

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 I

TRANSCRIPT OF PROCEEDINGS

March 3, 2008 - Pages 1 through 149

BEFORE THE HONORABLE MARK RINDNER
Superior Court Judge

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1 PROCEEDINGS

2 THE COURT: We're on the record in
 3 Case No. 3AN-06-5630 Civil, the State of Alaska
 4 versus Eli Lilly and Company. For the Plaintiffs
 5 we have Mr. Allen, Mr. Suggs, Mr. Sniffen and
 6 Mr. Fibich.

7 MR. FIBICH: Fibich.

8 THE COURT: Fibich. Sorry. For
 9 the Defendants, we've got Mr. Jamieson,
 10 Mr. Lehner, Mr. Brenner and Ms. Gussack --

11 MS. GUSSACK: Your Honor, my
 12 colleague, Andrew Kantra.

13 MR. KANTRA: Good morning,
 14 Your Honor. Andy Kantra.

15 THE COURT: Thank you very much,
 16 Mr. Kantra.

17 I want to go over what we'll try to
 18 do today, try to clear up issues before the panel
 19 comes up. What we'll do today is the juror panel
 20 should have been assembled downstairs and should
 21 be filling out the questionnaire that was
 22 provided for them to fill out. When they get
 23 done with that, at some point the panel is going
 24 to be brought up here. And what I will try to do
 25 today is to weed out the panel members who have

1 hardship problems because it's spring break or
 2 because they're not going to be able to stay
 3 through a four-week trial.

4 I may will -- I'd like to introduce
 5 you to them, and I'm probably going to designate
 6 one person on each side to introduce co-counsel
 7 for the Defendants. That's going to be
 8 Mr. Jamieson. If Mr. Sanders were here --

9 MR. FIBICH: Your Honor, we would
 10 like Mr. Sniffen to do that, if that would meet
 11 with the Court's approval.

12 THE COURT: Mr. Sniffen. Then I'll
 13 introduce other people for the Plaintiffs.

14 I'm going to start talking with the
 15 jury about what the case is about, and explain to
 16 them why they're here and what's going on and
 17 they're going to take an oath for answering
 18 questions that are put to them during voir dire.
 19 We're going to give them some information about
 20 the case, and I'll take that issue up in a
 21 second.

22 And that's what we'll try to get
 23 done today with the jury panel once we've weeded
 24 out people -- I may try to also ask them the
 25 questions that prequalify them as to anyone has

1 got a felony or anything like that. There's
2 about 13 questions -- although other than obvious
3 reasons to take someone off the jury because
4 they're -- they don't meet the statute, they're
5 not a citizen or not a resident of the state or
6 something like that.

7 Some of the questions I may wait
8 for yesterday. And I may tell the panel what's
9 going to happen and then I want them back
10 tomorrow, and tomorrow we'll start picking names
11 and ask them questions and we'll send them home
12 and we'll see what we'll do with the rest of our
13 day. Either letting you go -- when the panel
14 comes up.

15 We called in a panel of, I think,
16 75 people, I hope, and I'm going to ask the
17 people sitting in the back of the room who are
18 associated with the parties and counsel to let
19 the jurors take the seats. And you can stand or
20 still be here, but we're going to have trouble
21 getting the 75 in, I think. So I want to do
22 whatever I can to keep the jurors comfortable.

23 So, that -- any questions about how
24 that's going to go?

25 Before the jury comes in, I've

1 issued -- you should have just received some
2 rulings on the remaining motions in limine. And
3 I don't think there are any pending motions done.

4 I've gone over the documents that
5 the State filed for use in opening statement and
6 preadmission, and I'm mostly prepared to make
7 rulings on most of those things, except for the
8 six or seven new documents that the State had
9 added because I didn't think it appropriate for
10 me to make preadmission rulings on those
11 documents before I had received the actual
12 objections from Lilly. But now I've gotten those
13 objections this morning, and so I'll try to get
14 those done either tonight -- yes.

15 MR. ALLEN: Yes, Your Honor. We
16 had some more over the weekend, about five or
17 six. I gave them to the defense this morning.
18 Can I approach and give them to you?

19 THE COURT: Sure.

20 MR. ALLEN: I will tell the Court,
21 as I told in my letter of, I think, Friday, I do
22 not know -- I'm clearly not going to use all of
23 these, but I'm having to make a judgment and I
24 don't want to get caught short.

25 THE COURT: I understand what

1 you're trying to do. Again, I'm not going to --
2 I just don't think it's appropriate to rule on
3 those new ones until I know -- other than
4 assuming there's a good chance that Lilly will
5 object to them based on past history being a
6 predictor of future activity. I don't know -- I
7 want to know why they're objecting, because I
8 can't really rule intelligently.

9 MR. LEHNER: Are those on the list
10 of 120 that you initially submitted or are those
11 different? Because if they're on the list of
12 120, we've already filed objections if we have
13 objections to those. If they weren't, we could
14 easily let you know. To be honest, I don't know.

15 MR. ALLEN: I have a feeling --
16 some of them were from Eski's deposition,
17 Your Honor. Ms. Eski, who was taken on Friday.
18 And there is an FDA letter from January of 2007.
19 I don't know if it's on the list or not.

20 MR. LEHNER: The objections,
21 Your Honor, I think are both to the evidence
22 itself and, indeed, to the motions in limine that
23 you already granted, I think we laid out in our
24 papers we filed.

25 THE COURT: Right. I think part of

1 those motions in limine have been clarified by
2 what I issued today.

3 Lilly has also filed a motion for
4 preadmission of certain exhibits, and my problem
5 with that is, unlike getting this nice binder, I
6 didn't have the exhibits to really read, and I
7 wanted to actually look at the exhibits before I
8 ruled on the objections. There's, I know, a
9 general objection and some briefing about hearsay
10 of FDA internal documents; is that the right way
11 to put it?

12 And I generally will overrule that
13 objection, but I really don't want to make these
14 determinations in a vacuum without seeing the
15 documents themselves.

16 MR. LEHNER: We'll have a packet to
17 you very -- within the hour, Your Honor.

18 THE COURT: So I'll try to read the
19 new ones and look at the objections that Lilly
20 made to the old new ones, but I've got a list of
21 what I did with the exception of the new ones.

