

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
 Plaintiff,)
)
 VS.)
)
 ELI LILLY AND COMPANY,)
)
 Defendant.)
 _____)

Case No. 3AN-06-05630 CI

VOLUME 9

TRANSCRIPT OF PROCEEDINGS

March 13, 2008 - Pages 1 through 202

BEFORE THE HONORABLE MARK RINDNER

Superior Court Judge

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08:11:51 1 PROCEEDINGS
 2 THE COURT: We're back on the record in State
 3 of Alaska vs. Eli Lilly and Company. We're outside the
 4 presence of the jury. Counsel are present. The record
 08:30:45 5 should reflect that I provided counsel with my rulings on
 6 deposition testimony of -- I'm going to forget who the two
 7 people are.
 8 MR. ALLEN: Alan --
 9 MR. LEHNER: It was Alan Breier and David
 08:31:03 10 Noesges.
 11 THE COURT: Thank you.
 12 MR. LEHNER: And Your Honor, in connection
 13 with the Dr. Breier designation, Mr. Suggs gave me a couple
 14 paragraphs that they'd like to add in there, and we will
 08:31:10 15 make our objection with respect to our motion in limine on
 16 OUS. Previously I know you overruled that, so just to
 17 preserve the record if I could read in here the lines added
 18 into the clip, we'll make our objection.
 19 THE COURT: Okay.
 08:31:23 20 MR. LEHNER: It would be Lines 447 -- on
 21 Page 447, Line 24 through Page 448, 17, and then Page 450,
 22 Line 2, through Page 451, Line 2. And we would maintain the
 23 objection we made previously with respect to the motion in
 24 limine with respect to outside U.S. matters.
 08:31:46 25 THE COURT: Okay. If you give me those

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08:31:50 1 actual page and line numbers, I'll take a look at them
 2 again.
 3 MR. LEHNER: Okay.
 4 THE COURT: I understand what your objection
 08:31:58 5 is going to be, but I want to read the page and line.
 6 MR. ALLEN: Your Honor -- you got them?
 7 THE COURT: I've got them.
 8 MR. ALLEN: Your Honor, the good news is
 9 we've cut Dr. Breier down to a half almost of what it was,
 08:32:08 10 and I appreciate the Court's ruling, but we looked at it
 11 yesterday. We're going to be down to -- after last night,
 12 to half of it. I know it doesn't make a difference in the
 13 law, but just so you understand.
 14 THE COURT: Lilly filed two motions this
 08:32:22 15 morning. One is a motion to strike the testimony of
 16 Dr. Hopson, who's currently being cross-examined. I ruled
 17 on this yesterday. There's some additional material, but I
 18 continue to believe that Dr. Hopson was a witness that was
 19 listed on Lilly's witness list, he was deposed in this case,
 08:32:50 20 and I'm going to deny the motion to strike.
 21 Lilly's also filed a renewed motion for a
 22 mistrial. There were new motions that cited several cases.
 23 I'm going to read the cases.
 24 MR. FIBICH: Your Honor, if I may, I see we
 08:33:13 25 have a new reporter. I'm Tommy Fibich for the State of

08:33:17 1 Alaska.
 2 Judge, we anticipated that they would
 3 probably do this. We'd like to call the Court's attention
 4 to the Alaskan decision in Meyst, M-e-y-s-t, versus --
 08:33:28 5 THE COURT: Hold on a -- give me a second.
 6 M-e- --
 7 MR. FIBICH: I'm just going to hand you the
 8 case, Your Honor.
 9 THE COURT: Okay. Then that's fine.
 08:33:38 10 MR. FIBICH: If I may approach --
 11 THE COURT: If you want to make a record for
 12 the court reporter.
 13 MR. FIBICH: For the record, it's Meyst,
 14 M-e-y-s-t, versus Estate Fifth Avenue Service, Incorporated,
 08:33:54 15 at 401 Pacific 2d, 430. This is an Alaskan Supreme Court
 16 case that deals with the wide discretion that the trial
 17 court has with respect to determining whether a mistrial is
 18 appropriate or not. In this case the Supreme Court declined
 19 to interfere with the decision of the Supreme -- of the
 08:34:16 20 trial court to go forward when a lady had fainted and a
 21 mistrial was raised with respect to what the jurors may have
 22 seen or not seen. It's not directly in point, but I do
 23 think it goes to the discretion that the courts have
 24 afforded the trial court here in the State of Alaska.
 08:34:34 25 We also have a Supreme Court of Indiana case

08:34:39 1 by the style -- by the style of Partlow, P-a-r-t-l-o-w,
 2 versus State of Indiana. Again, I'll provide the Court my
 3 copy of that decision at 453 Northeast 2d 259. This was a
 4 criminal case in which there was an issue regarding the
 08:34:58 5 jurisdiction over a juvenile defendant in a murder case. A
 6 pathologist was in the stand; a juror passed out; the
 7 pathologist got off the stand; went into the jury box;
 8 rendered aid to that particular juror. And as a result of
 9 that, mistrial was made. The Court went forward with the
 08:35:20 10 trial and the Supreme Court of Indiana said that was not an
 11 abuse of discretion of the trial court with respect to those
 12 circumstances.
 13 So we have only saw their motion a few
 14 minutes ago, but we anticipate this issue may arise again,
 08:35:30 15 so I'll give these cases to the Court. More importantly, I
 16 want to point out to the Court that in the event that we are
 17 wrong or the Court is wrong, they have a right of appeal.
 18 On the other hand, if the Court were inclined to grant the
 19 mistrial, then we wouldn't have any means of determining
 08:35:47 20 whether that was appropriate.
 21 So it seems to us that the logical thing
 22 would be to go forward with the trial. If they are
 23 successful and win, then it's not of issue, if they're
 24 unsuccessful and lose, they've got this point on appeal. I
 08:35:58 25 think the Court has wide discretion, and I would hand these

08:36:02 1 two cases to the Court at this time.
 2 I would also point out to the Court, and I
 3 have not read their cases because they didn't provide them
 4 to me, but with respect to their motions, all of the cases
 08:36:11 5 that they cite are where the doctor that goes into the jury
 6 box is a defendant or a party and we think that's
 7 significant.
 8 THE COURT: I don't --
 9 MR. BRENNER: You need to read the cases,
 08:36:28 10 Judge. I don't believe that's a correct characterization.
 11 THE COURT: Well, I mean, I don't know how
 12 you know that if you didn't read the cases, but --
 13 MR. ALLEN: I was wondering how he knew that,
 14 too.
 08:36:32 15 MR. FIBICH: I presume that they would have
 16 put it in their motions and they did not.
 17 THE COURT: I'm going to read the cases. My
 18 clerk, even as we speak, is running them off. And either
 19 at -- either this afternoon or if we play a deposition, then
 08:36:46 20 if I have a chance while the deposition is running, I'll try
 21 to read those cases. But I'm not going to -- my motion --
 22 the motion was made yesterday and the -- all the jurors were
 23 examined and we have a record of that, and the -- I made my
 24 ruling, then, denying the motion but Lilly has now provided
 08:37:15 25 me with case law authority saying that that was the wrong

08:37:18 1 decision. I'm going to read the case law authority and
 2 decide whether I'm going to stick to my decision or not.
 3 But we're going to go forward pending any ruling where I
 4 might change my mind.
 08:37:30 5 MR. JAMIESON: Your Honor, may I be heard?
 6 THE COURT: Sure.
 7 MR. JAMIESON: Your Honor, Brewster Jamieson,
 8 for the record. This concerns the Defendant Lilly's motion
 9 to strike the testimony of Duane Hopson. I believe Your
 08:37:48 10 Honor said that this was already ruled upon and this was the
 11 basis it was already considered, and respectfully, Your
 12 Honor, I don't think you have. What happened here was
 13 Dr. Hopson got on the stand yesterday and expressed opinion
 14 evidence, and he gave numerous opinions in response to
 08:38:08 15 questioning by the State that had never been disclosed to
 16 Eli Lilly in the required summary of other expert opinion
 17 testimony.
 18 THE COURT: Well, he'd only have to give a
 19 summary of other expert testimony if he was an expert,
 08:38:19 20 right?
 21 MR. JAMIESON: No. If he's a hybrid witness,
 22 and this is under the case of Miller versus Phillips, and
 23 Your Honor might recall that this is a case that I had some
 24 involvement with. Under Miller versus Phillips you have
 08:38:30 25 a -- another expert, or another witness who might be called

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08:38:35 1 upon to give expert testimony. Dr. Hopson was never even
 2 listed on the State's witness list, much less was he -- a
 3 summary of his opinion -- or his opinions given to us. And
 4 furthermore, his absence on the witness list throughout
 08:38:52 5 until day before yesterday gave us every confidence that the
 6 State -- and we relied on that, now to our detriment. It
 7 gave us every confidence that Dr. Hopson was not going to
 8 express opinion testimony.
 9 The deadline for this other -- other expert
 08:39:07 10 testimony was November -- November 5th of 2007. As Your
 11 Honor may recall, we took the deposition of Dr. Hopson on
 12 December 11th of 2007. If we had known -- and there was no
 13 reason that the State could not have made the decision at
 14 that time. If we had known that Dr. Hopson was going to be
 08:39:25 15 called to give opinions about this -- about the issues he
 16 gave yesterday, we would have done a very different
 17 examination. We took that deposition confident that he was
 18 not going to be expressing any expert opinions. And we --
 19 we came into this court confident that the State was not
 08:39:42 20 going to offer him for that purpose or for any purpose in
 21 its case in chief.
 22 And the only reason that we were going to
 23 offer Dr. Hopson was to elicit factual evidence. We were
 24 not going to be asking him opinions. But what happened
 08:39:55 25 yesterday, and what we now know has occurred, and we only

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08:39:58 1 learned this in the beginning of the cross-examination,
 2 because if you -- if Your Honor recalls, Mr. Allen began the
 3 examination, we've never spoken, we've never -- you know,
 4 we've never met, have we. So it gave the impression that
 08:40:10 5 here Dr. Hopson is coming in cold, but what we now know is
 6 that Dr. Hopson, in the very recent days, and without any
 7 knowledge on our part, was meeting with the State's lawyers,
 8 and was being shown a very select and a very biased and
 9 out-of-context selection of documents that we don't even
 08:40:30 10 know what he was shown.
 11 We know he was shown some of them, but we
 12 don't know what the extent of that. And now we're in the
 13 position of having to conduct a discovery deposition to find
 14 out what he was shown and what he wasn't shown, and we have
 08:40:39 15 to do that in front of the jury. And that's just not fair.
 16 Your Honor, this is a terrific move if you're
 17 allowed to make it in this court. Where you can -- you can
 18 lay in the weeds, you can have the witness deposed, you can
 19 not tell them -- tell the other side that you're going to
 08:40:54 20 call him as an expert, and you can have him express expert
 21 opinions. You can violate the rule by not doing the
 22 summary. You can keep him off your witness list until the
 23 very last moment, then you can pop out and say, hey, I'm
 24 going to call this guy in my case in chief and I'm going to
 08:41:08 25 ask him opinion testimony.

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08:41:08 1 And, Your Honor, it's a great move if you can
 2 make it, and if Your Honor allows it, that's a move I intend
 3 to make, and I hope I'm allowed to make it in every case I
 4 bring to trial in this court. This is exactly what the
 08:41:20 5 Miller versus Phillips and the -- its progeny is designed to
 6 prevent. This -- this is unfair surprise; it was very
 7 prejudicial.
 8 For that, Your Honor, you only need to look
 9 at the first two column inches of the Anchorage Daily News
 08:41:35 10 story today to show how prejudicial it was, because that
 11 story begins -- and this is a layperson looking at it --
 12 wow, here's a witness that was called for the first time --
 13 or that was going to be called for the first time in Lilly's
 14 case in chief, is now being called in the State's case in
 08:41:51 15 chief, and he's given all these opinions about how bad
 16 Zyprexa is and how Zyprexa caused diabetes in patients who
 17 otherwise would not have had diabetes.
 18 That is the -- that goes to the very essence
 19 of fair play. And, again, this is -- my hat's off. If
 08:42:03 20 you're allowed to play this game and if you're allowed to
 21 make this move, it's one that I would like to -- to make in
 22 every other case, and every other lawyer in my position
 23 would have -- would dearly love to be able to make. But
 24 this is very prejudicial. It's in clear violation of Your
 08:42:18 25 Honor's rule. It's in violation of the -- of the uniform

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08:42:22 1 pretrial order, and it is truly unfair surprise and
 2 prejudice to Eli Lilly.
 3 THE COURT: Okay. Let me hear from
 4 Mr. Allen.
 08:42:30 5 MR. ALLEN: Your Honor, of course we
 6 disagree, and the Court's already made a ruling, but I do
 7 feel --
 8 THE COURT: Well, they're bringing to my
 9 attention that there's a new other expert testimony
 08:42:48 10 requirement and they're citing me Miller versus Phillips.
 11 MR. ALLEN: Your Honor, first --
 12 THE COURT: I'm going to have to read that
 13 case.
 14 MR. ALLEN: Yes, Your Honor. Let me, then,
 08:42:54 15 go through this issue. Again, I just have got this motion
 16 15 minutes ago.
 17 THE COURT: Well, do you want to -- I'm not
 18 going to do anything now about this till I read Miller
 19 versus Phillips. I'm going to reserve -- I need to read
 08:43:09 20 that case.
 21 MR. ALLEN: Yes, sir. But I do want to
 22 respond so the Court --
 23 THE COURT: I'm just suggesting to you,
 24 Mr. Allen, do you want to wait to you read the case and
 08:43:19 25 provide me either oral response based on doing that, or do

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08:43:24 1 you want to do it now? I don't -- it's up to you.
 2 MR. ALLEN: On the -- I need -- I want to
 3 respond factually to what happened and then on the law, I'll
 4 read the case. But I will note, if you look at the -- the
 08:43:36 5 citation, they describe a case called Zavrel versus Hanley.
 6 It's on the last page of the motion, where the Court said,
 7 we thought it significant that the Millers had received
 8 Dr. Newton's affidavit setting out the substance of his
 9 opinions well before trial, whereas in Zavrel the agreed
 08:43:55 10 party had no advance notice that Dr. Borden would offer the
 11 disputed testimony or allow an expertise that he had
 12 disclaimed at his deposition.
 13 Then the Court ruled there is no reason in
 14 this situation to permit such undisclosed opinions. Well,
 08:44:08 15 that's not the situation here. In fact, there is far more
 16 than an affidavit in this case. There was, in fact, an
 17 entire deposition taken and it was taken by the Defendants.
 18 And I want to inform the Court of just some of the opinions
 19 that were given by Dr. Hopson in his deposition on this --
 08:44:28 20 these very same points.
 21 At Page 55, Lines 7 through 25, and I have --
 22 I'll just read you the answer, but here's what Dr. Hopson
 23 said in his deposition while they were taking it. It's
 24 their responsibility. If they want to follow up, that's
 08:44:42 25 their job. It's not our job to -- you know, to tell them

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08:44:45 1 what to ask next, but here's what he said.
 2 Well, typically I think people have always
 3 felt that, you know, there's a higher weight gain, higher
 4 risk of increased blood sugars and lipids with Zyprexa. I
 08:44:56 5 think a lot of times you have to challenge yourself to
 6 wonder how much the other drugs cause that, as well. You
 7 know, when the data is presented, and that's -- that's the
 8 typical presentation they would make and that you would have
 9 to consider.
 08:45:09 10 Question: Well, you said that people always
 11 felt that there was a higher risk of weight gain problems
 12 with lipids and diabetes with Zyprexa than the other
 13 atypicals?
 14 Answer: Yes.
 08:45:20 15 It goes on.
 16 Q. When competitors came around and touted
 17 this product over Lilly with regard to these issues relating
 18 to weight gain, lipids and diabetes, did it come as a
 19 surprise to you?
 08:45:30 20 Answer: No.
 21 Question: You're aware of such issues from
 22 reading the literature and talking to colleagues?
 23 Yes.
 24 Going on, they ask him about the label and
 08:45:39 25 they say: And that was true long before the label change?

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08:45:42 1 He says, it was a risk. I think, you know,
 2 it was a risk that we did not know, I guess, the seriousness
 3 of the risk at that stage of the game.
 4 Question: When did you become aware of the
 08:45:52 5 risk?
 6 Around the time of the label change.
 7 He goes on to say -- because you remember he
 8 lived in Fairbanks and then Anchorage. They said --
 9 basically the question is and I won't bore the Court: When
 08:46:05 10 did you know? He said, we talked about it here, talking
 11 about Anchorage. In Fairbanks, not that I recall.
 12 Now, here's the question from Mr. Rogoff, who
 13 took the deposition. This is the question of the
 14 Defendants: Why is it that you would continue to prescribe
 08:46:22 15 Zyprexa given the higher risk of weight gain, lipids and
 16 diabetes? He says, well, I think, one treatment approach is
 17 you try other medications perhaps first. You go with a less
 18 risk profile and if perhaps they're not as effective,
 19 patients perhaps have side effects of them, didn't tolerate
 08:46:42 20 them, and then you would make a change in your approach and
 21 try Zyprexa. And then it goes on.
 22 Question: Same one Ms. Gussack asked: But
 23 there are also some doctors in your group who treated with
 24 Zyprexa first?
 08:46:54 25 He said -- at the time he said, that's

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08:46:55 1 possible, yes. Yesterday he said, in fact, the answer was
 2 yes.
 3 Going on, Page 77, Line 14, all the way
 4 through Page 79, Line 14. When you prescribe Zyprexa, do
 08:47:08 5 you talk to your patients about the risk and benefits?
 6 Answer: Yes.
 7 Have you always done that?
 8 Yes.
 9 What are the risks that you've been told
 08:47:16 10 about Zyprexa?
 11 Well, there again, I think it's been -- it's
 12 been a process of changing --
 13 THE COURT: Let me cut this short, Mr. Allen.
 14 Give me the whole deposition and I'll see what he had to
 08:47:28 15 say.
 16 MR. ALLEN: Here's my -- my point here is,
 17 Your Honor, he talks about the side effects, he talks about
 18 how they change, he talks about how the label changed his
 19 opinions, he talks -- it's exactly what he testified to.
 08:47:39 20 They just didn't -- I asked the questions; they didn't like
 21 the answers. He -- it is -- they talked about him in voir
 22 dire as being the head doctor of API.
 23 And by the way, this issue of not being on
 24 our witness list, we had, as you called it, the savings
 08:47:55 25 clause. This came as no surprise. What came as a surprise

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08:47:58 1 to them is that when they challenged us on opening statement
 2 that we're not going to call him, I issued a subpoena.
 3 Now this issue, which I don't -- I don't
 4 really appreciate the way it's framed and I don't take it
 08:48:08 5 personally. I like these lawyers. They said -- we
 6 attempted to mislead the jury by falsely implying that this
 7 employee of the State had come to the court cold.
 8 I asked this witness whether he and I had
 9 ever met before, whether we had ever talked before. Your --
 08:48:24 10 the Court allowed them, properly, I might add, to
 11 cross-examine him as he met with other attorneys. I would
 12 note that in the depositions of Bandick, Torres and Jordan,
 13 ex-employees of Eli Lilly -- I asked the same thing and the
 14 Court struck it, so here's my point. That's
 08:48:40 15 cross-examination.
 16 THE COURT: And just on that point,
 17 Mr. Allen, they made the objection to that question and you
 18 didn't, and -- you made a comment yesterday about the rules
 19 and being equal, and you got to make the same objections to
 08:48:58 20 get the same rulings.
 21 MR. ALLEN: Well, you know, I guess, Your
 22 Honor, you and -- I respect this Court, and I respect this
 23 Court's rulings. I don't always win; sometimes I lose. I
 24 just go ahead and take it even when I have a slightly
 08:49:11 25 different opinion about that.

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08:49:12 1 THE COURT: I understand.
 2 MR. ALLEN: But I clearly spent, in the time
 3 particularly of the ex-employees of this company, I mean,
 4 Mr. Jordan had five lawyers with him, and he had met with
 08:49:22 5 them extensively, and I pointed that out in his deposition.
 6 And my point here is, this is common. I've tried a lot of
 7 cases. What happened yesterday with this witness happens in
 8 every trial I've ever been in. Every trial. They have a
 9 deposition; they ask what they want to ask. They ask about
 08:49:40 10 the risk of the product. We decided not to do a direct.
 11 It's not my fault; it's theirs.
 12 THE COURT: I think what their argument is is
 13 the question of disclosure and notice. And I've got to read
 14 the case and -- or two cases and I've got to read the
 08:49:59 15 deposition and then I'll decide on that basis, but that's --
 16 that's what their argument is. I mean --
 17 MR. ALLEN: Well -- well, there's one -- just
 18 like the mistrial on this juror. If the Court is wrong -- I
 19 mean, for some reason wanted to rule against me, if it's
 08:50:13 20 wrong, we have no remedy. If the Court is right, and should
 21 not to strike Dr. Hopson, then it's -- we can't do anything
 22 about it. We need to finish the trial, finish the
 23 testimony, close the case up. And if they win, it's of no
 24 consequence. If we -- if they lose, they have a point of
 08:50:30 25 appeal. If you grant their motion, we're just thrown out in

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08:50:33 1 the dark about -- and I'm on the first plane to Houston.
 2 And anyhow, the Court can do --
 3 THE COURT: If you lose, you have the right
 4 of appeal for that ruling, so it's --
 08:50:42 5 MR. ALLEN: Well, Your Honor, I think
 6 practicalities. I think practicalities are clear.
 7 THE COURT: And if you win, you won't care.
 8 MR. ALLEN: Your Honor, that's really not
 9 true. You know, it's -- I understand what everybody's
 08:50:52 10 laughing at, but that's really not true. When -- we have
 11 the -- start the whole trial again with different witnesses.
 12 I mean, what they're saying --
 13 THE COURT: I understand. I certainly am
 14 aware of that on the motion to declare a mistrial, what the
 08:51:05 15 result of that is.
 16 MR. ALLEN: It's a different trial at a
 17 different time. There is no remedy. And so we have the
 18 evidence. It may be humorous, but it's not true.
 19 THE COURT: I understand that, but as to what
 08:51:14 20 I do with Dr. Hopson, both sides can appeal if they need to
 21 appeal, and -- but I'm -- I'm not sure -- I think I need to
 22 decide what I think is a fair trial and then what the
 23 Supreme Court does to me -- I mean, any judge who thinks you
 24 can do a four-week trial with the caliber of lawyers I have
 08:51:40 25 in front of me and not recognize there is at least a

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08:51:43 1 possibility that the Supreme Court's going to disagree with
 2 one or two of my -- of your rulings, is just way too
 3 arrogant, and I am just calling them the best I can.
 4 MR. JAMIESON: Your Honor, and we appreciate
 08:51:57 5 that, the candor there. This -- in this particular instance
 6 we have a really good clue as to what the Supreme Court is
 7 going to do in a situation like this, and it -- if -- you'll
 8 bear with me just a minute to talk about Miller versus
 9 Phillips.
 10 I'm the guy that was accused of doing the
 11 wrong maneuver in that case, but it was a very different --
 12 a very, very different circumstance than was here. In that
 13 case Dr. Newton had been a party. He had submitted an
 14 affidavit expressing opinions, following -- in support of a
 08:52:30 15 summary judgment motion. And he gave opinions about the
 16 standard of care. Following -- following that, he was
 17 deposed. And the court found determinative in that case is
 18 that Neil Kennelly had the opportunity but chose not to
 19 interview him about those -- to depose him about those
 08:52:46 20 opinions. Contrast that here. We never had that
 21 opportunity. We did not know what opinions that he was
 22 expressing until he sat on the stand yesterday and started
 23 expressing the opinions.
 24 THE COURT: Well, I think I need to read the
 08:53:00 25 deposition to figure that out.

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08:53:02 1 MR. JAMIESON: Well, but let's also look at
 2 the context of the deposition. It is a very, very different
 3 deposition if on November 5th -- remember, this deposition
 4 happened a month later. If on November 5th the State says,
 08:53:14 5 just in a paragraph, you know, we're going to call
 6 Dr. Hopson. We're going to get him to express opinions
 7 about the adequacy of the label and whether or not
 8 statements in it were true or misleading or they were --
 9 they were representations of safety, which is all the
 08:53:27 10 opinion that he gave yesterday. If they had done that, it
 11 would have been a very different deposition. But we went to
 12 that deposition confident he was not going to be asked to
 13 express opinions, and that is a very -- very big and
 14 significant difference.
 08:53:40 15 THE COURT: Well, again, you may have been
 16 confident, but what Mr. Allen suggests to me is that
 17 confident or not, a lot of these opinions were expressed,
 18 and that's what I need to read.
 19 MR. JAMIESON: Right, and then let me also
 08:53:52 20 address, we did not know -- and we did not enter those
 21 opinions into evidence and we did not choose to, and the
 22 State did not choose to from the deposition of Dr. Hopson in
 23 its deposition designations. And this whole notion -- and
 24 let me just tell you, this is something that's been eating
 08:54:07 25 at me for the last couple days since it was said.

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08:54:10 1 There was a, quote, unquote, savings clause
 2 in the State's second late supplemental exhibit list. Yes,
 3 that does appear there. But it was never served on me. It
 4 was never served on my office. I didn't find out about it
 08:54:26 5 until March 11th. Eric Sanders' office -- because we called
 6 and said, Hey, where is this? Does it exist? They didn't
 7 get it until March 3rd. And so to say that there was a
 8 savings clause in something that was never served on -- it
 9 was filed in the Court certainly enough, but it was never
 08:54:45 10 served on this office. And had it been, we would have -- we
 11 would have objected, and we would have said, look, they're
 12 saying they're going to be calling any witness that might be
 13 on our witness list. Could we please get an indication of
 14 who that might be? And they never did that.
 08:54:57 15 And we never had that opportunity. And we
 16 were -- we were surprised when he was called to the stand in
 17 the first place in the case in chief. We relied, to our
 18 detriment, on the rule that says you have to list your
 19 witnesses. When we said, they're not going to call him, and
 08:55:14 20 that's -- that's a significant disregard of the court rules
 21 that are designed to prevent trial by ambush, which, by the
 22 way, Your Honor, this is an incremental process.
 23 I don't know if you recall, but I stood up
 24 here in one of the hearings many -- it seems like years ago
 08:55:29 25 now, and I said, look, we haven't got a proper trial brief

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08:55:32 1 from the State. We don't know what they're going to be
 2 saying.
 3 THE COURT: I recall.
 4 MR. JAMIESON: And I was -- that was shot
 08:55:36 5 down. Oh, no, I'm not going to make them do a trial brief,
 6 I'm not going to make them tell you what their case is. You
 7 already know it. No, we didn't know it, and that's why we
 8 asked. The trial brief would have been the first
 9 opportunity for us to get that information. It was never
 08:55:48 10 provided. This is the proverbial camel getting his nose
 11 under the tent, and now the camel is all the way in the tent
 12 and prejudice is occurring because of this incremental
 13 relaxation of the pretrial rules that are designed to
 14 prevent what's happening here.
 08:56:02 15 THE COURT: Okay. Well, I'm going to read
 16 the deposition. I'm going to read the cases on both the
 17 motions, and then I'll rule on that. I'll just state for
 18 the record that if Lilly didn't understand what the State's
 19 argument was going to be and what their trial was after
 08:56:25 20 reading the depositions that I've read and hearing
 21 testimony, it's real surprising to me.
 22 MR. JAMIESON: We didn't know which witnesses
 23 would be called for that purpose, Your Honor. There's a big
 24 difference to that, and that is a significant difference.
 08:56:38 25 THE COURT: Well, I understand --

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08:56:40 1 MR. JAMIESON: We know that they were going
 2 to do this looky-loo limbo through --
 3 THE COURT: I'm going to read the deposition
 4 to see if there was surprise or there wasn't surprise. I'm
 08:56:46 5 going to read the cases to see what the law requires me to
 6 do, and -- I mean, I understand there's probably issue here
 7 of surprise in that -- I mean, to put it probably too
 8 bluntly, they stole your witness. But whether that's just
 9 good trial tactics or whether it's unfair trial tactics, I
 08:57:14 10 have to figure out what that line is.
 11 MR. JAMIESON: And, Your Honor, along those
 12 lines, the documents that -- we don't even know what
 13 documents they are, but we presume they're the New York
 14 Times documents that Judge Weinstein has already declared to
 15 be one-sided, out of context. Those documents weren't
 16 provided to him in time for his deposition. He would have
 17 said, Oh, yeah, I looked at these Lilly documents. Oh, my,
 18 I wish I had known that beforehand. He would have answered
 19 the questions very differently. They deliberately kept them
 08:57:39 20 from him. And then they pumped him on the eve of trial --
 21 pumped him full of those documents, brought him in here and
 22 had him express opinions about them.
 23 THE COURT: Well, I don't think --
 24 MR. ALLEN: That's not -- that's just not
 08:57:50 25 true. What he's saying is just not true. And I -- does

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08:57:53 1 he --
2 MR. JAMIESON: Your Honor, if I -- if I may,
3 exactly -- ask him. Did Dr. Hopson receive these documents
4 before his deposition? When exactly did Dr. Hopson receive
08:58:04 5 these -- these -- did he do his Miller versus Phillips
6 disclosure as required by the pretrial order? Did he put
7 Dr. Hopson's name anywhere on any of the witness lists that
8 he filed in this case? Those are all valid questions that
9 I'd like to hear Mr. Allen answer.
08:58:17 10 MR. ALLEN: Not a problem. Not a problem.
11 First of all, Your Honor, what this doctor did yesterday was
12 testify to facts. He was a fact witness. And second of
13 all -- and then we'll talk about it. He rendered -- he also
14 talked about his opinions related to those facts, which were
08:58:34 15 also expressed in the deposition --
16 THE COURT: Well, that's what I have to read.
17 MR. ALLEN: -- yes -- concerning the risk and
18 when he knew about it --
19 THE COURT: I don't know what extra argument
08:58:43 20 is helping you other than you're entitled to make a record,
21 obviously, but I'm pretty -- pretty wide latitude in doing
22 that. I have to read the deposition and I like to read to
23 decide what cases say for myself rather than what lawyers
24 tell me they say.
08:58:59 25 MR. ALLEN: But I have to clear the record.

