase.

25 Here, unlike those cases, we have the decision

1 maker actually disavowing any fraud, finding out the  
2 information, the, quote, truth when it's revealed,  
3 discounting it, saying it didn't affect their decision.  
4 They're still a big supporter. They still want to meet with  
5 the CEO. They still want to buy more stock.

6 They go to meet with them as late as August, after  
7 this lawsuit has been filed by Norfolk, after Norfolk has  
8 sought to become a class representative and claimed fraud for  
9 those statements.

10 And even after that in a meeting with Ms. Kopcho  
11 and Alan Auerbach, she goes into that meeting with all of  
12 that public information available and all the accusations of  
13 fraud and the full, quote, truth having been revealed to the  
14 market, and says she walked into that meeting already having  
15 concluded he had not committed fraud; he had not lied to the  
16 market. She didn't care about that. She meets with him and  
17 then buys more stock.

18 So we have a -- we have -- just that alone makes  
19 our case in this narrow window between both sides proving too  
20 much, right, and you appropriately noted on -- or accurately  
21 noted, I should say, on Friday when we started talking about  
22 how a -- let's call it a value investor or an investor who  
23 has some individual reason why they might not have simply  
24 relied on the market, you noted that, well, that could prove  
25 too much. You could then say no value investor can ever

1 recover. And that argument was specifically rejected by  
2 Halliburton, too.

3 The flip side, though, as Judge Scheindlin pointed  
4 out when she analyzed this in the Gamco case, was, well, you  
5 can't prove -- your proving too much could prove too much.  
6 And now you're saying that no one could ever overcome the --  
7 that no defendant could overcome the presumption.

8 So what she did in Gamco is looked the  
9 decision-maker in the eye. She assessed his credibility when  
10 he spoke. She determined the -- you know, under the hood, as  
11 it were, about the bases for the decision. And she as the  
12 fact finder in that case found that there was a basis to  
13 overcome the presumption.

14 Here the plaintiffs ask you to take that role away  
15 from the jury, which of course is an even higher standard  
16 than if Your Honor was being the fact finder as Judge  
17 Scheindlin was.

18 And they want -- they want to ask you to take that  
19 away from the jury and not let the jury make the same  
20 credibility determinations, calculus of direct and  
21 circumstantial evidence, direct evidence of disclaimer of  
22 fraud, and their own investment approach, they ask you to  
23 take that away from the jury because they don't trust the  
24 jury to do what Judge Scheindlin did. And that, I would say,  
25 is -- would be quite in error.

1 I can go back to the class unless you need me to  
2 follow up more on that.

3 THE COURT: Let me ask this. What is your theory  
4 for what caused the undisputed price drop at that particular  
5 moment? What's the Latin phrase for close in time doesn't  
6 mean causation? But maybe it does.

7 MR. CLUBOK: Okay. So now we're talking causation.  
8 What evidence have we put in that other factors caused the  
9 stock to drop? I'll start with the easier one, the June  
10 stock drop. We have a mountain of evidence that nothing that  
11 supposedly was disclosed at ASCO that relates to the four  
12 statements could have possibly caused the stock to drop.

13 There is evidence -- and both experts did event  
14 studies. Professor Gompers did an event study. He simply  
15 took the math, the regression analysis as given, that  
16 Professor Feinstein had at least done his math right. And  
17 then both experts did their own event studies, which is  
18 simply an expert analyzing the market reaction to a stock  
19 moving and to try to discern what actually moved the stock.

20 One might argue that you don't -- actually many  
21 have argued this, have argued that that's not really  
22 something you need an expert to do any more than a juror  
23 could do by reading the analyst reports for themselves.

24 THE COURT: I'm listening carefully. Again, what's  
25 your theory of what caused it the drop? I'm hearing lots of

1 words. I'm just telling you, my brain isn't piercing  
2 together an answer to that question.

3 MR. CLUBOK: So new information about the  
4 node-negative subgroup, which is not inconsistent with or had  
5 anything to do with the alleged misrepresentation but does  
6 have an effect going forward on the potential size of the  
7 market, that -- that is the -- in fact, Skye Drynan herself  
8 when she says, hey, I've seen all the information, and  
9 they're accusing -- you know, they're focusing on these DFS  
10 rates.

11 That doesn't matter at all. I understand what he  
12 said, and that doesn't impact my analysis. But one thing I  
13 am kind of worried about is future competition, the  
14 node-negative subgroup issues, things that have nothing to  
15 do.

16 So those are concerns that she specifically talks  
17 about still being on the radar of why the stock dropped and  
18 why that might have a relevance to the issues. But she  
19 specifically disclaims anything to do with the alleged fraud.  
20 It's these other factors -- the node-negative subgroup,  
21 the timing of the FDA approval.

22 Remember, that was a big issue. In fact, you may  
23 recall I spent a lot of time with Professor Feinstein,  
24 confronting him with the words he had written and him trying  
25 to explain that there was context behind them when he had

1 said that it was all about the FDA approval.

2 He then gave his answers. The jury was able to  
3 assess his credibility whether those answers stood up and  
4 compare it to testimony from people like Troy Wilson, all of  
5 the investors, common sense, that the FDA approval was the  
6 whole -- was the whole thing.

7 We were not going to be able to -- in fact, we were  
8 precluded from getting out the issue of FDA approval.

9 Plaintiffs chose at the end, I think almost like the last  
10 question to ask our expert whether or not it did receive FDA  
11 approval. So that evidence is now in the record.

12 But certainly the question about when FDA would  
13 approve it, the timing, whether the FDA would require two  
14 more years of data or just the one, which they ultimately  
15 required, that evidence is in the record. But after ASCO  
16 folks thought -- some folks from those doctors' comments  
17 thought, oh, the FDA is going to wait for overall  
18 survivability data.

19 In other words, three -- at least five-year curve  
20 data or maybe even overall survivability data or maybe two  
21 years rat studies, none of which happened, but all of which  
22 dramatically affect the stock price because it affects the  
23 timing and the potential for FDA approval.

24 None of those things have anything to do with the  
25 alleged fraud, but we pointed out why they very much could --

1 in fact, did cause the stock to drop. And Professor  
2 Feinstein had admitted as much in his report. He did the  
3 best he -- I guess he made his argument, and the jury could  
4 assess his credibility for trying to disclaim that opinion,  
5 but that's the record in the case.

6 And that's what we will present to the jury caused  
7 the stock to drop. Again, we think -- we -- what we did was  
8 we showed why the alleged information, alleged corrective  
9 information at ASCO about curves, about the picture of the  
10 Kaplan-Meier curves, and the specific number of the dose  
11 discontinuation rate. We demonstrated or at least we  
12 provided lots of evidence in detail --

13 THE COURT: Wait. Lots?

14 MR. CLUBOK: Yes, I believe so.

15 THE COURT: Finish your sentence. I interrupted.  
16 Sorry. You provided lots of evidence in detail...

17 MR. CLUBOK: Yeah. We -- Professor Gompers put up  
18 the exhibit where he had gone through every single page of  
19 every single analyst report that reported on ASCO. And there  
20 were, like, you know, 36 pages or something. It was a -- it  
21 was an eye test, but it was -- we showed how he had gone  
22 through every single page.

23 All of those are in the record, by the way, so the  
24 jurors could go through the pages themselves. They don't  
25 have to take Professor Gompers' word for it. But Professor

1 Gompers testified that he had done the work for them. And  
2 out of all those pages of analyst reports, there were four  
3 that even mentioned the curves or the discontinuation rate.  
4 And they all did so in a positive or at worst a neutral way.

5 He did that work for them as an expert can do with  
6 an event study, but the jury can do it for themselves. They  
7 have the tools to look at those themselves. So we disproved  
8 the proffered basis for fraud, and then we offered proof of  
9 the actual reason why the stock dropped, which was concerns  
10 about the node-negative subgroups and the FDA approvability,  
11 the timing of the FDA, et cetera.

12 So that -- I could go on frankly, but it is in our  
13 brief. Much of this is in our brief.

14 THE COURT: It is in your brief.

15 MR. GRONBORG: Actually, Your Honor --

16 THE COURT: Filed either at 11:58 a.m. on Sunday  
17 morning or 12:01 according to my computer.

18 MR. CLUBOK: Ours was 11:57 in the morning.

19 THE COURT: According to your computer. I'm a  
20 little concerned it did say 12:01, but we fully reviewed it.

21 MR. CLUBOK: We appreciate that, Your Honor.

22 THE COURT: Well, no. If it's 11:57 or if it's  
23 12:01, who cares? Go ahead.

24 MR. GRONBORG: If I can follow up, frankly a lot of  
25 what was just said was not in the brief. It's not in the

1 record. This -- I mean, we're hearing for the first time the  
2 timing --

3 THE COURT: Wait. What's not in the record?

4 MR. GRONBORG: The timing of FDA approval. We'll  
5 get back to the real issue, which is defendants need to have  
6 evidence that it was not the fraud-related statements that  
7 caused the drop. It is not enough to make inferences and to  
8 suggest that plaintiffs have not established loss causation.  
9 This is price impact.