22 The two -- there are a couple of
23 problems I have, and we may have to talk about
24 those documents specifically. There are some
25 foundation and authenticity objections made at

1 times, and it's hard for me to rule on that in
 2 the abstract as well, and I'm not sure what the
 3 basis of the foundation authenticity is as for
 4 certain documents, but to go over the original, I
 5 guess I'll call them lists that were provided to
 6 me, these are all Alaska documents, No. 19 is
 7 preadmitted; 284 is preadmitted; 320 is
 8 preadmitted; 995 is preadmitted; 1110 is
 9 preadmitted; 1111 is preadmitted; 1169 is
 10 preadmitted --

11 MR. SUGGS: Excuse me, Your Honor.
 12 Did you skip over 1145?

13 THE COURT: It's possible I did
 14 skip over 1145; that is preadmitted.

15 What was the last one that I said?

16 THE CLERK: 1169, Your Honor.

17 THE COURT: 1215 is preadmitted,
 18 but I'm not making a ruling on the completeness
 19 of the document. These documents are at this
 20 time being admitted for the purposes of being
 21 able to use them in opening statement, and I
 22 assume that only a tiny portion of these
 23 documents -- in some cases they've been
 24 highlighted and in some cases they haven't, is
 25 going to be used. And so completeness we can

1 deal with if the document -- when the document
 2 comes in in evidence at trial, but for the
 3 purposes of an opening statement, I just want the
 4 record to reflect that I'm not precluding doing
 5 something to make the document complete.

6 1605, again, there's a completeness
 7 argument on that one we may have to take up in a
 8 little bit. There's a hearsay objection, and I'm
 9 not clear what the hearsay objection is based on,
 10 and so I'll probably need a little more education
 11 on that objection for 1605. 1962 is admitted;
 12 3109 is admitted; 3924, again, there's a
 13 foundation, there's an authenticity objection
 14 made. I'm not clear whether it's a Lilly
 15 document or isn't a Lilly document or is part of
 16 my ability to rule on those things.

17 4007 is admitted; 4051 is admitted;
 18 4176, there's a stipulation for admission of that
 19 document and it's admitted; 4968 is admitted;
 20 5073 is admitted; 5565 is admitted; 5846 is
 21 admitted.

22 MR. LEHNER: Your Honor, excuse me,
 23 the last one?

24 MR. ALLEN: 5846.

25 MR. LEHNER: 5846. Excuse me.

1 THE COURT: I didn't hear the
 2 question.

3 MR. LEHNER: 5846. I just didn't
 4 hear the number. I'm sorry.

5 THE COURT: 6128 is admitted, but
 6 the objection is sustained as to a portion of
 7 that document that talks about out-of-U.S.
 8 marketing efforts. That portion shouldn't be
 9 used in the opening. And I'm not sure I see the
 10 relevance of at least that portion of the
 11 documents. As I recall that document, there's
 12 something about marketing efforts in the European
 13 market.

14 6215, I think I need a little more
 15 discussion on. I'm not sure I understand the
 16 objection.

17 7802, again, there's a completeness
 18 argument that's made there, and my previous
 19 ruling as to completeness applies to any places
 20 where there's a completeness argument. There's
 21 also a foundation and an authenticity argument
 22 made as to 7802 that we'll need to get some
 23 better discussion on.

24 7822, there's a -- is admitted
 25 except for the foundation argument, and I want to

1 talk about that as well. There is -- that
 2 document has a fair amount of redacted material
 3 in it, and I don't know what's intended to do
 4 with the indication that certain documents are
 5 redacted and why and what that's going to mean
 6 for the jury. And I'd probably want some
 7 discussion on that.

8 8479 is admitted; 8584 is admitted;
 9 8911 I will sustain the objection, what little --
 10 what relevance there is, I think, 403 I would
 11 find and sustain the objection as to 8911.

12 9281 is admitted; 9739 is admitted;
 13 10017 is admitted subject to foundation, although
 14 I note it's a deposition exhibit and I would have
 15 thought that there might be a foundation that was
 16 laid in the deposition. I just don't know.

17 10061, I will sustain the objection
 18 as to that and for -- to the extent that people
 19 are looking as to when a document might seem in
 20 my mind to cross the line on being more money
 21 than motive, that's an exhibit that, I think,
 22 goes more to the issue of profit and dollars
 23 rather than motivation, and I'd sustain the
 24 objection under 403.

25 10 -- 10064 is admitted subject to,

1 I believe, there's a foundation exhibit; 10066 is
2 admitted; 10068, again, subject to a foundation
3 objection would be admitted; 10094 is admitted.
4 And 10095, the objection is a subsequent remedial
5 measure, and I'm not sure whether it is or it
6 isn't. I suppose you'll have to give me a little
7 bit more education about how that exhibit came
8 into being and why it's not a subsequent remedial
9 measure.

10 MR. ALLEN: I'm going to pull all
11 these exhibits that you've had questions on and
12 look at them.

13 THE COURT: So those -- I think
14 those are the original ones. Again, there's
15 what's been -- what was submitted in Attachment
16 C, which are the new exhibits that Lilly just
17 filed responsive to and as I understand it, the
18 exhibits that -- on Lilly's response, which I
19 haven't really gone over in depth, 10153 and 1003
20 it says hearsay agree to admit notice. Is
21 that -- the agree to admit is -- I can't tell if
22 you're objecting or you're agreeing to admit?

23 MR. LEHNER: Well, we have an
24 objection that these documents are hearsay, but
25 we would recognize they could be admitted

1 for purpose as just notice provision as opposed
2 to the truth of the matter asserted in the
3 documents. So we request an instruction each
4 time one of those documents is used to which that
5 objection would apply.

6 THE COURT: Again, what are you
7 doing as far as opening statements, which is part
8 of what we're doing first just so that I know. I
9 mean, to the extent that there is a basis for
10 that, are you agreeing that it can be used during
11 opening statement?

12 MR. LEHNER: It can be used for an
13 opening statement provided that there is an
14 instruction that would indicate to the jury that
15 certain documents and then when they're used
16 later on --

17 THE COURT: The jury is going to
18 get an instruction that your opening statements
19 are not evidence, so that's what instruction
20 they're going to get.

21 MR. LEHNER: During the trial, we
22 would request an instruction when that exhibit is
23 offered with a witness that that document is
24 being offered for -- it's not being offered for
25 the truth of the matter asserted but under the

1 notice provision.

2 MR. SUGGS: Excuse me, Your Honor.
3 I think you skipped over 1926.

4 THE COURT: I did, and I'll have to
5 go back and see -- and look at that exhibit.

6 So I will go back and look at these
7 other -- Tab C exhibits, go back and look at
8 1926. I'll go back and look at the ones that
9 were submitted today and wait for Lilly's
10 response to the ones that were submitted today,
11 and try to give you either before we start doing
12 questioning tomorrow or whatever, rulings on
13 those.