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08:59:02 1 I'd like to say my cousin -- what is it, My Cousin Vinny,
2 the opposite of what he said, but the -- the fact of the
3 matter, and it's absolutely true, to imply that we tried
4 this case by ambush. We did not intend to call Dr. Hopson
08:59:16 5 in our case in chief when we started this case. It was only
6 because of the challenge issued by the lawyers for Lilly
7 that said we didn't essentially -- and I'm paraphrasing in
8 Scott Allen words -- we didn't have the guts. We were too
9 scared to call him.
08:59:35 10 Well, when you -- and then I issued a
11 subpoena. On the issue of documents, plural, documents, I
12 asked him yesterday -- I thought the answer, quite frankly,
13 was going to be no. I think he said he hadn't seen any
14 documents. He may have seen one. That's what I recall his
08:59:47 15 testimony. And then there was some confusion about which
16 one.
17 I want to assure the Court, as I sit here
18 today, I never provided him a document one. Now, he has --
19 he has counsel. And if his counsel met with him, it's an
09:00:04 20 attorney-client privileged relationship, but I'm not even
21 worried about that. This man testified to facts and what
22 he's done about the risk of Zyprexa, and as every document I
23 use with this witness was their documents, it -- they made a
24 conscious decision when they go to depose him. They could ask
09:00:24 25 him anything they want. But I want the court to know -- he

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09:00:27 1 was designated -- I don't know about giving it to my
2 distinguished colleague, Brewster Jamieson, but our witness
3 list -- we've been at the Cook Hotel. I'm on Floor 4.
4 They're on Floor, I think, 17. There have been documents
09:00:40 5 back and forth. I don't hear anybody saying they didn't get
6 our witness list. They did.
7 And so this implication that somehow some
8 deceit has gone on is false. And I -- and the final comment
9 is, if I'd have filed a pretrial plan, which we did,
09:00:54 10 according to the rules of -- my local counsel filed it
11 according to the rules, but if you'd have asked me, are you
12 calling Dr. Hopson? My answer would have been N-o. After
13 they gave their opening statement, my answer is Y-e-s, and
14 that's all that happened.
09:01:08 15 THE COURT: Last time, Mr. Jamieson.
16 MR. JAMIESON: And if that's -- thank you,
17 Your Honor, and I do have the deposition of Dr. Hopson. But
18 obviously if he had -- if they had said they're going to
19 call Dr. Hopson, we would have taken a deposition of him.
09:01:23 20 We would have found out what their -- what the -- what his
21 testimony was going to be, what his new opinions are.
22 Your Honor, for the record, this morning I
23 was walking out in the hall and there's one of those rooms
24 with -- with the -- that you can interview witnesses in, and
09:01:40 25 that's exactly -- Dr. Hopson is still under oath and he's

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09:01:43 1 still on cross-examination. And he's being consulted by the
2 State's lawyers with a big legal pad full of points and so
3 forth. I raised it to their attention and I said, "What's
4 going on here?" That's something maybe you can do with your
09:01:55 5 expert, but that's not something you can do with a fact
6 witness, and that's what they're doing.
7 This is an expert witness coming into Court
8 offering expert opinion about things he never even hinted at
9 in his deposition and the State never even hinted at prior
09:02:07 10 to this trial, in violation of the rules of this Court. And
11 again, great move if you're allowed to make it, because it
12 really does put the other side at a disadvantage. And I
13 sure would like to make it in every single case that I try.
14 But the rules are set up to prevent exactly that.
09:02:22 15 And what's happening here is unfair surprise.
16 I'm going to hand up Dr. Hopson's deposition.
17 THE COURT: Again, we'll continue with the
18 deposition of Dr. Hopson. I'll read his deposition and I'll
19 read the cases cited and the cases that the Plaintiffs have
09:02:45 20 cited to me, and I'll make my ruling as I -- after I've done
21 that work.
22 Anything else that we need to do before we
23 bring in the jury? Give the jury a little heads up notice
24 and we'll continue.
09:03:15 25 (Break.)

09:03:15 1 THE CLERK: Please rise. Court now stands in
 2 recess. Off the record.
 3 (Discussion off the record.)
 4 THE COURT: Please be seated.
 09:10:58 5 We're back on the record, and all members of
 6 the jury are present. Good morning, ladies and gentlemen of
 7 the jury.
 8 We have Dr. Hopson with us again. And,
 9 Doctor, you realize that you're under the same oath you took
 09:11:17 10 when you started the testimony?
 11 THE WITNESS: Yes, I do.
 12 THE COURT: Thank you very much.
 13 Ms. Gussack.
 14 MS. GUSSACK: Thank you, Your Honor.
 09:11:25 15 CROSS-EXAMINATION, CONTINUED
 16 Q. (BY MS. GUSSACK) Good morning, Dr. Hopson.
 17 A. Good morning.
 18 Q. Doctor, yesterday you told us that your
 19 psychiatric training spanned the time period between 1986 to
 09:11:39 20 1990, right? Your residency and --
 21 A. Yes.
 22 Q. -- training.
 23 So when you were first prescribing for
 24 patients with schizophrenia and bipolar disorder and major
 09:11:51 25 depression that you talked about yesterday, you all -- you

09:11:53 1 had available to you the very beginning of the
 2 second-generation atypical antipsychotics, right?
 3 A. Yes.
 4 Q. Okay.
 09:11:59 5 So I'm wondering, since you're certainly not
 6 old enough to remember the days when the antipsychotic
 7 medications were not available, whether you are a sufficient
 8 medical historian that you can tell us a little bit about
 9 how the serious mental illness treated in the '40s and '50s?
 09:12:17 10 A. Well, prior to the first generation, prior to
 11 Thorazine, Haldol and --
 12 MR. ALLEN: Your Honor, can we approach?
 13 THE COURT: You may.
 14 (Bench discussion.)
 09:12:32 15 MR. ALLEN: I just want to make a record.
 16 I'm not -- this is not in his deposition. It's not his -- I
 17 mean, if the theory is he said they're surprised by these
 18 matters --
 19 THE COURT: Again, you can make your
 09:12:44 20 record --
 21 MR. ALLEN: Well, then I need to object to
 22 this question, because if, in fact, they're right, it
 23 shouldn't be asked.
 24 MS. GUSSACK: Your Honor, Mr. Allen in his
 09:12:57 25 direct asked about lobotomy --

09:12:58 1 THE COURT: I recall that testimony, and to
 2 the extent there's an objection, which I'm not sure there
 3 is, I'll overrule the objection.
 4 MR. ALLEN: All right.
 09:13:06 5 THE COURT: And just everybody can -- you'll
 6 have his deposition as part of your appellate record and
 7 everybody can refer to that when --
 8 MR. ALLEN: Right. Thank you, Your Honor.
 9 (End bench discussion.)
 09:13:24 10 Q. (BY MS. GUSSACK) Dr. Hopson, can you tell us
 11 about treatment before the first-generation antipsychotics
 12 were available?
 13 A. Well, there weren't a great deal of at least
 14 scientific treatments available. There were methods such as
 09:13:40 15 giving patients that were extremely psychotic, give them
 16 high doses of insulin and put them into insulin coma, and
 17 where they would have seizures, then they would give them
 18 glucose water and bring them out of it. There are reports
 19 where they would put people in ice baths to kind of shock
 09:13:59 20 their system. So they -- they were pretty, you know,
 21 primitive treatment approaches at that point.
 22 Q. And surgical lobotomies were also used in the
 23 '40s and '50s to treat psychosis, right?
 24 A. At that point, yes.
 09:14:12 25 Q. And ice baths that you mentioned?

09:14:14 1 A. Yes.
 2 Q. And electroconvulsive shock treatment?
 3 A. That's correct.
 4 Q. And even today sometimes electroconvulsive
 09:14:21 5 shock treatment is used in serious treatment-resistant
 6 conditions, right?
 7 A. That's correct.
 8 Q. Now, you used the term psychosis, Doctor.
 9 Can you tell the jury what you mean by that?
 09:14:29 10 A. It's a broad term to characterize
 11 hallucinations; auditory or visual hallucinations,
 12 typically.
 13 Q. Okay.
 14 And psychosis is prevalent in patients with
 09:14:43 15 schizophrenia?
 16 A. Yes.
 17 Q. And can patients with bipolar disease also
 18 have psychosis?
 19 A. They can.
 09:14:48 20 Q. In fact, patients with depression can have
 21 psychosis, as well?
 22 A. That's correct.
 23 Q. Okay.
 24 So -- and those are the patient population --
 09:14:55 25 I'm sorry -- the types of patients that you're treating at

09:14:57 1 API?
 2 A. Yes.
 3 Q. Okay.
 4 Now, let's take our history lesson forward a
 09:15:02 5 little bit. Can you tell us -- the first-generation
 6 antipsychotics, included, I think you said, Haldol and
 7 Thorazine and --
 8 A. Yes.
 9 Q. -- perphenazine. Okay.
 09:15:11 10 A. Fluphenazine.
 11 Q. And can you tell us how you -- how effective
 12 those medications were for treating the serious mental
 13 illness of schizophrenia and bipolar disease?
 14 A. They were effective in what we call the
 09:15:24 15 positive symptoms, meaning the hallucinations, the
 16 delusions, the paranoia. They did help with those symptoms.
 17 So they did make a big difference in treatment compared to
 18 prior to their development.
 19 Q. But they didn't help with what we call the
 09:15:37 20 negative symptoms, correct?
 21 A. That is correct.
 22 Q. Can you tell the jury, what are the negative
 23 symptoms of those diseases?
 24 A. The negative symptoms are what we call
 09:15:46 25 anhedonia, lack of enjoyment in life, lack of motivation,

09:15:53 1 things that prevent the individual from enjoying their life.
 2 So their hallucinations may be decreased from the
 3 first-generation, but they're -- but they still have a kind
 4 of a negative pull in their life that keeps them from
 09:16:06 5 working, keeps them from getting up and being functional.
 6 And the second generation did address the negative symptoms.
 7 Q. They were more effective in treating the
 8 negative symptoms of that flat emotional feeling?
 9 A. Yes.
 09:16:18 10 Q. And that loss of life's pleasures and the
 11 inability to show any interest in life, correct?
 12 A. That's correct.
 13 Q. Okay.
 14 Now, in -- right behind you, Doctor, on that
 09:16:29 15 chart are a list of medications. Those are all
 16 second-generation antipsychotics, right?
 17 A. That's correct.
 18 Q. Okay.
 19 Now, the jury has also heard the term in the
 09:16:38 20 past couple of days atypical antipsychotic. What does that
 21 mean?
 22 A. It really refers to the second generation.
 23 They're just not the typical first -- first generation.
 24 Q. Okay.
 09:16:48 25 And the typicals refer to the first

09:16:51 1 generation and those are the ones that treated the positive
 2 symptoms of the diseases, right?
 3 A. That's correct.
 4 Q. Okay.
 09:16:58 5 Now, what about the safety profile of the
 6 first-generation antipsychotics? What was notable about
 7 that?
 8 A. Well, the safety profile, they were noted to
 9 cause tardive dyskinesia, which can be a permanent and
 09:17:16 10 disabling neurological disorder where the patient would
 11 develop tremors, muscular rigidity, oral dyskinesias where
 12 their tongue would protrude, and it was very uncomfortable
 13 for the patient both personally and socially.
 14 Q. Can you show the jury literally by gesturing
 09:17:37 15 what someone with tardive dyskinesia can look like if they
 16 have these kind of disorders?
 17 A. Well, their mouth is constantly moving.
 18 Their tongue may stick in and out a lot.
 19 Q. What about facial or physical gestures?
 09:17:50 20 A. There's grimacing sometimes. With their
 21 eyelids opening -- or opening their mouth really wide, and
 22 these are uncontrollable movements. They're involuntary.
 23 Q. Okay.
 24 And is it -- you would agree, wouldn't you,
 09:18:05 25 that the second-generation atypical antipsychotics have a

09:18:06 1 lower incidence of those movement disorders or tardive
 2 dyskinesia?
 3 A. Yes.
 4 Q. In fact, no one at API is prescribing
 09:18:14 5 first-generation antipsychotics any longer, are they?
 6 A. Typically not.
 7 Q. And that's largely because of that
 8 side-effect profile, isn't it?
 9 A. That's correct.
 09:18:20 10 Q. Okay.
 11 Now, Doctor, yesterday -- it's a little loud.
 12 Yesterday you talked -- you used the term
 13 first-line and second-line treatment, and I just want to
 14 make sure that there's no confusion. When you say
 09:18:34 15 first-line, you mean that a medication may be a physician's
 16 first choice for a particular patient, correct?
 17 A. That's correct.
 18 Q. Okay.
 19 And when you say second-line, you mean that
 09:18:46 20 some physicians may choose to use that medication only after
 21 they've tried another medication first?
 22 A. That's correct.
 23 Q. Okay.
 24 And I think you told us yesterday that in
 09:18:54 25 your personal experience you're using Zyprexa typically

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09:18:58 1 after a patient may not have responded to their first
2 treatment, right?
3 A. That's correct.
4 Q. You sort of think of Zyprexa as your big gun
09:19:05 5 for those really treatment-challenging patients, don't you?
6 A. Yes.
7 Q. But there are physicians at API today who use
8 Zyprexa as their first choice or their first-line treatment,
9 correct?
09:19:13 10 A. Possibly so.
11 Q. Okay.
12 Well, not possibly so, Doctor. They are, in
13 fact, right?
14 A. On this day today, I don't know what someone,
09:19:22 15 but on occasion someone might choose that as their first
16 choice.
17 Q. Okay.
18 Now, Doctor, looking at that list of atypical
19 antipsychotics behind you, you would agree that all of them
09:19:36 20 have risks attendant to them, correct?
21 A. They do. Some more than others.
22 Q. Okay.
23 And some of those risks -- and I'm talking
24 about risks that have nothing to do with weight gain or
09:19:46 25 hyperglycemia, right?

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09:19:48 1 A. Okay.
2 Q. Well, you're familiar, for instance, with,
3 let's say, ziprasidone, Geodon?
4 A. Yes.
09:19:55 5 Q. What's the most significant risk in the
6 bolded labeling that accompanies Geodon?
7 A. There have been some risks associated with
8 cardiac abnormalities, I think.
9 Q. They have a bolded warning about sudden
09:20:09 10 cardiac death, don't they?
11 A. Yes.
12 Q. Okay.
13 And, for instance, Clozaril, the most notable
14 serious side effect associated with Clozaril is what?
09:20:17 15 A. Blood dyscrasias.
16 Q. A fatal blood disorder, correct?
17 A. Yes.
18 Q. Okay.
19 And Risperdal, for instance, has a side
09:20:25 20 effect of extrapyramidal symptoms; movement disorder that's
21 significant, doesn't it?
22 A. Higher than the others, yes.
23 Q. Okay.
24 And Seroquel, for instance, quetiapine behind
09:20:37 25 you, what's the side effect that's unique to Seroquel?

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09:20:42 1 A. We have issues with hypotension, cardiac --
2 they ask us to monitor as well.
3 Q. They -- they actually have a warning about
4 agranulocytosis too, don't they?
09:20:52 5 A. Yes.
6 Q. And hypothyroidism?
7 A. Yes.
8 Q. Okay.
9 And cataracts, right?
09:20:58 10 A. I'm sure it's listed there. It's not one
11 that we monitor regular -- I mean, we monitor for it, but
12 it's not one that we're most concerned about.
13 Q. Okay.
14 But those are risks for Seroquel that are not
09:21:12 15 as prevalent for Zyprexa, correct?
16 A. Right.
17 Q. Okay.
18 Now, so you would agree with me, Doctor, that
19 the first-generation and second-generation antipsychotics
09:21:31 20 are not equally effective, right?
21 A. I would agree with that.
22 Q. And you would agree with me that they're not
23 equally safe?
24 A. Yes.
09:21:38 25 Q. Okay.

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09:21:39 1 And so you need to evaluate the risks of the
2 medication as you look at your individual patient, correct?
3 A. Yes.
4 Q. Now, Doctor, let me turn to something we
09:21:56 5 talked about yesterday, I think, towards the end of our time
6 together. We talked about the label change that Lilly made
7 in 2003.
8 Do you remember that?
9 A. Yes.
09:22:04 10 Q. Okay.
11 And you know that that label change was made
12 at FDA's direction by all the members of the
13 second-generation atypical antipsychotic class of medicines,
14 right?
09:22:18 15 A. Yes.
16 Q. So every manufacturer on that list behind you
17 was directed by FDA to make a warning about hyperglycemia
18 and diabetes, right?
19 A. Yes.
09:22:30 20 Q. Okay.
21 Now, did you know the process that FDA
22 engaged in for three years before it came to the conclusion
23 that a class label should be -- a class label change should
24 be made by all the manufacturers of the class?
09:22:44 25 A. No.

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09:22:45 1 Q. Okay.
2 So you didn't know that FDA asked each
3 manufacturer of those atypical antipsychotics to submit all
4 of their data and that FDA considered that data over a
09:22:59 5 three-year period, did you?
6 A. No.
7 Q. Okay.
8 Did you know that FDA in its analysis of this
9 issue reviewed clinical trial data from six different
09:23:10 10 companies, post-marketing reports, those are reports of
11 adverse events experienced by patients who took the product
12 after marketing, right?
13 A. Right.
14 Q. And that would be post-marketing reports for
09:23:22 15 six different medications. That's what FDA was looking at.
16 Did you know that?
17 A. No.
18 Q. Okay.
19 Did you know that they looked at published
09:23:29 20 case series reports, published clinical pharmacology
21 studies, published preclinical studies, and unpublished
22 studies for Clozaril, Risperdal, Zyprexa, Seroquel, Geodon
23 and Abilify over a three-year period?
24 Did you know that?
09:23:47 25 A. Not specifically, no.

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09:23:48 1 Q. Okay.
2 And -- but you did know that based on FDA's
3 analysis of these issues, it directed this class label
4 change?
09:23:55 5 A. Yes.
6 Q. Okay.
7 Now, did you know that Lilly immediately
8 implemented FDA's direction about making a label change in
9 September, 2003?
09:24:09 10 A. I don't know how quickly they did that.
11 Q. Okay.
12 We -- we looked at that label yesterday,
13 didn't we? In fact, why don't we bring that -- hold that
14 one sec, Nick.
09:24:22 15 Did you know, sir, that after FDA directed
16 that class label change in September, 2003, it continued to
17 look at this issue? Were you aware of that?
18 A. I would hope they would.
19 Q. Okay.
09:24:36 20 EL2034, please.
21 Doctor, let me -- let's just get the
22 chronology right here so that you can follow along. If we
23 look at the second page of EL2034 first, you'll see at the
24 bottom there there's a date, September -- that's the date it
09:25:03 25 was received by G. Brophy at Eli Lilly, September 15th,

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09:25:08 1 2003.
2 If we go back to the first page, you can see,
3 if we blow up that first couple of paragraphs, that this is
4 a letter from FDA to Dr. Brophy in regulatory affairs at
09:25:20 5 Lilly. And it says, in that second paragraph, after
6 reviewing the available data pertaining to the use of
7 atypical antipsychotic medications and diabetes mellitus
8 adverse events, we have concluded that the product labeling
9 for all atypical antipsychotics should be updated to include
09:25:42 10 information about these events.
11 Do you see that, Doctor?
12 A. Yes.
13 Q. Okay. And so you now see that as of
14 September, 2003 FDA was directing this language to be
09:25:51 15 implemented by all members of the class, right?
16 A. Yes.
17 Q. Okay.
18 And if we go down a little bit on that
19 document, couple paragraphs, you'll see -- and this is the
09:26:01 20 language we talked about -- keep going, Nick, if you don't
21 mind.
22 This is the language we were reading together
23 yesterday, weren't we?
24 A. Yes.
09:26:09 25 Q. Okay.

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09:26:09 1 And you see the language that ends with the
2 available data are insufficient to provide reliable
3 estimates of differences?
4 A. Yes.
09:26:17 5 Q. Okay.
6 Now, Lilly implemented this label
7 September 16th, 2003. You recall that's the label we showed
8 yesterday, right?
9 Want to see that label again so we can keep
09:26:31 10 the chronology?
11 A. Yes.
12 Q. 2003 label. I'm sorry.
13 Good. Thank you.
14 I believe it's Page 7 that we were looking at
09:26:49 15 yesterday.
16 No. Keep -- keep going, Nick. I'm sorry.
17 Can you make it a little larger? And we'll just keep -- go
18 to the next page, to Page 9.
19 No, I'm sorry, Nick. We said Page 7. I'm
09:27:38 20 sorry. Sorry for my -- there we go. It was on the bottom
21 of Page 6. I was wrong by a page. Okay.
22 So if we go down to the bottom of Page 6
23 there and blow that up under hyperglycemia, diabetes
24 mellitus.
09:27:52 25 You recall, Doctor, that's the label we were

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09:27:55 1 talking about yesterday?
 2 A. Yes.
 3 Q. Okay.
 4 Now, you'll be pleased to know that just as
 09:28:04 5 you hoped, FDA continued to monitor this issue, and it
 6 continued to review the warning language, and in December,
 7 2003 did you know that they further revised the warning for
 8 all second-generation antipsychotics?
 9 A. I'm not exactly sure what they did at that
 09:28:25 10 point.
 11 Q. Okay.
 12 Well, let's take a look at EL2039, and if you
 13 blow that up a little bit, Nick, in that first -- no, go
 14 down.
 09:28:43 15 You see that there's a -- a sentence that's
 16 been stricken from the proposed warning there, right,
 17 Doctor?
 18 A. Yes.
 19 Q. And if you go to the top of this document,
 09:28:51 20 you can see that this is -- going further up, again, a
 21 letter from FDA, now directed to Michelle Sharp at Lilly,
 22 and it says we -- and if you read those first couple of
 23 paragraphs: We are asking you to amend the warning, and
 24 it's now approvable, correct?
 09:29:10 25 A. Yes.

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09:29:11 1 Q. Okay.
 2 And then, Doctor, I think you said yesterday
 3 that you received the Dear Doctor letter that Lilly sent in
 4 March, 2004 about this label change, correct?
 09:29:21 5 A. I'm sure that I did.
 6 Q. Okay.
 7 And that would be EL2728. Let's take a look
 8 at that.
 9 Okay. So in March, 2004 Lilly notified
 09:29:33 10 physicians, including you, that they made important labeling
 11 changes that were made by all manufacturers in the class
 12 regarding the warning on hyperglycemia and diabetes in
 13 patients, correct?
 14 A. Yes.
 09:29:45 15 Q. Okay.
 16 Now, the ADA Consensus statement that you
 17 testified about yesterday -- you recall that?
 18 A. Yes.
 19 Q. Do you want to see it, or do you recall it?
 09:30:01 20 A. Let's look at it again.
 21 Q. Okay.
 22 Well, actually, before I show it to you, let
 23 me just ask you one question: Did you know that the ADA
 24 Consensus statement was the result of three day's worth of
 09:30:15 25 work by those who participated in the process?

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09:30:17 1 A. No, I didn't.
 2 Q. Okay.
 3 So you didn't know that FDA took three years
 4 to make this label change and you didn't know that the ADA
 09:30:25 5 Consensus statement took three days?
 6 A. Right.
 7 Q. Okay.
 8 Did you, sir, know that FDA had submitted a
 9 letter responding to the ADA's conclusions in their
 09:30:37 10 Consensus statement?
 11 A. Can you repeat the question?
 12 Q. Did you know that FDA had written a letter
 13 responding to the conclusions of the ADA in their Consensus
 14 statement?
 09:30:50 15 A. I'm not aware of that, no.
 16 Q. Okay.
 17 Well, let me show you that -- first,
 18 Dr. Hopson would like to see the ADA Consensus statement?
 19 Can we just bring that up? I'm sorry, I don't have the
 09:31:05 20 exhibit number.
 21 There. Do you recall that?
 22 A. Yes.
 23 Q. Okay.
 24 Now, if we could bring up EL2157.
 09:31:15 25 And blow up on the right -- on the bottom

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09:31:20 1 column there.
 2 MR. ALLEN: Your Honor, I'd just like a copy
 3 of EL2157, please.
 4 MS. GUSSACK: I believe you have that,
 09:31:29 5 Mr. Allen, but I'll be --
 6 MR. ALLEN: There's over 10,000 documents and
 7 I don't have them all at my fingertips, so --
 8 MS. GUSSACK: No, no. That's fine.
 9 Here you go.
 09:31:45 10 That's a little bit big, Nick. Can we take
 11 that down a little bit? Just so we can read it -- okay.
 12 Good.
 13 Q. Doctor, have you seen before -- and we're
 14 going to take you to the end of it so you can identify it,
 09:32:01 15 this response to the Consensus statement, and now if we're
 16 going to go to the end of that letter to the editor, written
 17 by Dr. Boehm, Dr. Racoosin, Dr. Laughren and Dr. Katz. Do
 18 you see their names at the end of that?
 19 A. Yes.
 09:32:18 20 Q. And do you see that they are identifying
 21 themselves as the -- from the division of
 22 neuropharmacological drug products at FDA, right?
 23 A. Yes.
 24 Q. And you know that the division of
 09:32:29 25 neuropharmacological drug products is the division at FDA

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09:32:33 1 that's responsible for oversight of medicines that are used
2 to treat mental illness, right?
3 A. I would assume so, yes.
4 Q. Okay.

09:32:42 5 Now, could we go back to the beginning of
6 that response by FDA. And look at the -- let me direct your
7 attention to the second sentence. Were you aware, sir, that
8 it was FDA's view that although the ADA ranked the diabetes
9 risk for second-generation antipsychotics, that the U.S.
10 Food and Drug Administration's division of
11 neuropharmacological drug products does not believe that the
12 evidence currently available allows such a ranking.
13 Were you aware of that, sir?
14 A. No.
09:33:18 15 Q. Okay.
16 You see that this is a -- published in the
17 August, 2004 Diabetes Care Journal as a response to the ADA
18 Consensus statement. See that at the bottom of the page?
19 A. Yes.
09:33:30 20 Q. Okay.
21 And if we go to the next page and the final
22 paragraph of their response to the ADA Consensus statement,
23 you see that the division agrees with the ADA's
24 recommendation to monitor patients treated with
09:33:48 25 second-generation antipsychotics for evidence of diabetes.

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09:33:50 1 And let me stop there, sir.
2 You were monitoring your patients at API for
3 signs of diabetes, correct? In 2004, 2003, and, in fact, I
4 think you told us yesterday even before that, correct?
09:34:04 5 A. It's correct that we began monitoring --
6 we've always monitored blood sugars as part of the regular
7 routine admission, and as time rolled on, we began
8 monitoring it specifically in its association with these
9 drugs.
09:34:18 10 Q. And when these drugs -- you're referring to
11 all of the second-generation atypical antipsychotics?
12 A. Yes.
13 Q. Thank you, sir.
14 And you see under FDA's view, they go on to
09:34:28 15 say, We do not believe that the available evidence allows
16 the ranking of diabetes risk for these drugs at this time,
17 correct?
18 A. I see that.
19 Q. Okay.
09:34:38 20 Were you aware of that being FDA's view at
21 the time, sir?
22 A. No.
23 Q. Now, you can take that down, Nick.
24 Also yesterday, Dr. Hopson, we talked about
09:34:59 25 the CATIE study that was published in the New England

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09:35:02 1 Journal of Medicine.
2 Do you recall?
3 A. Yes.
4 Q. And I think this was a study that you told us
09:35:06 5 you keep in your files at API, or at one time you'd kept it
6 in your files, right?
7 A. Yes.
8 Q. Okay.
9 We talked about the efficacy conclusions from
09:35:15 10 that study yesterday, didn't we?
11 A. Yes.
12 Q. And how Zyprexa had been demonstrated to be
13 more effective because patients stayed on it longer, right?
14 A. Yes.
09:35:22 15 Q. And you certainly know, sir, from your
16 experience in treating seriously mentally ill patients that
17 getting patients to stay on medicine is the biggest
18 challenge, isn't it?
19 A. It is.
09:35:32 20 Q. Okay.
21 Now, let's talk about the safety conclusions
22 from that CATIE study for a minute, if we might. You're
23 aware that the CATIE study found, aren't you, that there was
24 greater weight gain and increases in blood glucose shown for
09:35:46 25 olanzapine among the agents studied, correct?