10 Defendants bear the burden of proof. Their expert  
11 -- you asked the question: What caused the drop? What we  
12 heard was, well, our expert has suggested that it could have  
13 been other things. That's not enough.

14 If I came in on loss causation and I had an expert  
15 stand up there and my expert said, well, I'm not opining that  
16 the drop was caused by the revelation of the fraud, but it  
17 definitely could have been, and I think it could have caused  
18 it, we wouldn't be going to a jury.

19 Price impact is the flip side of that. Defendants  
20 have the burden. What's not in the brief is now what we just  
21 spent all this time on, which is timing of FDA approval.  
22 That's not even one of the four items that Gompers said could  
23 have.

24 Again, that could have is all that matters because  
25 he does not say that the price decline on June 1st and 2nd

1 was caused by anything. He doesn't give you a number of how  
2 much. He doesn't say all. He doesn't say some. It is  
3 purely could have. And the jury cannot take a bunch of could  
4 haves and from that make a decision as to price impact.

5 Worse, there is no --

6 THE COURT: Whoa, whoa, whoa.

7 MR. GRONBORG: Yes.

8 THE COURT: Excuse me. Why is that? Why couldn't  
9 the jury take a number of could haves and make a conclusion?

10 MR. GRONBORG: Because there is no conclusion that  
11 is offered. Defendants have the -- there is no conclusion  
12 offered as to July 22nd whatsoever. There is no could have  
13 been caused by anything else. There is no conclusion offered  
14 with respect to May 13th.

15 Gompers himself on his slide said those were caused  
16 -- you know, that the only causes were what he calls fact one  
17 and two. And the only -- and there's no evidence. There is  
18 speculation by an expert. There's no evidence. There is  
19 speculation that something else may have had an effect, but  
20 their own expert doesn't get past speculation.

21 Even now what we're hearing is timing of FDA  
22 approval. That is -- that's not what their expert said.  
23 It's not in their brief. I mean, we're just hearing new  
24 theories that come up, and it's not enough to just throw  
25 theories and say, well, I've got a theory. I'm going to

1 throw it out there, and somewhere they could read an analyst  
2 report. I think by reading that analyst report, they could  
3 come to a conclusion about price impact, which ignores what  
4 happens on the most important day for price impact, which is  
5 the day the statements are made in this case, remember.

6 And there is no theory. There is no rebuttal of  
7 the fact that the stock price went up \$146 a share. There is  
8 nothing at all that talks about that. So just throwing a  
9 couple analyst reports and saying I have attacked your  
10 causation theory is not enough.

11 The Supreme Court has said that over and over.  
12 Loss causation -- price impact is not loss causation. This  
13 is defendants' burden. That's class-wide. Can I deal with  
14 the individual or --

15 THE COURT: We need to wrap up. I thought you were  
16 saying all you needed to say.

17 MR. GRONBORG: One last thing --

18 THE COURT: Hold on. Hold on. One at a time. How  
19 much more time do you need?

20 MR. GRONBORG: Two minutes.

21 THE COURT: Okay. Conclude.

22 MR. GRONBORG: On Norfolk what I heard was -- well,  
23 one, I heard a lot of evidence that's not in the record.  
24 It's not in the brief. What I heard was the key issue and  
25 the reason why we can prevail is she admitted there was no

1 fraud. That's not right. She said: I didn't think I was  
2 defrauded, but I did not look into it.

3 She went on to say, I would have wanted to know it  
4 was a fraud. And she went on to say the most important  
5 thing, which is, when I made my purchase decisions after May  
6 13th, it was based on the stock price.

7 So whatever admission they think they got, that  
8 doesn't carry the way to establishing that Norfolk -- that  
9 Capital did not rely on the integrity of the market price  
10 when they made their purchase decisions.

11 THE COURT: All right. I see facial expressions  
12 and shaking heads from the defense side, and that's not  
13 professional, but I am going to rule against these motions.

14 So now we need to move on to the jury instructions.

15 Thank you for your argument, counsel.

16 Mr. Gronborg, I understand your position. I appreciate the  
17 papers, but I'm denying the motion.

18 I'm now looking at the agreed-upon instructions,  
19 and I'm turning first to page 5. Who can describe the  
20 dispute here? I note, counsel, that I received, sent to me  
21 here in chambers I guess yesterday, this January 27th, 2019,  
22 paper.

23 It did give -- it did give me a heads up, but it  
24 said you were still -- finish your conversation. Did you  
25 finish it?

1 MR. GRONBORG: Yes. I'm sorry.

2 THE COURT: I read it. It said you were still  
3 talking, so I didn't really want to devote a huge lot of time  
4 to see what might be resolved. So I think it's best now to  
5 just simply look at the instructions which have been  
6 conveniently identified.

7 First is on page 5: Certain exhibits are documents  
8 known as analyst reports. Boy, this seems to be new. Who's  
9 presenting this?

10 MR. CLUBOK: I hate to interrupt --

11 MR. GRONBORG: There is no issue actually. The  
12 reason we had flagged this was we had put in the bracketed  
13 language about the exhibit numbers. We just wanted to flag  
14 it. We weren't sure if you actually wanted to read out the  
15 exhibit numbers the limiting instruction applied to or not.

16 THE COURT: Oh, I definitely think we should  
17 include that. So please remove the brackets as you go  
18 through your corrections. Okay?

19 MR. CLUBOK: Yeah, that was it. And we have no  
20 dispute. We just didn't know what your preference would be.

21 THE COURT: Good. Thank you for that.

22 Next we have on page 17: Because knowing conduct  
23 is an essential element of plaintiffs' claims. So who would  
24 like to address that? Actually, let me just read it to  
25 myself and decide who's going to address it.

1           Just a moment.

2           (Court reading document)

3           THE COURT: So this is the good-faith instruction.  
4 All right. So, I previously gave my thoughts on this. Any  
5 new thoughts would be particularly welcome, but my tentative  
6 is against giving this. So I'll hear from the defense.

7           MS. GRANT: Thank you, Your Honor.

8           Good morning. On Friday I understand we left off  
9 on a little bit of a dilemma on this instruction between  
10 Your Honor's decision in Schultz and Judge Selna's decision  
11 in Moshayedi. On the choice between those two --

12          THE COURT: Wait. Hold on. You opened by  
13 referencing Schultz. Then you referenced Judge Selna. Good  
14 place to start.

15          MS. GRANT: So on this tension, I think we have  
16 good news. We believe both of those decisions are correct,  
17 but only one is applicable here. Schultz, like the rest of  
18 the authority that plaintiff relies on, is a criminal case,  
19 and the intent standard in those criminal cases is much  
20 higher. They all involve an intent to defraud.

21          So in those cases there would be no need for a  
22 good-faith instruction to clarify the standard. It would be  
23 repetitive. With the intent to defraud standard, it's not  
24 possible for a jury to simultaneously find that a criminal  
25 defendant acted with the intent to defraud and also acted in

1 good faith.

2 THE COURT: What about United States versus  
3 Shipsey?

4 MS. GRANT: Well, Your Honor, that case only found  
5 that the defendant did not have a right to an instruction  
6 that the government was required to prove affirmatively that  
7 there was no good faith because that instruction was not  
8 necessary.

9 In that case, even notwithstanding that decision,  
10 that case, the District Court actually did provide some  
11 instruction on good faith and instructed the jury that it was  
12 permitted to consider the defendant's good faith in deciding  
13 whether or not there was an intent to defraud.

14 We think that case is not inconsistent with a  
15 separate decision in a civil case under 10(b)(5) where the  
16 standard is knowingly, a standard that, while it may be  
17 familiar to lawyers, is a little bit more difficult to apply  
18 for juries.

19 When faced with an instruction on recklessness, the  
20 law may not be clear to them that good-faith conduct cannot  
21 also be reckless. The Ninth Circuit and other Courts have  
22 said that, that at the fact-finding stage --

23 THE COURT: Wait. Have said what?

24 MS. GRANT: That at the fact-finding stage,  
25 scienter is a subjective standard. That standard is not met

1 when the defendant acts in good faith. I think that the  
2 Ninth Circuit in SEC versus Gebhart actually referenced the  
3 quote about white heart and empty head not being enough for  
4 scienter.