14 And if Lilly gets me the documents
15 that it wants to use in opening statement -- and
16 it was helpful to me to kind of have the
17 documents in a binder along with what the State's
18 objections previously filed were the way they --
19 the way the State did that, so if you could kind
20 of give me the same little packet, that was
21 useful.

22 MR. LEHNER: My recollection is,
23 Your Honor, they're base -- we'll provide you all
24 the documents. They're basically the same kind
25 of document, just different dates and sequence,

1 so I think you'll certainly be able to look at
2 them all. I think your ruling to one will apply
3 to them all.

4 MR. ALLEN: Your Honor, I'm looking
5 through the documents that you had questions on
6 and I'm certainly prepared to --

7 THE COURT: What I want to is I'm
8 not sure what the timing is as to when the jury
9 is coming up. My guess is we're talking about
10 more 9:30 or 10:00. That's just based on past
11 experience of when a panel tends to get up here,
12 and that's a panel that doesn't have a jury
13 questionnaire like this one does, so it might be
14 a little bit later. But I want to use our time,
15 but I also want to get the jury stuff done more
16 than anything else.

17 One other thing that I neglected to
18 do, and I just am doing this to make a record.
19 Over the weekend Judge Christen had asked me for
20 a copy of my ruling on the preemption matters,
21 and I told her that it was an oral ruling and I
22 gave her a copy of the transcript which is not an
23 official transcript of my ruling. In reading it
24 over, either I misspoke at some points or
25 didn't -- or it didn't get clear at some points.

1 For example, there's -- and
 2 primarily there is a discussion where I talked
 3 about that one of the things that was important
 4 to me is that the product labels have been
 5 effectively superseded by other product labels
 6 that were involved with the FDA, and that this
 7 wasn't a consideration of a product label that
 8 was currently in effect that was being discussed.
 9 And I mentioned that something about the fact
 10 that this wasn't a case where I felt that all --
 11 the FDA being fully informed told Lilly, don't
 12 put warnings in on this particular subject, and
 13 if that were the case it might make a difference.

14 The way it reads in the transcript,
 15 is sort of exactly the opposite. It's as if the
 16 FDA actually did consider all this stuff and
 17 rejected the idea that Lilly should include
 18 additional warnings. And I don't think -- if
 19 that's what I said, it's not what I intended to
 20 say. I intended to say it the other way around.

21 And I just want -- to the extent
 22 there's a petition for review on that issue, I
 23 just want there to be a record, because it was an
 24 oral decision and it's very possible I might have
 25 left out a negative or stated it in some

1 particular ways, and I just want to clarify at
 2 least that point on the record.

3 I want to turn to the statement of
 4 the case that Lilly has submitted. The State of
 5 Alaska has filed objections to that, although I
 6 haven't gotten their statement of the case, and I
 7 don't know what the State intends to do today.
 8 But the State is quite correct; Lilly's statement
 9 was not what I expected to get. It's far too
 10 advocate -- it's far too much of an advocate
 11 piece to at least start this phase of the trial.
 12 I didn't want an advocate piece that started out
 13 with "living hell that most people can't imagine"
 14 and some of those things.

15 And so Lilly's going to have to
 16 tone this down, I mean, because the jury's going
 17 to hear what this case is about in about ten
 18 minutes -- or not ten minutes -- but sometime
 19 shortly today so that they know what the case is
 20 about and -- and it would be helpful if I had
 21 something from the State so I could kind of
 22 figure out what the heck --

23 MR. FIBICH: May I approach on
 24 that, Your Honor?

25 THE COURT: Sure. Do your friends

1 have a copy?

2 MR. FIBICH: It was my
 3 understanding that Lilly did not have objections
 4 to our -- with the exception of some -- well,
 5 maybe Mr. Lehner wants to speak to that, but the
 6 only thing I would say, Your Honor, is I added a
 7 provision about bifurcation so that the panel
 8 would know that there are certain things they
 9 will not be considering. And I think Mr. Lehner
 10 had a question or issue with respect to how I
 11 said that. That may be something that the Court
 12 may want to take up with them directly as opposed
 13 to being in our statement.

14 MR. LEHNER: Your Honor, we have no
 15 objection to the statement, other than the last
 16 paragraph that I think you're looking at right
 17 there where it says damages, and I think if the
 18 words "if any" were added after that, we would be
 19 happy with that statement.

20 THE COURT: That's fine.

21 MR. JAMIESON: With that said,
 22 Your Honor, Brewster Jamieson for Lilly. If
 23 we're having to tone ours down in light -- we
 24 exchanged these over the weekend. We thought a
 25 rough similarity in the ways -- the way each one

1 was phrased and based on the idea of parity in
 2 that respect, we thought ours and theirs were
 3 roughly of the same tone. The State's is not
 4 exactly a model of objectivity. It talks about
 5 Lilly misrepresented serious yet undisclosed
 6 risks. Lilly knew about these risks, Lilly
 7 withheld information, was motivated by a concern
 8 of losing sales, used or employed deception,
 9 fraud, false pretense, false promise,
 10 misrepresentation, knowingly concealed,
 11 suppressed, omitted material fact.

12 It is of very much the same ilk.
 13 With respect to the "living hell" language, I'm
 14 not sure Counsel recognized this, but that came
 15 from the State's own expert witness and that is
 16 Dr. Wirshing's --

17 THE COURT: That may be fine,
 18 Mr. Jamieson, and I certainly won't preclude it
 19 in opening statement. It's more what I'm -- I
 20 mean, all I'm trying to do here is let the jury
 21 know what this case is about. I think the
 22 State's, at least from their perspective, does do
 23 that. I mean, I don't have any objections for
 24 you saying you're here because the State of
 25 Alaska sued our client, a pharmaceutical company.

1 Lilly discovered this medication and sold this
2 medication across the world for almost a dozen
3 years. And then say Zyprexa is, you know, you're
4 going to hear that Zyprexa is -- what is it? The
5 No. 1 -- is that accurate? I don't know -- drug
6 of choice for these kind of condition or those
7 kind of conditions.

8 MR. JAMIESON: How about generally
9 considered very effective for serious --

10 THE COURT: That would even be
11 better. Generally considered an effective
12 treatment for the things that it's approved for
13 treatment for since 1996. That statement is
14 fine.

15 I'm not so sure I like the last
16 sentence in the first paragraph. I mean, to
17 fairly in a vanilla way say that the State of
18 Alaska uses this and prescribes it in its
19 treatment facilities across the state is fine
20 with me.