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09:35:50 1 A. Yes.
2 Q. Actually, it wasn't news to you because you
3 already believed that?
4 A. Yes.
09:35:54 5 Q. Okay.
6 But there was no increase in the rate of
7 diabetes shown with Zyprexa as compared to the other agents,
8 was there?
9 MR. ALLEN: Well, objection, Your Honor. The
09:36:03 10 question is misleading.
11 THE COURT: No, I'll let him answer. You can
12 cross-examine him.
13 MR. ALLEN: Okay.
14 THE WITNESS: Can you reask the question?
09:36:12 15 Q. (BY MS. GUSSACK) Sure.
16 There was no difference in the rate of
17 diabetes shown between Zyprexa and the other medications
18 studied, was there?
19 A. I would have to look at the study again. I
09:36:23 20 can't recall specifically how they addressed that.
21 Q. Okay.
22 Well, they looked at it in terms of
23 determining whether more patients who -- whether diabetes
24 was more prevalent in any particular group based on whether
09:36:36 25 they needed to start new diabetes medications, correct?

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09:36:39 1 MR. ALLEN: Objection to form, Your Honor.
 2 Same objection.
 3 THE COURT: Overruled.
 4 THE WITNESS: Yes, that's my understanding.
 09:36:47 5 Q. (BY MS. GUSSACK) Okay.
 6 And they found no difference -- no
 7 statistically significant difference between Zyprexa and the
 8 other agents studied in terms of diabetes risk when you
 9 looked at whether new diabetes medications were required,
 09:36:59 10 correct?
 11 A. Again, I'd have to look at the study to see
 12 how they reported on that.
 13 Q. Okay.
 14 Would you like to see the study now? We can
 09:37:07 15 bring that up.
 16 If you turn to Page 1221.
 17 Doctor, in that chart where you see oral
 18 glucose-lowering drugs, insulin, that there was no
 19 significant -- statistically significant difference in the
 09:37:36 20 number of new diabetes medications required, correct?
 21 A. Correct.
 22 Q. Okay. Thank you, sir.
 23 Now, the -- you can take that down, Nick.
 24 The conclusion that olanzapine was found to
 09:37:50 25 have greater weight gain and blood glucose was not only

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09:37:54 1 known to you but was also reflected later in the October,
 2 2007 label change that Lilly made, correct?
 3 A. Yes.
 4 Q. Okay.
 09:38:04 5 Now, I think you said yesterday you couldn't
 6 recall in all the mail you received whether you received
 7 Lilly's Dear Doctor letter telling you about the label
 8 change made in October, 2007, right?
 9 A. Yes.
 09:38:15 10 Q. Okay.
 11 But let's -- let's bring that up for a
 12 minute, if we could. EL2182.
 13 And if we could for a second, let's look at
 14 the second bullet point in the -- I'm sorry.
 09:38:30 15 Before we go to the Dear Doctor letter,
 16 here's our Dear Healthcare Professional letter from October
 17 of 2007. And it's saying that Lilly wants to inform
 18 physicians such as yourself about new information being
 19 added in the warning section for weight gain and
 09:38:45 20 hyperlipidemia, correct?
 21 A. Yes.
 22 Q. Okay.
 23 Let's turn to the second bullet point for a
 24 minute. And I want to ask you, Doctor: It's true, isn't
 09:38:58 25 it, that this information here in this second bullet point,

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09:39:01 1 while relative risk estimates are inconsistent, the
 2 association between atypical antipsychotics and increases in
 3 glucose levels appears to fall on a continuum and olanzapine
 4 appears to have a greater association than some other
 09:39:16 5 atypical antipsychotics wasn't news to you, correct?
 6 A. Correct.
 7 Q. You already believed that that was the case?
 8 A. Yes.
 9 Q. And you believed that going back to 2003, at
 09:39:26 10 least, correct?
 11 A. We saw that in our patients, yes.
 12 Q. Okay.
 13 And, in fact, if we go to the next bullet
 14 point, referring to greater increases in lipids, total --
 09:39:40 15 and lipids are cholesterol findings, right, Doctor?
 16 A. Yes.
 17 Q. Generally speaking.
 18 A. Generally.
 19 Q. From a nondoctor to a doctor, that's a little
 09:39:49 20 scary comment, but can I -- is that fair to say that the
 21 lipids refer to the cholesterol readings?
 22 A. Right, it has to do with the level of fats
 23 and cholesterol.
 24 Q. Okay.
 09:39:58 25 And you knew -- you see this letter says that

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09:40:02 1 there were -- they're reporting on this label change about
 2 increases in lipids seen with Zyprexa-treated patients. You
 3 knew this, as well, going back to as early as 1996?
 4 A. Yes.
 09:40:17 5 Q. Okay.
 6 And you knew, turning to the next bullet
 7 point, Lilly was telling the physicians in this October,
 8 2000 label change that there's additional information now
 9 about weight gain over a two-year period in Zyprexa-treated
 09:40:33 10 patients, correct?
 11 A. I see that.
 12 Q. Okay.
 13 But you knew about significant weight gain in
 14 Zyprexa-treated patients from the time it was first
 09:40:41 15 introduced into the market in 1996, didn't you?
 16 A. We were most familiar with the weight gain.
 17 Q. Okay.
 18 And you had seen in your patients that you
 19 treated starting in 1996 with Zyprexa that some patients
 09:40:55 20 gained significant amounts of weight?
 21 A. Yes.
 22 Q. Okay.
 23 Doctor, is there a person at API who is
 24 charged with working on wellness programs and helping the
 09:41:08 25 seriously mentally ill patients that you treat at API have

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09:41:13 1 better quality of their lifestyle and nutrition and diet?
 2 A. It is a component of our treatment plan.
 3 Q. Can you tell us a little bit about that?
 4 A. The -- we offer various psycho-educational
 09:41:27 5 classes to the patients, and a group of those classes focus
 6 on wellness, diet, exercise, things you can do to stay
 7 healthy.
 8 Q. Okay.
 9 And you believe that's a worthwhile effort
 09:41:43 10 even though you're dealing with seriously mentally ill
 11 patients, correct?
 12 A. Yes.
 13 Q. Okay.
 14 And that's because you believe you can
 09:41:49 15 educate and motivate them to take control of those issues to
 16 the best of their abilities, right?
 17 A. I believe we have a responsibility to attempt
 18 to educate them and to help them learn the coping skills
 19 they need.
 09:42:01 20 Q. And do you also include family members in
 21 that supportive effort?
 22 A. In that particular -- there is some family
 23 education that goes on, but in those classes the patients
 24 are attending alone.
 09:42:16 25 Q. Okay.

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09:42:16 1 Can we bring up P10144, and particularly
 2 Page 4011.
 3 THE COURT: Is that the right exhibit number?
 4 MS. GUSSACK: That was the exhibit number,
 09:42:32 5 Your Honor, that I believe Plaintiffs used yesterday.
 6 THE COURT: When you're saying P, it's not
 7 really --
 8 MS. GUSSACK: I'm sorry, Your Honor. You're
 9 right. AK, is it?
 09:42:41 10 Sorry, Mark. I'll get that right.
 11 Okay.
 12 Q. Doctor, let me direct your attention to a
 13 call note that -- you know -- and we discussed call notes
 14 yesterday, didn't we?
 09:42:58 15 A. Yes.
 16 Q. This -- this is one that is for -- was
 17 written by Joey Eski, the Lilly sales representative we
 18 heard from yesterday briefly, correct?
 19 A. Yes.
 09:43:08 20 MR. ALLEN: Your Honor, I apologize. Again,
 21 can I have a copy of this? I know with 10,000 pages --
 22 MS. GUSSACK: Just a minute.
 23 MR. ALLEN: I apologize, sir.
 24 THE COURT: This is one you used yesterday?
 09:43:23 25 MR. ALLEN: No, it's not.

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09:43:33 1 MS. GUSSACK: Your Honor, I'm not sure -- may
 2 we approach?
 3 THE COURT: Sure.
 4 (Bench discussion.)
 09:43:42 5 MS. GUSSACK: Mr. Allen, I am having to
 6 provide you with documents, although we're not getting
 7 copies of exhibits as he uses them. We're seeing them for
 8 the first time on the screen. And I'm certainly happy to
 9 give it to you, but I don't have one right now. I don't
 09:43:53 10 want to interrupt --
 11 MR. ALLEN: Your Honor, where I come -- I
 12 mean, it's customary before you use an exhibit that's not in
 13 the evidence to provide it to the other side. A lot of them
 14 I do have.
 09:44:03 15 MS. GUSSACK: This is in evidence.
 16 THE COURT: I understand the volume of
 17 documents here, but you've got all of these documents --
 18 they gave you. I realize the number of them.
 19 MR. ALLEN: Your Honor, if I could carry
 09:44:14 20 10,000 documents knowing what she's going to use -- I can't
 21 do that.
 22 MS. GUSSACK: All I'm asking is goose for the
 23 gander. You're not giving us documents, so that's all I'm
 24 asking.
 09:44:23 25 THE COURT: I'm happy to have both sides make

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09:44:26 1 copies of their exhibits that they're going to use.
 2 MR. ALLEN: I understand, Your Honor. The
 3 call notes are voluminous for thousands of doctors. I
 4 couldn't pick out a page and be prepared for that.
 09:44:37 5 THE COURT: All I'm saying is that when you
 6 are going to use an exhibit that hasn't been introduced into
 7 evidence, give him a copy, and when you're going to use an
 8 exhibit that hasn't been introduced into evidence, have a
 9 copy ready for the other side.
 09:44:48 10 MR. ALLEN: Okay.
 11 MS. GUSSACK: And I understand.
 12 MR. ALLEN: I wasn't trying to do anything.
 13 MS. GUSSACK: No, I understand.
 14 THE COURT: I understand what you need and
 09:44:56 15 I'm happy to accommodate, but both of you need to do it.
 16 (End bench discussion.)
 17 MS. GUSSACK: Can we bring that up, Nick,
 18 please?
 19 Q. Okay. Doctor, nobody would fault you for not
 09:45:10 20 remembering what happened in September, 2001, so let me just
 21 direct your attention to -- and this is a call note we are
 22 saying from Ms. Eski and it has your name on it as the
 23 prescriber. And do you see where it says we discussed --
 24 I'm sorry. Let's start with, had weight change concerns,
 09:45:30 25 about the fourth line down.

09:45:31 1 A. Yes.
 2 Q. Okay.
 3 We discussed the information and
 4 strategies - send medical letter to Hopson so we can
 09:45:38 5 distribute to staff.
 6 Does that refresh your recollection, Doctor,
 7 about whether you would have received a medical letter from
 8 Lilly with respect to weight gain and weight gain
 9 management?
 09:45:47 10 A. Again, I don't -- I don't recall.
 11 Q. You have no reason to dispute it, though, do
 12 you?
 13 A. No.
 14 Q. Okay.
 09:45:53 15 Now, Doctor, I think yesterday you told us
 16 that you are a member of the State of Alaska's P & T
 17 committee, correct?
 18 A. Yes.
 19 Q. What is the P & T committee?
 09:46:08 20 A. The P & T committee was formed around 2004,
 21 and physicians from various disciplines were selected and
 22 asked to be on it. And the purpose of it was to go through
 23 the different classes of medications and come up with a
 24 preferred formulary list for Medicaid patients.
 09:46:40 25 Q. Are you the only psychiatrist that sits on

09:46:43 1 the P & T committee?
 2 A. No, I'm not.
 3 Q. Okay.
 4 Let's define what P & T stands for.
 09:46:49 5 A. Pharmacy and therapeutics.
 6 Q. Okay.
 7 Who is the other psychiatrist who sits on the
 8 committee?
 9 A. Currently, Lucy Curtiss.
 09:46:55 10 Q. And you have been sitting on the committee
 11 since, I'm sorry, 2004?
 12 A. Yes.
 13 Q. Okay.
 14 And so is it fair to say that the pharmacy
 09:47:01 15 and therapeutics committee assesses efficacy and safety
 16 issues for medications that are being prescribed to Medicaid
 17 patients?
 18 A. Yes.
 19 Q. Okay.
 09:47:12 20 Now, the P & T committee can decide whether
 21 to restrict a medication that's being used for Medicaid
 22 patients?
 23 A. Well, restricted from the sense of it may
 24 not -- the list does not prevent a physician from using any
 09:47:30 25 medication on it if it's medically necessary. They can

09:47:33 1 indicate that on the prescription and override is given.
 2 But it does offer a list for the physician -- the prescriber
 3 to consider when they're prescribing a particular class of
 4 medications.
 09:47:46 5 Q. Okay.
 6 Have you, sir, personally ever urged the
 7 P & T committee to restrict the use of Zyprexa in any way?
 8 A. No.
 9 Q. Doctor, do you know the State of Alaska's
 09:48:01 10 expert witness, Dr. Wirshing?
 11 A. No, I do not.
 12 Q. Have you met him?
 13 A. I just said hello to him yesterday.
 14 Q. Do you know him by reputation?
 09:48:09 15 A. No, I do not.
 16 Q. Well, you have a great deal in common, don't
 17 you, because you both are treating or have treated seriously
 18 mentally ill patients, including patients with
 19 schizophrenia, right?
 09:48:20 20 A. I would assume so, if he's a psychiatrist
 21 that's been in practice.
 22 Q. Well, Doctor, would you tell me: Do you
 23 agree with Dr. Wirshing that once you have found a
 24 medication that works, you fight like the devil to fix the
 09:48:35 25 side effects because the hardest thing in the world to fix

09:48:37 1 is psychosis --
 2 MR. ALLEN: Your Honor, there's no -- this is
 3 improper. I'll object if -- I want to approach.
 4 (Bench discussion.)
 09:48:45 5 MR. ALLEN: I don't know -- she says do you
 6 agree with Dr. Wirshing. She hasn't laid a predicate for
 7 this testimony. She hasn't said -- he's not familiar with
 8 him. Hasn't shown him a deposition. It's just an
 9 argumentative statement of counsel. You can't impeach
 09:49:08 10 somebody with somebody else's deposition.
 11 THE COURT: I don't think she's impeaching
 12 him at all. She's asking him if she -- he agrees with what
 13 I assume will be testimony. If it's not testimony, it's not
 14 testimony.
 09:49:19 15 MR. ALLEN: Well, if she wants to do that,
 16 she needs to put it on the screen and put it in full detail,
 17 but that's okay. I just want to -- what we're doing here is
 18 exactly what I have not been allowed to do. We're allowing
 19 evidence in predicated on later evidence.
 09:49:34 20 THE COURT: Well, I don't think that's really
 21 what my ruling is all about.
 22 MR. ALLEN: Okay.
 23 MS. GUSSACK: Your Honor, just so the record
 24 is clear, I'm allowed to ask this witness about whether he
 09:49:44 25 agrees with someone who the State is claiming is an expert

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09:49:47 1 and whether he agrees with those views. It's no different
 2 than putting up a public --
 3 THE COURT: I'm allowing the question.
 4 (End bench discussion.)
 09:49:59 5 Q. (BY MS. GUSSACK) Dr. Hopson, let me start
 6 again, so you have the question in mind. Okay?
 7 A. Okay.
 8 Q. The question I had is: Do you agree with
 9 Dr. Wirshing's view that once you have found a medication
 09:50:08 10 that works for a patient with serious mental illness, you
 11 fight like the devil to fix the side effects because the
 12 hardest thing in the world to fix is psychosis, and if you
 13 find a drug that works, you deal with the toxicity, whatever
 14 that may be?
 09:50:23 15 A. I would agree in most cases that you try to
 16 do that, yes.
 17 Q. Doctor, you mentioned earlier that you've
 18 been monitoring blood sugar as part of your regular routine
 19 admissions. How -- how long has that been going on?
 09:50:35 20 A. Well, blood sugar has always been a
 21 prescreening test for an admission into the hospital. So
 22 it's something that we've always done.
 23 Q. Thank you, sir.
 24 THE COURT: Mr. Allen?
 09:51:00 25 MR. ALLEN: Thank you, Your Honor.

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09:51:01 1 REDIRECT EXAMINATION
 2 Q. (BY MR. ALLEN) Thank you, Your Honor.
 3 Let's go right back to that last question.
 4 You said blood sugars have always -- I mean,
 09:51:07 5 blood monitoring has always been done -- excuse me. Blood
 6 has always been done on all patients since you've been at
 7 API.
 8 A. Yes.
 9 Q. Was the blood drawn because of Zyprexa?
 09:51:19 10 A. No, not necessarily.
 11 Q. Okay.
 12 But what has changed since you found out
 13 about the risk of Zyprexa concerning this blood that's
 14 taken?
 09:51:28 15 A. Since 2004 we have specifically monitored
 16 blood sugars and lipids and other blood indices specifically
 17 because of the risks associated with Zyprexa.
 18 Q. And when you said you've always taken blood,
 19 it's just like every patient when they go in the hospital
 09:51:50 20 every time; they always have their blood taken?
 21 A. Correct.
 22 Q. But now you're looking at the blood
 23 particularly -- of these patients particularly because of
 24 the risk associated with Zyprexa?
 09:52:01 25 A. That's correct.

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09:52:01 1 Q. And if you see patients who already have some
 2 elevated glucose who are at risk for diabetes, you just
 3 don't give the patient Zyprexa?
 4 A. That would have to come under a great deal of
 09:52:13 5 consideration, yes.
 6 Q. Yes, sir.
 7 And, therefore, it would be misleading to
 8 suggest to this jury that you've always taken blood and it's
 9 nothing new. It is new out there at the hospital, isn't it,
 09:52:27 10 concerning Zyprexa?
 11 MS. GUSSACK: Objection.
 12 THE COURT: What's the objection?
 13 MS. GUSSACK: Leading and mischaracterizing
 14 the testimony of the witness.
 09:52:33 15 THE COURT: Rephrase the question.
 16 Q. (BY MR. ALLEN) Would it be -- would it be
 17 misleading to suggest that nothing has changed at your
 18 hospital once you've learned about the risk of diabetes with
 19 Zyprexa?
 09:52:46 20 A. Yes.
 21 Q. Thank you, sir.
 22 Now, remember, you talked about yesterday
 23 that all drugs have risks and side effects?
 24 A. Yes.
 09:53:01 25 Q. And that you need to give patients informed

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09:53:03 1 consent?
 2 A. Yes.
 3 Q. And in order to do that you need as much
 4 information as possible?
 09:53:07 5 A. Yes.
 6 Q. And when we're talking about Zyprexa, you
 7 talked about the fact that this issue of hyperglycemia and
 8 diabetes was back at the adverse reaction section for years
 9 with no warning?
 09:53:20 10 A. Yes.
 11 Q. Now, concerning the risk of medications, if
 12 you get a proper warning, you can try to handle that side
 13 effect or be on guard for that side effect?
 14 A. That's correct.
 09:53:32 15 Q. Or you can decide not to use the medication?
 16 A. Yes.
 17 Q. And, remember, Ms. Gussack just had you turn
 18 around and said all these drugs have different risks, right?
 19 A. Yes.
 09:53:43 20 Q. And she talked to you about what's the one
 21 with Geodon. Do you recall that question?
 22 A. With the Geodon? Yes.
 23 Q. And you said QTC or cardiac issues.
 24 A. Yes.
 09:53:55 25 Q. Now -- and then she said, what about

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09:53:58 1 Clozaril? Do you remember that?
 2 A. Yes.
 3 Q. And I think you've talked about the
 4 agranulocytosis?
 09:54:04 5 A. Yes.
 6 Q. The reason that that's so prevalent in your
 7 knowledge is because the drug companies actually have a
 8 warning on those issues?
 9 MS. GUSSACK: Objection; leading.
 09:54:14 10 Q. (BY MR. ALLEN) Well, let me ask this
 11 question: Do the drug companies who make Clozaril and
 12 Geodon have a warning on those issues?
 13 A. Yes.
 14 Q. Okay.
 09:54:21 15 This is a PDR, right?
 16 A. That's correct.
 17 Q. All right.
 18 And on this issue, I just want to get
 19 something straight when we talk about the PDR. They're
 09:54:34 20 using the word "label." You've heard that word?
 21 A. Yes.
 22 Q. Do you use labels in your practice?
 23 A. No. We usually use the PDR information.
 24 Q. And is that because the labels may be created
 09:54:44 25 by the drug company, but you get your information when it's

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09:54:47 1 compiled in this book?
 2 A. Yes.
 3 Q. They don't send you -- they or any drug
 4 company, every time they make some change in their label,
 09:54:54 5 they don't send you the label, do they?
 6 A. Not that I know of.
 7 Q. Okay.
 8 This is what you use?
 9 A. Yes.
 09:55:00 10 Q. Thank you.
 11 On Clozaril -- hard to get the book over
 12 here. The reason --
 13 THE COURT: Can I just ask, what year of PDR
 14 are we --
 09:55:30 15 MR. ALLEN: This is a 2008 PDR.
 16 THE COURT: Okay.
 17 MR. ALLEN: We can get others.
 18 Q. This is the Clozaril PDR, and the reason we
 19 know about the potential risks for agranulocytosis is
 09:55:40 20 because it's in a black box warning; is that correct?
 21 A. That's correct.
 22 Q. And that certainly, then, gives you as a
 23 doctor and the patients the ability to know about this,
 24 right?
 09:55:51 25 A. Yes.

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09:55:51 1 Q. And once this warning came out in a black box
 2 on Clozaril, what happened?
 3 A. We took it seriously and we monitored for it,
 4 and considered it in our prescribing practice.
 09:56:04 5 Q. And you watched for it because if you can
 6 catch it with proper blood monitoring, you can avoid the
 7 serious consequences?
 8 A. That's correct.
 9 Q. So if you warn somebody and give it where
 09:56:15 10 they can see it, doctors can monitor it and then handle it.
 11 A. Yes.
 12 Q. But if you don't warn anybody, then the
 13 doctor doesn't monitor it and the doctor can't handle it?
 14 A. That's correct.
 09:56:26 15 Q. And this drug company, since 1996, after they
 16 knew about elevated blood glucose in their testing, did not
 17 warn about diabetes and hyperglycemia, did they?
 18 MS. GUSSACK: Objection; both leading and
 19 mischaracterizing the evidence.
 09:56:47 20 THE COURT: Why don't you rephrase.
 21 MR. ALLEN: I'll rephrase it.
 22 Q. Since 1996, when Eli Lilly put Zyprexa on the
 23 market, they didn't have a warning on diabetes and
 24 hyperglycemia, did they?
 09:57:02 25 A. No, they did not.

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09:57:02 1 Q. And, in fact, when this warning came out on
 2 agranulocytosis, one of the things that also happened is
 3 prescriptions of Clozaril dropped dramatically, didn't they?
 4 A. I'm not -- I'm not for sure that the
 09:57:17 5 prescriptions dropped.
 6 Q. That's okay, Doctor. Now let's talk about
 7 Geodon. Remember she asked you about Geodon?
 8 A. Yes.
 9 Q. Let me find it.
 09:57:31 10 This is the 2008 Geodon. It's made by
 11 Pfizer, right?
 12 A. Yes.
 13 Q. And by the way, these are not in alphabetical
 14 order. Every drug company has their own section of this
 09:57:42 15 book.
 16 A. That's correct.
 17 Q. And then you go to the drug company's
 18 section, and then their drugs are listed in alphabetical
 19 order?
 09:57:48 20 A. Right.
 21 Q. So if you want to look up, let's say, a 2002
 22 PDR on Zyprexa, you would look under Eli Lilly and go to the
 23 Zs.
 24 A. Right.
 09:57:57 25 Q. And what you would find would be no warning

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09:57:59 1 on diabetes and hyperglycemia, correct?
 2 A. That's correct.
 3 Q. Okay.
 4 Now, let's look at the Geodon. What's -- by
 09:58:13 5 the way, what's a contraindication? What's a
 6 contraindication, Doctor?
 7 A. Contraindication is if someone has a
 8 particular condition or situation going on in their -- in
 9 their body, a contraindication would mean you should not
 09:58:28 10 prescribe that medication for them because of the heightened
 11 risk of serious side effect.
 12 Q. And as we saw -- I'm sorry, sir. I'm sorry.
 13 Did I interrupt you?
 14 And as we saw yesterday, in 2002 the Japanese
 09:58:43 15 or Eli Lilly contraindicated Zyprexa for patients with
 16 diabetes already?
 17 A. Yes.
 18 Q. Okay.
 19 Now, concerning Geodon and how we know of its
 09:58:54 20 risk, we look in the package insert, right in the book that
 21 doctors use. And they have a contraindication concerning
 22 the issue of QT prolongation, do they not?
 23 A. They do.
 24 Q. All right.
 09:59:09 25 And then -- hold on. I'm trying to.

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09:59:13 1 Here it is.
 2 MR. FIBICH: Need to focus it.
 3 MR. ALLEN: I know. It's hard enough for me
 4 to get it on the screen.
 09:59:23 5 There it is. I'm going to try to focus at
 6 the same time. Hold on.
 7 Here we go.
 8 Let me find it.
 9 Q. (BY MR. ALLEN) This is -- I'm sorry. I
 09:59:36 10 didn't show this. It's hard to get this book on here.
 11 Then we have a warning. Do you see the
 12 warning section?
 13 A. Yes.
 14 Q. And then we come up here, and this, in fact,
 09:59:46 15 Doctor, it's harder to see on the screen, and I'll show you,
 16 is an entire -- can I approach, Your Honor?
 17 THE COURT: You may.
 18 Q. (BY MR. ALLEN) This is not only a warning;
 19 it's a bolded warning for a whole column in the package
 10:00:00 20 insert, is it not?
 21 A. It is.
 22 Q. So when we're talking about risk, what
 23 Ms. Gussack talked to you about, knowing the risk is
 24 critically important?
 10:00:09 25 A. Yes.

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10:00:10 1 Q. It allows the doctor to try to manage the
 2 risk if they decide to prescribe the medication.
 3 A. Yes.
 4 Q. And it allows the patient the right to choose
 10:00:18 5 if he or she wants to accept that risk.
 6 A. Yes.
 7 Q. And that's all this is about concerning risk
 8 and complications of medications, right?
 9 A. Yes.
 10 Q. It's freedom of choice, correct?
 11 A. Yes.
 12 Q. You don't -- do you have freedom of choice
 13 and informed consent if you're not given all the
 14 information?
 15 A. No.
 16 Q. In fact, if you don't get all the
 17 information, your right to freely choose is stolen from you,
 18 correct?
 19 A. Yes.
 10:00:47 20 MS. GUSSACK: Objection, Your Honor.
 21 THE COURT: We're getting a little
 22 argumentative.
 23 MR. ALLEN: Okay.
 24 Q. (MR. ALLEN) Let me ask this: Is your right to
 10:00:54 25 freely choose what you want to do with your medical care

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10:00:57 1 taken away from you if you're not provided all the
 2 information?
 3 MS. GUSSACK: Objection.
 4 THE COURT: I'll overrule.
 10:01:04 5 A. I think it's restricted, yes.
 6 Q. (BY MR. ALLEN) Yes, sir.
 7 And is it good to restrict patients' rights
 8 to know concerning their choices or their family's choices
 9 concerning medical care?
 10:01:14 10 A. No.
 11 Q. Okay.
 12 Now, this issue of the label, the 2003 label,
 13 do you recall those lines of questions Ms. Gussack asked you
 14 about both yesterday and this morning?
 10:01:50 15 A. Yes.
 16 Q. And I believe Ms. Gussack -- like I say, I
 17 know Ms. Gussack asked you about this label yesterday in her
 18 examination. She -- I don't know if you remember. Towards
 19 the end of the day she flashed it on the screen and asked
 10:02:21 20 you to turn to Page 7. Do you recall that?
 21 A. Yes.
 22 Q. Okay.
 23 First, we'll turn to Page 6, and she was
 24 reading from the -- what she called the new class labeling
 10:02:33 25 in regard to hyperglycemia and diabetes that was put into

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10:02:38 1 effect in September of 2003.
 2 Do you recall that?
 3 A. Yes.
 4 Q. Okay.

10:02:43 5 And then she said -- let's turn to Page 7.
 6 And she said -- do you see this sentence: That the
 7 available data are insufficient to provide -- let me focus
 8 it again. Can we see that? Can y'all see that again? The
 9 available data are insufficient to provide reliable
 10 estimates of differences in hyperglycemia-related adverse
 11 event risk among the market -- marketed atypical
 12 antipsychotics.
 13 Do you remember her asking about that?
 14 A. Yes.