5 Here we believe the good-faith instruction is not  
6 repetitive or superfluous at all, but instead necessary and  
7 appropriate to clarify the knowing standard. That's why we  
8 think there have been numerous 10(b)(5) cases that have  
9 charged the jury on knowingly and good faith at the same  
10 time. This includes the Avendi, Avayo, JDS Uniphase, Toray,  
11 and again Moshayedi.

12 All of the authorities that plaintiff listed out on  
13 Friday -- I think he called it a litany of authority -- not  
14 one of those is a civil 10(b)(5) case and so should not guide  
15 Your Honor's decision in the first instance about whether or  
16 not a good-faith instruction is appropriate here.

17 THE COURT: All right. Just a moment.

18 (Pause in proceedings)

19 THE COURT: Talk to me more about criminal cases  
20 not applying. It seems to me the Court would be perhaps more  
21 concerned about protecting a criminal's rights than a civil  
22 defendant's rights.

23 MS. GRANT: Well, two points on this. So the Ninth  
24 Circuit pattern instruction on an intent to defraud is that  
25 it is an intent to deceive or cheat. So it's not that a

1 good-faith instruction is not appropriate but simply that it  
2 is not necessary because it -- there's no need to clarify  
3 what an intent to deceive or cheat is.

4 Secondly, none of these Courts have held that it's  
5 inappropriate to grant a good-faith instruction on this in  
6 the first instance. In fact, the Ninth Circuit pattern  
7 instruction on an intent to defraud actually includes  
8 proposed language on how good faith or the interplay between  
9 good faith and the intent to deceive or cheat.

10 So the Ninth Circuit pattern provides Courts some  
11 guidance on how to instruct on good faith with an intent to  
12 deceive or cheat. And we believe here in a civil case, it  
13 would be more appropriate simply because the standard is  
14 lower and less readily applicable or more difficult to  
15 understand for a jury because it includes recklessness.

16 THE COURT: You know, my understanding of the cases  
17 or at least some of the cases are that there's no right to a  
18 good-faith instruction when the jury has been adequately  
19 instructed regarding intent. You've hinted at that. Tell me  
20 again explicitly why the present instructions as to intent  
21 are not adequate.

22 MS. GRANT: The knowingly standard and specifically  
23 recklessness is difficult to apply. Courts have spent a long  
24 time -- I know we studied them in law school going back and  
25 forth on what exactly recklessness is and what conscious

1 reckless or deliberate recklessness is required. And in  
2 a case like this -- sorry. Let me back up.

3 There have been numerous 10(b)(5) cases that have  
4 provided additional guidance on what exactly is required for  
5 that recklessness standard. The majority of them have  
6 provided good-faith instructions. We would submit that based  
7 on that precedent, numerous Courts have found that it's  
8 appropriate to further clarify what the Court means by  
9 recklessness.

10 THE COURT: All right.

11 Plaintiff.

12 MR. GRONBORG: Starting at the end, I've seen no  
13 evidence of a majority of cases have provided a good-faith  
14 instruction in this context or any others.

15 THE COURT: What if I give Judge Selna extra  
16 points?

17 MR. GRONBORG: Sure, I'll give Judge Selna extra  
18 points. And perhaps in that case there was some basis for  
19 it. But again, was there a good-faith defense there? It was  
20 certainly an SEC case. Other issues.

21 I think the point -- there's the clear Ninth  
22 Circuit -- who should probably get the most points of all --  
23 precedent, which is these are not necessary. And to the  
24 point you were making, if it's not necessary in a criminal  
25 context and it's clear the --

1 THE COURT: I'm interrupting only because what  
2 you're about to say is important to me. Again, describe the  
3 distinction between criminal and civil. You started to say  
4 it. If it's not necessary in...

5 MR. GRONBORG: Well, I think there would be a  
6 heightened concern in a criminal case versus civil case, but  
7 I think to the point being made here, the description, the  
8 intent description, it is not as if the intent description in  
9 a criminal case builds in the good-faith language that is  
10 missing from the civil knowing and reckless standard.

11 There's not a distinction to be drawn there, and so  
12 hence if there is not a concern in those criminal cases,  
13 there's no need to add a good-faith instruction. There's  
14 certainly none here.

15 The concern that it expressed in all of the Ninth  
16 Circuit cases and should be one here is frankly this makes  
17 the job more confusing. There are almost -- there are  
18 inherent contradictions in the proposed good-faith  
19 instruction that frankly just run counter to the agreed-upon  
20 intent instruction.

21 Frankly, I think the instruction on reckless,  
22 however many cases there may have been, is not confusing.  
23 It's highly unreasonable conduct that is an extreme departure  
24 from ordinary care presenting a danger of misleading  
25 investors which is either known to the defendant or is so

1 obvious that the defendant must have been aware of it.

2 That strikes me as fairly clear, and any good  
3 faith -- certainly the proposed good-faith instruction then  
4 just confuses that issue and sort of creates a separate  
5 element that doesn't exist in these cases in the model  
6 instructions.

7 THE COURT: All right. I'm looking at page 65 of  
8 your previous briefing on this, document 687.

9 MR. GRONBORG: Yes.

10 THE COURT: Looking at page 10, you say: But in  
11 the Ninth Circuit, it is, quote, well settled, end quote.  
12 Where does the word well settled come from? You put it in  
13 quotes. Do you have those papers?

14 MR. GRONBORG: I have the papers --

15 THE COURT: I mean, it's an odd way of writing a  
16 brief where you just kind of say well settled.

17 MR. GRONBORG: It is from Shipsey, so the words  
18 well settled are actually in Shipsey at 967.

19 THE COURT: Okay. But wasn't the instruction given  
20 in Shipsey?

21 MR. GRONBORG: It wasn't given. The jury was told  
22 at some point that they could consider, which is different  
23 from a burden, that they could consider good faith. I know  
24 -- I've not read the full set of instructions, but it was not  
25 a separate instruction. It was nothing like this where there

1 is a separate independent instruction given. It was simply  
2 that is among the evidence that could be considered.

3 So it was certainly not shifting a burden and  
4 saying there is some burden to disprove good faith.

5 THE COURT: Beginning at line 13, you go on and  
6 cite maybe four or five other cases.

7 MR. GRONBORG: Yes.

8 THE COURT: They all start with the words  
9 United States.

10 MR. GRONBORG: They do.

11 THE COURT: How come you don't give one that  
12 doesn't start with United States?

13 MR. GRONBORG: Those are the cases that go up to  
14 the Ninth Circuit --

15 THE COURT: Ah, interesting point, I think raised  
16 by the defense previously, that civil cases like this don't  
17 get appealed much. Adding to that, criminal cases do. Okay.  
18 Interesting. All right. Go ahead.

19 MR. GRONBORG: If you don't have -- I mean, we find  
20 that judges, that your tentative on this was accurate, that  
21 this instruction is both unnecessary; and that particularly  
22 as worded, it would just create more confusion.

23 THE COURT: Okay. I appreciate the argument.  
24 Since my tentative right now is in favor of the plaintiff,  
25 I'll let the defense close.

1 MS. GRANT: Just two additional points, Your Honor.  
2 The fact that there are no Ninth Circuit civil cases on this  
3 I think is simply reflective of the fact that most -- that of  
4 the very few 10(b)(5) cases that do go to a jury trial, all  
5 of them have provided some clarifying language on what it  
6 means to be knowingly.

7 As Your Honor points out, in plaintiffs' briefing  
8 all of the cases that they rely on are criminal cases. They  
9 have not identified one case where a civil 10(b)(5) defendant  
10 has requested and been denied a good-faith instruction.

11 THE COURT: Okay. Anything else? Nothing else?

12 All right. You can mark down defendants' proposed  
13 instruction originally number 11, now at page 17 of the  
14 document that has just been handed to me, that instruction is  
15 rejected.

16 Let me just add a footnote. Counsel, do you what  
17 you need to do in making your record. Historically I've  
18 sometimes tried to appeal decisions against me based on jury  
19 instruction rulings. Just make your record clear. Maybe  
20 you want to file -- I don't have a file number, but I assume  
21 you're filing this closing jury instructions document, just  
22 so other people will know what we're talking about.

23 All right. That proposed instruction is rejected.  
24 That gets us to page 19. Okay. Now, this concerns the  
25 investment advisor. It has in red, alternative Court

1 instruction. So who wants to tell me what's going on here?  
2 And then, by the way, I believe I also have the e-mail I got  
3 yesterday. So I guess I should turn to the plaintiff. It  
4 looks like I've got three things in front of me.

5 Let me ask this: Is the e-mail I got yesterday  
6 reflected on page 19?

7 MS. GRANT: Yes, it is.

8 MR. GRONBORG: Yes, Your Honor.

9 THE COURT: Is that exactly 19?

10 MR. GRONBORG: It's the alternative, so the second  
11 half of 19. There's the original, defendants' original  
12 proposed delegation of authority, and then the alternative  
13 that was e-mailed to you yesterday is right below it.

