**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**HONORABLE ANDREW J. GUILFORD, JUDGE PRESIDING**

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

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

***JURY TRIAL, DAY 8***

***JURY INSTRUCTIONS CONFERENCE***

**SANTA ANA, CALIFORNIA**

**FRIDAY, JANUARY 25, 2019**

**MIRIAM V. BAIRD, CSR 11893, CCRA**
**OFFICIAL U.S. DISTRICT COURT REPORTER**
**411 WEST FOURTH STREET, SUITE 1-053**
**SANTA ANA, CALIFORNIA 92701**
**MVB11893@aol.com**

**A P P E A R A N C E S**

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| **IN BEHALF OF THE PLAINTIFF, HSINGCHING HSU:** | **TOR GRONBORG<br>DEBASHISH BAKSHI<br>ROBBINS GELLER RUDMAN & DOWD LLP<br>655 WEST BROADWAY, SUITE 1900<br>SAN DIEGO, CA 92101** |
| **IN BEHALF OF THE DEFENDANT, PUMA BIOTECHNOLOGY, ET AL:** | **COLLEEN SMITH<br>MICHELE JOHNSON<br>ANDREW CLUBOK<br>SARAH TOMKOWIAK<br>JORDAN COOK<br>LATHAM AND WATKINS LLP<br>12670 HIGH BLUFF DRIVE<br>SAN DIEGO, CA 92130** |

SANTA ANA, CALIFORNIA; MONDAY, JANUARY 28, 2019; 10:00 A.M.

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THE COURT: All right. Appearances, please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Documents handed to the Court)

THE COURT: Thank you.

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

THE COURT: Okay. Thank you for that.

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

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

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

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

MR. GRONBORG: I understand.

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

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

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

THE COURT: What about the pending motion?

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

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

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

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

In order to rebut the presumption of reliance on a

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

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

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

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

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

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

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

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

THE COURT: All right. Continue.

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

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

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

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

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

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

about the fraud.

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

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

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

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

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

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

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

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

THE COURT: Do what you think best.

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

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

Here, unlike those cases, we have the decision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

said that it was all about the FDA approval.

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

We were not going to be able to -- in fact, we were precluded from getting out the issue of FDA approval. Plaintiffs chose at the end, I think almost like the last question to ask our expert whether or not it did receive FDA approval. So that evidence is now in the record.

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

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

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

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

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

THE COURT: Wait. Lots?

MR. CLUBOK: Yes, I believe so.

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

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

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

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

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

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

THE COURT: It is in your brief.

MR. GRONBORG: Actually, Your Honor --

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

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

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

MR. CLUBOK: We appreciate that, Your Honor.

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

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

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

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

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

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

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

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

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

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

Worse, there is no --

THE COURT: Whoa, whoa, whoa.

MR. GRONBORG: Yes.

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

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

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

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

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

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

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

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

MR. GRONBORG: One last thing --

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

MR. GRONBORG: Two minutes.

THE COURT: Okay. Conclude.

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

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

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

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

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

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

Thank you for your argument, counsel.

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

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

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

MR. GRONBORG: Yes. I'm sorry.

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

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

MR. CLUBOK: I hate to interrupt --

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

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

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

THE COURT: Good. Thank you for that.

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

Just a moment.

(Court reading document)

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

MS. GRANT: Thank you, Your Honor.

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

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

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

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

good faith.

THE COURT: What about United States versus Shipsey?

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

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

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

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

THE COURT: Wait. Have said what?

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

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

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

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

THE COURT: All right. Just a moment.

(Pause in proceedings)

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

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

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

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

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

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

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

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

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

THE COURT: All right.

Plaintiff.

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

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

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

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

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

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

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

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

Frankly, I think the instruction on reckless, however many cases there may have been, is not confusing. It's 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 is so

obvious that the defendant must have been aware of it.

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

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

MR. GRONBORG: Yes.

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

MR. GRONBORG: I have the papers --

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

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

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

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

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

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

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

MR. GRONBORG: Yes.

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

MR. GRONBORG: They do.

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

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

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

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

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

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

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

THE COURT: Okay. Anything else? Nothing else?

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

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

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

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

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

MS. GRANT: Yes, it is.