10:03:17 15 Q. The fact of the matter is, first of all, you
 16 never -- you didn't get this label, did you?
 17 A. Not that I recall.
 18 Q. And the fact of the matter is, isn't it, that
 19 this statement never made it into this book, did it?

10:03:33 20 A. No.
 21 Q. Now, let's see how we know that.
 22 Remember about the -- the FD -- the FDA, in
 23 fact, wrote Eli Lilly a letter in December of 2003.
 24 Do you see that, sir?

10:03:59 25 A. Yes.

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10:04:00 1 Q. And told them -- I don't know what I've done
 2 now.
 3 What do I have to do?
 4 Can you help me with it?

10:04:19 5 Thank you, sir.
 6 The FDA wrote them a letter and told them,
 7 and all of the manufacturers, to take out this sentence that
 8 says the available data are insufficient to provide reliable
 9 estimates of differences in hyperglycemia-related adverse
 10 events risk among the marketed atypical antipsychotics; is
 11 that right?
 12 A. I see that, yes.
 13 Q. And that's what the FDA told them to do,
 14 correct?

10:04:57 15 A. Yes.
 16 Q. Now, something had happened prior to the time
 17 of that letter, and it was the Consensus Development --
 18 MS. GUSSACK: Objection. Your Honor, I think
 19 that mischaracterizes the chronology of events here.

10:05:18 20 Mr. Allen, you might want to check the date of that article.
 21 MR. ALLEN: I have no problem.
 22 Q. (MR. ALLEN) Something -- this -- let's go
 23 back just to make sure. I'll clear up any confusion. This
 24 letter from the FDA is dated December the 16th, 2003,
 10:05:36 25 correct?

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10:05:36 1 A. Yes.
 2 Q. Okay.
 3 The Consensus Development Conference was held
 4 in November of 2003. Do you see that?

10:05:53 5 A. Yes.
 6 Q. And Food and Drug Administration officials
 7 were present and testified at this hearing. Do you see
 8 that?
 9 A. I do.

10:06:04 10 Q. Now, Ms. Gussack said you understand this
 11 just took place over three days. Do you -- do you remember
 12 that question?
 13 A. Yes.
 14 Q. That's true, there was hearings held for
 15 three days. Do you see it? They have the dates right
 16 there.
 17 A. Yes.
 18 Q. All right.
 19 But that's not what happened. What happened
 20 was this panel, before the conference, received copies of
 21 the known peer-reviewed English language clinical studies
 22 published in this area as well as additional articles from
 23 animal studies and other papers and abstracts were reviewed.
 24 Do you see that?
 25 A. Yes.

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10:06:44 1 Q. In other words, this panel didn't just meet
 2 and say, okay, we got three days. The panel studied
 3 everything they could get their hands on in the English
 4 language literature. Do you see that?

10:06:54 5 A. I do.
 6 Q. Now, not only that -- by the way, during this
 7 three-day period the drug companies who make the
 8 second-generation antipsychotics, including Eli Lilly,
 9 testified. You see that?

10:07:18 10 A. I do.
 11 Q. In other words, they got to put their best
 12 testimony and foot forward. Do you see that?
 13 A. Mm-hmm.
 14 Q. Okay.

10:07:25 15 But not only that. The panel who was making
 16 these judgments -- I got to find it. Dr. Blonde was one
 17 member of the panel, Lawrence Blonde. Do you see that?
 18 A. I do.
 19 Q. And Dr. -- I think it's -- yeah, here it is.

10:07:49 20 Dr. Kane was a member of the panel. Do you see that?
 21 A. I do.
 22 Q. These panel members, Dr. Blonde and Dr. Kane,
 23 had received money from Eli Lilly. Do you see that?
 24 A. I do.
 10:08:05 25 Q. Okay.

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10:08:05 1 And this entire event was sponsored by the
2 drug companies and supported by it. Do you see that?
3 A. I do.
4 Q. In addition, Dr. Cavazzoni and Dr. Buse --
10:08:24 5 we've seen their names in articles -- they got to come there
6 and testify. Do you see that?
7 A. Yes.
8 Q. And members of the FDA, Judy Racoosin, who
9 we've heard something about, she got to testify. Do you see
10:08:39 10 that?
11 A. Yes.
12 Q. And in addition our expert, William Wirshing,
13 got to testify. Do you see that?
14 A. I do.
10:08:46 15 Q. And not only that, many other experts
16 testified. Do you see that?
17 A. Yes.
18 Q. Okay.
19 So this wasn't some three-day hopscotch. It
10:08:59 20 was actually a detailed evaluation of these medications --
21 I'll rephrase the question, Your Honor.
22 THE COURT: Thank you.
23 MR. ALLEN: I'll tell you what, we'll move
24 on.
10:09:15 25 Q. (MR. ALLEN) Now, we talked about the fact,

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10:09:17 1 and Ms. Gussack mentioned that they were told to change the
2 label in September of 2003. Do you remember that question
3 and answer?
4 A. Yes.
10:09:27 5 Q. It took them six months before they ever
6 prepared a letter to doctors after they'd been told to
7 change the warning six months earlier. Do you see that?
8 A. Yes.
9 Q. Now, Doctor, I asked you this yesterday, and
10:09:51 10 it was a very serious question. I said, how many pieces of
11 mail do you approximately get a day? And I don't remember
12 what your answer was; 30 to 50 or something?
13 A. Yes.
14 Q. And if you get -- let's just take the middle,
10:10:02 15 40 pieces of mail a day, six days a week the mail comes,
16 that's 240 pieces of mail a week, over a thousand pieces of
17 mail a month, over 12,000 pieces of mail a year; is that
18 right?
19 A. That's correct.
10:10:13 20 Q. Okay.
21 So when these -- when the drug companies make
22 these changes, wait six months, and send you a letter, it
23 doesn't hit your desk and go into your brain right away,
24 does it?
10:10:27 25 A. No.

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10:10:27 1 Q. Okay.
2 Now, remember this line on Page 7 that
3 Ms. Gussack pointed out about the available data are
4 insufficient -- remember that?
10:10:41 5 A. Yes.
6 Q. Okay.
7 And we saw the FDA said, don't do that, take
8 that out of there, right?
9 A. Right.
10:10:46 10 Q. And, in fact, it's not in the letter. That
11 was sent dated March the 1st, 2004, wasn't it?
12 A. Correct.
13 Q. Now, Ms. Gussack talks about the FDA told us
14 to do this and the FDA -- we met with the FDA. You heard
10:11:03 15 those lines of questions, right?
16 A. Yes.
17 Q. Do you know that the FDA and the regulations
18 with the FDA permit the manufacturers of a drug to change
19 their warning on their own at any time if they deem it
10:11:17 20 necessary? Did you know that?
21 A. No.
22 MS. GUSSACK: Objection, Your Honor; beyond
23 the scope and expertise.
24 MR. ALLEN: I'm asking him did he know based
10:11:25 25 on the FDA questions asked of him.

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10:11:26 1 THE COURT: I'll overrule the objection.
2 Q. (BY MR. ALLEN) Did you know a drug company
3 can change its label at any time if they deem it necessary?
4 Did you know that?
10:11:34 5 A. No.
6 Q. Okay.
7 By the time this letter went out on March the
8 1st, 2004, which Ms. Gussack has properly characterized as
9 class labeling, the Consensus statement and the Consensus
10:11:55 10 panel had already met. Do you know that?
11 Okay. This letter comes out March the 1st.
12 Remember, the Consensus panel is in November of 2003.
13 A. Yes.
14 Q. Some five months earlier.
10:12:08 15 A. Yes.
16 Q. And the Consensus panel reached the
17 determination, as we've seen in Table 2, that Zyprexa and
18 Clozaril had the worst risk of weight gain, diabetes and
19 lipids. Do you see that?
10:12:27 20 A. Yes.
21 Q. And this article was published in February of
22 2004, correct?
23 A. Yes.
24 Q. Okay.
10:12:44 25 So by the time Eli Lilly sent the letter in

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10:12:49 1 March of 2004, they already had the results of the Consensus
2 panel, did they not?
3 A. Yes.
4 Q. Did they send you a letter and tell you,
10:12:58 5 Doctors, we want you to know what the ADA, American Diabetes
6 Association, the American Psychiatric Association, the
7 American Association of Endocrinologists and the North
8 American Association for the Study of Obesity have found?
9 Did they send you a letter on that?
10:13:14 10 A. No.
11 Q. Did they tell you about -- did they have Ms.
12 Eski or anybody from their company come and sit down with
13 you and say, we'd like to tell you about the Consensus panel
14 which we sponsored, which we sponsored, and our experts were
10:13:29 15 on the panel and we got to testify? Did they come and tell
16 you those conclusions?
17 A. No.
18 Q. Have they ever done it?
19 MS. GUSSACK: Objection; it's vague to me.
10:13:41 20 Done what?
21 THE COURT: If you understand the question,
22 you may answer it.
23 A. No, they have not.
24 Q. (BY MR. ALLEN) Do you think they should?
10:13:49 25 A. Yes.

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10:13:50 1 Q. Now, on this issue of the letter, do you
2 remember the letter from the FDA that was written after
3 the -- the consensus conference that Ms. Gussack discussed
4 with you and I said I'd like a copy of it?
10:14:23 5 A. Yes.
6 Q. Okay.
7 And they said we have a letter from the FDA,
8 and it was signed by Dr. Boehm, Dr. Racoosin, Dr. Laughren
9 and Dr. Katz.
10:14:36 10 A. Yes.
11 Q. First of all, we know Dr. Racoosin testified,
12 we just saw it, at the Consensus conference, correct?
13 A. Yes.
14 Q. So her views had been heard right before the
10:14:47 15 panel of experts.
16 A. Yes.
17 Q. Sponsored by this drug company, right?
18 A. Yes.
19 Q. Okay.
10:14:52 20 But Dr. Laughren also signed this, right?
21 A. Yes.
22 Q. Do you know what information Dr. Laughren had
23 at the time he wrote this letter? Do you know?
24 A. No.
10:15:06 25 Q. I got to get my water here.

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10:15:12 1 All right. Well, let's see if I can help.
2 In -- sorry, Mark, I'm going to have to find
3 the exact exhibit number so I can help the Court.
4 I'm sorry, Your Honor.
10:15:41 5 THE COURT: That's okay.
6 MS. GUSSACK: Can I get a copy?
7 MR. SUGGS: Is that the January 12 letter?
8 MR. ALLEN: I need to give them the
9 January --
10:15:53 10 MR. SUGGS: AK10104.
11 MR. ALLEN: AK10104.
12 MR. SUGGS: Page 41.
13 MR. ALLEN: I need to give a copy to
14 Ms. Gussack.
10:16:02 15 And while you're at it, get her a copy of
16 Plaintiff's Exhibit 10094.
17 THE COURT: So that's AK10094? That's the
18 second one you just mentioned?
19 MR. ALLEN: Yes, sir.
10:16:24 20 THE COURT: Okay.
21 MR. ALLEN: I do apologize, but I cannot
22 keep...
23 Maybe it's a good time for our coffee -- is
24 it a good time for our coffee break to get these?
10:16:41 25 THE COURT: Actually, it is. Why don't we

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10:16:42 1 take a 15-minute break, ladies and gentlemen of the jury.
2 Again, I'll give you the warning. Please do not discuss
3 this case with anyone or let anyone discuss it with you.
4 Please try to keep open-minded until you've heard all of the
10:16:57 5 evidence in this case. We'll be in recess for about 15
6 minutes.
7 THE CLERK: Please rise.
8 We are now in recess. Off the record.
9 (Short recess.)
10:31:24 10 THE COURT: We're back on the record outside
11 of the presence of the jury. I heard there was an issue the
12 parties wanted to pick up outside the presence of the jury.
13 MS. GUSSACK: Yes, Your Honor. I think there
14 was a question pending, and actually perhaps this is best
10:35:52 15 done without Dr. Hopson observing while we have this
16 discussion about his expertise or lack thereof. I leave it
17 to the Court's judgment about whether he should be excused.
18 THE COURT: I don't know what the issue is,
19 but, Doctor, would you mind stepping out while we have this
10:36:12 20 conversation?
21 MS. GUSSACK: Your Honor, we want to make an
22 objection to the increasingly argumentative, leading and, I
23 think, inappropriate questioning that's going on of this
24 witness, and most particularly to the series of questions
10:36:39 25 that Mr. Allen just started right before the break, which

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10:36:42 1 are largely designed to make this witness, a nonexpert, the
2 witness to answer about FDA regulations or expertise.
3 He has no pretense expertise; he hasn't been
4 qualified; his deposition demonstrated no knowledge of this.

10:37:00 5 And Mr. Allen appears to be continuing on a path towards
6 making his closing argument using this witness to answer
7 questions about FDA's expectations, knowledge. It is -- he
8 doesn't even have the pretense to expertise that
9 Dr. Gueriguian did, and we have the same objections here.

10:37:16 10 This witness is not an appropriate witness to trot through a
11 series of documents of which he has no knowledge. He's told
12 us he didn't see most of the documents, and he has no
13 understanding of -- absent some qualification, and we would
14 object for the reasons set forth in our motion.

10:37:31 15 THE COURT: Let me just ask you this: Didn't
16 you take him through some FDA documents saying, were you
17 aware that the FDA -- were you aware that this letter had
18 been sent? Were you aware that that this happened? I mean,
19 isn't this just a follow-up on your questioning on the same
20 line?

10:37:48 21 MS. GUSSACK: No, Your Honor. I think it's
22 quite different. We asked the witness, since he had been
23 asked in direct by Mr. Allen, about his views about what
24 should -- Lilly should or shouldn't have done pursuant to
25 various labeling and Dear Doctor letters, whether he was

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10:38:02 1 aware -- or the ADA consensus, whether he was aware of the
2 analysis done. When -- and that was a factual question, was
3 he aware. Now he's being asked by Mr. Allen questions about
4 whether FDA would have liked to know, whether they should
5 have known, whether Lilly should have done things as a
6 result. These are opinion questions. They are quite
7 different than setting a factual predicate as to whether he
8 was aware of information.
9 I think there's a substantial difference, and
10 I think this is really evidence of what it is that our
11 motion this morning was designed to address.

10:38:25 12 MR. ALLEN: And of course I disagree. I
13 didn't even have this in my examination plan. They were
14 asking were they aware, were they aware. She showed him FDA
15 letters.

10:38:42 16 THE COURT: This is what I'm going to say.
17 The questions have been -- I know you're rushing through
18 this, and leading is designed to speed this along, but it is
19 becoming increasingly --

10:38:54 20 MR. ALLEN: Your Honor, I will do it --
21 THE COURT: -- leading, and it has at times
22 been -- I thought I was going to -- I thought some of your
23 objections that you said were leading and mischaracterizing
24 were going to be argumentative objections, but there's been
25 a bit of that too.

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10:39:09 1 So please try to control the leading and try
2 to control the argumentative. I will allow you to ask the
3 were you aware kinds of questions, same as Ms. Gussack did.
4 To the extent you ask would the FDA have wanted to know or
5 start getting into those opinions, I'm going to sustain that
6 objection.

10:39:27 7 MR. ALLEN: Yes, sir, and I think that -- and
8 by the way, I don't think that's what I did at all. I
9 understand the leading. I was rushing for time.

10:39:39 10 THE COURT: I understand.
11 MR. ALLEN: And -- but I will have no problem
12 asking were you aware, which is what I did, and the record
13 will reflect that, and the Court was correct when it
14 answered Ms. Gussack. I promise, this wasn't even in my
15 examination until she brought the issues up.

10:39:51 16 MS. GUSSACK: Your Honor, I appreciate the
17 guidance the Court has given the State because we really do
18 not wish to interrupt or be perceived as interrupting the
19 examination.

10:40:04 20 THE COURT: I understand that -- the dilemma
21 that somebody has when there's a lot of leading questions.
22 I'll let everyone know, I tend to be perhaps more liberal
23 than some people are on leading questions, just because I
24 kind of look at it to see, do I really have the witness
25 testifying or do I have the attorney testifying.

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10:40:29 1 But I also understand that people are trying
2 to get through things, and I somewhat apply a -- in my own
3 mind try to apply a standard of what I perceive that it's
4 getting too much as opposed to we're accomplishing something
5 with a little bit of leading stuff, but it was pushing over
6 the line.

10:40:43 7 MS. GUSSACK: Your Honor, just so long as
8 it's clear that if I used the word mischaracterizing I
9 certainly meant argumentative. There's no question that
10 that was what was going on.

10:40:53 11 THE COURT: You're free to say argumentative.
12 And again, I very much appreciate that you're not having
13 speaking objections unless I invite them. But saying
14 objection, argumentative; or objection, leading; or
15 objection, hearsay is perfectly fine with me. It's going
16 beyond -- if I need a further explanation, I'll ask for it.

10:41:05 17 MS. GUSSACK: Thank you, Your Honor. And I
18 understand that the guidance from the Court is factual
19 inquiries, not what FDA knew or what Dr. Laughren thought or
20 believed or would have wanted to know.

10:41:20 21 THE COURT: Right. The witness can say what
22 he was aware of and just as he did on direct, and -- but I
23 don't want him testifying as to what he would have thought
24 the FDA would have wanted to know or what somebody else
25 would have wanted to know.

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10:41:34 1 MR. ALLEN: No problem. No problem.
 2 THE COURT: That's the -- that's going to be
 3 the line.
 4 MR. ALLEN: There's no problem.
 10:41:39 5 THE COURT: Anything else, then?
 6 Oh, I actually have something else. I've had
 7 a chance to review the additional lines to be added to
 8 the -- is it the Breier deposition? And I'll overrule the
 9 objections to those lines.
 10:42:01 10 MR. ALLEN: Can we go get -- somebody go
 11 get --
 12 THE COURT: Yes.
 13 MR. ALLEN: -- Dr. Hopson.
 14 THE COURT: Right. And we can -- the jury is
 10:42:12 15 ready to go. We'll go off record, but I'll stay at the
 16 bench.
 17 THE CLERK: Off record.
 18 (Discussion off the record.)
 19 THE CLERK: On record.
 10:43:28 20 THE COURT: Mr. Allen?
 21 MR. ALLEN: Thank you, Your Honor.
 22 CONTINUED REDIRECT EXAMINATION
 23 Q. (BY MR. ALLEN) Dr. Hopson, Scott Allen.
 24 Remember you were asked questions by
 10:43:44 25 Ms. Gussack about the letter? Do you recall that?

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10:43:47 1 A. Yes.
 2 Q. And she asked if you were aware that the
 3 members of the FDA had written a letter following the
 4 Consensus statement?
 10:43:55 5 A. Yes.
 6 Q. And we pointed out that Dr. Racoosin was on
 7 that letter.
 8 A. Yes.
 9 Q. Were you aware of -- and from looking at the
 10:44:05 10 Consensus statement, that Dr. Racoosin was one of the
 11 individuals who testified?
 12 A. No.
 13 Q. And after -- if you look at the Consensus
 14 statement, you're now aware of that?
 10:44:17 15 A. Yes.
 16 Q. Okay.
 17 Were you aware that Dr. Tom Laughren or
 18 Laughren, M.D., signed this letter?
 19 A. I see that, yes.
 10:44:24 20 Q. Now, were you aware that Dr. Laughren also
 21 wrote a letter to Eli Lilly in January of last year? Do you
 22 see Dr. Laughren's name?
 23 A. Yes.
 24 Q. Were you aware that he wrote this letter?
 10:44:47 25 A. Not until now.

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10:44:51 1 Q. Were you aware of what Dr. Laughren said in
 2 this letter?
 3 MS. GUSSACK: Your Honor, if the witness was
 4 not aware, why are we going through the letter? I have an
 10:45:03 5 objection to this line of questioning.
 6 MR. ALLEN: I'm doing the same thing they
 7 did. Are you aware of this and are you aware of what this
 8 said.
 9 THE COURT: I'll allow him to ask the
 10:45:11 10 questions the way they're being phrased.
 11 Q. (BY MR. ALLEN) Doctor, are you aware that
 12 Dr. Laughren wrote Eli Lilly and said, Recent articles in
 13 the New York Times reported on clinical trial data from 70
 14 clinical trials on Zyprexa that showed patients taking
 10:45:28 15 Zyprexa experienced high blood sugar levels and weight gain
 16 that may have differed from -- may have differed from
 17 information Eli Lilly revealed publicly and to the FDA?
 18 A. Yes.
 19 Q. Okay.
 10:45:43 20 And do you see, of course, that this letter,
 21 which was sent in January of 2007, was after August of 2004,
 22 when Dr. Laughren had originally signed his letter
 23 concerning the ADA?
 24 A. Yes.
 10:46:11 25 Q. Were you aware that in addition to making the

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10:46:20 1 statement we read earlier, Dr. Laughren says, By this
 2 letter, we are asking you to ensure that you are in
 3 compliance with all applicable statutes and regulations, and
 4 we further request that you submit to the agency all data
 10:46:37 5 and information, including but not limited to those
 6 referenced in the New York Times articles that bear on the
 7 safety of Zyprexa.
 8 In particular, we are interested in receiving
 9 data and analyses bearing on these concerns about weight
 10:47:01 10 gain and hyperglycemia that have not already been submitted
 11 to the agency. Additionally, if you are in possession of
 12 other information not specifically required to be submitted
 13 by statute or regulation, but that would nevertheless be
 14 useful to FDA in evaluating the safety of Zyprexa regarding
 10:47:30 15 these concerns of weight gain and hyperglycemia, we request
 16 that you please submit this information to us, as well.
 17 Were you aware of that?
 18 A. I see that. I was not aware of it, no.
 19 Q. Right.
 10:47:44 20 So when Ms. Gussack asked you if you were
 21 aware of the letter signed by Dr. Laughren -- I can't
 22 remember, were you aware of this letter?
 23 A. I think I had been shown this before.
 24 Q. Okay.
 10:47:58 25 But you were not made aware by Ms. Gussack or

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10:48:03 1 Eli Lilly -- let me ask this: Were you made aware by Eli
2 Lilly at any time of this letter sent by the FDA to Eli
3 Lilly in January of 2007?
4 A. No.

10:48:13 5 Q. Were you aware that Eli Lilly responded to
6 this letter?
7 A. No.

8 Q. Okay.

9 Were you aware and have you ever been made
10 aware by Eli Lilly that the FDA wrote them another letter in
11 March of 2007?
12 A. No.

13 Q. This is this letter. It's Exhibit Alaska --
14 State of Alaska 10094, signed by Dr. Laughren. Do you see
15 that?
16 A. I do.

17 Q. Were you ever made aware by Eli Lilly that
18 Dr. Laughren told Eli Lilly that your -- your recent
19 February 20th, 2000 response to our letter of January the
20 12th, 2007 letter regarding the New York Times story has not
21 been particularly helpful in addressing these concerns.
22 Were you aware of that?
23 A. No, I was not.

24 Q. Were you -- were you made aware by Eli Lilly
25 that our -- that Dr. Laughren said our overall goal is to

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10:49:45 1 improve labeling with regard to these findings so that
2 clinicians will be better informed on what the risks are for
3 the patients.
4 Were you made aware of that by Eli Lilly?
5 A. No, I was not.

6 Q. Do you agree with the goal that labeling
7 should be sufficient so that clinicians -- and clinicians
8 means doctors, doesn't it?
9 A. Prescribers, yes.

10:50:09 10 Q. Prescribers. Do you agree with the goal that
11 the prescribers should be better informed on what the risks
12 are for the patients?
13 A. Absolutely.

14 Q. Yes, sir.

10:50:17 15 So did Eli Lilly at any time come to your
16 offices, write you a letter, and make you aware of any of
17 this?
18 A. No.

19 Q. Now, back -- I need to backtrack. I didn't
20 ask this earlier. I have -- there they are.
21 Sir, do you remember the letter that --
22 March 1st, 2004, that Ms. Gussack showed you and that I
23 showed you that Eli Lilly wrote concerning the new class
24 labeling?
25 A. Yes.

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10:51:30 1 Q. Okay.
2 Are you aware of the fact that the label
3 changes that had been mandated on Zyprexa by the FDA in 2007
4 have not been mandated on risperidone -- let me use the
5 other names. Have not been mandated on Risperdal, Seroquel,
6 Geodon and Abilify?
7 A. That is my understanding, yes.

8 Q. So the FDA -- you are aware of the fact that
9 the FDA has mandated a new warning on Zyprexa?
10 A. Yes.

11 Q. Thank you, sir.
12 Now, the March 1st, 2004 letter obviously did
13 not get sent until after the 2 -- the 2004 PDR was out; is
14 that correct?
15 A. Yes.

16 Q. So therefore, in the book that you used, had
17 you picked up the 2004 PDR you would not have found this new
18 warning; is that correct?
19 A. That's correct.

20 Q. And, in fact, we can go to that.
21 This is, by the way, 2004 Zyprexa. There is
22 no warning on hyperglycemia and diabetes in the 2004 PDR, is
23 there, sir?
24 A. That is correct.

25 MR. ALLEN: What number are we on? If I mark

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10:53:31 1 this, what would it be?
2 A SPEAKER: 10165, AK10165.
3 MR. ALLEN: Your Honor, we offer
4 Plaintiff's -- I mean, State of Alaska's AK10165, the 2004
5 PDR.
6 THE COURT: Any objection?
7 MR. LEHNER: No.
8 THE COURT: AK10165 may be admitted.
9 MR. ALLEN: Can I publish this to the jury,
10 Your Honor?
11 THE COURT: You may.
12 MR. ALLEN: Mary Beth, AK10166?
13 A SPEAKER: Right.
14 MR. ALLEN: Your Honor, for identification
15 purposes, until it's admitted, I'm going to display the 2003
16 PDR marked currently for identification purposes as AK10166,
17 and I provided a copy to counsel.
18 Q. (BY MR. ALLEN) Sir, this is the 2003 PDR.
19 A. Yes, sir.

20 Q. Just for the record, again, this is Zyprexa.
21 A. Yes.

22 Q. And this is the warning section, and again,
23 there's no warning of hyperglycemia and diabetes or weight
24 gain or hyperlipidemia; is that correct?
25 A. That's correct.

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10:55:42 1 MR. ALLEN: Your Honor, the State of Alaska
 2 offers AK10166.
 3 MR. LEHNER: No objection.
 4 THE COURT: AK10166 is admitted.
 10:55:54 5 MR. ALLEN: Can I publish it to the jury,
 6 Your Honor?
 7 THE COURT: You may.
 8 Q. (BY MR. ALLEN) And, sir, we could march
 9 backward every year, but isn't it true that prior to the
 10:56:08 10 2005 PDR there was never a warning concerning hyperglycemia
 11 and diabetes in regards to Zyprexa?
 12 A. That is true.
 13 Q. Okay.
 14 MR. ALLEN: Actually, I have an extra copy.
 10:56:43 15 Mary Beth, 1016 --
 16 A SPEAKER: AK10167.
 17 MR. ALLEN: I have marked for identification
 18 purposes and provided to opposing counsel Plaintiff's
 19 Exhibit AK10167.
 10:57:15 20 Q. This is the 2005 PDR on Zyprexa. And that's
 21 the first PDR on which a warning of hyperglycemia and
 22 diabetes appeared?
 23 A. Yes.
 24 Q. And the information contained within this PDR
 10:57:40 25 is this language, which we'll have time to read with other

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10:57:43 1 witnesses, is right here. It goes down about a quarter --
 2 about a -- actually, probably a quarter or third of the page
 3 to right here. Is that correct?
 4 A. That's correct.
 10:58:03 5 Q. And by the way, there's -- this warning was
 6 the -- as Ms. Gussack said, the class labeling that went on
 7 all of the second-generation antipsychotics?
 8 A. That's correct.
 9 Q. And the first time it appeared was 2005?
 10:58:18 10 A. Yes.
 11 MR. ALLEN: Your Honor, the State of Alaska
 12 offers Alaska -- AK10167.
 13 MS. GUSSACK: No objection.
 14 THE COURT: AK10167, the 2005 PDR, may be
 10:58:33 15 admitted and may be published to the jury.
 16 MR. ALLEN: Thank you, Your Honor. Now, that
 17 2005 PDR, which I've already -- 10167?
 18 THE COURT: 2005 is 1016 -- AK10167, yes.
 19 MR. ALLEN: Before I ask that, I need help on
 10:59:31 20 a number again, please. What's that number?
 21 Q. (BY MR. ALLEN) Doctor, on October the 5th,
 22 2007 did you receive -- well, you couldn't have received it
 23 that day, but did you -- have you ever received -- or did I
 24 ask you yesterday -- you received or been sent the October
 10:59:59 25 the 5th, 2007 letter from Eli Lilly?