14 THE COURT: Okay. So let me give you my tentative  
15 thoughts. You know, initially I was kind of saying how come  
16 the Ninth Circuit instructions don't have it. Defendant may  
17 have answered that question by -- I don't know that you  
18 specifically said this, so I'll say it. The Ninth Circuit  
19 instructions have an agency instruction that isn't  
20 necessarily found in the securities law section. They have  
21 an agency instruction, which is appropriate in cases where  
22 agency -- where an agent is involved.

23 That kind of gets me over that hump, leaning in  
24 your favor on that point. But then I wonder if this just  
25 provides unnecessary confusion. So, go with all of that.

1 You score points by me observing that it's just an agency  
2 instruction, and you get that in cases involving agents.

3 Go ahead.

4 MS. GRANT: Yes, Your Honor. So we believe this  
5 instruction is necessary in either form because the jury has  
6 heard a lot of evidence at the most basic level that Capital  
7 purchased on behalf of -- Capital purchased the stock for  
8 which Norfolk is claiming losses on.

9 We believe both instructions are an accurate  
10 statement of law, and the jury needs some tool to be able to  
11 evaluate that evidence and decide what actions and/or  
12 omissions of Capital are attributable to Norfolk.

13 THE COURT: My tentative is with the defense.

14 Go ahead. Tell me why we shouldn't just give a  
15 slightly modified agency objection.

16 MR. GRONBORG: Well, the issue we have with the  
17 alternative agency is -- I mean, one, these are designed for  
18 cases in which you have an agent or a principal as a  
19 defendant.

20 If you look around each of these model  
21 instructions, that's the intent, and you can -- the very end,  
22 the last one, any act or omission of an agent within the  
23 scope of the authority is the act or omission of the  
24 principal.

25 These are used in cases where the agent or the

1 principal either has a counterclaim or is a defendant. There  
2 really is --

3 THE COURT: Hold on. Just give me a chance here to  
4 think. You're suggesting those last lines appearing at  
5 basically lines 21 -- appearing at lines 20 and 21 of page 19  
6 only apply when -- well, maybe I'm not understanding.

7 Go ahead.

8 MR. GRONBORG: This instruction within the model  
9 rules is in the context of other rules which are discussing  
10 agents or principals as defendants, hence the discussion of  
11 an act or omission of an agent within the scope of authority.

12 So the rules sort of preceding it and following it,  
13 that is the context in which this instruction is given. It  
14 is not particularly applicable here. You know, there is no  
15 claim or charge against either the principal, which would be  
16 Norfolk here, or the agent, which would be Capital.

17 There's no act or omission that is at issue. So  
18 it's a -- it's hard for me to understand how a jury would  
19 hear this and be trying to figure out what there is, or, you  
20 know, defense counsel suddenly going to be claiming that  
21 there are omissions that were done by an agent.

22 So the second part of it, the second issue is in --  
23 at lines sort of 14 through 16 or 17, is the description of  
24 what an agent is, including one who is subject to the other's  
25 control or right to control the manner and means of

1 performing the services.

2 And Capital is an agent of Norfolk, but frankly the  
3 whole discussion -- and it's not a disputed discussion -- is  
4 that Capital had discretion to make these purchases. I mean,  
5 the implication here is somehow that it is Norfolk that is  
6 controlling them, you know, and is making them make the  
7 decisions, which I don't think is what defendants want to  
8 imply. It's certainly not what we've implied. It's just not  
9 the facts that the jury has heard.

10 So it frankly runs counter to the undisputed fact  
11 that Capital has discretion to make these purchases. So  
12 again, it may be the language that is in the model rules, but  
13 it is not language that fits the relationship that has been  
14 described here between Norfolk and Capital.

15 So it is hard to see how that, you know, helps and  
16 doesn't confuse, given there is no dispute. It's not a case  
17 where, you know, plaintiffs are disputing that Norfolk has  
18 discretion to make the purchases on behalf of Norfolk.

19 THE COURT: I think agents often act with some  
20 discretionary authority. For example, I may tell my  
21 gardener, make my yard pretty. The gardener makes a decision  
22 to trim the hedges or cut the roses sometimes a little bit  
23 too early in January.

24 That's what agents do. It's not unusual that an  
25 agent has discretion to make the decisions. I think you can

1 address that in closing statement based on testimony that I  
2 can recall. They were using some form of discretion like my  
3 gardener trimmed my roses two weeks ago.

4 MR. GRONBORG: I understand, though I -- the point  
5 being that I don't think there's any dispute. I mean, we've  
6 all agreed to stipulate that Capital has the discretion to  
7 trade on behalf of Norfolk.

8 So to the extent this is implying actually  
9 something other than that fact, I don't -- I mean, frankly  
10 the prior version of the instruction that is not based on any  
11 model rule is actually closer to what the actual relationship  
12 is.

13 THE COURT: All right. I'm going to give the  
14 alternative Court instruction number on page 19. Mark that  
15 down as a given.

16 MR. GRONBORG: Well, Your Honor, again if I  
17 could -- to make the record, if we are going to give an  
18 instruction on this, I would be -- the prior, the original  
19 one is better than the alternative. We don't think it's  
20 necessary, but the original instruction about delegating  
21 authority to the investment advisor is a better description.

22 THE COURT: All right. Now I need to do that.  
23 Just a moment.

24 Let me just ask. If defense agrees, we're done.  
25 If not, I'll make a ruling as to which is best. Okay. Now

1 I'm inclined to give the first version. What does the  
2 defense have to say? It's a little hard to argue against  
3 your first version, but under the circumstances you may.

4 MS. GRANT: We also like the first version,  
5 although we spent some time looking for something more akin  
6 to agency in the pattern instruction. So I personally also  
7 like the second instruction.

8 The only thing that we would ask the Court to  
9 consider is whether there is any use for something like the  
10 last line of the alternative instruction which specifically  
11 attributes acts or omissions of the agent to the principal.

12 THE COURT: Well argued. Good point, but I'm just  
13 going to give your original instruction. The last line was  
14 raising particular opposition from the plaintiff with some  
15 reasonable arguments, so I'm giving the first version.

16 All right. That brings us to, I think, our last  
17 jury instruction in dispute. If so, I commend the parties  
18 for their good work. That's on page 21 of the recent  
19 submission.

20 Okay. So this is the money damages issue. Who  
21 wants to address this?

22 MR. GRONBORG: I will. It's perhaps the smallest  
23 of all changes. As you recall, last week we raised our  
24 concern about plaintiff bearing the burden of separating out  
25 the share price decline as a --

1 THE COURT: Finish your sentence. Let me just say  
2 --

3 MR. GRONBORG: We raised our concern. Go ahead.

4 THE COURT: Can I just read this to myself? The  
5 issue is whether I do what's in yellow or what's in bold?

6 MR. GRONBORG: What's in yellow is what was in the  
7 proposed, your language. What is in bold, you'll notice we  
8 moved the "any." We added an "if" and moved the any to later  
9 in the sentence to address our concern that it was  
10 presupposing that there were other factors that needed to be  
11 separated out.

12 THE COURT: Okay. Let me just make my sentence  
13 again and see if I'm wrong. Is my decision to decide whether  
14 to include the highlighted or the bold?

15 MR. GRONBORG: No. Your decision is keep the  
16 highlighted or replace the highlighted with the bold.

17 THE COURT: I thought that's what I was saying.  
18 Okay. I got it. Just a moment.

19 So does it all focus on the if any?

20 MR. GRONBORG: Yes.

21 THE COURT: Yeah, I think that's appropriate. What  
22 does the defense say about the if any.

23 MS. GRANT: We believe it would be accurately  
24 captured in Your Honor's original writing, but it's fine.

25 THE COURT: I'm accepting the if any. Yeah. I'm

1 definitely accepting the if any, so plaintiffs' variation.  
2 So I will give the instruction on page 21 with the phrase if  
3 any. Are there any other instructions to address?

4 MR. GRONBORG: No.

5 MR. CLUBOK: There are from us, Your Honor. Two  
6 things. One, we appreciate, and I see this document bears  
7 signature pages for both parties which I just noticed. I  
8 think this is perhaps what Your Honor was referring to. I'm  
9 not positive.