21 And then you might -- I mean, I
22 don't have any problems with the fact that the
23 State continues to pay for the medication and
24 those things. I'd rather it was stated as a
25 positive statement, although rather than using

1 the "although," which is a little more
2 argumentative.

3 MR. JAMIESON: I'll just take out
4 the "although".

5 THE COURT: The State claims that
6 Lilly failed to adequately warn of the side
7 effects of Zyprexa. Why don't you say Lilly
8 denies these allegations?

9 MR. JAMIESON: I think we wanted to
10 include -- much as the State has done, some
11 element of what has to be done here, has to be a
12 proof made.

13 THE COURT: I don't have -- you
14 will have to resolve this dispute, but I'm just
15 wondering if that's what you're doing, is denying
16 these allegations, why don't you just say it?
17 And you don't seem to say too much there about --
18 you've got the warning, but I don't know if
19 you're -- I mean, if the State talks a little bit
20 more about the UTPA claim. You don't talk too
21 much about that, but I don't -- that's fine. If
22 you don't want to, I don't care.

23 And then the first sentence of the
24 last paragraph is fine. The rest of it when you
25 say you will have to resolve this dispute, that's

1 fine. But if he does not, then Judge Rindner
2 will tell you to find in favor of Lilly. I want
3 that out.

4 MR. JAMIESON: How about, and if
5 not, then the State -- then you must find in
6 favor of Lilly?

7 THE COURT: Why don't you just not
8 say anything about you must find or you must
9 find -- we'll save that for closings or for
10 openings. Again, the idea of this is to tell
11 them what the case is about, not how the -- what
12 they should do or shouldn't do based upon later
13 on down the road the evidence. So, with that
14 guidance, do you think you can quickly make this
15 a little more neutral?

16 MR. JAMIESON: Just one second,
17 Your Honor.

18 Your Honor, is there any objection
19 to the portion that talks about the -- and I
20 don't think Your Honor struck this, but that --
21 that the State seems to forcibly medicate
22 patients with -- with Zyprexa?

23 THE COURT: Yeah, I don't really
24 think that's necessary for explaining what the
25 case is about. I think I suggested that you use

1 something to the language that of -- to date, the
2 State continues -- you'll learn that the State,
3 you're going to hear or whatever that the State
4 continues to pay for Zyprexa, and to use it to
5 treat patients in facilities such as API or in
6 State facilities that treat patients with these
7 conditions.

8 I don't want to talk about --
9 certainly, free to talk about forcing stuff, but
10 I don't think that's critical and appropriate for
11 the purposes of, again, it starts leaning over to
12 advocacy and your arguments that you're going to
13 make in support of your case rather than trying
14 to say, this is what we're defending on and this
15 is what this case is going to be about.

16 MR. JAMIESON: Thank you,
17 Your Honor. I think I do understand. We'll work
18 something up here shortly.

19 THE COURT: I think that
20 essentially kind of leaves where we are. I
21 probably will go back and start -- maybe I can
22 read some of these objections to the most recent
23 objections -- or Exhibit C and give you some
24 rulings on that. I'd like some guidance from
25 both of you as to what you want me to focus my

1 time on that I have pre -- actually getting
2 started with openings and evidence and those
3 kinds of things. I've got a ton of nonopening
4 statement exhibits that there's been some request
5 to rule on preadmission, at least from the State.
6 I don't know about Lilly. And I've also got a
7 ton of deposition designations and objections.

8 And some of these things, I'm
9 probably not going to get to until it comes in
10 during the course, and some of the deposition
11 designations you probably ought to prioritize for
12 me in terms of who's going to come up when, so
13 that I can start making rulings on designations
14 of client -- of people that might come up in the
15 first or -- half of the trial as opposed to the
16 second half of the trial.

17 But what's more important? I mean,
18 I just want to try to triage this for my time.

19 MR. LEHNER: I think the --
20 obviously getting clarity on the exhibits that
21 are going to be used in opening is the most
22 important thing. And I -- when we look at those
23 things, I think that will probably be able to be
24 resolved fairly quickly and with a little
25 explanation on those, you'll be able to make a

1 ruling on them one way or the other. There
2 didn't appear to be that many that are
3 outstanding. We probably could do that. I
4 haven't had a chance to look at the ones you had,
5 but I can do that quickly.

6 I think the deposition
7 designations, I think a lot of those will be
8 solved by the rulings you made. Some of the
9 objections we've made, some of the objections
10 we've made you've dealt with in terms of the
11 documents, we talked about getting together
12 either this afternoon or tomorrow to talk about
13 deposition designations. I think we ought to
14 nonetheless give a schedule to you. The
15 Plaintiffs first told us they intended to call
16 two live witnesses on Thursday and Friday, and I
17 don't think plan to re -- do deposition
18 transcripts on Thursday or Friday; is that
19 correct?

20 MR. ALLEN: I'm the one who is
21 going to be handling all of this.

22 MR. LEHNER: We were told that they
23 were planning to call Dr. Brancati and
24 Dr. Guerigian on Thursday and Friday. So we
25 don't need to necessarily get to that until the

1 end of the week.

2 MR. ALLEN: All right. I agree
3 with Mr. Lehner on the issue for exhibits for
4 opening. I am actually getting copies made now.
5 We have a book that I'm getting them brought over
6 here. I like Mr. Lehner's optimism -- I'll sit
7 down with him right now and see if we can
8 agree --

9 THE COURT: Again, what I'd like
10 you to do is to the extent that my rulings will
11 take care of a bunch of the designation
12 objections and I don't have to rule on them,
13 because other than -- I want to give everybody a
14 chance to make objections and I realize that just
15 because I may have ruled on a motion in limine
16 there's probably case law floating around that if
17 you don't make your objection to the deposition
18 designation at some other point, you may waive
19 it, and I don't want anybody to waive it.

20 So to the extent I can give people
21 standing objections to particular things, I'll do
22 that, so that everybody has a fair chance to make
23 records and nobody is inadvertently waiving
24 things they clearly are objecting to. I don't
25 want to leave somebody in that trap. But to the

1 extent you can shorten my work, that's what I'm
2 looking at.

3 MR. ALLEN: Your Honor, let me
4 finish. I want to make clear, the most important
5 thing is the opening statement exhibits which I'm
6 getting. On the deposition exhibits, I can
7 prioritize them right now for you. We gave them
8 a list, I think, yesterday or this morning.

9 MR. LEHNER: I haven't seen them.

10 MR. ALLEN: You're going to get
11 one. The one you can prioritize, I've cut from
12 24 to nine hours. I think I'm down to seven
13 hours total deposition time. That's my goal.