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11:00:02 1 A. I'm certain that I have.
 2 Q. And I'm sorry. You're certain you have?
 3 A. Yes.
 4 Q. Okay. And that is AK10095.
 11:00:16 5 MR. ALLEN: Your Honor, I am -- I'm
 6 uncertain, I apologize, whether this has been admitted. I
 7 will get a clean copy, but we'd ask for the admission of
 8 AK10095.
 9 THE COURT: It's in.
 11:00:30 10 MR. ALLEN: Thank you, Your Honor.
 11 Q. (BY MR. ALLEN) And in this letter, Eli Lilly
 12 advised healthcare professionals of new warnings for weight
 13 gain and hyperlipidemia; is that correct?
 14 A. That's correct.
 15 Q. And just for the record, from the time
 16 Zyprexa went on the market in 1996, until October of 2007,
 17 there had been no warnings ever regarding weight gain and
 18 hyperlipidemia; is that correct?
 19 A. That's correct.
 11:01:11 20 Q. Okay.
 21 And we're going to talk about the new
 22 warnings on hyperglycemia in a minute.
 23 Do we have the 2008 PDR?
 24 A SPEAKER: I put it right there.
 11:01:36 25 MR. ALLEN: Oh, okay. Right here. I have

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11:01:38 1 the 2008 PDR.
 2 THE COURT: Since we're showing the 2008 PDR
 3 up on the screen, does anyone have any objection to making a
 4 copy of that and making that an exhibit in this case?
 11:02:01 5 MS. GUSSACK: No, Your Honor, with the caveat
 6 that we discussed before, the clarification about
 7 publication.
 8 THE COURT: Sure.
 9 MR. ALLEN: And I apologize. I thought I had
 11:02:10 10 a copy, but I got the book. We'll make one tonight.
 11 MR. SUGGS: Scott, Mary Beth tells me that it
 12 is a copy -- a copy of it is in those notebooks right there.
 13 MR. ALLEN: Oh, I can get a copy?
 14 MR. SUGGS: Apparently.
 11:02:24 15 MR. ALLEN: AK10168?
 16 A SPEAKER: Yes.
 17 MR. ALLEN: For identification purposes, I
 18 have -- let me go back, make sure I'm making sense.
 19 Q. (BY MR. ALLEN) Eli Lilly wrote a letter
 11:03:27 20 concerning new warnings of weight gain and hyperlipidemia,
 21 did they not?
 22 A. They did.
 23 Q. But there was also an updated new warning on
 24 hyperglycemia, correct?
 11:03:37 25 A. Yes.

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11:03:37 1 Q. And for the first time ever the new label for
2 Zyprexa recommended monitoring of glucose, weight and lipids
3 for all Zyprexa patients; is that correct?
4 A. That's correct.

11:03:58 5 Q. And, in fact, it referred to guidelines
6 published by the American Diabetes Association following the
7 Consensus Development Conference, which was held back in
8 2003, correct?
9 A. Correct.

11:04:11 10 Q. And the Consensus statement had made
11 recommendations back when they had held it for
12 recommendations for the monitoring of blood glucose, weight
13 and lipids, in those treated with atypical antipsychotics;
14 isn't that correct?
15 A. That is correct.

11:04:28 16 Q. And Eli Lilly only amended their warnings in
17 this regard once the FDA told them to in the fall of 2007;
18 isn't that true?
19 A. That's true.

11:04:41 20 Q. And just -- I'm going to show you what I've
21 currently marked for identification purposes -- well, I will
22 offer it, I think, basically.
23 MR. ALLEN: I'm going to offer Plaintiff's
24 Exhibit -- or Alaska Exhibit 10168, the 2008 PDR reference
11:05:00 25 of Zyprexa, Your Honor.

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11:05:01 1 THE COURT: And as I understand it, there's
2 no objection.
3 MS. GUSSACK: Right.
4 THE COURT: 10168 is admitted, and you may
11:05:08 5 publish it to the jury if you wish.
6 MR. ALLEN: Thank you, Your Honor.
7 Q. (BY MR. ALLEN) And before I do that,
8 obvious -- this information that has -- has a Dear
9 Healthcare Professional letter has been sent out and is not
11:05:23 10 in the current PDR, is it, sir?
11 A. No.
12 Q. And I probably have a double negative in the
13 question. Am I correct in saying that -- the information
14 sent in the October letter is currently not in the PDR. Am
11:05:39 15 I correct in that?
16 A. You are correct.
17 MR. ALLEN: Thank you, Your Honor. I'll now
18 publish AK10168 to the jury.
19 Q. (BY MR. ALLEN) And as reflected on the
11:06:24 20 letter dated October the 5th, 2007, Eli Lilly has been
21 required to have blood -- to recommend blood monitoring for
22 all Zyprexa patients whether they have high blood sugar or
23 diabetes at the outset, all patients are supposed to be
24 blood monitored now, right?
11:06:43 25 A. That's correct.

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11:06:44 1 Q. But it's based upon recommendations that were
2 made back -- how many years ago? Three years ago, correct?
3 A. Yes.
4 Q. And by the way, it had been known, I guess,
11:06:56 5 since you were in medical school or before, though, that if
6 you -- one was at risk for high blood sugar, the way to
7 diagnose that's with blood monitoring, right?
8 A. Yes.
9 Q. In addition, this new warning advised special
11:07:18 10 precautions for people who were at risk of getting diabetes,
11 those abnormal or borderline glucose levels, correct?
12 A. Yes.
13 Q. This new warning said for the first time that
14 the risk of glucose level increases fall on a continuum and
11:07:39 15 olanzapine appears to have a greater association, correct?
16 A. Correct.
17 Q. Of course, that had been published, at least,
18 back after the Consensus statement, right?
19 A. Right.
20 Q. And you -- are you aware of what Eli Lilly
21 has said -- or are you or are you not aware of what they had
22 said in their own personal private correspondence and
23 documents and memos long before that? Are you aware of --
24 you're probably not, are you?
11:08:08 25 A. No.

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11:08:09 1 Q. Okay.
2 And for the first time in regard to Zyprexa
3 only, there has to be a warning concerning cholesterol and
4 lipids; is that correct?
11:08:19 5 A. That's correct.
6 Q. And for the first time on Eli Lilly only a
7 warning on weight gain; is that correct?
8 A. That's correct.
9 Q. And in the new label it is required that
11:08:34 10 information be given to patients concerning physicians are
11 advised to discuss the following issues with patients for
12 whom they prescribe Zyprexa; is that right?
13 A. That's correct.
14 Q. And patients should be advised of the
11:08:49 15 potential of hyperglycemia-related adverse events, and
16 patients should be monitored regularly for worsening of
17 glucose control; is that correct?
18 A. That's correct.
19 Q. Also in weight gain, patients should be
11:09:03 20 counseled that olanzapine is associated with weight gain and
21 should have their weight monitored regularly; is that right?
22 A. That's correct.
23 Q. Again, all new information concerning Zyprexa
24 that you had never received before; is that correct?
11:09:18 25 MS. GUSSACK: Objection; leading, Your Honor.

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11:09:20 1 MR. ALLEN: Well, let me ask -- I'll rephrase
2 it.
3 Q. (BY MR. ALLEN) Was this all new information
4 that Lilly had never advised you before or not?
11:09:26 5 A. It was the first time.
6 Q. Thank you.
7 Now, you have told Ms. Gussack and me in your
8 testimony, and the jury, that you changed your practice
9 concerning this blood monitoring in 2004?
11:09:49 10 A. '4.
11 Q. Okay.
12 And yesterday -- and at that time the PDR did
13 not have these new requirements, right?
14 A. That's correct.
11:09:58 15 Q. So -- and you also told us you're on the
16 cutting edge. Do you recall talking about that yesterday?
17 A. Yes.
18 Q. And of course you're at a major hospital,
19 president of the Alaska Psychiatric Association, but you're
11:10:15 20 in a much different position than primary care doctors in
21 Homer, Alaska, for example; would you agree?
22 MS. GUSSACK: Objection, Your Honor.
23 MR. ALLEN: Let me ask --
24 MS. GUSSACK: The doctor's expertise with
11:10:31 25 respect to primary care doctors' knowledge.

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11:10:32 1 THE COURT: Do you feel you have enough
2 information about what primary care doctors, whether it's in
3 Homer or another place of the state -- I mean, the question
4 related to Homer, but I'm going to ask you on both
11:10:43 5 instances. Do you feel you have enough knowledge about what
6 doctors who aren't practicing at API in Alaska do?
7 THE WITNESS: Yes.
8 THE COURT: I'll allow the question.
9 Q. (BY MR. ALLEN) So as the medical director of
11:10:59 10 the Alaska Psychiatric Institute, as president of the Alaska
11 Psychiatry Association, as the positions you hold that
12 you've discussed with us, would you be more knowledgeable
13 concerning Zyprexa and its risks than a family doctor in
14 Homer?
11:11:16 15 A. I would expect so.
16 Q. Yes.
17 Now, did you -- you said you changed your
18 practice in 2004. What prompted that change, sir?
19 A. There were several things. Our increasing
11:11:30 20 anxiety and concerns about the side effects of Zyprexa, and
21 we also hired at the hospital a new family practice
22 physician as our medical officer, and she was fresh out of
23 her residency and I would consider on the cutting edge with
24 her recommendations to begin regular monitoring.
11:11:50 25 Q. And when did she -- and so when did this --

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11:11:53 1 Dr. -- what was her name?
2 A. Love.
3 Q. And not personal, but I need it for the
4 record. What's her first name?
11:11:58 5 A. Jenny, J-e-n-n-y.
6 Q. And she had just completed her residency,
7 which is your training after medical school?
8 A. Yes.
9 Q. And can you just tell us where that was, if
11:12:09 10 you know?
11 A. South Carolina.
12 Q. Thank you, sir.
13 But did your -- well, let me show you. Sir,
14 you remember you were asked by Ms. Gussack when you knew
11:12:23 15 certain things and when you did not concerning the risk of
16 Zyprexa and how you learned?
17 A. Yes.
18 Q. Would it help refresh your recollection to
19 review your testimony that you gave to the lawyer,
11:12:35 20 Mr. Rogoff, for Eli Lilly on that point?
21 A. Yes.
22 MS. GUSSACK: Objection. Your Honor, there's
23 been no indication that Dr. Hopson has a lack of
24 recollection.
11:12:44 25 MR. ALLEN: Okay.

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11:12:45 1 Q. (BY MR. ALLEN) Do you remember what you
2 testified to?
3 THE COURT: Well, not -- I think you ought to
4 ask the question that you want answered here, and if he says
11:12:52 5 he doesn't know or can't remember, then you can show him.
6 MR. ALLEN: Yes, sir. I was just trying to
7 shortcut.
8 Q. (BY MR. ALLEN) Do you remember Mr. Rogoff
9 asking you --
11:13:12 10 THE COURT: Just ask the question. You don't
11 have to ask it as do you remember him asking you. Ask the
12 question you want to ask.
13 MR. ALLEN: Yes, sir, I will.
14 Q. (BY MR. ALLEN) Doctor, do you know when you
11:13:21 15 became aware of the seriousness of the risks related to
16 weight gain, lipids and diabetes regarding to Zyprexa? Do
17 you remember when?
18 A. When I specifically became aware? No.
19 Q. Would it help you refresh your recollection
11:13:36 20 to see what you told Mr. Rogoff?
21 A. Sure.
22 Q. Okay.
23 A. Been a while.
24 Q. Yes, sir.
11:13:40 25 THE COURT: Why don't you just show it to him

| | |
|---|--|
| <p style="text-align: right;">Page 114</p> <p>11:13:42 1 rather than put it up on the board. You're trying to 2 refresh his recollection -- 3 MR. ALLEN: Okay. 4 THE COURT: -- not the jury's. 11:13:48 5 MR. ALLEN: Yes, sir. 6 Q. (BY MR. ALLEN) Do you see where Mr. Rogoff 7 asked you, when competitors came around and touted their 8 product over -- 9 THE COURT: No, no. Let him read it and then 11:13:59 10 you can ask him does this refresh your recollection, and if 11 he says yes, then he can testify as to what his refreshed -- 12 what he now recalls. If he says no, then you can read this. 13 MR. ALLEN: Okay. 14 Q. (BY MR. ALLEN) And I would ask you to read 11:14:14 15 Page 56, Line 11 down through 57, Line 21. 16 Does that help refresh your recollection, 17 sir? 18 A. Yes. 19 Q. Okay. 11:14:54 20 You left Fairbanks, I think, sometime 2003? 21 A. '3, yes. 22 Q. You were not aware of the seriousness of the 23 risk -- 24 MS. GUSSACK: Objection, Your Honor. 11:15:10 25 MR. ALLEN: Okay. I'll rephrase it.</p> | <p style="text-align: right;">Page 116</p> <p>11:16:24 1 Q. Are warnings important? 2 A. Warnings are extremely important. 3 Q. Now, sir, you were asked questions about the 4 CATIE study. Do you recall that? 11:16:38 5 A. Yes, I do. 6 Q. You said -- I think you told Mrs. Gussack you 7 believe you actually keep this in your files. 8 A. I believe so. 9 Q. This is the New England Journal of Medicine. 11:16:54 10 Can you tell the jury, please, what the New England Journal 11 of Medicine is? 12 A. It's a longstanding journal that is broad in 13 its -- in its writings. It's not just limited to 14 psychiatry, internal medicine, pediatrics. They can take on 15 any particular topic and publish it. And it's highly 16 respected as a journal that conveys up-to-date information. 11:17:10 17 Q. Yes, sir, and this was the CATIE study, and I 18 just want to go through a few findings. By the way, do you 19 consider this a reliable authority, the New England Journal 11:17:26 20 of Medicine and this article in this field? 21 A. Yes. 22 Q. The results of the CATIE study included that 23 overall 74 percent of patients discontinued the study 24 medication. And by the way, I need to define that. This 11:17:43 25 looked at Zyprexa, perphenazine. Now, perphenazine is a</p> |
| <p style="text-align: right;">Page 115</p> <p>11:15:12 1 Q. (BY MR. ALLEN) Were you aware of the 2 seriousness of the risks involving weight gain, lipids and 3 diabetes when you were in Fairbanks? 4 A. Not to the degree that we are now. 11:15:21 5 Q. Thank you. 6 And isn't it also true -- let me ask this. 7 Once Eli Lilly and all the other 8 manufacturers were forced to change their label by the FDA 9 concerning the class labeling -- you remember the class 11:15:43 10 labeling? 11 A. Yes. 12 Q. Did that change your prescribing habits? 13 A. Yes. 14 Q. Okay. 11:15:49 15 And why did the initial label change -- 16 change your prescribing habits? Can you tell the jury that, 17 please? 18 A. Because at that point, you know, it -- it was 19 really established that as a class this medication posed 11:16:07 20 risks. So as that information was conveyed to us, we began 21 to monitor it, be more concerned about it. 22 Q. And now that you have seen the new warning 23 that is on Zyprexa, will that again change your consent 24 practice and your practice regarding Zyprexa? 11:16:23 25 A. Yes.</p> | <p style="text-align: right;">Page 117</p> <p>11:17:49 1 first-generation antipsychotic, correct? 2 A. That's correct. 3 Q. And I'm going to go ahead and use the trade 4 names for us. It looked at Zyprexa, perphenazine, Seroquel, 11:18:01 5 Risperdal and Geodon; is that right? 6 A. That's correct. 7 Q. And this study was designed to determine how 8 long patients actually stayed on these medicines, right? 9 A. That's correct. 11:18:14 10 Q. In addition, it was designed to find out when 11 they got off the medicines, why they got off the medicines; 12 is that correct? 13 A. That's correct. 14 Q. As the results -- and this -- what do you 11:18:28 15 call this front section? It's called an -- there it is 16 right there. It's called an abstract. 17 A. Yes. 18 Q. And that's just a kind of a summary of the 19 entire article; is that correct? 11:18:36 20 A. That's correct. 21 Q. And it says overall 74 percent of patients 22 discontinued the study medication before 18 months, and they 23 give some statistics; 64 percent of those assigned to 24 Zyprexa, almost two-thirds, right? 11:18:53 25 A. Yes.</p> |

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11:18:54 1 Q. 75 percent assigned to perphenazine,
2 82 percent assigned to Seroquel, and 74 percent assigned to
3 Risperdal, and 79 percent of those assigned to Geodon,
4 right?

11:19:08 5 A. Correct.
6 Q. But then it also looked at for those who
7 quit, why they quit; is that correct?
8 A. Yes.
9 Q. And Zyprexa was associated with more
11:19:19 10 discontinuation for weight gain or metabolic effects; is
11 that correct?
12 A. That's correct.
13 Q. It goes on to say, The majority of patients
14 in each group discontinued their assigned treatment owing to
11:19:35 15 inefficacy or intolerable side effects or for other reasons.
16 Is that correct?
17 A. That's correct.
18 Q. And it concludes in the abstract, Zyprexa was
19 associated with greater weight gain and increases in
11:19:52 20 measures of glucose and lipid metabolism.
21 Did I read that correctly?
22 A. You did. That's correct.
23 Q. Now, on the discontinuation rate, this
24 article -- let me see if I can zoom down -- said the
11:20:21 25 difference between Zyprexa and perphenazine -- that's the

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11:20:24 1 first-generating antipsychotic -- was not significant after
2 adjustments for multiple comparisons.
3 Did I read that correctly?
4 A. Yes.
11:20:32 5 Q. And so that indicated that the
6 first-generation antipsychotic, perphenazine, and Zyprexa,
7 as it said, had similar discontinuation rates; is that
8 right?
9 A. That's what it says, yes.
11:20:45 10 Q. And then it not only looked at that -- and
11 these are statistics in here, and ziprasidone is Geodon. It
12 said within the cohort, and cohort is a study term, is it
13 not?
14 A. It's a group, a study group, yes.
11:21:07 15 Q. Of 889 patients who underwent randomization
16 after Geodon was added to the trial, those receiving Zyprexa
17 had longer interval before discontinuing treatment for any
18 cause than those -- those in the Geodon group; however, this
19 difference was not significant after adjustment for multiple
11:21:29 20 comparisons. Is that right?
21 A. Yes.
22 Q. And the jury has heard in this case what
23 you're looking for is statistical significance, and we've
24 heard about that, and that's what -- when you read articles,
11:21:39 25 it says it's not significant, it means it's not

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11:21:41 1 statistically significant; is that right?
2 A. That's correct.
3 Q. So both Geodon -- is it correct to say both
4 Geodon, which is -- yeah, ziprasidone and the
11:21:55 5 first-generation antipsychotic, perphenazine, had similar
6 discontinuation rates to Zyprexa?
7 A. Yes.
8 Q. And again, by the way, it says it down here,
9 concerning discontinuation, the time to discontinuation,
11:22:13 10 skipping down, but the difference between Zyprexa and Geodon
11 groups was not significant after adjustment for multiple
12 comparisons. Did I read that correctly?
13 A. You did.
14 Q. Now, it didn't just look at when you quit --
11:22:30 15 and by the way, to put us in focus here, the majority of all
16 these patients quit for one reason or another, did they not?
17 A. They did.
18 Q. Either intolerable side effects, right?
19 A. Yes.
11:22:41 20 Q. Medication wasn't working, correct?
21 A. Correct.
22 Q. And by the way, this -- has this article and
23 these results been discussed extensively in the psychiatric
24 community?
11:22:52 25 A. Yes.

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11:22:53 1 Q. Then it looks at adverse events and the
2 reasons they quit. It said, the rates of treatment
3 discontinuation due to intolerable side effects differed
4 between treatments. Risperdal had the lowest percent and
11:23:11 5 Zyprexa had the highest percent; is that correct?
6 A. That's correct.
7 Q. And it also looked at neurologic side
8 effects, did it not?
9 A. Yes.
11:23:23 10 Q. And those would be the extrapyramidal and
11 tardive dyskinesia, things that Ms. Gussack asked you about.
12 A. Yes.
13 Q. And at least in this study -- by the way,
14 this study was sponsored by the National Institute of Mental
11:23:37 15 Health; is that right?
16 A. That's right.
17 Q. It wasn't sponsored by any drug company;
18 isn't that right?
19 A. That's correct.
11:23:42 20 Q. And in this study published in the New
21 England Journal of Medicine --
22 THE COURT: Mr. Allen, again, we're -- I
23 realize you're going through an article, but you can ask the
24 questions in a less leading way.
11:23:53 25 MR. ALLEN: Yes, sir.

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11:23:54 1 Q. (BY MR. ALLEN) In this study published in
2 the New England Journal of Medicine, did it reach a
3 conclusion concerning the neurologic side effects?
4 A. Yes.

11:24:00 5 Q. Can you read for the jury, please, what it
6 concluded?
7 A. That there were no significant differences in
8 the groups regarding the incidence of extrapyramidal side
9 effects.

11:24:13 10 Q. Can you go ahead and --
11 A. Akathisia or movement disorders as
12 reflected -- it's off on my screen -- by rating-scale
13 measures of severity.
14 Q. Okay.

11:24:25 15 And those differences in the groups -- and
16 the groups included the first-generation perphenazine?
17 A. It did, yes.

18 Q. Then it looked at weight gain and metabolic
19 changes, did it not?
11:24:43 20 A. It did.
21 Q. And did it include that the patients in the
22 olanzapine group gained more weight than patients in any
23 other group with an average weight gain of two pounds per
24 month. That would be, what, two pounds a month would be
11:24:56 25 24 pounds in a year; is that right?

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11:24:58 1 A. That's correct.
2 Q. Has Eli Lilly ever informed you that back in
3 1995, prior to the time their product came on the market in
4 Puerto Rico, they had reported to their outside consultants
11:25:15 5 that Zyprexa caused 24 pounds of weight gain on average per
6 year? Have they ever told you that?
7 A. No.
8 Q. In fact, if we can look at --
9 I'm trying to find --
11:26:03 10 Here it is.
11 In fact, if we look at -- is it correct to
12 say that for every kilogram that's 2.2 pounds?
13 A. That's correct.
14 Q. And I have chosen the 2005 PDR, which is in
11:26:38 15 evidence. In the adverse reactions section, under weight
16 gain, doesn't it state that average weight gain during
17 long-term therapy was 5.4 kilograms?
18 A. Yes.
19 Q. And 5.4 kilograms is approximately 11 pounds?
11:27:06 20 A. That's correct.
21 Q. Less than half of 24 pounds; is that correct?
22 A. That's correct.
23 Q. But the National Institutes of Mental Health
24 study determined that, in fact, patients lost an average of
11:27:26 25 two pounds per month -- two pounds per month on Zyprexa,

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11:27:34 1 right?
2 A. That they gained.
3 Q. I mean -- did I say lost? I'm sorry.
4 Is it correct to say that the National
11:27:42 5 Institutes of Mental Health study, the CATIE study,
6 indicated that Zyprexa patients gained an average of two
7 pounds per month --
8 A. Yes.
9 Q. -- which would be 24 pounds a year?
11:27:53 10 A. That's correct.
11 Q. If -- if -- should that type of information
12 be reported to doctors?
13 A. Yes.
14 Q. Was it ever reported to you by Eli Lilly?
11:28:03 15 A. No.
16 Q. It goes on to say, a larger proportion of
17 patients in the Zyprexa group than in the other groups
18 gained seven percent, and I'll move on. It said Zyprexa had
19 effects consistent with the potential development of the
11:28:19 20 metabolic syndrome was associated with greater increases in
21 glycosylated hemoglobin. Can you tell the jury what that
22 means?
23 A. It's a type of hemoglobin that's measured in
24 the blood that is associated with diabetes.
11:28:35 25 Q. At greater increases in glycosylated

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11:28:40 1 hemoglobin, total cholesterol, and triglycerides after
2 randomization than the other study drugs, even after
3 adjustment for the duration of treatment.
4 Did I read that correctly?
11:28:50 5 A. Yes.
6 Q. It said, Geodon was the only study drug
7 associated with improvement in each of these metabolic
8 variables.
9 Did I read that correctly?
11:29:00 10 A. That's correct.
11 Q. And Geodon is ziprasidone, correct?
12 A. Correct.
13 Q. And that's the drug which was reflected under
14 discontinuation of treatment that had no difference between
11:29:19 15 Zyprexa and Geodon, right?
16 A. Right.
17 Q. Thank you, sir.
18 Now, Ms. Gussack asked you if you had -- she
19 said, I would expect -- do you recall her asking you about
11:29:34 20 the American Journal of Psychiatry?
21 A. Yes.
22 Q. She said basically that's the official
23 journal of the American Psychiatric Association.
24 A. It is.
11:29:42 25 Q. And she asked you whether or not you had --

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11:29:47 1 you subscribed or -- to that --
 2 A. Yes --
 3 Q. -- journal.
 4 And you said you did.
 11:30:00 5 A. Yes.
 6 Q. And following the CATIE study, the American
 7 Journal of Psychiatry editors even discussed this study, did
 8 they not?
 9 A. Yes.
 11:30:09 10 Q. Are you aware that Eli Lilly designated
 11 experts in this case, and one of the experts they designated
 12 was a doctor by the name of Carol A. Tamminga, M.D.?
 13 A. No, I'm not.
 14 Q. Do you know --
 11:30:29 15 MS. GUSSACK: Objection, Your Honor. I think
 16 that mischaracterizes the counsel's witness list.
 17 MR. ALLEN: Well, I can mark it. I said
 18 designated experts. Is there an objection?
 19 THE COURT: I'm not -- why don't counsel
 11:30:44 20 approach. I'm not sure I understand the objection.
 21 (Bench conference.)
 22 MS. GUSSACK: In our final witness list
 23 Dr. Tamminga was --
 24 MR. ALLEN: The difference between a witness
 11:30:57 25 list and an expert designation.

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11:30:58 1 MS. GUSSACK: In our final witness list
 2 Dr. Tamminga wasn't listed.
 3 MR. ALLEN: She was a designated expert
 4 witness for them.
 11:31:08 5 THE COURT: Can you rephrase the question to
 6 say originally designated?
 7 MR. ALLEN: Okay. I'll do that.
 8 THE COURT: Does that satisfy your objection?
 9 MS. GUSSACK: No, Your Honor. We adhere to
 11:31:18 10 the subject that when you designate your witnesses for your
 11 final list, that that indicates --
 12 THE COURT: Right, but if you designate a
 13 witness at some point during the trial, that indicates you
 14 may call them and that they are --
 11:31:32 15 MS. GUSSACK: Well, our understanding, Your
 16 Honor, was that the final --
 17 THE COURT: Is she going to testify in this
 18 case?
 19 MS. GUSSACK: No. She's not intended to be.
 11:31:40 20 THE COURT: Just move on.
 21 MR. ALLEN: Okay.
 22 (End bench conference.)
 23 Q. (BY MR. ALLEN) Doctor, I'll hand you an
 24 editorial by Dr. Tamminga published in the April, 2006
 11:32:06 25 American Journal of Psychiatry and ask you if you've seen

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11:32:09 1 that before.
 2 A. I'm sure I took a look at it. I don't
 3 remember this article specifically.
 4 Q. Will the writing in the article itself help
 11:32:24 5 refresh your recollection about what it says?
 6 A. I'm sure it would.
 7 Q. And this is in evidence already. I can't
 8 remember the exhibit number.
 9 A SPEAKER: I'm not sure if that one is --
 11:32:38 10 MR. ALLEN: It's okay. We'll get it later.
 11 Your Honor, this is in evidence.
 12 THE COURT: Well, let me just make sure
 13 that's the case, because I don't know whether it is or it
 14 isn't.
 11:32:48 15 MR. ALLEN: I will -- if somebody will
 16 please -- I can use it to refresh his recollection, then
 17 we'll --
 18 THE COURT: Sure. I don't want you to put it
 19 up on the screen. You can refresh his recollection by
 11:33:01 20 showing it to him and having him read it like he's doing.
 21 MR. ALLEN: Okay. Well, I'll have somebody
 22 check.
 23 Q. (BY MR. ALLEN) Doctor, in this article by
 24 Dr. Tamminga, do you recall that following the CATIE study
 11:33:14 25 Dr. Tamminga said that the metabolic side effects of Zyprexa

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11:33:21 1 and Clozaril have implications for the psychiatric practice?
 2 MS. GUSSACK: Objection, Your Honor. The
 3 witness has said he doesn't recall the article.
 4 THE COURT: Well, the question is now having
 11:33:30 5 read the article, can you -- do you recall reading it and
 6 what it said.
 7 THE WITNESS: I see that in the article, yes.
 8 THE COURT: Well, let me just ask you,
 9 Doctor, are you recalling that you saw it and you knew about
 11:33:41 10 this because you now see it, or are you just saying, well,
 11 it's there so I must have seen it?
 12 THE WITNESS: Again, I don't recall reading
 13 it earlier.
 14 THE COURT: Okay.
 11:33:49 15 MR. ALLEN: Okay.
 16 THE COURT: I'm not going to let you question
 17 him at this point.
 18 MR. ALLEN: At some point -- we'll find out.
 19 It's in evidence, but I don't have the number.
 11:33:58 20 MR. SUGGS: Scott, we need to see the -- she
 21 needs to see it so she can find it.
 22 MR. ALLEN: Okay.
 23 Q. (BY MR. ALLEN) Doctor, while we're looking
 24 that up -- almost done.
 11:34:18 25 Do you recall being asked by Ms. Gussack

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11:34:37 1 questions about the primary care doctors and mood, thought
 2 and behavioral disorders?
 3 A. Yes.
 4 MS. GUSSACK: Objection, Your Honor. That
 11:34:47 5 wasn't the question.
 6 THE COURT: Well, I -- I mean, the witness --
 7 ladies and gentlemen, when -- sometimes we get questions
 8 that relate to what other people asked or what a witness may
 9 have previously testified to, and there's a disagreement
 11:34:59 10 among counsel as to whether that was asked or that testified
 11 to.
 12 You are the sole decision-makers as to the
 13 facts in this case and what witnesses said on previous on
 14 their testimony. If somebody asks a question about what a
 11:35:16 15 witness previously did or what happened previously and that
 16 is in accord with your memory, then you can give the answer
 17 whatever -- to the question whatever significant you wish to
 18 and whatever weight you do. If a person asks a question
 19 about something that happened and it's not your recollection
 11:35:34 20 that it actually happened, then that -- you should also take
 21 that into account in deciding what weight you want to give
 22 to the answer that comes. And again, I'll remind you that
 23 questions of lawyers are not evidence; it's the answers that
 24 are evidence.
 11:35:50 25 MR. ALLEN: Your Honor, we found the cite.