10 We certainly as defendants are not agreeing to  
11 these instructions to the extent they're inconsistent with  
12 the proposed instructions we already gave. This was our  
13 effort. We're not --

14 THE COURT: Cutting to the chase, you're not  
15 agreeing to these. These are part of a continuing process?

16 MR. CLUBOK: That is correct.

17 THE COURT: I agree with that.

18 MR. CLUBOK: Thank you.

19 THE COURT: And, you know, for the record, what  
20 goes to the jury will not be signed by parties. Okay?

21 MR. CLUBOK: Correct.

22 THE COURT: Next.

23 MR. CLUBOK: And I realize this is covering old  
24 ground, but just to be very clear for the record,  
25 particularly given the opportunity we've had a chance on both

1 sides to review all the facts in anticipation of the closing,  
2 I just want to very clearly state that with respect to the  
3 specific statements as summarized, the one, two, three, four  
4 statements that relate to DFS rates, grade-three plus  
5 diarrhea, KM curves, and discontinuation rates, the facts as  
6 adduced at trial and as properly should be argued are all  
7 purely about misstatements with relation to those four facts,  
8 not omissions, unless every single misstatement case, the  
9 flip side is omission.

10 I know I've raised this before, and I just wanted  
11 to raise it again for the record.

12 THE COURT: I don't know what you want me to do.  
13 Those were a lot of words. Do you need me to do something?  
14 You just made a record.

15 MR. CLUBOK: We would like you to reconsider your  
16 decision to let the jury believe that this -- or have an  
17 instruction on omission with respect to four specific factual  
18 statements that the only evidence at all in the record of an  
19 omission is simply that they didn't allegedly tell the truth  
20 about the factual statement.

21 They supposedly, for example, knew the DFS rates  
22 were 2.3 when they led the market to believe they were four  
23 or five.

24 THE COURT: Okay. Hold on. I'm getting a lot of  
25 words. Can you in one sentence tell me what you're

1 addressing right now, what you want me to do?

2 MR. CLUBOK: I would like you to remove the  
3 omission instruction.

4 THE COURT: You're rearguing omission. Okay.  
5 Respectfully denied.

6 MR. CLUBOK: Thank you.

7 THE COURT: Moving on to page 26 of what has just  
8 been given to me, I don't explain the verdict form. All  
9 right. Do you see page 26?

10 MR. GRONBORG: We'll remove that.

11 THE COURT: Okay. That concludes the jury  
12 instructions as I understand it.

13 Now, you'll make those changes. You'll add the  
14 opening instructions.

15 MR. GRONBORG: Correct.

16 THE COURT: And that will take care of that.

17 MR. GRONBORG: How would you like us to get -- we  
18 can go do that now. What's the best way to get this to you?

19 THE COURT: First of all, I want something handed  
20 to me where both sides have agreed reflects their positions  
21 and more importantly my rulings, and they agree this is the  
22 best order to give them.

23 And if you come to that conclusion quickly, you can  
24 spend the rest of the day constructing your closing argument  
25 around it. So come to that conclusion quickly. Distribute

1 it amongst yourselves, and hand it to me tomorrow and I'll  
2 read it starting, you know, ten instructions in, ignoring the  
3 first ten or so which have already been given. Does that  
4 explain it?

5 MR. GRONBORG: I assume we can reach a quick  
6 agreement. You don't want us to e-mail it?

7 THE COURT: You don't need to e-mail it if you  
8 bring it in tomorrow with all of your agreement. That would  
9 be great.

10 Then let's turn to the verdict form. I have done  
11 no work since last Friday, hoping you would come to a  
12 resolution. I commend counsel for working over the weekend.  
13 I have plaintiffs' version and defense version.

14 I invite you but don't require you to put something  
15 up on the screen and tell me where the dispute is, or simply  
16 proceed as you think best.

17 MR. GRONBORG: You have the two versions in front  
18 of you?

19 THE COURT: I do.

20 MR. GRONBORG: Okay. I think -- so the first is  
21 hopefully a very easy issue. Actually if you go to  
22 defendants' form.

23 THE COURT: Got it.

24 MR. GRONBORG: They've bracketed the language.  
25 There are a number of places in the instructions where they

1 have a preference to add alleged fraud. Plaintiffs' position  
2 is having sort of made a decision about, you know, alleged  
3 false statements, that having made, answer question one. If  
4 they answer that yes -- if they say no, they don't go on.  
5 But if they say yes, they made false statements, that it  
6 doesn't make sense to in the subsequent questions refer to  
7 them as alleged because at that point they have decided that  
8 there are misrepresentations and omissions made.

9 And not to make their argument, but we discussed it  
10 last night. I understood the concern was we would in closing  
11 sort of stand up and use the verdict form, and if it didn't  
12 say alleged on it, that somehow would imply that the decision  
13 had already been made, which I can say we don't have an  
14 intent to do.

15 But we are worried that including alleged false  
16 statements confuses the issue if the jury has already decided  
17 they are false statements.

18 THE COURT: Well stated. Interesting point. I'm  
19 up in the air.

20 Response.

21 MS. GRANT: Plaintiffs' counsel accurately stated  
22 our concern, which is that many of these verdict form  
23 questions will appear in the parties' closing slides, and we  
24 don't think that it's appropriate at that time to  
25 characterize any of the statements as fraudulent -- false or

1 misleading statements without a qualifier of alleged.

2 THE COURT: You know, I would also add that my  
3 experience is juries go through the whole thing first  
4 without -- like, not touching two until they answer one.  
5 They read the whole thing, figure out what they need to do,  
6 and then come back. That makes me think alleged is a good  
7 thing to do.

8 What do you say?

9 MR. GRONBORG: I'm not going to use political  
10 capital on it.

11 THE COURT: Okay.

12 MR. GRONBORG: If I have any -- we discussed it.  
13 It was not a huge -- we both understood each other's point.

14 THE COURT: You can briefly say in closing  
15 argument, it says alleged. But if you're there, it's not  
16 alleged. You have found. I mean, you can say that.

17 MR. GRONBORG: I will say the only real concern I  
18 have is with respect to damages, that if, for example, the  
19 jury finds that there are certain false statements that were  
20 not false and misleading -- I hope they don't -- but then  
21 they think we have to write down damages for every alleged  
22 statement as opposed to those that they found false and  
23 misleading, that's there's a potential for confusion there.

24 THE COURT: I think you can handle that in your  
25 closing.

1 MR. GRONBORG: I think we can as well.

2 THE COURT: First page, that's the only dispute,  
3 and I'm saying include alleged.

4 Going to the second page.

5 MR. GRONBORG: I think that is the only -- correct  
6 me if I'm wrong, but I think that is the only dispute on the  
7 verdict form itself. There is a separate dispute on the  
8 appendix, but that's it.

9 THE COURT: All right. So on page 2 you're going  
10 to include the word alleged.

11 MR. GRONBORG: Yes. I understand you're telling me  
12 to, so...

13 THE COURT: Section four. Very good.

14 Then that gets us to disputes about the statements,  
15 right?

16 MR. GRONBORG: Correct, to the appendix.

17 THE COURT: I'm now in the appendix, and I'm  
18 looking at the front page. So we're back to adding those  
19 words. Let's see.

20 MR. GRONBORG: I believe defendants, the first  
21 bracket, so a number one, the bracket is actually language  
22 they would remove. And point two, the grade-three diarrhea  
23 rate.

24 THE COURT: Hold on. Let's just focus on point one  
25 to begin with. Let's see. What is defense's position on

1 number one?

2 MS. GRANT: We believe it might be more appropriate  
3 to remove this here because --

4 THE COURT: Okay. Remove what?

5 MS. GRANT: Remove the language in Mr. Auerbach's  
6 answer about the main AE because --

7 THE COURT: Okay. I'm not -- okay. I'm just  
8 trying to make a record for you. Do you mean remove the  
9 language in brackets in defendants' proposed --

10 MS. GRANT: Yes, Your Honor.

11 THE COURT: And that begins with "and then."

12 MS. GRANT: And then in terms of the safety  
13 profile, yes.

14 THE COURT: All right. And the plaintiff says what  
15 about removing that?

16 MR. GRONBORG: Well, it's the full question and  
17 answer. It is the way we've presented it here as exactly as  
18 the jury has heard it over and over. As they'll read it, we  
19 have put in bold sort of the items that are specifically tied  
20 to disease-free survival.

21 THE COURT: I'm not catching what's in bold. What  
22 are we saying about bold?

23 MR. GRONBORG: So this is about the disease-free  
24 survival. So in bold and italics in part one are the  
25 portions that are very specifically tied to disease-free

1 survival. That's in both parties.

2 THE COURT: Okay. So everyone agrees to say, so in  
3 terms of DFS -- so in terms of the DFS of the placebo.

4 MR. GRONBORG: Correct.

5 THE COURT: You all want that. Do you all want it  
6 bold and italics?

7 MR. GRONBORG: We've all agreed on that.

8 THE COURT: Okay. So the only thing that's up to  
9 me to decide is whether to include the portion in brackets?

10 MR. GRONBORG: Correct.

11 THE COURT: And what is the defense -- the  
12 plaintiffs' position -- the strongest -- the plaintiffs'  
13 strongest position to include it is that that's what was  
14 referenced to the jury?