14 THE COURT: What you can do is give
15 me -- all of this work is going to -- until this
16 weekend -- this work is going to be done -- since
17 my afternoons are totally full, in the evenings
18 or on the weekends, and so I just want to take
19 them in the order that you need them, which will
20 make both our lives easier.

21 MR. ALLEN: Yes, sir. That's
22 exactly right. And I will be able to provide to
23 you, I think, this afternoon, if not sooner, the
24 deposition excerpts greatly reduced of
25 Mr. Lechleiter, the CEO of the company,

1 Mr. Bandick, the brand manager for Zyprexa,
2 United States, Mr. Jack Jordan who was U.S.
3 marketing and Denise Torres. They're very short.
4 There's nothing in any of them --

5 THE COURT: Can you give me that in
6 a written list, typed list? It doesn't have to
7 be fancy or with pleadings or anything. It can
8 say, Judge, can you start -- these are the ones
9 you need to work on and we'll probably need this
10 decision by -- so that I can have a deadline as
11 to what I've got to do.

12 MR. ALLEN: Yes, sir. And, in
13 fact, Mr. Lehner said one thing I may disagree
14 with. He's indicated we're going to call live
15 witnesses first. We are -- I think it's
16 Dr. Brancati and Dr. Guerigian. But on the
17 schedule, we're probably going to play one of the
18 depositions I just mentioned. I may consult with
19 counsel -- I will consult with my counsel, and I
20 may have it down to one you need to review this
21 week. One of the videos, we may play one of
22 them. I could actually cut it down to four for
23 you to concentrate on now, but I can probably cut
24 it down to one.

25 THE COURT: What I'm going to do,

1 after we resolve the opening statements use of
2 documents, I'll probably concentrate on
3 deposition designation objections. My
4 understanding is you guys are going to talk and
5 see if some of those are going to be reduced
6 based on my motion in limine rulings subject to
7 allowing somebody to make a record --

8 MR. LEHNER: Just as we indicated
9 last week, I think we will identify those which
10 we know how you're going to rule, we'll preserve
11 the objection, and you can sort of rule en masse
12 on that --

13 MR. ALLEN: I can, as soon as my
14 team gets those four together -- I think they're
15 together now. I'll give them to him. I can meet
16 with Mr. Lehner and agree to disagree within five
17 minutes and see if I can reach agreement. But
18 I'll try.

19 MR. LEHNER: We'll take a minute to
20 disagree.

21 THE COURT: And I think that that
22 would -- with that guidance, that's how I'm going
23 to proceed, then. And everybody should --
24 nobody -- you should all not hesitate to let me
25 know that, Judge, we've got this coming up and we

1 really need a ruling on this before then, and --
2 because there's a lot of stuff out there and --
3 that I might miss something is possible. I'd
4 rather you just don't hesitate to tell me,
5 you've -- you overlooked something and I'll try
6 to get to that that evening.

7 MR. ALLEN: I appreciate
8 Your Honor's -- so really I'm just down to about
9 three or four documents that you mentioned in
10 your order this morning.

11 THE COURT: I also want to say, to
12 the extent there are these foundation and
13 authenticity rulings, I recognize that they're
14 appropriate to make foundation and authenticity
15 rulings. On the other hand, I suppose I'll tell
16 you that as a judge, it's generally been my
17 practice to prefer that -- if all it means is
18 they've got to put on another witness to
19 authenticate a document or something, that's
20 likely to happen. I'd rather everybody recognize
21 that.

22 MR. ALLEN: And, Your Honor, also
23 in that regard, I looked through briefly as
24 quickly as I could on the rulings you made -- you
25 had questions, you said admitted subject to a

1 designation --

2 THE COURT: When I did this, I
3 looked at the document and I looked at every
4 objection that Lilly had made to each document,
5 and whenever there was an authenticity or
6 foundation or completeness document objection, I
7 didn't really think I could deal with it. There
8 were one or two other ruling things that I think
9 I mentioned that I was a little less clear about.
10 The objection didn't readily -- I was -- what the
11 exhibit was was less clear to me, so it was
12 harder for me to rule on the objection.

13 MR. ALLEN: Yes, Your Honor. I
14 looked quickly, but every one -- they're
15 self-authenticating. They were produced by the
16 Defendant in the course of discovery in response
17 to the discovery requests and under the rules,
18 they're self-authenticating. They're actually
19 Lilly documents, so the ones that I identified.
20 I can explain to the Court and I don't think they
21 can deny it.

22 THE COURT: Why don't you -- again,
23 we're waiting for the jury and you can go back
24 through those, and we'll see if any of those
25 objections are going to be standing, like I said,

1 if we're getting more time. We'll try to get a
2 read as to the status of the panel. If we have
3 some more time, maybe there were a couple of them
4 that I said I wasn't sure needed more discussion.
5 If not, we'll see how far -- whether we have any
6 time --

7 MR. LEHNER: We can take a look at
8 some of these and maybe we can resolve some of
9 them; maybe we can't. If you can start clearing
10 them off --

11 THE COURT: We can clear them off
12 today, because we do what we need to do with the
13 panel and we send them home and it's not 1:30
14 yet. We'll try to do that. If we can't, I want
15 to try to clear them up and then maybe at 8:15
16 tomorrow we'll take up a few of these and
17 bring -- start with our panel stuff at 9:00 or
18 something like that.

19 MR. ALLEN: It may help us clear it
20 up if when I meet with the other side. If the
21 Court agrees, if they've been produced by the
22 Defendants in the course of discovery and they're
23 Defendants' documents, they're authenticated,
24 that would take away their authenticity
25 objection.

1 THE COURT: Let me ask Lilly if
2 Lilly agrees with that.

3 MR. LEHNER: I'd like to look at
4 the documents just to make sure that we see what
5 they are before we make any agreement.

6 THE COURT: Do you agree or
7 disagree with that proposition of law?

8 MR. LEHNER: Well, I think just
9 because we produced it in discovery doesn't
10 self-authenticate a document as a Lilly document.
11 All sorts of things could have been produced in
12 the course of discovery. Newspaper articles --
13 I don't know what they are right now but we'll
14 take a look --

15 THE COURT: I don't think any of
16 them are that kind of stuff. And I think some of
17 them even may say something about -- some of them
18 it was clear to me that they were Lilly
19 documents; and some of them it was less certain,
20 although they may well have been.