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11:35:54 1 It's AK10147, Practical Treatment Information for
 2 Schizophrenia. It has previously been admitted. Can I now
 3 display this for the --
 4 THE COURT: Just let me double-check.
 11:36:05 5 THE CLERK: That has been admitted, Judge.
 6 THE COURT: Okay. AK10147 has been admitted,
 7 so you can ask questions about that --
 8 MR. ALLEN: I --
 9 THE COURT: -- if they're properly asked.
 11:36:26 10 MR. ALLEN: Yes.
 11 Q. (BY MR. ALLEN) This is AK10 -- 10147, the
 12 Practical Treatment Information for Schizophrenia in the
 13 April, 2006 American Journal of Psychiatry; is that correct,
 14 sir?
 11:36:40 15 A. That's correct.
 16 Q. Do you still have a copy of it up there in
 17 front of you?
 18 A. I do.
 19 Q. And in this article Dr. Tamminga says, the
 11:36:52 20 metabolic and other somatic effects -- can you tell the jury
 21 what somatic effects are?
 22 A. Effects that would -- the person would feel
 23 or experience, such as pain and some sort of discomfort,
 24 something to do with their body.
 11:37:09 25 Q. Of Zyprexa and Clozaril; is that correct?

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11:37:14 1 A. That's correct.
 2 Q. It says clozapine --
 3 A. Clozapine.
 4 Q. -- also have implications for psychiatric
 11:37:21 5 practice. As long as psychotropic medications were
 6 considered relatively free of side effects, psychiatrists
 7 could practice in settings appropriate to other mental
 8 health counselors. However, medication treatments with high
 9 side effect burden -- excuse me -- with high side effect
 11:37:43 10 burden demand clinical settings that are capable of
 11 detecting and managing serious side effects.
 12 Did I read that correctly?
 13 A. You did.
 14 Q. It goes on to say, this knowledge means that
 11:37:57 15 the clinician's office -- and that's the doctor or treater's
 16 office, right?
 17 A. Correct.
 18 Q. -- needs to be equipped to efficiently
 19 monitor antipsychotic drug side effects. Blood pressure
 11:38:10 20 cuffs, scales, body tape measures, a process for plasma
 21 chemistry monitoring and -- that's a -- I don't think we've
 22 seen that exact phrase before. What's plasma chemistry
 23 monitoring?
 24 A. It just means blood monitoring.
 11:38:24 25 Q. And electrocardiograms -- and I think we know

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11:38:28 1 what that is, but can you tell us, please?
 2 A. Electrocardiogram. EKG was the old term,
 3 ECG, where they monitor the leads on the chest and monitor
 4 the heart pattern, looking for abnormalities in the heart.
 11:38:41 5 Q. And qualified consultants for medical
 6 questions become important components of practice.
 7 Did I read that correctly?
 8 A. Yes.
 9 Q. And, in fact, you have, I guess, out there
 11:38:53 10 the qualified consultant for medical questions is Dr. Love?
 11 A. Yes.
 12 Q. Okay.
 13 Dynamic information of drug side effects need
 14 to -- needs to take a prominent place in a patient's
 11:39:10 15 psychiatric chart. Medical consequences of psychiatric
 16 drugs are real, preventable, and require focused monitoring.
 17 Did I read that correctly?
 18 A. Yes.
 19 Q. And that is what you have been told for the
 11:39:25 20 first time in the new warning that was put out in October of
 21 2007; is that correct?
 22 MS. GUSSACK: Objection; leading.
 23 Q. (BY MR. ALLEN) Well, let me ask this: Is
 24 this similar to the information that you were given in the
 11:39:37 25 October, 2007 new Zyprexa label?

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11:39:41 1 MS. GUSSACK: Objection, Your Honor.
 2 THE COURT: I'll allow that.
 3 A. Yes.
 4 Q. (BY MR. ALLEN) Clinicians will need to have
 11:39:50 5 systems for the effective monitoring of drug side effects to
 6 maintain and promote physical health among patients as well
 7 as psychiatric health.
 8 That these studies were NIMH. What is that?
 9 A. National Institute of Mental Health.
 11:40:06 10 Q. Funded -- that these studies were National
 11 Institute of Mental Health funded increases our confidence
 12 that they are as free from marketing or other bias or 'spin'
 13 as possible.
 14 Did I read that correctly?
 11:40:21 15 A. Yes.
 16 Q. And what does that mean to you as a doctor?
 17 A. Well, they're saying that, you know, this is
 18 an unbiased report, comes from the NIMH, it's not
 19 drug-supported research or editorial. That it's from the
 11:40:34 20 NIMH recommendations.
 21 Q. Thank you, sir.
 22 By the way, do you agree with that editorial?
 23 A. Yes.
 24 Q. Is that in effect -- is that what you do out
 11:40:49 25 at API?

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11:40:49 1 A. Yes.
 2 Q. Sir, I'm going to display AK Exhibit 5846,
 3 the Zyprexa launch meeting, Viva Zyprexa document, and I
 4 want to turn to -- there's pages on these. Page 72 of the
 11:41:16 5 PowerPoint, and it's also noted in another column with its
 6 Bates stamp. Where is it? Page 7. Okay?
 7 It says, Zyprexa Primary Care, Strategic
 8 Intent, Goals by Phase. Strategic Intent: Zyprexa can and
 9 will become an everyday agent in primary care.
 11:41:51 10 Do you see that?
 11 A. I do.
 12 Q. Do you think Zyprexa should be utilized as an
 13 everyday agent in primary care?
 14 A. No, I do not.
 11:42:00 15 MR. ALLEN: Thank you, Your Honor. Thank
 16 you, Doctor.
 17 THE COURT: Ms. Gussack.
 18 MS. GUSSACK: Your Honor, would this be a
 19 time for a break?
 11:42:24 20 THE COURT: No, I'd like to go a little bit
 21 longer.
 22 MS. GUSSACK: Okay. Do you mind if I just
 23 have a minute to organize some paper?
 24 CONTINUED CROSS-EXAMINATION
 11:42:41 25 Q. (BY MS. GUSSACK) Dr. Hopson, do primary care

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11:42:48 1 physicians have blood pressure cuffs in their office?
 2 A. Certainly.
 3 Q. And they have scales in their office, don't
 4 they?
 11:42:54 5 A. Yes.
 6 Q. And they have body tape measures?
 7 A. Yes.
 8 Q. In fact, psychiatrists may not have scales in
 9 their office, do they?
 11:43:00 10 A. I think pretty much any more they do, yes.
 11 Q. Now they do? Okay.
 12 And you would agree primary care physicians
 13 have electrocardiogram equipment available to them?
 14 A. Yes.
 11:43:11 15 Q. Okay.
 16 And they know how to take blood and submit it
 17 for monitoring or tests to be done, right?
 18 A. Yes.
 19 Q. Okay.
 11:43:18 20 Now, sir, you -- you know that the
 21 Physicians' Desk Reference is an independent commercial
 22 publication of FDA-approved labels, right?
 23 A. Yes.
 24 Q. That's not a publication owned or controlled
 11:43:34 25 by Eli Lilly, is it?

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11:43:35 1 A. No.
 2 Q. Okay.
 3 And, in fact, the Physicians' Desk Reference
 4 contains the labels of all the different companies who make
 11:43:42 5 prescription medicines, right?
 6 A. Yes.
 7 Q. And every year that volume comes out with
 8 labels that have been submitted by pharmaceutical companies,
 9 right?
 11:43:51 10 A. Yes.
 11 Q. And there are supplements to the PDR every
 12 year, aren't there?
 13 A. Yes.
 14 Q. In fact, there are two supplements every
 15 year, aren't there?
 16 A. Generally, yes.
 17 Q. So when you said that the label that
 18 contained the warning for hyperglycemia and diabetes hadn't
 19 appeared until 2005, that's not correct, is it? Because it
 11:44:08 20 was in the 2004 supplement to the Physicians' Desk
 21 Reference, isn't it?
 22 A. I haven't reviewed the supplement.
 23 Q. Okay.
 24 So since you hadn't reviewed the supplement
 11:44:18 25 to the 2004 PDR, you wouldn't be able to say accurately

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11:44:20 1 whether that label containing the hyperglycemia and diabetes
2 warning for Zyprexa had appeared there?
3 A. Correct.
4 Q. Okay.

11:44:28 5 But if I told you that it did appear in the
6 2004 supplement, you wouldn't have any reason to argue with
7 me about it, would you?
8 A. No.
9 Q. Okay.

11:44:38 10 Now, every publication has a cutoff date,
11 doesn't it?
12 A. Yes.
13 Q. Okay.
14 So in order for the Physicians' Desk
15 Reference to be put together every year, at some point that
16 company has to say all submissions have to be in by a
17 certain date, right?
18 A. Yes.
19 Q. Do you know what the cutoff date is for the
20 Physicians' Desk Reference?
21 A. No.
22 Q. Okay.
23 Now, if I told you that it was June, 2003 for
24 the 2004 Physicians' Desk Reference, you wouldn't have any
11:45:08 25 reason to disagree, would you?

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11:45:08 1 A. No.
2 Q. So a label that was changed by Lilly in
3 September, 2003 would be too late to be submitted for the
4 2004 PDR, right?

11:45:20 5 A. Yes.
6 Q. And, in fact, you know, Doctor, don't you,
7 that the PDRs come out several months before the new year --
8 A. Yes.
9 Q. -- right?

11:45:29 10 So you get your 2005 PDR in the last few
11 months of 2004.
12 A. Generally, yes.
13 Q. Okay.
14 So the ability of any company to submit
15 information to the -- for the Physicians' Desk Reference to
16 be published is really a function of when their label
17 changes and when the publication date for the PDR cuts off,
18 right?
19 A. Yes.
20 Q. Okay.
21 And so a company that may miss the
22 publication date has the opportunity to submit its label for
23 the supplement, right?
24 A. Yes.
11:45:50 25 Q. And so if you have a label change in

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11:46:03 1 September, 2003, that 2003 PDR already exists; you can't get
2 it in there, can you?
3 A. No.
4 Q. And the best thing you could do would be to
11:46:11 5 try to get it into the 2004 PDR, right?
6 A. Yes.
7 Q. But if you miss the publication date because
8 you didn't have a label change until after the publication
9 date, then you would get it in the supplement, right?

11:46:23 10 A. Yes.
11 Q. Okay.
12 Now, sir, you testified just a moment ago
13 that the 2007 label was the first time that weight gain
14 associated with Zyprexa had been noted, but that's not
11:46:40 15 right, is it?
16 A. The first time that I recall it being in the
17 warning section.
18 Q. Okay. In the warning section.
19 But you're well aware, sir, aren't you, that
11:46:49 20 there was significant discussion of weight gain associated
21 with Zyprexa in the 1996 label, right?
22 A. It was noted and we were aware of it, yes.
23 Q. Okay.
24 And that label that Mr. Allen just showed you
11:47:00 25 from 1996 -- well, actually, let me take that back because I

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11:47:04 1 don't know that he showed you the 1996 label. But at least
2 you know that in the 1996 label that weight gain in
3 long-term clinical trials was described, right?
4 A. Yes.
11:47:12 5 Q. And that weight gain was reported to be on
6 average 11 pounds?
7 A. Yes, I think so.
8 Q. I think it's 5.4 kilograms, and if my math is
9 even close, it's about 11 pounds, right?

11:47:30 10 A. Right.
11 Q. Okay.
12 Let me go first to ask you, sir, about the
13 weight gain that was described in this -- in the CATIE
14 study. I'm sorry, I should have showed you that. Okay? If
11:48:00 15 we can go back to that CATIE study.
16 Mr. Allen asked you, boy, doesn't this show
17 that -- that patients on olanzapine would have gained
18 24 pounds in a year, right? Isn't that what he asked you?
19 A. Yes.
11:48:12 20 Q. Okay.
21 But this study doesn't, in fact, say that.
22 What it says, doesn't it, is that the average weight gain
23 reported in the CATIE study was 9.4 pounds, right?
24 I'm sorry.
11:48:27 25 Correct? The average -- you can see the

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11:48:33 1 olanzapine column and weight change by pound, 9.4, right?
 2 A. I see that, yes.
 3 Q. Okay.
 4 And, in fact, the CATIE study was an 18-month
 11:48:43 5 study, wasn't it?
 6 A. Yes.
 7 Q. Okay.
 8 So what we've just learned is in an 18-month
 9 study reported on in the CATIE article, that the average
 11:48:52 10 weight gain seen by patients on olanzapine or Zyprexa was
 11 9.4 pounds, right?
 12 A. Yes, according to that.
 13 Q. Now, Mr. Allen also asked you about the
 14 efficacy findings that we talked about in the CATIE study,
 11:49:09 15 and I want to show you up here -- I don't know if I can make
 16 this a little bigger.
 17 Okay, that's good.
 18 The olanzapine group had the lowest rate of
 19 discontinuation. Do you see where it says that, sir?
 11:49:32 20 A. Yes.
 21 Q. And, Doctor, it says, which might lead one to
 22 consider olanzapine the most effective of the medications
 23 studied, right?
 24 A. Yes.
 11:49:40 25 Q. Its apparent superior efficacy is also

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11:49:43 1 indicated by the greater reduction in psychopathology. What
 2 is psychopathology?
 3 A. Broad term, relating to all of the symptoms
 4 we've described; mental illness, psychosis, depression.
 11:49:57 5 It's all under psychopathology.
 6 Q. Okay.
 7 So it's apparent superior efficacy is also
 8 indicated by the greater reduction in psychopathology,
 9 longer duration of successful treatment, and the lower rate
 11:50:10 10 of hospitalizations for an exacerbation of schizophrenia.
 11 Doctor, isn't that what you look for in any
 12 medication that you use to treat serious mental illness?
 13 A. Certainly.
 14 Q. It's critical to you, isn't it, that you get
 11:50:27 15 a reduction in psychopathology, patients staying on
 16 medicine, and try to reduce hospitalizations for an
 17 exacerbation of their disease, right?
 18 A. Yes.
 19 Q. Doctor, I think you also testified just a few
 11:50:47 20 minutes ago that the 2007 label change in October was the
 21 first time that you were advised in a letter from Lilly to
 22 monitor patients for glucose abnormalities. But that's not
 23 right, is it, because you knew that the 2003 label urged
 24 monitoring of patients for glucose abnormalities, right?
 11:51:06 25 A. I don't recall a letter or anything specific.

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11:51:10 1 Q. You don't recall the Dear Doctor letter that
 2 you received?
 3 A. In '03?
 4 Q. In --
 11:51:15 5 A. I do recall that letter.
 6 Q. Okay.
 7 And do you recall that the warnings that were
 8 inserted in 2003 recommended monitoring of patients for
 9 diabetes risk?
 11:51:25 10 A. I'd have to see that letter again.
 11 Q. Okay. Okay.
 12 This is the Dear Doctor letter we were just
 13 talking about, right?
 14 A. Yes.
 11:51:54 15 Q. Okay.
 16 This is the March, 2004 Dear Doctor letter
 17 that you said you received, and if we go to the second
 18 paragraph, it says: Patients with risk factors who are
 19 starting treatment should undergo fasting blood glucose
 11:52:11 20 testing at the beginning of treatment, right?
 21 A. Yes.
 22 Q. And periodically during treatment. So it's
 23 right -- it's not right to say that 2007 was the first time
 24 you received information about monitoring patients, is it?
 11:52:22 25 A. It appears that we did receive it in that

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11:52:27 1 letter, as well. However, there were further
 2 recommendations in the more recent letter.
 3 Q. Fair enough.
 4 Doctor, were you one of the 100,000
 11:52:36 5 physicians that received a letter from Lilly in October,
 6 2003 reporting on the new label?
 7 MR. ALLEN: Objection. Ask to approach.
 8 THE COURT: Please.
 9 (Bench conference.)
 11:52:47 10 MR. ALLEN: There's no proof made. They said
 11 they have data to support that. We have no data. That's
 12 just her blatant statement that a 100,000 doctors --
 13 THE COURT: Just rephrase the question to see
 14 if he received this.
 11:53:02 15 MS. GUSSACK: Okay.
 16 Q. (BY MS. GUSSACK) Doctor, did you receive a
 17 letter from Eli Lilly in October, 2003 reporting on the
 18 label change, even before this March, 2004 Dear Doctor
 19 letter?
 11:53:14 20 A. I probably did.
 21 Q. Okay.
 22 And do you recall seeing the press release
 23 that Lilly issued following the label change in September,
 24 '03?
 11:53:22 25 A. I don't recall.

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11:53:25 1 Q. Is it something that you recall being
2 discussed at the Alaska Psychiatric Institute meetings in
3 around September or October of 2003?
4 A. I'm sure it was discussed at some point.
11:53:37 5 Q. Okay.
6 Well, certainly a label change that applied
7 to all the second-generation atypicals would have been
8 something that the leading psychiatric organization was
9 discussing at -- in a realtime around the label change,
11:53:50 10 right?
11 A. Sure.
12 Q. Okay.
13 And did you ever go look on the Web site for
14 Lilly Zyprexa to see information about Zyprexa or label
11:54:01 15 changes there?
16 A. Not that I recall.
17 Q. Okay. Thank you, Doctor.
18 MR. ALLEN: Your Honor, one thing on the
19 CATIE and the weight gain.
11:54:14 20 FURTHER REDIRECT EXAMINATION
21 Q. (BY MR. ALLEN) The CATIE study was intended
22 to be an 18-month study, but 64 percent of the patients
23 discontinued the study; isn't that correct?
24 A. That is true.
11:54:30 25 Q. And, in fact, the median, which is the

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11:54:36 1 average time the patients stayed on Zyprexa, was only nine
2 months, 9.2 months. Do you see that?
3 A. Yes.
4 MR. ALLEN: Thank you, sir. I have nothing
11:54:48 5 further, Your Honor.
6 THE COURT: Do any members of the jury have
7 questions for this witness?
8 Mark, I think there's a few more.
9 Counsel should approach, please.
11:56:41 10 (Bench conference.)
11 THE COURT: I'm trying to decide. That's not
12 a question as much as -- I mean you can decide what you want
13 to in your case. Why don't you look at these. There's a
14 bunch of them there.
11:57:08 15 MS. GUSSACK: Would this be a good time to
16 take a break?
17 THE COURT: Yeah, maybe we should do that.
18 Well, I want to get them all.
19 MR. ALLEN: [Inaudible]
11:58:12 20 MS. GUSSACK: [Inaudible]
21 THE COURT: Why don't you read the rest of
22 the questions. If you guys don't want to -- I -- I'm sort
23 of -- I'll tell you, I like to have jurors' questions
24 answered, but you both want to say these are going to open
11:58:33 25 up a lot of worms and --

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11:58:41 1 MS. GUSSACK: [Inaudible]
2 MR. ALLEN: [Inaudible]
3 THE COURT: Are you both telling me you kind
4 of want to let this -- [inaudible] -- Again, you know what
11:59:26 5 they're asking about, so you may think you've covered it,
6 but -- [inaudible].
7 MS. GUSSACK: My only concern, quite
8 frankly is I don't want the jurors to -- [inaudible].
9 THE COURT: But I've already given -- you've
12:00:04 10 gotten an instruction on that.
11 MR. ALLEN: [Inaudible]
12 MS. GUSSACK: [Inaudible]
13 THE COURT: I'm not sure I agree with that.
14 This would be an easy question to ask.
12:00:41 15 What these questions are telling you about
16 that you think you may have let them know about this
17 information, but at least some people didn't get it.
18 MR. ALLEN: [Inaudible]
19 THE COURT: I can tell them that we have to
12:01:02 20 discuss whether -- I think that the questions have been
21 answered -- the questions they have asked have been answered
22 as fully as I can let the doctor answer.
23 THE CLERK: One more.
24 THE COURT: Okay. Ladies and gentlemen of
12:01:48 25 the jury, as -- after conferring with the lawyers, I'm going

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12:01:55 1 to conclude that the questions that are being asked here
2 have been answered as fully as I can let them be asked, and
3 so some of these questions are likely to be -- may be
4 answered throughout the rest of the trial. One of you did
12:02:08 5 not ask a question, but asked a question about a timeline.
6 The lawyers are aware of that question as
7 well as the other questions you asked, and it's going to be
8 up to them as to what they provide you in the trial, but
9 they know at least somebody would like a timeline. And so
12:02:29 10 we'll see whether that gets provided during the course of
11 the trial or not. But as to the doctor's answering
12 questions, at this point we're going to conclude his
13 testimony.
14 We're going to take our second break for the
12:02:44 15 afternoon. And, Doctor, you may be excused at this point.
16 We'll have a 15-minute break and then resume with our next
17 witness.
18 THE CLERK: Please rise. Court now stands in
19 recess. Off record.
12:03:00 20 (Discussion off the record.)
21 (Jury out.)
22 THE CLERK: On record.
23 THE COURT: We're back on record, and I just
24 want to advise counsel obviously that to the extent you've
12:03:34 25 seen these questions, and I think the record is clear that

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12:03:38 1 both sides asked me not to have any further questioning
 2 based -- or have the jurors' questions answered, but both of
 3 you are certainly free to lead those questions and ask
 4 those questions or clarify for the members of the jury who
 12:03:55 5 need them clarified in further evidence that's presented
 6 through other witnesses.
 7 MR. ALLEN: Go ahead.
 8 MS. GUSSACK: Your Honor, I think it would be
 9 helpful to counsel if we could receive copies of the
 12:04:07 10 questions.
 11 THE COURT: That's fine. Mark, can you make
 12 copies of those questions, and if you want copies of
 13 questions that were asked of previous witnesses, you're
 14 entitled to those, as well.
 12:04:17 15 MS. GUSSACK: That would be helpful, Your
 16 Honor. Thank you.
 17 MR. ALLEN: Thank you, Your Honor.
 18 THE COURT: Okay.
 19 THE CLERK: Off record.
 12:04:25 20 (Short recess.)
 21 THE COURT: We're back on the record. All
 22 members of the jury are present. Who is the State's next
 23 witness?
 24 MR. ALLEN: Your Honor, we call Dr. John
 12:25:38 25 Lechleiter of Eli Lilly, then COO, currently CEO, by oral

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12:25:43 1 videotape deposition.
 2 I guess can we get the lights?
 3 Thank you, Your Honor.
 4 VIDEOTAPE TESTIMONY OF DR. JOHN LECHLEITER
 12:26:04 5 Q. Good morning.
 6 A. Good morning.
 7 Q. How are you today?
 8 A. Just fine.
 9 Q. State your name for the record, please, sir.
 12:26:11 10 A. My name is John Clifford Lechleiter.
 11 Q. Dr. Lechleiter, can you please tell the jury
 12 your position with Eli Lilly?
 13 A. I am presently president and chief -- and
 14 chief operating officer of Eli Lilly and Company.
 12:26:27 15 Q. And that is the No. 2 position in the entire
 16 company, is it not?
 17 A. Yes, it is.
 18 Q. You're also on the board of directors of Eli
 19 Lilly?
 12:26:34 20 A. Yes, I'm presently on the board of directors.
 21 Q. You have been president and chief operating
 22 officer of Eli Lilly since approximately October of 2005; is
 23 that correct?
 24 A. Yes, that's correct.
 12:26:48 25 Q. The only person more senior to you in the

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12:26:52 1 entire company is Mr. Taurel; is that correct?
 2 A. That's correct.
 3 Q. And he is the chairman of the board and CEO
 4 of Eli Lilly?
 12:26:59 5 A. That's correct.
 6 Q. And right underneath him is you, Dr. John
 7 Lechleiter, president and COO of Eli Lilly?
 8 A. Yes. I report to Mr. Taurel, yes, sir.
 9 Q. You've been with Eli Lilly since 1979?
 12:27:15 10 A. That's correct.
 11 Q. Do you also serve on the policy and strategy
 12 committee of Eli Lilly?
 13 A. Yes, I do.
 14 Q. How long have you been on that committee?
 12:27:27 15 A. The policy and strategy committee was renamed
 16 in October 2005. Prior to that it was called the policy
 17 committee. And my membership on the policy committee dates
 18 from May 1998.
 19 Q. The most recent report I have found is that
 12:27:46 20 you have direct ownership of approximately 150,000 shares of
 21 Eli Lilly stock?
 22 A. Yes.
 23 Q. And in 2005 reported cash compensation was
 24 close to \$4 million and your stock options in 2005 were a
 12:28:08 25 little over \$400,000; is that correct?

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12:28:08 1 A. I'm sorry, I'm just looking at this
 2 information.
 3 Q. Yes, sir. It's also on the screen; I've
 4 highlighted it for you. Does that sound about right, cash
 12:28:18 5 compensation of close to \$4 million and stock options of
 6 400,000?
 7 A. Yes.
 8 Q. All right, let me -- let me backtrack,
 9 Dr. Lechleiter. And by the way, Dr. Lechleiter, for the
 12:28:31 10 record, I'm calling you Dr. Lechleiter because you are a
 11 doctor; is that correct?
 12 A. I have a Ph.D. in organic chemistry.
 13 Q. Right, you have a Ph.D., and for the record,
 14 you're not a medical doctor; is that correct?
 12:28:42 15 A. That's correct.
 16 Q. Eli Lilly is a multinational corporation, is
 17 it not, sir?
 18 A. Yes, it is.
 19 Q. Has approximately 41,000 employees?
 12:28:49 20 A. That's correct.
 21 Q. I also have seen your Web site and some of
 22 the documents we'll see in this case describes Eli Lilly as
 23 the diabetes care company. Have you ever heard the company
 24 described in that nature?
 12:29:05 25 A. Diabetes care is an important aspect of our

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12:29:10 1 business. It has been for over 80 years. We're not a
 2 diabetes care company, but it is an important part of our
 3 business.
 4 Q. Yes, sir.
 12:29:19 5 How many products and drug or pharmaceutical
 6 products does Eli Lilly market or sell that treat the
 7 disease diabetes?
 8 A. We have several products that treat the
 9 disease diabetes.
 12:29:32 10 Q. And a -- and what is the annual sales, if you
 11 know, approximately of all of your diabetes products, Eli
 12 Lilly's diabetes products in 2006? What was your worldwide
 13 sales of diabetes products?
 14 A. I don't -- I don't have that number.
 12:29:47 15 Q. Would it be in excess of a billion dollars?
 16 A. Yes, it would be in excess of a billion
 17 dollars, but I don't know beyond that how -- how much that
 18 would be.
 19 Q. Did you have any responsibility regarding
 12:29:59 20 Zyprexa since 1996?
 21 A. Well, in 1996 I was responsible for Lilly's
 22 global regulatory affairs function. That organization was
 23 mainly involved in helping Lilly gain registration approval
 24 for products, including Zyprexa. In 1998 I became head of
 12:30:25 25 our essentially Lilly's drug development effort. That was

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12:30:32 1 the time when I became senior vice-president for
 2 pharmaceutical products. That's a position that I held
 3 until January 2004, and during that time my responsibilities
 4 included teams of scientists and physicians who were charged
 12:30:57 5 with bringing new drugs to market and also with developing
 6 new indications and new scientific data for existing
 7 products.
 8 Q. Okay.
 9 And is the answer yes, you had
 12:31:12 10 responsibilities involving Zyprexa?
 11 A. The answer is since 1996 a part of my
 12 responsibilities during that period, which changed over that
 13 time, involved Zyprexa.
 14 Q. In fact, sir, the record will reflect and
 12:31:25 15 we'll see today, you prepared e-mails yourself involving
 16 Zyprexa, correct?
 17 A. I may have prepared e-mails or been copied on
 18 e-mails concerning Zyprexa, yes.
 19 Q. Right.
 12:31:38 20 You had people report to you about Zyprexa
 21 while it was on the market, did you not?
 22 A. Yes.
 23 Q. Not only that, you instructed people to
 24 prepare you reports and report to you about Zyprexa,
 12:31:49 25 correct?