15 MR. GRONBORG: Correct.

16 THE COURT: And the defense says? I mean, I could  
17 ask what was alleged in the complaint and what was alleged in  
18 the interrogatories.

19 MR. GRONBORG: It is also how it was alleged in the  
20 complaint and the pretrial order.

21 THE COURT: Ah.

22 MS. GRANT: We're fine on this particular  
23 statement, including that. We just think it may create some  
24 confusion with the next statement where that language is also  
25 fully included.

1 THE COURT: All right. So let me just read this.

2 All right. So I'm going to include the underlying  
3 portion in section -- statement one. I'm going to include  
4 that. I guess the next issue presented to me is section two.  
5 Who would like to describe for me what I must decide here?

6 MR. GRONBORG: On section two on defendants'  
7 version, the bracketed and underlined language there --  
8 you'll see there's quite a bit of it -- is all language that  
9 defendants want to add to the description of the statement  
10 that plaintiffs have included.

11 THE COURT: Okay. And why do you want to add it?

12 MS. GRANT: Your Honor, if the Court is going to  
13 instruct on omissions and agree that this is an omissions  
14 case, we believe that all of the language surrounding the  
15 alleged false statements would also be relevant and should be  
16 considered in this document by the jury.

17 THE COURT: That's a powerful statement.

18 What does the plaintiff say.

19 MR. GRONBORG: The title of this appendix is  
20 alleged false and misleading statements. None of the  
21 bracketed underlined information was alleged as false and  
22 misleading. It wasn't in the complaint, never in any  
23 interrogatory, not in the pretrial order, not what was played  
24 to the jury.

25 If defendants' worry is context, we've already

1 included at the top of the appendix, see Exhibit 103 for the  
2 full transcript. So they have the full transcript. But to  
3 suggest that we have alleged that these are false and  
4 misleading is incorrect.

5 The fact that there are omissions, our pleading  
6 identifies the statements that triggered the duty to  
7 disclose. They are not what are underlined and bracketed  
8 here. They are exactly as plaintiffs have included it in  
9 their version of the appendix.

10 THE COURT: All right. Let me just read it for a  
11 moment.

12 (Court reading document)

13 THE COURT: Okay. I'm going to include the  
14 bracketed portion beginning under statement two and going to  
15 the first asterisk, the first three asterisks.

16 Is there anything I need to decide after that?

17 MS. GRANT: There's a similar issue, Your Honor, in  
18 the later statements where there's other bracketed language  
19 that plaintiff would like to not include and we would like to  
20 include.

21 THE COURT: Okay.

22 MR. GRONBORG: Your Honor, I -- do you mind giving  
23 an explanation of why we're including that language? Because  
24 I -- I don't understand. It's an appendix of alleged false  
25 statements, and that is not anything that has ever been

1       alleged to be a false statement.

2               The implication is we need to prove that is false,  
3       and we have never alleged falsity or misleading with respect  
4       to that language.

5               THE COURT: I invite you to respond to what I'm  
6       about to say. False statements have to be viewed in context  
7       and in follow-up statements, and I can imagine that follow-up  
8       statements help provide context for the actual false  
9       statement.

10              I know you say that they can look elsewhere, but  
11       this is a simple summary that I have relied on. Also, the  
12       issue of omissions, it might or might not be helpful in  
13       guiding them on the omissions section, and those are two  
14       reasons to start with.

15              What would you say? First of all, you would say  
16       they can look at the whole transcript. Second of all --  
17       well, go ahead. Make your argument.

18              MR. GRONBORG: This is why I saved my political  
19       capital. On the issue of context, that simply just becomes a  
20       slippery slope. I mean, what is the context, then the  
21       information he received? The appendix is what is alleged to  
22       be false.

23              The context is what this trial has been about, what  
24       defendants are arguing about, what plaintiffs are arguing  
25       about. This is purely telling the jury, is this statement

1 false, and including in that language that plaintiffs have  
2 never alleged as false. It's never been played to the jury.  
3 We've never told the jury that these are statements that are  
4 false.

5 It simply is incorrect. It is factually incorrect.  
6 That's not what this is an appendix of. And they have the  
7 exact context. I mean, I -- you say it's not enough just to  
8 point to -- Exhibit 103 is going to be right in front of  
9 them.

10 Every single witness has referenced it. They're  
11 going to have it. So I think to create -- the notion of  
12 context doesn't apply when we are creating an appendix of  
13 what it is that has been alleged to be false and what the  
14 jury has to decide is false.

15 They should consider all of the context, not just  
16 some piece. And all of that context will go, but the context  
17 does not define what is alleged be false or misleading.

18 On the issue of omissions, the fact that there are  
19 alleged omissions doesn't sort of create a different need for  
20 context. The omissions are triggered by an alleged  
21 statement. We've pled that in this case, and defendants  
22 don't get to change what the alleged false statement is that  
23 we have pled consistently throughout the case.

24 THE COURT: All right. You know what? Consider  
25 your argument as I reread this again. Just a moment.

1 (Court reading document)

2 THE COURT: I've read all of the bracketed items  
3 under statement two all the way up to statement three.  
4 Again, my tentative is to include it.

5 I hold open the possibility of adding in the  
6 description of the appendix to say appendix of text involving  
7 alleged false and misleading statements, adding the word  
8 appendix of adding text involving. You may or may not want  
9 that. It is an attempt to sort of respond to your concerns.  
10 But give me more argument this.

11 You know, there's complexity. I can imagine  
12 someone making a misleading statement or inaccurate statement  
13 and then including other words that put it in context. Let  
14 me think of an example.

15 I'll just throw it out off the top of my head. My  
16 gardener doesn't follow my instructions. I have told him to  
17 make the garden look beautiful, and I have suggested  
18 overtrimming is not a good thing. And I came home yesterday  
19 and found the roses were trimmed, period.

20 I think you need the last to fully understand  
21 whether the first was inaccurate. That may not be the best  
22 example, but this is a man talking off the cuff. These are  
23 off the cuff. These are not prewritten statements. I think  
24 they're off the cuff responding to questions, right?

25 MR. GRONBORG: He knows who's asking the questions

1 and he knows what questions are coming basically.

2 THE COURT: That's a good point. And he could have  
3 thought it through his head ahead of time. I'm going to say  
4 that, but I'm going to put in this qualifier. But that's my  
5 concern.

6 And I do think attaching an appendix to the special  
7 verdict form, which is appropriate in these kind of cases, is  
8 a powerful statement. So I'm inclined to give it. If the  
9 plaintiff wishes, I will say appendix of text involving  
10 alleged false and misleading statements.

11 MR. GRONBORG: Your Honor, I --

12 THE COURT: You know, there's even things -- I know  
13 politicians who say things, and then two sentences later they  
14 say a different thing. I won't use any examples under the  
15 circumstances.

16 But if you were to say the politician is lying,  
17 you've really got to read what he said -- what he or she said  
18 two sentences later; don't you? I mean, don't you? And  
19 maybe there's a little of that going on here. It's not as  
20 direct as some of the circumstances I can think of, but it  
21 seems to me you've got to look at it in context.

22 MR. GRONBORG: Your Honor, in that case, then I say  
23 we should get rid of the appendix and direct them to 103. It  
24 is not a long document. It's right there. But it is the  
25 impression they get from here, and adding text involving

1 doesn't change it. It is, for example, that plaintiffs need  
2 to prove something about the effect of Imodium. Plaintiff --  
3 there is nothing, no allegation about false and misleading  
4 statements about whether or not they had done a study with  
5 Imodium.

6 THE COURT: Yeah, but the overall thing is whether  
7 the diarrhea results are worth buying more or worth buying  
8 less. What if you were to say the prices went up because  
9 Mr. Auerbach reminded them of the prophylactic effect of  
10 Imodium? What if you were to say that? That's why the  
11 prices went up.

12 MR. GRONBORG: They can say whatever they want.  
13 That's not an alleged false statement. Again, this context,  
14 they can say whatever they want about what he knew, what he  
15 -- what he said, what else matters. But to go and just add  
16 and call these alleged false and misleading statements -- and  
17 text involving just does not solve that problem.

18 It is still saying these are what plaintiffs are  
19 alleging and what they need to prove. There is no obligation  
20 for me to prove that some statement here about the first  
21 cycle effect of Imodium is true or false. That's not my  
22 complaint, not what we alleged was false and misleading. The  
23 omitted facts aren't about Imodium.