21 MR. LEHNER: We'll take a look at
22 that with what Your Honor has already indicated.

23 MR. ALLEN: There was one critical
24 one which you mentioned, which you said had a lot
25 of redactions. It was a Lilly regulatory affairs

1 document. They made the redactions -- I have to
2 live with the redactions -- I don't agree with
3 them but it is their document. It's in the
4 courtroom.

5 THE COURT: And my question on the
6 redactions is people redact things for all sorts
7 of things that are entirely appropriate. I
8 prefer juries try to decide things based on
9 knowing what's going on rather than trying to
10 guess at what's going on.

11 MR. LEHNER: We can take a look at
12 that.

13 MR. ALLEN: It's their redactions,
14 so I can't even speak to it.

15 THE COURT: Then, why don't you
16 take a look at some of these documents that
17 I've -- we've got hanging. And are there other
18 things we need to talk about while we're waiting
19 for the panel, or do you want to --

20 MR. FIBICH: I have a couple
21 questions, Your Honor. You mentioned that we
22 will probably start tomorrow at 9:00. I
23 presume --

24 THE COURT: We may start -- again,
25 let's see what -- if we get things done today,

1 we'll start with the questioning at 8:30 and try
2 to get the panel in here then. But I would like
3 to -- we've got to find the time to clear this
4 all up and make records so that both of you know
5 what's preadmitted and what isn't for the
6 purposes of your opening statements, hopefully on
7 Wednesday.

8 MR. FIBICH: My question was we
9 will pick the jury tomorrow, that will be
10 completed tomorrow, irrespective of your
11 afternoon schedule? Do you think?

12 THE COURT: No, I don't. We will
13 start picking the jury tomorrow. How that works
14 may well depend on what happens today. If we get
15 a panel of 72 to 5 that's been called in and only
16 50 show up and a whole bunch of them go for --
17 out for -- because they've got hardships, we've
18 got some issues as to what's going to go.

19 We'll start tomorrow, but we're
20 going to stop tomorrow at 1:30. I have a
21 therapeutic court that I do on Tuesday afternoons
22 that starts at 1:45, and in a real crisis I'll
23 try to do something about that, because -- but
24 I'm really loathe to do that. It was my
25 expectation that we would do as much as we can

1 tomorrow; if we finish, we finish. That's great.
 2 If we don't and have our 14 in the box, that's
 3 great. If not, we're going to finish on
 4 Wednesday and do the opening statements on
 5 Wednesday. Or -- but the goal -- but subject to
 6 all kinds of things that I just can't control,
 7 such as what's going to happen with the jurors
 8 and how long it takes you to -- I mean, I'm going
 9 to give you a fair chance to do things.

10 And, you know, if we've got a lot
 11 of people who don't want to talk about their
 12 mental health problems or their relatives' mental
 13 health problems in front of everybody, we're
 14 going to have to take them into the back and
 15 that's going to take more time. Hopefully the
 16 jury questionnaire will let us identify those
 17 people a little bit quicker as they come into the
 18 box. Like I said, it's possible we've got a ton
 19 of people that are going to have hardships, and
 20 that's going to be a problem.

21 MR. FIBICH: My concern was, if
 22 both the State and the Defendant take two hours,
 23 that's four hours. That's 9:00 to 1:00 right
 24 there. So I'm just concerned about the
 25 timing and scheduling --

1 THE COURT: You mean in terms of
 2 the -- in terms of the opening statements?

3 MR. FIBICH: Well, just in terms of
 4 the voir dire and whether we can get a jury
 5 empaneled tomorrow.

6 THE COURT: I'm going to do my
 7 best. I mean, that's -- my goal is for you to be
 8 able to do your opening statements on Wednesday
 9 so that you can do it, but I'm just saying that
 10 there are things out of my control. We'll see --
 11 by Tuesday I'll have a better idea about things
 12 and whether we need -- I'm going to need to go
 13 longer, in which case I'm going to have to really
 14 scramble and do something or whether Wednesday
 15 will possibly go a little longer.

16 But, again, if we're short on
 17 jurors after we go through what I'm hoping we can
 18 go through today, we're going to have a problem.
 19 That's just the reality of having a trial like --
 20 of this length, with spring break being involved,
 21 and hopefully a lot of people recognize that and
 22 move their jury service to avoid that problem,
 23 but I'm not sure about that. And we're just
 24 going to have to play that by ear.

25 MR. FIBICH: Well, I'm appreciative

1 of the vagueries of what we're about and timing.
 2 I just -- let me just be as up front as I can
 3 about it. Four hours is going to go pretty quick
 4 tomorrow if both sides take their entire allotted
 5 time for voir dire. If that pushes voir dire
 6 over into Wednesday, then we don't have four
 7 hours to do the opening statements. And the last
 8 thing that the State of Alaska wants is for us to
 9 give our opening statement and them to have
 10 overnight to work on it and rebut everything
 11 we've said.

12 THE COURT: I understand that
 13 issue, and I'm trying to avoid that.

14 MR. FIBICH: Okay. Well, I want to
 15 be -- that's what's in the back of my mind when
 16 I raise these issues with the Court. Your Honor,
 17 I have never presubmitted my comments to the
 18 Court before a voir dire, and I'm still uncertain
 19 as to how that gets before the panel. Are you
 20 going to do that today, or are you going to do
 21 that tomorrow, or do we do it ourselves tomorrow?

22 THE COURT: Do what?

23 MR. FIBICH: Our opening statements
 24 that you've approved on voir dire. Statement of
 25 the case.

1 THE COURT: Oh. We'd have to -- I'd
 2 like to do that -- it's either going to be --
 3 when we bring in a panel, I'd like to tell them
 4 why they're here and what the case is about so
 5 they can answer the questions intelligently and
 6 know what it's about and, quite frankly, there
 7 are some experiences at least that the judges
 8 have had that letting the lawyers give their
 9 opening statements may make people more willing
 10 to serve on the case, as opposed to the -- I
 11 mean, there's always people that are looking for
 12 ways to get off of a four-week trial. The
 13 problem is that some of them, if they hear what
 14 the case is about may be more intrigued if you
 15 give the statements than me. So I'd like to do
 16 that today. I mean, the State's is generally
 17 approved. I need something from Lilly that based
 18 on what we've got --

19 MR. JAMIESON: Your Honor, if we
 20 could have a moment to huddle --

21 THE COURT: You guys can take a --
 22 I mean, I'm going to go off record and give you
 23 some more time and we're going to get sort of a
 24 sense, hopefully, as to -- I hear that the panel
 25 is almost ready to come up. So as soon as we

1 resolve that, we can bring the panel up and get
2 started. So why don't I give you what time you
3 need to work out something to see if you can
4 get -- based on what I've sort of suggested to
5 you, and see if you both can be comfortable with
6 this.