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12:31:49 1 A. I could have done that. I was in a position
 2 of responsibility where it would have been quite normal to
 3 ask for such reports.
 4 Q. In fact, Dr. Alan Breier reported to you
 12:31:59 5 quite often as head of the Zyprexa team about Zyprexa, did
 6 he not?
 7 A. Dr. Breier was head of our Zyprexa product
 8 team for a period of time. During that time he did not
 9 report directly to me but certainly shared information on
 12:32:17 10 I'm sure a number of occasions in the time that he was in
 11 that position.
 12 Q. Did Eli Lilly itself and its employees ever
 13 refer to the drug Zyprexa as a Lilly blockbuster?
 14 A. I can't say that I recall Lilly specifically
 12:32:35 15 calling Zyprexa blockbuster. It's been referred to as a
 16 blockbuster, I'm sure, by others. Generally within our
 17 industry any drug that exceeds about \$1 billion in sales
 18 would be called by outside observers or referred to by
 19 outside observers as a blockbuster.
 12:32:53 20 Q. In fact, Zyprexa, during the time period it
 21 was on the market, starting in year X, Zyprexa was the most
 22 important product for your company, was it not?
 23 A. Sir, I'd like to you repeat the question. I
 24 don't -- your reference to year X, I don't -- I don't -- I
 12:33:13 25 wasn't quite following that.

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12:33:14 1 Q. You know what year X is, though?
 2 A. Following that.
 3 Q. You know what year X is, though?
 4 A. We've used the term -- we used the term year
 12:33:22 5 X to describe the point in time when Prozac, another Lilly
 6 product, was about to have its U.S. patent expire.
 7 Q. Prozac was another Lilly blockbuster, was it
 8 not?
 9 A. Prozac was a important product for Lilly and
 12:33:38 10 for millions and millions of patients, and it was also a
 11 drug whose sales in the course of its time on the market did
 12 exceed a billion dollars.
 13 Q. And, in fact, Eli Lilly referred to Prozac as
 14 a blockbuster, did it not?
 15 A. I don't recall that specifically.
 16 Q. Okay.
 17 You recall that after the court ruling, I
 18 believe it was in August of 2000, when Lilly's patent for
 19 Prozac was not upheld, that 2001 became year X. You recall
 12:34:12 20 that, don't you?
 21 A. I recall being aware of the appeal verdict in
 22 August of 2000 and having the knowledge at that time that
 23 within that year we did lose the U.S. patent for Prozac,
 24 yes.
 12:34:28 25 Q. Back to Exhibit No. 3. Do you have that in

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12:34:28 1 front of you, sir?
 2 A. Yes.
 3 Q. Okay.
 4 A. Mm-hmm.
 12:34:33 5 Q. Exhibit No. 3, April 6, 2003, summary of
 6 historical analysis, talking about Zyprexa. On a cumulative
 7 IBT basis, that's income before taxes; is that correct, sir?
 8 A. That's what IBT refers to.
 9 Q. Zyprexa will bring in approximately
 12:34:51 10 \$16.1 billion in IBT through 2004.
 11 Did I read that correctly?
 12 A. You read that from the document correctly.
 13 Q. Right.
 14 Sales and IBT have greatly exceeded the
 12:35:08 15 initial prelaunch PMC values. Can you tell the jury what
 16 PMC valuations stand for?
 17 A. PMC stands for the portfolio management
 18 committee. It's our top decision-making body within Lilly
 19 Research Laboratories.
 12:35:24 20 Q. The sales of Zyprexa through 2004 exceeded
 21 the portfolio management committee's evaluations by
 22 \$14.3 billion and the income before taxes of Zyprexa to Eli
 23 Lilly from 1996 exceeded the PMC valuations by over
 24 \$9.2 billion; is that correct, sir?
 12:35:47 25 A. That's correct.

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12:35:47 1 Q. I've handed you Exhibit 5. It's an e-mail
 2 from Marni Lemons, who I take it works in y'all's
 3 department, dealing with the press, the press department?
 4 A. I believe she works or worked at the time in
 12:36:06 5 our corporate communications group.
 6 Q. Right.
 7 And what she's sending to this the U.S.
 8 Zyprexa people on February the 25th, 2003. Really the only
 9 thing I really want to ask you about, she's saying the
 12:36:20 10 following article appears in today's Wall Street Journal.
 11 And that's a well-recognized business newspaper, is it not?
 12 A. Yes, it is.
 13 Q. Anyhow, the following article appears in
 14 today's Wall Street Journal. It is based on a press release
 12:36:34 15 issued by IMS, press release is below. You know who IMS is,
 16 do you not?
 17 A. Yes, I know who IMS is.
 18 Q. Tell the jury who IMS is.
 19 A. IMS is a -- a company that deals in
 12:36:47 20 information including information about prescription drug
 21 trends.
 22 Q. Right. And, in fact, Eli Lilly utilizes
 23 IMS's services itself, does it not?
 24 A. I believe that nearly every pharmaceutical
 12:37:00 25 company realize on IMS for this kind of data.

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12:37:03 1 Q. Yes, sir.
 2 On a press release issued today by IMS, press
 3 release below, which states that Zyprexa is the number 4
 4 drug in the world in terms of sales, and had the largest
 12:37:16 5 growth in sales, worldwide, of any other drug. This again
 6 was dated February the 25th, 2003. Did you see that?
 7 A. Yes, it is. I want to make one comment, and
 8 that is, Ms. Lemons was and may still be in our corporate
 9 communications group, but you characterized the address list
 12:37:36 10 as the U.S. Zyprexa people, and I don't know that.
 11 Q. If you go to Page 5 of this document. It
 12 says -- it's Table 3. Leading products in 2002 in the
 13 world. Are you there, sir?
 14 A. Yes, I am.
 12:37:55 15 Q. The No. 1 selling drug was Lipitor. That's
 16 for high cholesterol, right?
 17 A. Yes, it is.
 18 Q. No. 2 was Zocor, and that's for high
 19 cholesterol, correct?
 12:38:05 20 A. Yes, I believe it is.
 21 Q. No. 3 was Prilosec. That's for GERD,
 22 gastroesophageal reflux disease and ulcers; is that correct?
 23 A. Yes, it is, I believe.
 24 Q. The No. 4 drug in the world was for Zyprexa,
 12:38:21 25 which is indicated for schizophrenia and bipolar mania; is

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12:38:26 1 that correct?
 2 A. Yes, it is.
 3 Q. Okay.
 4 No. 5 is Norvasc, which is for high blood
 12:38:31 5 pressure; is that correct?
 6 A. Yes, I believe it is. I'm not -- some of
 7 these products I'm not familiar with, since they're not our
 8 products.
 9 Q. Sir, I've handed you what's been marked as
 12:38:41 10 Deposition Exhibit No. 6. This is the -- an online document
 11 I got from the Wall Street Journal's Web page concerning
 12 stock prices. In particular I was looking at the stock
 13 price of Eli Lilly.
 14 MR. LEHNER: Your Honor, can we stop it here,
 15 please?
 16 THE COURT: Stop the tape, please.
 17 MR. LEHNER: This document as I recall, was
 18 specifically not admitted. It was not wanted to be used in
 19 opening and I don't know what it's doing here.
 12:39:18 20 MR. ALLEN: It's not going to be offered,
 21 it's on the tape. It's -- the testimony's relevant. We're
 22 not offering this exhibit as an exhibit.
 23 THE COURT: I'm just trying to remember. I
 24 mean, the objections were made and I'm trying to remember
 12:39:30 25 what I did with this --

12:39:33 1 MR. LEHNER: You sustained it.
 2 MR. ALLEN: You sustained it, but it can be
 3 used for demonstrative purposes with a witness.
 4 THE COURT: No, if I've sustained the
 12:39:39 5 objection, it needs to go out.
 6 MR. ALLEN: I don't -- I don't control the
 7 tape.
 8 MR. LEHNER: Well, you do.
 9 THE COURT: You do.
 12:39:49 10 MR. ALLEN: I don't know where we have to
 11 skip --
 12 THE COURT: Wherever the next question
 13 is that avoids this stuff.
 14 MR. ALLEN: Here's where I'm going to start
 12:39:53 15 where I hand him the annual report. Sorry, Your Honor.
 16 THE COURT: That's okay.
 17 CONTINUED VIDEOTAPE TESTIMONY OF DR. LECHLEITER
 18 Q. Sir, I want to hand you what I've marked
 19 as Exhibit 8, it's Plaintiff's Exhibit 5913. It's Eli
 12:41:27 20 Lilly's 2000 annual report. The front cover is a bad copy.
 21 I think it says Straight Talk. But I'm going to turn to
 22 Page 6 of this report. I'm going to -- there you go, sir.
 23 You're obviously familiar with the annual report?
 24 A. Page 6.
 12:41:57 25 Q. You're obviously familiar with the annual

12:42:00 1 report, sir?
 2 A. Yes, I am.
 3 Q. Now, it says what happened with Prozac, and
 4 it says no company would relish losing the patent on its
 12:42:07 5 biggest product three years early. We certainly don't.
 6 A. That's what it says.
 7 Q. Now, you didn't expect this, to lose this
 8 patent. You were surprised to have lost this patent.
 9 A. Sir, we were surprised, but we were prepared.
 12:42:19 10 Q. You were not only surprised, your report says
 11 you were very surprised and disappointed by the judicial
 12 ruling; is that correct?
 13 A. That's correct.
 14 Q. Okay.
 12:42:29 15 So this loss of the Prozac patent that caused
 16 your company to lose over \$36 billion in market cap came as
 17 a big surprise to Eli Lilly, did it not?
 18 A. We were surprised at the ruling by the
 19 three-judge panel.
 12:42:43 20 Q. Yes, sir. And I'm sorry, I didn't use the
 21 word -- I'm trying to find where I put it. Here it is.
 22 Y'all used the word, I didn't. You not only
 23 were surprised, you were very surprised; is that true?
 24 A. Our analysis of the arguments that had held
 12:43:01 25 sway going into that appeal and the strength of those

12:43:04 1 arguments led us to believe that the earlier decision would
 2 be upheld, so naturally when the judges reversed that
 3 decision we were surprised.
 4 Q. Very surprised. Right?
 12:43:17 5 A. Sir, I said surprised. It says very
 6 surprised here. I -- I didn't write this piece so it's
 7 difficult for me to characterize the distinction.
 8 Q. Going on down, it's on the screen, sir, it
 9 says what did you all do? It says we significantly
 12:43:31 10 increased the size of our global sales force and will
 11 continue to do so in order to have the 'firepower' we need
 12 to successfully launch and sell the next wave of products
 13 from our pipeline.
 14 Did you consider yourselves global sales
 12:43:47 15 force firepower, sir?
 16 A. Our global sales force is the main way in
 17 which we engage our customers and help physicians make the
 18 right decisions for patients.
 19 Q. And what it says here is you significantly
 12:44:02 20 increased the size of the global sales force in response to
 21 Prozac losing its patent protection, correct?
 22 A. That's not what that statement means. This
 23 refers to the fact that we had in our pipeline at that point
 24 in time, at the point at which this document was written,
 12:44:21 25 nine new molecules, new drugs, that we intended to launch in

12:44:26 1 the succeeding years and that actually began in 2001. This
 2 refers to the commitment of resources that were going to be
 3 necessary to launch nine new products, which was more than
 4 anybody else in our industry launched during that time.
 12:44:42 5 Q. Sir, go ahead and skip to Page 9. We'll talk
 6 about in blockbuster term we discussed earlier, which was
 7 used by your company regarding Zyprexa.
 8 Page 9. We're on the topic of So What Now.
 9 That's on Page 8. So what now? You see where it says, So
 12:45:02 10 What Now?
 11 A. Yes. There's a -- some kind of a photograph,
 12 and I -- I can't make that out. I can just see the words
 13 so, what now.
 14 Q. Yes, sir. I don't have the photograph --
 12:45:12 15 this is the best copy I have available. So, what now, your
 16 company says, our newer products will stand as our front
 17 line against the inevitable generic competition for Prozac.
 18 Introduced throughout the last half of the '90s -- that
 19 would be Prozac, right? Excuse me, Zyprexa was introduced
 12:45:29 20 in the last half of the '90s, right?
 21 A. Yes, Zyprexa would be one of several products
 22 introduced through the last half of the '90s.
 23 Q. They will be the key to our abilities to
 24 produce earnings growth during that time and resume our
 12:45:42 25 strong performance thereafter.

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12:45:43 1 The number one product you list is -- it's
 2 number one, and not in the alphabet, it's No. 26 in the
 3 alphabet, is Zyprexa; is that correct?
 4 A. Zyprexa is next in the text here, yes.
 12:45:57 5 Q. Yes.
 6 But let's go to Zyprexa. Zyprexa is a
 7 genuine -- can you read that word out loud for me, sir?
 8 A. Blockbuster.
 9 Q. So blockbuster is not a term Scott Allen
 12:46:09 10 created, it's actually one that Eli Lilly uses itself in its
 11 annual reports, right?
 12 A. Blockbuster is a term that is used
 13 generically and ubiquitously throughout our industry to
 14 denote a product, as I said earlier, in general that exceeds
 12:46:27 15 a billion dollars in sales.
 16 Q. Zyprexa is a genuine blockbuster, surpassing
 17 the \$2 billion sales mark in 2000, and becoming Lilly's
 18 number one selling product in the fourth quarter. Just as
 19 Prozac changed the treatment of depression, Zyprexa has
 12:46:41 20 redefined the standard of care for schizophrenia, a
 21 devastating disease that ravages the mind and has been
 22 called the cancer of mental illness. Did I read that
 23 correctly?
 24 A. Yes.
 12:46:52 25 Q. The growth trajectory, what does that mean?

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12:46:55 1 A. People invest in companies so -- and expect
 2 companies to grow, so this was about how are we going to
 3 resume growth after losing a substantial portion of sales of
 4 an important product, Prozac.
 12:47:08 5 Q. I marked as Exhibit No. 9 a Zyprexa product
 6 team off-site meeting team, July 25, 2000. My first
 7 question to you is just tell the jury what the Zyprexa
 8 product team is.
 9 A. First of all, I'd like to make a correction.
 12:47:24 10 It's July 25, 2001.
 11 Q. What did I say?
 12 A. 2000.
 13 Q. I apologize.
 14 A. 2001.
 12:47:28 15 Q. My question is can you tell the jury what the
 16 Zyprexa product team is.
 17 A. The Zyprexa product team is a group of
 18 clinicians, clinical scientists and other R&D personnel, who
 19 are charged with the development of the Zyprexa molecule and
 12:47:46 20 the stewardship of the molecule from the scientific
 21 regulatory point of view.
 22 Q. You'll see a PowerPoint presentation of the
 23 Zyprexa product team says Straight Talk - What's At Stake.
 24 This is July 2001, when Prozac was about to lose its patent
 12:48:05 25 protection. It says, the company is betting the farm on

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12:48:09 1 Zyprexa. The ability of Eli Lilly to remain independent and
 2 emerge as the fastest growing pharma company of the decade
 3 depends solely on our ability to achieve world class
 4 commercialization of Zyprexa. Did I read that correctly?
 12:48:31 5 A. You read correctly what's on the slide.
 6 Q. Okay.
 7 Well, sir, I'm going to hand you what I
 8 marked as Zyprexa Exhibit No. 10. I have a copy for you and
 9 both your counsel, Mr. Oltman and Mr. Lehner. Excuse me,
 12:48:46 10 Mr. Lehner.
 11 This is a presentation put on by Mike
 12 Bandick, Zyprexa brand manager, Eli Lilly national sales
 13 meeting, on March the 13th, 2001. Do you see that, sir?
 14 A. I do see that.
 12:49:01 15 Q. If you flip to the next page, Page 3 --
 16 Page 3, it says -- this is Michael Bandick speaking. Just
 17 imagine the added impact that better sales messages,
 18 competitive differentiation and peer-to-peer activity will
 19 have on our future sales line.
 12:49:21 20 Skipping down a paragraph. But dollars pay
 21 the bills and boost the stock price, so let's look at dollar
 22 growth. Did I read Mr. Bandick's comments correctly, sir?
 23 A. Yes, you're reading it correctly.
 24 Q. Mr. Bandick, continuing, this is year X for
 12:49:38 25 Eli Lilly, and the conventional wisdom is that companies

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12:49:42 1 don't just bounce -- just don't bounce back from losing
 2 patent protection from their biggest product. We need to
 3 own this target, because the affiliate -- that's Eli Lilly.
 4 Isn't that the affiliate, Eli Lilly U.S.A.?
 12:49:57 5 A. No, the affiliate refers to one of our
 6 businesses, so --
 7 Q. Okay.
 8 A. -- when he's talking about the affiliate
 9 here, it would refer to not the company but our U.S. based
 12:50:09 10 business.
 11 Q. Yes, your U.S. I'm sorry. We need to own
 12 this target, because the affiliate, that's the U.S., needs
 13 our help. Do I have your commitment on this? I personally
 14 challenge each of you to drive toward a goal that will help
 12:50:23 15 turn year X into year exceptional. Did I read that
 16 correctly?
 17 A. Yes, you did.
 18 Q. You yourself, sir, personally -- you
 19 personally, Dr. Lechleiter, consider the disclosure of
 12:50:36 20 Zyprexa side effect profile as a corporate crisis, didn't
 21 you?
 22 A. I don't recall that.
 23 Q. Sir, I'll hand you what's been marked as
 24 Exhibit No. 11. It's the Consensus statement on
 12:50:52 25 antipsychotic drugs and obesity and diabetes. I have one

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12:50:55 1 for you and one for both of your counsel. I have
2 highlighted your copy, and I will put it on the board. This
3 was -- you're familiar with this, are you not, sir? This
4 Consensus statement. You know exactly what this is, don't
12:51:10 5 you?
6 A. Yes, I've seen this document before.
7 Q. This Consensus statement, by the way, was put
8 out by the American Diabetes Association, the American
9 Psychiatric Association, the American Association of
10 Clinical Endocrinologists and the North American Association
11 for the Study of Obesity, correct?
12 A. That's what I read here, yes.
13 Q. Well, yes, sir, and also you know they had a
14 panel of experts and Eli Lilly made presentations before
12:51:35 15 this panel before this Consensus statement was published,
16 correct?
17 A. I believe that's correct.
18 Q. And you -- once this thing was published,
19 Consensus statement, once it was published, you considered
12:51:43 20 it a corporate crisis for Eli Lilly, correct?
21 A. I consider the conclusions reached in this
22 Consensus statement to be dead wrong.
23 Q. Look at what it says. It says, the six
24 currently available SGAs vary -- that's second generation
12:51:58 25 antipsychotics, vary -- vary in their efficacy, formulation,

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12:52:01 1 biochemistry, receptor binding, and side effect profiles.
2 Do you agree with that?
3 A. Yes.
4 Q. By the way, you understand there's a
12:52:09 5 difference in the law and in fact between a warning and a
6 package insert and a listing in the adverse events section?
7 A. Those are two different parts of the product
8 label.
9 Q. Right. You understand what a warning in the
12:52:22 10 package insert is, do you not?
11 A. Yes, I do.
12 Q. You -- you understand what Changes Being
13 Effected is, do you not?
14 A. I know what that refers to.
12:52:29 15 Q. The company Eli Lilly can change its package
16 insert on its own at any time to make a stronger statement
17 concerning the risk, can it not?
18 A. I believe that's one of the criteria for
19 Changes Being Effected.
12:52:42 20 Q. Yes.
21 And the company can make that on its own
22 without FDA approval, correct?
23 A. Yes, and we've done that many times.
24 Q. Just for the record, did I give you -- what
12:52:53 25 exhibit number is it now? Let me -- I need the last copy

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12:52:56 1 back, if you don't mind. Sorry, Mr. Oltman.
2 This is Exhibit No. 12.
3 And again, this was produced by your company.
4 This is an e-mail on 1-27-04. We don't have time to read it
12:53:14 5 but if you look at the back of the initial e-mail, you'll
6 see Eli Lilly received the Consensus statement in advance,
7 and you've already testified you recall getting the
8 Consensus statement in advance, correct?
9 A. I recall -- yes, I do recall that we received
10 the Consensus statement in advance.
11 Q. Hunter Heath. Tell the jury who Hunter Heath
12 is.
13 A. Hunter Heath in this time period, I believe,
14 was the head of our medical function -- our medical
12:53:43 15 organization within the Lilly U.S. affiliate or the U.S.
16 business. Hunter Heath is a physician.
17 Q. Hunter Heath says, Dear all, If you are not
18 aware at the time you read this, you will soon know that we
19 have been asked by Messrs. -- that's you, Messrs. Lechleiter
12:54:02 20 and Santini -- tell the jury who Mr. Santini is.
21 A. Mr. Santini at that time was the president of
22 our Lilly U.S. business.
23 Q. Right.
24 We have been asked by Messrs. Lechleiter and
12:54:16 25 Santini to gear up for a major assault on Zyprexa, because

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12:54:22 1 of the ADA Consensus statement copied below. This is
2 regarded as a -- as potentially a corporate-level crisis.
3 Did I read that correctly?
4 A. You're reading correctly from Hunter's memo,
12:54:35 5 yes.
6 Q. By the way, this is regarded as potentially a
7 corporate-level crisis is bolded in the e-mail, is it not?
8 A. It is.
9 Q. Tell the jury who Dr. Tollefson is.
12:54:47 10 A. Dr. Tollefson is a person who retired from
11 Lilly. He was formerly one of our Zyprexa product team
12 ladders and then vice-president for our neuroscience product
13 team group.
14 Q. You worked with Dr. Tollefson on Zyprexa, did
12:55:04 15 you not?
16 A. I've worked with Dr. Tollefson in the past.
17 Q. And I think you've identified Dr. Taylor as
18 a -- you believe to be a research scientist. We're just
19 going to put Exhibit 13 on the board. This is an e-mail
12:55:18 20 written by Dr. Taylor on June 27, 22, to Hunter Heath,
21 who -- where is that? Hunter Heath and Dr. Tollefson, one
22 of your designated experts in this case, and other
23 individuals, and Dr. Taylor says, Ultimately, I expect that
24 a fair-minded, scholarly evaluation of the available data is
12:55:49 25 likely to support several conclusions. I'm going to read I

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12:55:54 1 and 2. Zyprexa, like other members of the class, causes
2 weight gain. Like other causes of weight gain,
3 Zyprexa-induced weight gain probably increases the risk of
4 diabetes.

12:56:05 5 Did I read that correctly?
6 A. You read those two correctly. This is pure
7 hypothesis and surmised by this Dr. Taylor.
8 Q. Exhibit 16, which I have just handed you,
9 this is a document that's been much discussed in this
12:56:25 10 litigation, and I provided it to your counsel prior to this
11 time of your deposition. You've seen this document before,
12 have you not?
13 A. I believe -- I believe I may have seen this
14 document.

12:56:37 15 Q. You know what the Global Product Labeling
16 Committee is, do you not, sir?
17 A. Yes, I do.
18 Q. Okay.
19 And this is a recommendation for a label
12:56:51 20 change presented to the Global Product Labeling Committee in
21 February of 2000, correct? February 21st, 2000.
22 A. Yes.
23 Q. Sir, so the author of this document indicates
24 that random glucose level elevations of treatment-emergent
12:57:12 25 hyperglycemia were over three times greater in the Zyprexa

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12:57:15 1 group than the placebo group, correct?
2 A. As this information was presented to this
3 committee, this is the information obviously that was
4 provided in the document.

12:57:25 5 Q. Look at Exhibit 17.
6 Exhibit 17 is an e-mail from Alan Breier,
7 among other people, to John Lechleiter, Gino Santini. Who
8 are these people. Gerhard Mayr. Are these the policy
9 committee?
12:57:47 10 A. No, these would have been the leadership of
11 our global sales and marketing organization at that time.
12 Q. It says here -- it starts, John. That's you,
13 is it not?
14 A. Yes.
12:57:56 15 Q. Okay.
16 John asked me to overview the topic of
17 olanzapine-associated weight changes (OWC).
18 Did I read that correctly?
19 A. Yes, you read it.
12:58:10 20 Q. So you had particularly asked Dr. Breier to
21 review olanzapine-associated weight changes, right?
22 A. I believe that I had been asked by the sales
23 and marketing leadership, since I was head of the product
24 teams at that time, to provide an assessment, which
12:58:29 25 Dr. Breier provides, on what we know about olanzapine

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12:58:34 1 associated weight changes, and I believe Dr. Breier's e-mail
2 here is being responsive to that request.
3 Q. Your request.
4 A. Yes, apparently.
12:58:43 5 Q. The next bullet point. Olanzapine is viewed
6 to have more associated weight gain than risperidone, that's
7 Risperdal, Seroquel, and traditional neuroleptics. Did I
8 read that correct?
9 A. That's what's written here.
12:59:07 10 Q. Well, Dr. Breier at least wrote at the time,
11 fact, colon, the order of weight gain, and he puts clozapine
12 is greater than olanzapine, olanzapine is greater than
13 Seroquel, and Seroquel is greater than risperidone, right?
14 A. Dr. Breier did indeed write that. I have no
12:59:23 15 basis for understanding how he reached that conclusion,
16 since it does not state it in this memo.
17 Q. I'm going to put up what's been marked as
18 Exhibit -- is that 18, sir? Is that 18?
19 A. Yes, it is.
12:59:34 20 Q. Thank you, sir.
21 This is an e-mail by Dr. Robert Baker in
22 October of 2000. Now, this e-mail is written October 2000,
23 just to put us in context, was shortly after the court
24 decision that said Eli Lilly will lose the patent protection
12:59:53 25 on Prozac in 2001, correct?

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12:59:56 1 A. This is dated in October, and I believe the
2 court decision was in that previous August.
3 Q. Subject: Meeting with endocrinologist
4 consultants. Now, endocrinologists are people like in the
13:00:11 5 American -- the clinical -- the Consensus statement was
6 published by the endocrinology group, right?
7 A. That was one of the groups. The
8 endocrinologists are people who specialize in endocrinology.
9 Q. Which treats diabetes, right?
13:00:29 10 A. Endocrinology treats many things, but
11 endocrinologists are involved in the diagnosis and treatment
12 of diabetes.
13 Q. Let's see what Mr. Brodie -- or is that
14 Dr. Brodie?
13:00:38 15 A. I believe it would be Mr. Brodie.
16 Q. Yeah, Mr. Brodie from the diabetes care side
17 of the company says subject re meeting with endocrinologist
18 consultants. Sorry if I mangled that word. He says,
19 Robert, and he sent it to Robert Baker. The jury will know
13:00:54 20 who Dr. Baker is. Robert, clearly, this group of
21 endocrinologists (who spoke up and I would rate those who
22 did speak up as the leaders of the pack) are very concerned
23 with the approach Lilly is taking towards the issue that
24 Zyprexa leads to diabetes. I can only hope that you and all
13:01:21 25 of the team hospital attended the North American Diabetes

13:01:27 1 Advisory Board, that's NADAB, is it not?
 2 A. I believe it is, yes.
 3 Q. Board meeting are gaining the ear of senior
 4 leadership and articulating this finding. Although the
 13:01:43 5 board's recommendation is probably not the way Lilly
 6 typically does business, I do believe they made a very
 7 strong point that unless we come clean on this, it would
 8 get -- it could get much more serious than we might
 9 anticipate.
 13:02:03 10 Did I read that correctly?
 11 A. You read that correctly.
 12 Q. You told me you were in senior leadership.
 13 We saw where Mr. Brodie recommended that the ear of senior
 14 leadership be gained on this meeting. Isn't that what
 13:02:18 15 Mr. Brodie said?
 16 A. Mr. Brodie had that opinion.
 17 Q. Yes.
 18 Okay, sir. Exhibit No. 20, Policy Committee,
 19 Zyprexa Safety Overview, we've established you're on the
 13:02:27 20 policy committee, correct?
 21 A. That's correct.
 22 Q. Introduction, a side effect that is
 23 associated with Zyprexa is weight gain and the sequelae of
 24 weight gain. Following is an overview of Zyprexa's
 13:02:42 25 metabolic profile, as well as a brief update on

13:02:47 1 agranulocytosis.
 2 Clinical data. Weight gain. Five atypical
 3 antipsychotic agents are associated with more weight gain
 4 than most traditional neuroleptic agents in the following
 13:03:09 5 order (most to least).
 6 Did I read that correctly?
 7 A. You read the statement correctly.
 8 Q. Now, I'll -- for the record, it appears a
 9 report was prepared on the results of the meeting, correct?
 13:03:23 10 For the report --
 11 A. I can't -- I can't tell whether this document
 12 was provided as a prelude to the meeting or whether it was a
 13 report following the meeting. It's not clear, nor is it
 14 clear who prepared this document.
 13:03:34 15 Q. The policy committee had this report and says
 16 in the following order most to least, Clozaril is the most,
 17 Zyprexa is next, Zyprexa is more than Seroquel, and Seroquel
 18 is more than Risperdal. Do you see that?
 19 A. I see what's written here.
 13:03:51 20 Q. That's in a the policy committee meeting,
 21 that's very similar to Table 2 of the Consensus Statement
 22 published in February of 2004, is it not, sir?
 23 A. I don't think it's similar to Table 2.
 24 Table 2 doesn't have the same order shown here.
 13:04:04 25 Q. All right.