24 So this is not what we have alleged. So if -- if  
25 the worry is context and the appendix creates a false

1 impression even though ours exactly matches what's in the  
2 pretrial order, if that's the problem, then I say we get rid  
3 of the appendix and point them to 103.

4 I mean, we have admitted facts about what the  
5 statements are. We can simply read to them the admitted  
6 facts about what the alleged false statement is and point  
7 them to 103 for the full context instead of this picking and  
8 choosing what we decide context is.

9 THE COURT: All right. There is some complexity in  
10 this case. There has been a lot of information dumped upon  
11 the jury. If I were a juror, boy, I'd love this appendix.  
12 So I'm not going to get rid of the appendix.

13 And I'm sticking with my decision here under  
14 section two to give the bracketed statements. So I'm giving  
15 the appendix. I'm giving the bracketed statements. I would  
16 include, if plaintiff wishes, adding, as I did to the title,  
17 and in closing argument you can say here's the false  
18 statement. So that's my ruling as to section two.

19 What's the issue on section three? Same issue?

20 MS. GRANT: Same issue. Less words. It's just the  
21 omission of the statement, et cetera, et cetera, which is at  
22 the bottom.

23 MR. GRONBORG: We can add that. There's just two  
24 different versions of the transcript. One has it; one  
25 doesn't. So et cetera, et cetera, doesn't matter.

1 THE COURT: Okay. Add et cetera, et cetera. That  
2 gets us to four. What's the difference?

3 MR. GRONBORG: I don't think there is any.

4 THE COURT: Good. So we've satisfied ourselves on  
5 the verdict. Do you want to think about my title?

6 MR. GRONBORG: I would.

7 THE COURT: Well, I mean, do you have a different  
8 title?

9 MR. GRONBORG: It obviously needs to have something  
10 of alleged false and misleading statements and, you know,  
11 defendants' proposed -- you know, something that notes that  
12 it's something else.

13 THE COURT: You could say --

14 MR. GRONBORG: On the spur of the moment, I'm  
15 trying to think what it is.

16 THE COURT: Appendix of text surrounding alleged  
17 false and misleading statements.

18 MR. GRONBORG: How about appendix of alleged false  
19 and misleading statements and surrounding text.

20 THE COURT: And surrounding text. Boy, yes. Do  
21 you want that?

22 MR. GRONBORG: No, but I'll live with it.

23 THE COURT: No, no, no. Okay.

24 MR. GRONBORG: But I like it better, you know, if  
25 I'm stuck with --

1 THE COURT: Appendix of alleged false and  
2 misleading statements and surrounding text. Boy, if you take  
3 that as acceptable while still maintaining your objection to  
4 including anything, I would agree unless I hear further from  
5 the defense.

6 MS. GRANT: We're fine with that.

7 THE COURT: Okay. Compromise, for the record,  
8 unsatisfactory to the plaintiff who has been coerced and  
9 forced into accepting it -- seriously. It's the record.

10 All right. I think that takes care of business.  
11 Again, I commend you for your good work.

12 MS. GRANT: Your Honor --

13 THE COURT: Yes.

14 MS. GRANT: -- If I may, I would like to just go  
15 back really briefly to the good-faith instruction and --

16 THE COURT: Really? No. We argued it a long time.  
17 Why do you want to go back? We've been arguing it now for  
18 days and days.

19 MS. GRANT: I understand.

20 THE COURT: Okay. Look, I've got to make decisions  
21 and move on. What do you want to argue that hasn't been  
22 argued?

23 MS. GRANT: I would just like to make an  
24 alternative request that the Court issue some instruction  
25 that the jury may consider good faith even if not our --

1           THE COURT: Really? I said good job. I'm a little  
2 disappointed. Denied.

3           MR. GRONBORG: One other item, Your Honor.

4           THE COURT: Yes.

5           MR. GRONBORG: As you may have recognized, there's  
6 a control person claim, 20(a), which we stripped out the  
7 instruction. We took it out of the verdict form. The  
8 parties have essentially agreed that given we have one  
9 defendant, if there's a 10(b) finding, sort of 20(a) just  
10 tags --

11           THE COURT: Hold on. Hold on. I was moving from  
12 one subject to the other. Tell me what you want me to do.

13           MR. GRONBORG: I'm -- nothing. I'm prepping you  
14 for the parties are working on a stipulation. We think we're  
15 pretty close. We will submit a stipulation that essentially  
16 says whatever the verdict is on the 10(B) claim, sort of the  
17 20(a) follows along.

18           THE COURT: Oh, okay.

19           MR. GRONBORG: I just wanted to alert you to that.  
20 I think we're close.

21           THE COURT: And I'll have that tomorrow morning, or  
22 when?

23           MR. GRONBORG: You should have it maybe this  
24 afternoon.

25           THE COURT: All right. Well, again, it's always

1 great if you say there's this and there's this. We disagree.  
2 Tell me to pick one or the other or add a word here or there.

3 MR. GRONBORG: Right. Hopefully this is one where  
4 there is no disagreement.

5 THE COURT: Thank you. Thank you for putting me on  
6 notice on that.

7 Anything else? I'd like to talk about timing if  
8 there is nothing else.

9 MR. CLUBOK: I have one other request, Your Honor.  
10 I know I have zero political capital, but I'm going to make  
11 this request. I would ask through the Court to ask the  
12 plaintiffs to tell us with -- just tell us what the omissions  
13 are that they are alleging.

14 To the extent of Mr. Gronborg's argument, I know  
15 exactly what misstatements they're alleging. It's in the  
16 complaint. And I just for the record would like to know  
17 before I hear it for the first time in closing argument,  
18 because I do not think we've heard it from the pleadings or  
19 for the entirety of this case what specifically in this fraud  
20 case are the omissions that we are going to have to defend  
21 against.

22 I want to very clearly -- understanding of the time  
23 here and your patience and all and you let us make these  
24 arguments -- ask through Your Honor to have the plaintiffs  
25 tell us what specific omissions they are alleging in this

1 case.

2 THE COURT: All right. I'm not doing that at this  
3 time.

4 MR. CLUBOK: Understood.

5 THE COURT: This is well beyond that. We've  
6 discussed omissions. It could've been presented as a counter  
7 when we discussed omissions. We're -- we've moved beyond  
8 omissions now once, twice, three times. I'm not at this late  
9 hour demanding that.

10 Anything else? Okay.

11 And where are we on timing? I have told you, you  
12 know, maybe 30 minutes for the instructions, which gets us to  
13 9:30. I'm not putting any limits on anyone. I'm simply  
14 asking.

15 How much time will plaintiff need for their opening  
16 closing and rebuttal closing?

17 MR. GRONBORG: Hour and a half for the opening and  
18 half hour for the rebuttal.

19 THE COURT: Okay. So now we are at -- looks like  
20 we're at 11:00 o'clock or thereabouts, not including your  
21 rebuttal.

22 What does the defense then wish?

23 MR. CLUBOK: We would like two hours, Your Honor.

24 THE COURT: Would you be willing to split it at the  
25 noon hour?

1 MR. CLUBOK: Sure. That's fine.

2 THE COURT: Good. So we don't have to be precise,  
3 but be thinking about that. And we'll see you split  
4 somewhere as the noon hour approaches.

5 MR. CLUBOK: I just -- one question. I just may  
6 have heard this wrong. Are you intending to read the  
7 instructions before?

8 THE COURT: Yes.

9 MR. CLUBOK: Okay. You're going to read all the  
10 instructions before closing argument, and then closing?

11 THE COURT: Yes.

12 MR. CLUBOK: Okay. Thank you.

13 THE COURT: Again, it's my state court background.  
14 I'm very open to what you do in closing beyond sitting in the  
15 witness chair and leaning on the jury rail. If you want to  
16 work in the middle, do it.

17 Does anyone wish to work in the middle?

18 MR. CLUBOK: I probably will, Your Honor.

19 THE COURT: Let me tell you what happens if we work  
20 in the middle. All of those microphones, like I see three of  
21 them lined up, I would turn them and have them aimed this  
22 way. You know, make sure the court reporter who you will be  
23 closer to can hear you, and certainly make sure the jury can  
24 hear you. And moving those microphones can help if you wish  
25 to argue from the well.

1 MR. CLUBOK: Thank you. A very small thing. I  
2 think we need to tweak a word or two in the instructions  
3 because I think the way they were written, it says something  
4 like, you've now heard the closing arguments, or something  
5 like that. So we might need to just make a word change to  
6 say you will hear the closing arguments, something like that.

7 THE COURT: Yes. If you want to do that, that's  
8 fine. Sometimes I do that on the fly when I'm reading it.  
9 But, yeah, if you want to do it ahead of time, that's great.