MR. GRONBORG: Yes, Your Honor.

THE COURT: Is that exactly 19?

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

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

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

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

Go ahead.

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

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

THE COURT: My tentative is with the defense.

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

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

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

These are used in cases where the agent or the

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

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

Go ahead.

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

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

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

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

performing the services.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So does it all focus on the if any?

MR. GRONBORG: Yes.

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

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

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

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

MR. GRONBORG: No.

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

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

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

MR. CLUBOK: That is correct.

THE COURT: I agree with that.

MR. CLUBOK: Thank you.

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

MR. CLUBOK: Correct.

THE COURT: Next.

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

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

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

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

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

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

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

addressing right now, what you want me to do?

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

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

MR. CLUBOK: Thank you.

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

MR. GRONBORG: We'll remove that.

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

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

MR. GRONBORG: Correct.

THE COURT: And that will take care of that.

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

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

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

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

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

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

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

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

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

THE COURT: I do.

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

THE COURT: Got it.

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

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

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

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

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

Response.

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

misleading statements without a qualifier of alleged.

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

What do you say?

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

THE COURT: Okay.

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

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

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

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

MR. GRONBORG: I think we can as well.

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

Going to the second page.

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

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

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

THE COURT: Section four. Very good.

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

MR. GRONBORG: Correct, to the appendix.

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

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

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

number one?

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

THE COURT: Okay. Remove what?

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

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

MS. GRANT: Yes, Your Honor.

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

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

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

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

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

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

survival. That's in both parties.

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

MR. GRONBORG: Correct.

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

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

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

MR. GRONBORG: Correct.

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

MR. GRONBORG: Correct.

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

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

THE COURT: Ah.

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

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

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

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

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

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

THE COURT: That's a powerful statement.

What does the plaintiff say.

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

If defendants' worry is context, we've already

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

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

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

(Court reading document)

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

Is there anything I need to decide after that?

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

THE COURT: Okay.

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

alleged to be a false statement.

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

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

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

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

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

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

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

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

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

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

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

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

(Court reading document)

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

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

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

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

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

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

and he knows what questions are coming basically.

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

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

MR. GRONBORG: Your Honor, I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GRONBORG: I would.

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

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

THE COURT: You could say --

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

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

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

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

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

THE COURT: No, no, no. Okay.

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

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

MS. GRANT: We're fine with that.

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

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

MS. GRANT: Your Honor --

THE COURT: Yes.

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

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

MS. GRANT: I understand.

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

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

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

MR. GRONBORG: One other item, Your Honor.

THE COURT: Yes.

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

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

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

THE COURT: Oh, okay.

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

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

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

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

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

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

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

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

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

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

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

case.

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

MR. CLUBOK: Understood.

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

Anything else? Okay.

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

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

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

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

What does the defense then wish?

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

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

MR. CLUBOK: Sure. That's fine.

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

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

THE COURT: Yes.

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

THE COURT: Yes.

MR. CLUBOK: Okay. Thank you.

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

Does anyone wish to work in the middle?

MR. CLUBOK: I probably will, Your Honor.

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

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

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

Anything else? All right.

THE CLERK: An exhibit issue that we talked about.

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

THE CLERK: I was.

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

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

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

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

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

MS. COOK: Right. Thank you.

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

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

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

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

THE COURT: Good.

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

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

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

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

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

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

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

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

MR. GRONBORG: Yes.

MR. CLUBOK: Yes.

THE COURT: Messed up.

MR. GRONBORG: Maybe --

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

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

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

All right. What's next?

MR. GRONBORG: That's all.

MR. CLUBOK: Your Honor, we have --

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

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

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

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

THE COURT: Response?

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

THE COURT: Okay. You're also requesting an

additional jury instruction, page 2, line 6?

MR. GRONBORG: I didn't see that.

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

Next point.

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

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

Will you be sitting there, Melissa?

THE CLERK: Yes.

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

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

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

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

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

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

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

What were you proposing?

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

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

MR. CLUBOK: Mindsweeper is our concern.

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

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

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

All right. See you all tomorrow.

(Proceedings adjourned at 11:39 a.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 01/28/2019

MIRIAM V. BAIRD
OFFICIAL REPORTER

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