13:04:05 1 The next bullet point, Zyprexa weight gain is
 2 roughly twice that of Risperdal, average seven kilograms
 3 versus three and a half kilograms. Did I read that
 4 correctly?
 13:04:18 5 A. You've read what's here correctly.
 6 Q. All right.
 7 They it says Pfizer's Geodon and BMS's
 8 aripiprazole -- now, that's Abilify, is it not?
 9 A. I believe that's a product name.
 13:04:30 10 Q. Pfizer's Geodon and BMS's Abilify appear to
 11 have less metabolic issues than other atypicals. Did I read
 12 that correctly?
 13 A. That's what's written there.
 14 Q. So a recent Zyprexa clinical trial analysis
 13:04:43 15 indicates patients with baseline diabetes risk factors;
 16 obesity, family history, non-Caucasian, advanced age, have
 17 higher occurrences of diabetes during what treatment, sir?
 18 A. During treatment with Zyprexa and other
 19 antipsychotic drugs.
 13:05:00 20 Q. Next bullet appointment under diabetes to the
 21 policy committee in April of 2002: Results of two Lilly
 22 epidemiologic studies. Did I read that correct, sir?
 23 A. Yes, we did quite a few studies in this area.
 24 Q. Results of two epidemiologic studies
 13:05:17 25 (analysis of AdvancePCS). What's AdvancePCS stand for, sir?

13:05:22 1 A. AdvancePCS is a pharmaceutical benefit
 2 manager that handles prescription execution for customers.
 3 Q. Analysis of AdvancePCS and GPRD databases
 4 indicate that the risk of diabetes is increased in patients
 13:05:43 5 treated with antipsychotics, including Zyprexa. Did I read
 6 that correctly?
 7 A. That's what that sentence states, and that
 8 was information that would have been gleaned from that
 9 particular type of an analysis, but it takes I think a
 10 composite of different analyses to draw any conclusions if
 11 you're trying to do that here.
 12 Q. Sir, honestly, under oath, to a jury and to a
 13 judge, you understand there's a difference between a warning
 14 under the FDA's definition and an adverse reaction, correct?
 13:06:13 15 A. Yes, I do.
 16 Q. All right, sir, we'll go back to the policy
 17 committee report on Zyprexa safety, and see what you said
 18 internally. FDA freedom of information database of reports
 19 of diabetes cases, Clozaril 542, Zyprexa 434, Risperdal 244,
 13:06:32 20 Seroquel 57. Possible explanations for differences among
 21 these drugs are differences in weight gain, illness severity
 22 in the target population, and reporting bias. Did I read
 23 that correctly?
 24 A. That's what's written, but there could be
 13:06:51 25 other reasons as well for the differences.

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13:06:53 1 Q. Okay.
2 Diabetic ketoacidosis, second bullet point.
3 FDA freedom of information database cases of DKA, cases in
4 total exposures, Clozaril 103 cases, total exposure not
13:07:09 5 available, Zyprexa 132 cases, 3.7 million exposures. Did I
6 read that correctly?
7 A. That's what's written here.
8 Q. This is the Japanese Dear Doctor letter label
9 change, it's produced out of your company's files, it's
13:07:24 10 plaintiff's Exhibit 320. Is this bringing it back to you
11 that there was a Japanese label change in April of 2002?
12 A. Yes, I'm aware of that.
13 Q. I've handed you what's been marked as
14 Exhibit 23. You're familiar with this exhibit, are you not,
13:07:45 15 sir?
16 A. I recall having seen this document.
17 Q. Well, sir, this document is a letter that was
18 written to you, or a memo written to you on July the 1st,
19 2002, by two members of senior management at Eli Lilly,
13:08:06 20 correct?
21 A. Yes, it was written to me by Mr. Bert
22 VandenBergh and Mr. Alan Breier.
23 Q. And for the jury, who is Mr. VandenBergh?
24 A. Mr. VandenBergh was -- is a Lilly executive.
13:08:15 25 At the time I believe he was responsible for a group of

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13:08:19 1 neuroscience product teams, including Zyprexa.
2 Q. And the memo is written to you and Mr. G.
3 Mayr. How do you pronounce that?
4 A. Mayr.
13:08:29 5 Q. And what's his title?
6 A. At that time Mr. Mayr was responsible for
7 global sales and marketing for Lilly.
8 Q. And Mr. -- okay, you pronounce Mascarenhas.
9 A. Mascarenhas.
13:08:45 10 Q. And what is his title, sir?
11 A. He was the general manager of our business
12 affiliate in Japan at that time.
13 Q. Sir, it's written to Dr. Lechleiter, and then
14 the head of global marketing, Mr. Mayr?
13:08:55 15 A. Global sales and marketing, yes.
16 Q. Right.
17 And it says trip summary to Japan in June of
18 2002 -- this would have been after the label change with
19 addition of the warnings, the contraindications and the
13:09:08 20 precautions we previously discussed, correct?
21 A. Yes.
22 Q. Do you recall receiving this memo?
23 A. I do recall receiving this memo.
24 Q. Was Mr. Mayr on the policy committee?
13:09:19 25 A. Mr. Mayr was on the policy and strategy

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13:09:21 1 committee.
2 Q. So at least two members of the policy and
3 strategy committee in 2002 were provided this memo, correct?
4 A. That's correct.
13:09:28 5 Q. Okay.
6 We can't read it all, we don't have time.
7 Japan trip, sir. It is clear that the impact of the label
8 change in Japan has been very profound. We concluded we
9 have lost substantial ground and trust in our relationships
13:09:50 10 with the MHLW, and that's the Japan equivalent of FDA;
11 correct?
12 A. Yes, it is.
13 Q. Market research shows we have also lost quite
14 a bit of credibility with prescribers and opinion leaders,
13:10:09 15 basically because they felt left in the dark with what they
16 perceived as the late sharing of information. Late sharing
17 of safety information. As a result, there has been a 75
18 percent drop in new patients who are being put on the drug,
19 and a continuing fairly high drop-out rate.
13:10:36 20 Did I read that correctly?
21 A. You read that correctly as it's stated. The
22 reason why we lost -- we -- why Dr. Breier might have stated
23 we lost substantial ground and trust in our relationships
24 with the MHLW is because, as I stated earlier, we did not --
13:10:55 25 we did not agree with the MHLW's action and we expressed

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13:11:00 1 that to them in discussions prior to the label change.
2 Q. So what you're saying is when you were
3 required to inform the prescribing physicians specifically
4 of the label change, you saw a drop-off in prescribing by 75
13:11:13 5 percent, correct?
6 A. What's written in this memo, which was
7 written --
8 Q. Is that answer to what I said or not?
9 A. I'm going to answer your question. This memo
13:11:23 10 was written about four months, I guess, after the label
11 change, and I can only answer that I can read from this
12 memo, and that is that there was a substantial drop-off in
13 new patients being put on the drug following that event.
14 Q. Right. And not only new patients, on
13:11:39 15 patients that were on the drug it was a fairly high dropout
16 rate, correct?
17 A. That's what I read here from this memo.
18 Q. It also gives a forecast, Dr. Breier,
19 Mr. VandenBergh expected that to continue. Says we need to
13:11:53 20 also revise our forecast for the year to reflect the
21 post-label-change environment and discuss how to communicate
22 it to the sales force because it is very unlikely the
23 affiliate will make plan.
24 Did I read that correctly?
13:12:08 25 A. You did. This is a simple statement of fact,

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13:12:11 1 but because prescriptions had fallen off it was unlikely, at
 2 least according to this memo, that the forecast of Zyprexa
 3 would be achieved that year. I should say the planned sales
 4 of Zyprexa in Japan would be achieved that year.

13:12:25 5 Q. Yes, sir.
 6 But we know at least for patients
 7 Dr. Vandenberg and Dr. Breier reported to Lilly that the
 8 patients were going to benefit by the label change, correct?
 9 A. No, I don't know what you're referring to. I
 13:12:40 10 can't answer that question.
 11 Q. Well, sir, let's look at the last page, where
 12 they sign off and make their conclusions.
 13 I'll start here. Moreover, as patients with
 14 diabetes are shifted away from Zyprexa to Risperdal and
 13:12:58 15 Seroquel, there should be a balancing of the playing field
 16 on this issue over time. There appears to be a decrease of
 17 hyperglycemia AEs, that's adverse events; is that correct?
 18 A. Yes.
 19 Q. At least Dr. Breier and Mr. Vandenberg
 13:13:16 20 reported to you there appears to be a decrease of
 21 hyperglycemia adverse events, and they conclude that they're
 22 going to promote the product within the label and which
 23 would by design dramatically reduce the number of events.
 24 Isn't that what they said at the time, sir?
 13:13:32 25 A. Yes. We always promote our products within

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13:13:34 1 the label. As you pointed out, the label change that
 2 occurred in April of 2002 put much greater restrictions on
 3 Zyprexa prescribing and on the other products. One would
 4 expect, therefore, that if this label was followed in our
 13:13:53 5 promotional practice and in prescribing, physicians would
 6 likely see less reports of diabetes because people with
 7 diabetes or predisposed in some way to diabetes would not be
 8 using our drug, they would be using another one of the
 9 products.
 13:14:06 10 Q. Okay.
 11 And you're quoting from the comments that you
 12 heard when you went out in the field, right?
 13 MR. ALLEN: We may need to stop this.
 14 MR. LEHNER: Stop this, Your Honor.
 13:14:17 15 MR. ALLEN: Stop.
 16 MS. GUSSACK: Do you want to take it off?
 17 MR. ALLEN: Let me see the book again.
 18 THE COURT: And ladies and gentlemen of the
 19 jury, just so you know, previously I've made rulings on
 13:14:45 20 objections to portions of this deposition, and some
 21 objections -- some of the testimony I've excluded.
 22 Sometimes the changes don't get quite made and the attorneys
 23 are sensitive to that, which is why we're jumping forward
 24 like this.
 13:15:05 25 MR. ALLEN: Actually, Your Honor, that

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13:15:20 1 concludes our offer of Dr. Lechleiter's deposition.
 2 THE COURT: Okay. Why don't we have the
 3 lights on.
 4 (Bench conference.)
 13:15:45 5 THE COURT: I don't have my rulings and stuff
 6 but -- well, again, we've managed to stop these, but --
 7 yeah, you may -- we've got, what, two more of these.
 8 MR. ALLEN: Yeah.
 9 THE COURT: Or maybe there's more than two.
 13:16:06 10 MR. ALLEN: He's implying that -- wait a
 11 minute. I want the record to reflect -- can we -- are we
 12 going to do any -- I mean, it's 1:20. Are we going to end
 13 today?
 14 Can I introduce the exhibits?
 13:16:18 15 THE COURT: Yeah, introduce the exhibits and
 16 then get rid of the jury and then we can do this.
 17 MR. ALLEN: Okay, Your Honor.
 18 We offer into evidence AK -- Alaska
 19 Exhibit 10034.
 13:16:52 20 THE COURT: AK10034 is admitted subject to --
 21 I mean, I made rulings on all of these exhibits so the
 22 objections are preserved and --
 23 MR. LEHNER: That's correct.
 24 THE COURT: AK10034 is admitted.
 13:17:23 25 MR. ALLEN: We move to admit AK1079.

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13:17:29 1 THE COURT: 1079? I just want to make sure
 2 how many zeros --
 3 MR. ALLEN: Yes, sir.
 4 THE COURT: AK1079 is admitted.
 13:17:40 5 MR. ALLEN: We move to admit AK5913, and
 6 we'll again have to do the same thing. It's the annual
 7 report, but we have portions.
 8 THE COURT: Portions of AK5913 that I allowed
 9 are admitted.
 13:17:58 10 MR. ALLEN: We move to admit AK8584, the
 11 Zyprexa product team off-site July 25th, 2001 meeting.
 12 THE COURT: AK8584 is admitted subject to
 13 previous objections. All these exhibits are subject to
 14 previous objections.
 13:18:17 15 MR. ALLEN: I don't recall one on that one,
 16 Your Honor.
 17 We move to admit AK3109, an e-mail from
 18 Hunter Heath, dated January 27th, 2004, Your Honor.
 19 THE COURT: AK3109 is admitted.
 13:18:33 20 MR. ALLEN: We move to admit AK8666, an
 21 e-mail dated June 27th, 2002, from Simeon Israel Taylor,
 22 Your Honor.
 23 THE COURT: AK8666 is admitted.
 24 MR. ALLEN: We move to admit AK918, an e-mail
 13:18:51 25 from Alan Breier, dated November 24th, 1999, Your Honor.

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13:18:55 1 THE COURT: AK918 is admitted.
 2 MR. ALLEN: We move to admit AK4051, policy
 3 committee meeting, April 12th, 2002, Your Honor.
 4 THE COURT: AK4051 is admitted.
 13:19:09 5 MR. ALLEN: Your Honor, we move to admit
 6 AK10017, a memo concerning Japan trip summary, dated
 7 June 23-27, 2002, Your Honor.
 8 THE COURT: AK10017 is admitted.
 9 MR. ALLEN: Anything else?
 13:19:30 10 MR. SUGGS: We have the exhibits we can get
 11 out --
 12 MR. ALLEN: We'll do that later.
 13 THE COURT: And all of those exhibits that
 14 were just admitted are subject to -- the objection is made
 13:19:44 15 to those --
 16 MR. ALLEN: Yes, Your Honor, that now
 17 concludes our offer of Dr. Lechleiter and his exhibits, Your
 18 Honor.
 19 THE COURT: And given that it's 20 after
 13:19:56 20 1:00, is this a good time to break for the day?
 21 MR. ALLEN: Yes, sir, it's whatever you want
 22 to do. I have a 10-minute depo, but it's up -- you know,
 23 whatever you want to do.
 24 THE COURT: Let's let the jury go home.
 13:20:06 25 MR. ALLEN: Okay.

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13:20:07 1 THE COURT: Ladies and gentlemen of the jury,
 2 we're going to rest for the day and we'll resume again the
 3 usual time tomorrow morning. Again, I would remind you,
 4 please do not discuss this case with anyone or let anyone
 13:20:20 5 discuss it with you. Please try to keep an open mind until
 6 you've heard all of the evidence in this case. Please do
 7 not view any newspaper articles, TV or radio or Internet
 8 concerning the subject matter of this lawsuit. I'll see you
 9 all tomorrow.
 13:21:09 10 (Jury out.)
 11 THE COURT: Again, we've gone through this
 12 process of reviewing objections to depositions, and --
 13 please be seated -- and other matters to get these things
 14 done as narrowly and avoid things in. I realize there's a
 13:21:31 15 lot of material and a lot of things are happening, but
 16 please -- just double-check with depositions to make sure
 17 that things that were excluded aren't -- don't get put up --
 18 don't get at least started. I think in both instances we
 19 caught them before anything really happened in this case.
 13:21:50 20 And I don't perceive that there was any prejudice at all
 21 with the material coming in.
 22 If you disagree, I'm happy to give the jury
 23 instruction to exclude certain things, but I don't really
 24 think there was anything they heard to exclude. But I'll
 13:22:04 25 consider that if you want me to.

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13:22:05 1 Let me bring up another topic briefly.
 2 As I indicated yesterday, I was going to get
 3 and did get a card for the jurors to sign for Mr. Van
 4 Huizen. I've signed that card. Do you all want to sign
 13:22:28 5 that card, given this motion practice for a mistrial.
 6 MR. ALLEN: Given what?
 7 THE COURT: Given the motion practice for the
 8 mistrial, I just don't want anybody to do something they
 9 think prejudices their position or anything. I have the
 13:22:46 10 card in my chambers and if everybody's comfortable
 11 proceeding with signing it and sending it, I'll give you the
 12 card and you all can add your names to the -- or add your
 13 wishes to the -- to the card. I just want to make sure.
 14 MR. FIBICH: Your Honor, the State will
 13:23:04 15 stipulate for the record that we will not raise as an issue
 16 if they choose to sign the card, that this somehow
 17 prejudices their position.
 18 MS. GUSSACK: Appreciate that stipulation,
 19 Your Honor, and do you have any information about the status
 13:23:15 20 of the juror's medical condition?
 21 THE COURT: My information -- actually
 22 Mr. Borneman can probably give you the best status that we
 23 had as of last night.
 24 THE CLERK: He's out of the hospital. He's
 13:23:29 25 out of the hospital. Had some -- had his eye glued shut.

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13:23:33 1 MR. ALLEN: He didn't have a heart attack?
 2 THE CLERK: No.
 3 MR. ALLEN: He fainted and hit his head?
 4 THE CLERK: Correct. It wasn't a full-blown
 13:23:44 5 heart attack.
 6 MR. ALLEN: Your Honor, we might as well --
 7 if you don't mind, make a record, just reject my Lechleiter
 8 offers that you rejected.
 9 THE COURT: Actually, I think there is a
 13:23:53 10 record, but again, if you want to make a different record to
 11 mark as an exhibit, that -- make as clear a record as you
 12 can, that's fine. As I've indicated, what I've done in each
 13 instance, and I've given them to you, is I took the
 14 objections that were made by Lilly to playing the portions
 13:24:16 15 of exhibits and I indicated on each document for each of
 16 these witnesses what objections were sustained and what
 17 portions therefore were not going to be played and what
 18 objections were overruled and therefore they could be
 19 played, and so I think the cuts are pretty well delineated
 13:24:32 20 on this but -- but I'm -- certainly have no objection to
 21 somebody making a record as clear as they think it needs to
 22 be.
 23 MR. ALLEN: And I apologize to the Court if
 24 you think so. It's the basic training I was taught and it
 13:24:45 25 always stuck with me.

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13:24:46 1 THE COURT: Again, you know --
 2 MR. ALLEN: Your Honor, I'm going to offer
 3 AK10169, which is the Dr. Lechleiter rejected offers of
 4 deposition, and I offer each question and answer
 13:24:59 5 individually.
 6 THE COURT: Okay. That -- that exhibit is
 7 not being offered to be admitted in this case, it's being
 8 offered as a record of what portions of the exhibit you
 9 would have liked to have played that I have sustained
 13:25:12 10 objections to and have basically said they can't be played.
 11 MR. ALLEN: Yes, sir. And I'm offering each
 12 question individually and each answer individually. I
 13 assume that's --
 14 THE COURT: That's -- that's fine. The way I
 13:25:24 15 think the objections were made were not necessarily each
 16 question but there may have been a group of questions put
 17 together, but that's -- that clarifies the record even more.
 18 That's fine.
 19 MR. ALLEN: Okay. And I'm also offering
 13:25:37 20 them -- each question as a group, and all the questions, and
 21 that's rejected also?
 22 THE COURT: The -- I have ruled on the
 23 objections the way I've ruled on the objections, which
 24 basically I think includes where I've sustained an objection
 13:25:50 25 it was either as to a group or -- and to the individual

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13:25:55 1 questions within the group.
 2 MR. LEHNER: Your Honor, I have no objection
 3 to making the record. I think you're right that the belt
 4 and suspenders, your rulings on them are pretty clear and I
 13:26:05 5 assume those are on the docket.
 6 MR. ALLEN: Your Honor, I had a -- if anybody
 7 wants to know, I had a -- this is kind of personal to me and
 8 I just don't ever want to have it happen again, so I -- I
 9 just do it every time.
 13:26:17 10 THE COURT: That's --
 11 MR. ALLEN: I appreciate the Court's
 12 indulgence.
 13 THE COURT: Again, I -- I know that every now
 14 and then the Supreme Court deals with an issue by deciding
 13:26:28 15 that it wasn't raised, and to the extent that everybody
 16 needs to get a record to let your issues being raised, quite
 17 frankly, I think it's my job to let you do that, and make
 18 the record as clear as possible.
 19 MR. ALLEN: Thank you, Your Honor. I
 13:26:41 20 appreciate it.
 21 MR. FIBICH: Your Honor, there's one other
 22 matter, if I may.
 23 Well, I've got one, Mr. Suggs' got one. If I
 24 could raise my first.
 13:26:49 25 THE COURT: Sure.

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13:26:50 1 MR. FIBICH: It occurred to me since we have
 2 two members of our jury excluded, that there may be attempts
 3 to contact them to determine various matters that they may
 4 have perceived during the course of the trial. State of
 13:27:04 5 Alaska does not intend on contacting these people --
 6 THE COURT: I'm going to make this easy. At
 7 some point when the trial is over I'll let all the jurors
 8 know, or at least the ones who are here, and the people that
 9 were excused, that they're free to talk to people they want
 10 to or are free not to talk to people if they don't want to,
 11 but until I tell you you're free to talk to jurors or excuse
 12 jurors, you are not free to talk to jurors or excuse jurors,
 13 and at this point you're not free to talk to any of the
 14 jurors.
 13:27:37 15 MR. FIBICH: Can we get a representation from
 16 the -- Lilly as to whether they have contacted either of
 17 these jurors.
 18 MS. GUSSACK: Yes, Your Honor. There's been
 19 no contact with either juror.
 13:27:47 20 THE COURT: I will -- it's my practice at the
 21 end of the case to let people know that it's up to them as
 22 to what they want to do, and that I actually tell them that
 23 sometimes it's helpful for lawyers to talk to them, but that
 24 will be entirely up to them. And I'll tell you now that I
 13:28:02 25 also will send eventually a letter of thank you as well as a

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13:28:07 1 survey that I give to jurors as to what the court did and
 2 how the process worked for parking and lots of --
 3 comfortableness of the seats, there's a bunch of questions I
 4 ask, and I tell them they're free not to answer that if at
 13:28:21 5 the don't want to, but I give them a self-addressed stamped
 6 envelope for that. There also -- there's a card the
 7 judicial council requires us to give to the jurors if we're
 8 going to be retention within the next two years, and I'm up
 9 to 2010 and I'm going to give that, and because of that I
 10 now have to give them this little card which asks them to
 11 give feedback about me, and they'll get that, as well. But
 12 that's all after this case is -- after this jury is done
 13 with its work in this case.
 14 Mr. Suggs.
 13:28:55 15 MR. SUGGS: Your Honor, I just have a small
 16 matter of cleanup. At the conclusion of Ms. Wojcieszek's
 17 deposition we forgot to get some deposition -- some exhibits
 18 admitted. I believe Your Honor has already ruled that these
 19 are admissible by overruling any objections but I don't
 13:29:11 20 think they've been formally admitted yet. One is AK10108.
 21 THE COURT: Why don't you just list them all.
 22 MR. SUGGS: Okay.
 23 THE COURT: 10108?
 24 MR. SUGGS: Correct, sir. Also AK10109,
 13:29:28 25 AK10110, and I'm not sure about 10104. Has that been --

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13:29:48 1 THE CLERK: I'm not showing it.
2 MR. SUGGS: You're not showing it? Then we
3 also have to admit, Your Honor, 10104.
4 THE COURT: Any others?
13:29:58 5 MR. SUGGS: I believe that's it.
6 THE COURT: AK10108, AK10109, AK10110, and
7 AK10104 are all -- were introduced during the Wojcieszek
8 deposition, are all admitted, all the objections that were
9 previously made to the admission of those exhibits are
13:30:16 10 preserved.
11 MR. SUGGS: Very good. Thank you, Your
12 Honor.
13 MR. LEHNER: Your Honor, last but not least,
14 tomorrow, if we could have some idea of where we are and
13:30:28 15 what we're doing.
16 MR. FIBICH: We're playing some more of the
17 depositions and at the conclusion of that we will start with
18 Dr. Wirshing.
19 MR. ALLEN: I'll try to get more help with
13:30:37 20 the depositions as soon as I get back to the office and look
21 at it. I just --
22 THE COURT: There's only a few more that I
23 think I've reviewed --
24 MR. ALLEN: And I may even take some out,
13:30:48 25 so -- but we've -- nothing you haven't done --

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13:30:51 1 THE COURT: Basically you got whatever
2 depositions you're going to play that have already -- all
3 the objections to which have been ruled on.
4 MR. ALLEN: Right. And one witness.
13:31:00 5 THE COURT: You'll let that know, and then
6 Dr. Wirshing is your last witness?
7 MR. ALLEN: Yes, sir.
8 THE COURT: Okay.
9 MR. LEHNER: We have -- the one issue that we
13:31:10 10 have outstanding, we have -- we informed them that we do
11 have a witness who will be coming from the East Coast whom
12 we reserved Monday. I've talked to Mr. Fibich about that,
13 and I'll share it with him the information that we just
14 learned, and I think it is almost impossible to move him
13:31:23 15 from Monday.
16 MR. ALLEN: Let me say Your Honor, we'll
17 cooperate with them and --
18 THE COURT: My only concern is that if he's
19 going to go -- he or she, I don't know, this witness is
13:31:32 20 going to go on Monday, and we don't finish Dr. Wirshing,
21 what we'll be doing is -- I don't know where that will put
22 Dr. Wirshing, finishing him up, so just think about that in
23 terms of what your order is.
24 MR. ALLEN: We will, Your Honor, and I'm -- I
13:31:47 25 hadn't even talked to my colleagues, because I don't know

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13:31:49 1 and I'm not requiring them to tell me, the length of cross
2 of Dr. Wirshing. If I get back to the office -- or the
3 hotel room tonight I'm going to look at our proof. It was
4 always my goal to finish on Friday.
13:32:01 5 We have the unfortunate Mr. Van Huizen and we
6 think we would have, and that's no fault of anybody's own,
7 but I'm going to see if I can, you know, plan established
8 where maybe we can finish tomorrow. But at the latest I can
9 promise you it will be Monday, and so I'll talk to
13:32:17 10 Mr. Lehner and Ms. Gussack but --
11 THE COURT: And again, if the witness that's
12 going to go on Monday is not going to take all day on
13 Monday, you may be able to finish up shortly on Monday and
14 then go to that witness and finish that witness up.
13:32:32 15 MR. ALLEN: That's what I think -- that's
16 what I think.
17 MR. SUGGS: Your Honor, I'd like to point out
18 that Dr. Wirshing has already been here waiting patiently to
19 go on and next week is his week with his children, their
13:32:47 20 Easter vacation, so --
21 THE COURT: Again, everybody is going to have
22 to just figure that out in terms of this other witness and
23 what else you're going to put on tomorrow.
24 MR. FIBICH: In that regard, Judge, can we
13:32:53 25 go -- is it possible to go late tomorrow?

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13:32:55 1 THE COURT: I don't know about tomorrow.
2 It's -- Monday we could go -- I'm pretty sure we could go a
3 little later if we need to. By a little later, I'm talking
4 about 2:00. Maybe -- I've got a -- I know I have something
13:33:13 5 at 2:30 on Monday. I don't recall what my calendar -- why
6 don't you get my calendar, see if Mike's there and can bring
7 in the calendar. I have three, I believe -- because I
8 looked at them last night, I have three afternoon matters on
9 tomorrow. I just don't remember when the first one starts.
13:33:31 10 It may be 2:30. In which case, if it's a 2:30 and --
11 MR. ALLEN: I think that's it.
12 THE COURT: Let me just check my calendar and
13 I'll let you know what Friday -- whether we can go late
14 tomorrow, as well.
13:33:55 15 Again, that's also subject to no -- making
16 sure that none of the jurors have something critical that
17 they need to do.
18 THE COURT: Let me just go off record for a
19 second, and I'll get the cards here.
13:35:04 20 THE CLERK: Off record.
21 (Discussion off the record.)
22 THE COURT: I actually have four things
23 tomorrow afternoon, and the first starts at 2:00. It's --
24 we can certainly go till 2:00 if we need to, and I do have a
13:35:36 25 break from 2:30 to 3:00, so if we went a little bit later

13:35:40 1 and I started my two o'clock a little late, just if we
2 could -- you know, you need like five or 10 more minutes,
3 I'll try to accommodate that if the jury can accommodate
4 that. In other words, if we can get -- if we can wrap up
13:35:53 5 the plaintiff's case tomorrow, then by just going a little
6 bit extra, but if it's considerable extra, we can't.
7 MR. ALLEN: I got it.
8 THE COURT: And let's go off record and Mark,
9 why don't you let the lawyers pass this around.
13:36:12 10 THE CLERK: Off record.
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13:36:13 1 REPORTER'S CERTIFICATE
2
3 I, RONALD L. COOK, Certified Realtime Reporter,
4 do hereby certify:
13:36:13 5
6 That the proceedings were taken before me at the time
7 and place herein set forth; that the proceedings were
8 reported stenographically by me and later transcribed under
9 my direction by computer transcription; that the foregoing
13:36:13 10 is a true record of the proceedings taken at that time; and
11 that I am not a party to, nor do I have any interest in, the
12 outcome of the action herein contained.
13 IN WITNESS WHEREOF, I have hereunto subscribed my hand
14 and affixed my seal this 13th day of March, 2008.
13:36:13 15
16
17
18 RONALD L. COOK,
19 Notary Public
13:36:13 20
21
22
23
24
25