10 Anything else? All right.

11 THE CLERK: An exhibit issue that we talked about.

12 THE COURT: An exhibit issue. Okay. Good. You've  
13 got the exhibits together? You were working here on Friday;  
14 weren't you?

15 THE CLERK: I was.

16 THE COURT: Okay. Where are we on the exhibit  
17 issue?

18 MR. GRONBORG: Exhibit 776 is not on the --

19 THE COURT: Hold on. Let me tell you my  
20 interpretation of my thing, and then we'll see where we  
21 stand. 776. I have 776 admitted on January 16th. Where are  
22 we on that?

23 MS. COOK: The parties met on Friday afternoon and  
24 both agreed that the exhibit had not actually been admitted.  
25 So we --

1 THE COURT: If you both agree, I will remove it.

2 MS. COOK: Right. Thank you.

3 THE COURT: I will tell you that it is possible I  
4 put it in the wrong spot. My biggest concern in removing it  
5 is there's an exhibit that was admitted that I didn't put  
6 down, if you understand.

7 You know, the testimony comes in quick. You'll  
8 know a few times I slowed you down and made you -- I had to  
9 go to the thing. And sometimes I just write real quickly not  
10 to disturb your examination.

11 If both sides agree it's not admitted, it is not  
12 admitted. And I warn you, there's a possibility then that  
13 that should have been placed somewhere else, like 766.

14 MR. GRONBORG: We did not catch -- in addition to  
15 looking what was there --

16 THE COURT: Good.

17 MR. GRONBORG: -- we tried to see if we caught  
18 anything that the parties didn't capture.

19 THE COURT: Or maybe I -- all right. 776 is  
20 omitted. What else?

21 MR. GRONBORG: There's one document we need, I  
22 believe it's exhibit 460, we just need to swap out the  
23 version that's in the binder. Is that right?

24 There is a version that removed the final pages.  
25 We're simply swapping that out in the binder.

1           THE COURT: Do you want us-- well, you see,  
2 ideally -- I admitted that on January 17th. There becomes a  
3 question as to what I admitted. Usually what I admit is  
4 what's in the binder. That's why I get -- I exhibit some  
5 concern, you may have observed.

6           You're now telling me that when I admitted 460,  
7 thinking I admitted what has been provided to the Court, I  
8 didn't?

9           MR. GRONBORG: No. I think what we realized was  
10 the version that was in the Court's binders was not the  
11 version that the parties were then working off of, that there  
12 was a snafu somewhere along the way where those last four  
13 pages hadn't been removed.

14          THE COURT: The parties agree that this SNAMUH has  
15 been corrected, correct?

16          MR. GRONBORG: Yes.

17          MR. CLUBOK: Yes.

18          THE COURT: Messed up.

19          MR. GRONBORG: Maybe --

20          MR. CLUBOK: We do not agree to that word.  
21 Everything else you said we agree to.

22          MR. GRONBORG: I'm too young to know what the  
23 acronym means. I just --

24          THE COURT: You didn't serve in the military.

25          All right. What's next?

1 MR. GRONBORG: That's all.

2 MR. CLUBOK: Your Honor, we have --

3 THE COURT: It's always, by the way, MUBAR in this  
4 court. Go ahead.

5 MR. CLUBOK: Your Honor, we have a request for  
6 judicial notice under 201(b) just of the daily stock price.  
7 This is information that is not -- the numbers are not in  
8 dispute. We have numbers actually I think that were provided  
9 to us by the plaintiffs at the outset of the case.

10 We had talked about entering it as an exhibit. We  
11 didn't. But under 201(b) the Court can take judicial notice  
12 of any stage of the proceeding and indeed must take judicial  
13 notice of a party requested if the Court is supplied with the  
14 necessary information.

15 So I'm now going to hand you up a brief, one-page  
16 motion with the stock price daily close for every day of the  
17 class period from -- the stock price close from, I guess,  
18 beginning on MAY 30th, 2014, through July 31st, 2015, which  
19 are dates that were brought up during the course of the case.

20 THE COURT: Response?

21 MR. GRONBORG: We just received it. I appreciate  
22 it. Counsel brought it to my attention before the hearing.  
23 I just said I wouldn't mind having an hour to take a look at  
24 it. So if you don't mind, I can -- I can get back to you.

25 THE COURT: Okay. You're also requesting an

1 additional jury instruction, page 2, line 6?

2 MR. GRONBORG: I didn't see that.

3 THE COURT: Which would be page 2, line 6.

4 MR. CLUBOK: We are, Your Honor. Thank you for  
5 reminding me.

6 THE COURT: So my inclination -- oh, and you've  
7 identified it as Exhibit 995. That's another thing you've  
8 done.

9 MR. CLUBOK: Yes. That was the exhibit that the  
10 parties had originally talked about introducing, but neither  
11 of us did. That is why it would've been, I believe, in your  
12 binder, I hope, in the binders as Exhibit 995 for  
13 identification purposes.

14 THE COURT: Okay.

15 MR. CLUBOK: Apologies for not raising that during  
16 the instructions.

17 THE COURT: I think that requires us to be here at  
18 8:30 tomorrow. My tentative is to include Exhibit 995, give  
19 the instruction. I instruct the plaintiff to provide that  
20 instruction. I instruct the parties to determine the place  
21 the instruction is to be submitted in the package.

22 And if there's any objection, be here at 8:30. If  
23 there's no objection, you don't need to be here at 8:30. But  
24 I'll be here at 8:30. You understand what I'm going. So  
25 include it in the package.

1           One of the reasons I have Instruction No. blank is  
2 exactly for this. Include it in the package. And if you  
3 want to argue that it be stricken, be here at 8:30 and I'll  
4 come out and either pull it out or leave it in.

5           I'm inclined to include it. It's beyond dispute.  
6 Judicial notice, et cetera. All right.

7           Next point.

8           MR. GRONBORG: That's all. It sounds like you'll  
9 be here. So if there is no objection, don't worry about  
10 e-mailing you?

11          THE COURT: That is true. I will be here at 8:30.  
12 If you need me, call me.

13          Will you be sitting there, Melissa?

14          THE CLERK: Yes.

15          THE COURT: You will be. So the door will be open.  
16 Melissa will be here. She can come and get me if you need me  
17 at 8:30. Otherwise, I really do look forward to a closing  
18 argument pulling all this together.

19          MR. GRONBORG: I was reminded of one last thing.

20          If the jury wishes to listen to the audio of the  
21 call, do we need to bring in equipment? What?

22          THE COURT: Boy, this is difficult. This really  
23 doesn't become an issue timing-wise probably until Wednesday  
24 morning, if you get my drift. Now, the problem is what sort  
25 of device will you give them? The traditional concerns are,

1 to be blunt, we don't want them playing solitaire on your  
2 computer device.

3 Another thing is the computer device may have other  
4 things they shouldn't be dealing with. What do you propose  
5 to provide? You know, there's laptops.

6 Melissa, it seems historically we've had a court  
7 laptop that has been cleansed. I don't -- I don't know about  
8 that. Again, this is something you'll need by -- unless  
9 you want to mention it in your closing. I did mention it  
10 quite a few days ago, and you need to work on that.  
11 Otherwise they aren't going to have anything.

12 What were you proposing?

13 MR. GRONBORG: Historically we've used -- in recent  
14 history we've used basically a cleansed laptop. That seems  
15 to be the easiest. Boom boxes are no longer available.

16 THE COURT: If you've got a cleansed laptop that  
17 both sides agree on, that's fine. And maybe you're not  
18 worried about solitaire. I usually get pretty attentive  
19 juries.

20 MR. CLUBOK: Mindsweeper is our concern.

21 THE COURT: Oh, and I've got a child pornography  
22 case at 1:30, so that's not a concern.

23 All right. Work it out amongst yourselves. If you  
24 need me to make a decision tomorrow, do so. If you can  
25 provide the laptop, that's fine. It stops us from having to

1 find it. I'll be here at 8:30 if you can't work it out. And  
2 you probably, although I say the actual solution aims for  
3 Wednesday morning, if you want to say it in closing argument  
4 and instruct them on what they need to do, then you need to  
5 have me decide it if you can't decide it yourself by 8:30  
6 tomorrow. Okay.

7 All right. See you all tomorrow.

8 (Proceedings adjourned at 11:39 a.m.)

9 CERTIFICATE

10 I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
11 TRANSCRIPT OF THE STENOGRAPHICALLY RECORDED PROCEEDINGS IN  
12 THE ABOVE MATTER.

13 FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE  
14 REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE  
15 REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

16  
17 /s/ Miriam V. Baird

01/28/2019

18 MIRIAM V. BAIRD  
19 OFFICIAL REPORTER

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23  
24  
25  
DATE

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