7 MR. JAMIESON: I've worked on it
8 while other issues have been decided -- have been
9 resolved, Your Honor, and I think we just need to
10 huddle and make certain that it's okay with
11 everyone and then --

12 THE COURT: Why don't you do that.
13 I'll come back on record. If it's okay with
14 everybody, then you both have statements you can
15 give and we'll bring the panel up.

16 MR. FIBICH: One more question,
17 Your Honor, just so I can use this time and we
18 don't need to do it tomorrow. With respect to
19 voir dire, if we have a member of the venire that
20 we want to challenge for cause, we do that at
21 that time; is that correct?

22 THE COURT: That's correct. What
23 you can do is you can come -- ask to approach
24 if -- I know people don't like to challenge
25 somebody for cause out in public and then maybe

1 have me say no and then you've got a problem in
2 your minds. And so you can ask to approach,
3 approach; we'll discuss it; we'll see if both of
4 you agree. I'm almost certainly going to grant
5 the challenge for cause if there's an objection.
6 If somebody thinks the person should be
7 challenged for cause, I'll rule on it.

8 It's possible that I may allow the
9 other side at that point to ask some additional
10 questions of that person to see if there's, you
11 know, the challenge is really going to be --
12 whether or not the person might answer
13 differently if they were asked the questions,
14 some additional questions and whether that will
15 affect it. But then I'll rule on the challenge
16 for cause and I'll excuse the person. And some
17 of them may become pretty obvious. I mean, if
18 somebody stands up and says, I hate the State and
19 I can't be fair.

20 MR. FIBICH: You also mentioned
21 that there may be occasions which you'll take
22 somebody out in the hall --

23 THE COURT: I have the ability --
24 it won't be the hall. We'll go back into my
25 chambers and I have a microphone back there that

1 Mr. Borneman will be able to hear what's going
2 on, but no one else will. And we'll make a
3 record with that person individually. And I tell
4 in the initial instructions that if anyone has
5 any things they'd rather not discuss in a room
6 full of people, but would rather discuss in
7 private, we'll go back in private and do that.

8 MR. FIBICH: Will you have a
9 bailiff that will take that person back; is that
10 how that works?

11 THE COURT: They'll just come on
12 back with Mr. -- with everybody else. They just
13 exit through the door there and I meet them and
14 you all come back. Although I probably would
15 prefer if that happens that I don't have five
16 people from each side coming back there. And --
17 yeah, I'll let you have two.

18 And you -- but, again, if I have
19 two back there, one of them is going to ask the
20 questions, not both of them. You know, if you
21 want different people do different parts of the
22 voir dire, that's fine. But as to -- if I go
23 back, I just want one person making your record
24 back there, not several people.

25 MR. FIBICH: Will the panel be

1 seated here when we voir dire?

2 THE COURT: No -- well, the panel's
3 going to be in the back and wherever I can seat
4 them for the purposes of what we're doing today
5 before we actually call. Once we've gone through
6 all that process, the jury is prequalified. Then
7 we're going to select 24 names, which is why I
8 hopefully have 24 seats up there, and that's
9 going to be when I call the 24 in the box. And
10 those 24 are the ones you're going to ask your
11 questions to.

12 And if there's challenges for cause
13 and I grant them, somebody else will come into
14 the box, but at the end of the day when you're
15 done with your voir dire, you're going to pass
16 all 24 for cause and the other side -- or 22 for
17 cause, I guess it is, 22 for cause, and the other
18 side will pass their 22 for cause. So -- when
19 this is done, your questioning is done, we've got
20 22 people that have been passed for cause, then
21 we'll go back into chambers. Plaintiff will
22 exercise their first preempt; Defendant will
23 exercise their first preempt and the eight people
24 will get struck by the preempts and that leaves
25 us with 14, which is the 12 plus the two we're

1 carrying as alternates.

2 MR. FIBICH: And if I understood
3 the Court previously, the 12 that will actually
4 deliberate will not be known until the conclusion
5 of the case.

6 THE COURT: No. If we lose two
7 during the course of the trial, then we've just
8 got 12. If we have lose more than 12, we've got
9 a problem. If we have 14 at the end of the case,
10 we'll pick two at random after instructions and
11 closing arguments, and those two become the
12 alternates and don't get to deliberate.

13 MR. FIBICH: Thank you, Judge.

14 MR. LEHNER: Your Honor, one final
15 matter, consistent with your desire to be alerted
16 to matters that may come up in a timely fashion.
17 We indicated this morning that -- with response
18 to Joey Eski. You recall Joey Eski is a sales
19 representative whose deposition was taken the
20 other day. This is both a legal and a practical
21 problem. The legal issue is we do not believe
22 that her testimony is going to be relevant, and
23 we're prepared to file a motion with respect to
24 that after the deposition was taken.

25 But on a practical point, which

1 relates to that, she was served with a trial
2 subpoena during her deposition. That subpoena is
3 returnable for Thursday the 6th. She has
4 prepaid -- she is one of these spring break
5 people. She had bought four tickets to go to
6 Hawaii in January for herself and her children.
7 We have an affidavit; we have a motion on that as
8 well. She's back and would be available on March
9 24th, assuming we're still here at that time.

10 But hopefully we won't be and we'll complete all
11 matters before then. So we've alerted them to
12 the practical problem. There's also a legal
13 problem. We're prepared to file a motion with
14 respect to that.

15 THE COURT: Well, the legal
16 problem, you can file a motion and I'll rule on
17 the legal problem. Give me a copy of the
18 transcript obviously. As to the practical
19 problem, it sounded to me like the State didn't
20 really intend to call her live the first two
21 days. But what do you want to do with that she's
22 in Hawaii?

23 MR. ALLEN: Yes, Your Honor.
24 Excuse me -- Scott Allen. We'll talk about the
25 legal issue later. I disagree. I just want that

1 on the record completely.

2 THE COURT: I got -- okay.

3 MR. ALLEN: We understand. We do
4 not intend to call her the first two days. She
5 was not in our plans to do so. We understand
6 her -- in fact, she's on vacation -- excuse me,
7 Your Honor -- and, in fact, we don't want to
8 interfere with anybody's vacation. That being
9 said, she's a critical witness.

10 She's a Lilly employee. She was
11 their designated representative. They chose her
12 out of all the sales people in Alaska. That's
13 the person. So if she gets over there with her
14 family and needs to come back for testimony,
15 despite the fact she has prepaid tickets, the
16 State will offer to pay for her round-trip ticket
17 to come back here to testify and then go back to
18 Hawaii.

19 They told me she has a two-week
20 vacation. Your Honor, I don't want to get too
21 optimistic, but I have a feeling that unless the
22 defense's case is longer than I think it is, this
23 case is going to be over quicker than you think.
24 And the 20th of March is when she gets back; is
25 that correct?

1 MR. LEHNER: She'll be available on
2 the 24th.

3 MR. ALLEN: The 24th. I don't
4 think we're going to have to get her back. I'll
5 bet you we're through long before the 24th. So
6 she can go on her vacation on Friday, is it -- or
7 Thursday. But we may need her to come back, and
8 we'll be glad to pay for her ticket to come back.

9 MR. FIBICH: Your Honor, if I may
10 add to that. Here's the real problem. We've got
11 two experts coming in the first part of trial.
12 Dr. Guerigian's son is getting married the
13 following week in India. And he has said he's
14 leaving after -- if he can't be on and off in the
15 appropriate amount of time. So we can't, we have
16 no room to modify anything. Even if we're
17 inclined to call her on the front of her case --

18 THE COURT: I'm not proposing that
19 you qualify her. One prospect I've heard is
20 bringing her back live and the State will pay to
21 bring her back live and send her back. And I
22 don't know the ages of her kids and whether she's
23 with her husband and any of those kinds of
24 things, but obviously that kind of is problematic
25 she's -- there's nobody to watch the kids.

1 MR. LEHNER: Your Honor, her
2 children are five, three and one years old. I
3 don't know that she's with her husband. Actually
4 I don't think she is.

5 THE COURT: Bringing her back isn't
6 going to really work well.

7 MR. LEHNER: I would note that she
8 was never on their witness list until we had
9 a witness list that was filed --

10 MR. ALLEN: They knew the trial was
11 starting.

12 THE COURT: We do things by
13 telephone all the time and there's other
14 technology. I don't know whether we've got the
15 availability for other things, but we do things
16 all the time. And the other resort is to take a
17 video trial perpetuation deposition and do that,
18 and you can show it -- show it that way. And --
19 but I'm not hearing that bringing her back with
20 kids that age with no one to watch them is a
21 practical thing.

22 MR. ALLEN: Your Honor, I tell you
23 what, I'm a reasonable man and I understand and I
24 have a family and certainly that's reasonable.
25 I'm not going to sit here and interfere with

1 things like that, but I would like to point out
2 that they knew when this trial was starting a
3 long time ago. They knew the date the trial was
4 going to start. They knew who they designated as
5 their witness, and now she's out of town. That
6 being said, if that's how -- if that's what we're
7 going to do, that's fine. I will let them know
8 if I need another deposition. I took the
9 discovery deposition via video and -- but I'm not
10 going to sit here and start this trial by saying
11 somebody can't go on vacation. I'm just not
12 going to do it.

13 THE COURT: Again, they can testify
14 live telephonically or they can -- you can do
15 whatever you want to with video depositions that
16 are appropriate.

17 MR. ALLEN: I understand. I just
18 want it know on the record that their witness
19 knew when this trial was starting and she's gone
20 for two weeks.

21 MR. LEHNER: Your Honor, I think
22 the record needs to reflect that she was not on
23 their witness list until about the 11th hour the
24 other night.

25 MR. ALLEN: That is incorrect and I

1 can talk about that if Mr. Lehner would like to.

2 THE COURT: Again, I don't quite --
3 really, unless you think you've got an appeal
4 point on these kinds of things, I'd rather that
5 you didn't try to make a record. It's not
6 really -- I'm very willing to let people make a
7 record of what they need to do to preserve appeal
8 points and to take me up and do what you want to
9 do. But I'd rather you didn't go back and forth
10 making records on things that really aren't going
11 to be that type of stuff.

12 MR. ALLEN: We're not going to take
13 you up on appeal on that matter. On the issue of
14 a trial deposition, Your Honor, could we take her
15 deposition, if we need it for trial, with her
16 sitting in that witness stand and having the
17 video taken in the courtroom?

18 THE COURT: No, I don't have the
19 time or the ability --

20 MR. ALLEN: This weekend?
21 Saturday?

22 THE COURT: When is she leaving?

23 MR. BRENNER: The 10th, Your Honor.

24 THE COURT: Let me think about
25 that.

1 MR. ALLEN: As opposed to an
2 office setting.

3 THE COURT: Well, what
4 difference -- can I ask why you think it makes
5 that critical a difference? It creates a lot of
6 issues for a lot of people if I do that.

7 MR. ALLEN: Again, if the Court
8 doesn't want to do it, I understand. I'll drop
9 that request if the Court -- I'm not going to
10 cause anybody trouble in this trial.

11 THE COURT: I'm willing to do what
12 I can if I think it's necessary to ensure a fair
13 trial. I'm just not clear why that's
14 necessary to ensure a fair trial.

15 MR. ALLEN: If the Court doesn't
16 think it's necessary, then I don't think it's
17 necessary.

18 THE COURT: If you want to take --
19 when is she leaving again?

20 MR. BRENNER: The 10th, Your Honor.

21 THE COURT: The 10th. So you could
22 definitely take her deposition for trial purposes
23 this weekend. If you want to do it, do it, but
24 I'll think about it. But my inclination is to
25 say no. There's --

1 MR. ALLEN: I'll withdraw that
2 request, Your Honor, so you don't have to work on
3 that.

4 THE COURT: Thank you.

5 MR. ALLEN: Yes, Your Honor.

6 THE COURT: Why don't you then
7 huddle to do your -- to go over Lilly's revisions
8 and we'll see if we've got any issues. If not,
9 we'll bring the panel up.

10 MR. ALLEN: Can we huddle --
11 besides that, Your Honor, before I leave here
12 today, I'd like to huddle and get them to stand
13 on these foundational objections, because quite
14 frankly I think they're --

15 THE COURT: One way or another,
16 whether it's -- yes, I mean, my next thing today,
17 just so that you know, is at 2:30 for a
18 settlement conference. So if we need to, after
19 we let the panel go, hopefully, we can try to
20 work those things out. But I thought you guys
21 were going to talk about them first and maybe
22 there's nothing to decide on those things.

23 Mr. Jamieson.

24 MR. JAMIESON: Your Honor, thank
25 you. We have revised the statement of the case.

1 If you have your copy with you, we can go over
2 those revisions and if the State would look at
3 it, we can very quickly do that. We've taken out
4 the language that Your Honor suggested. So we go
5 to the third sentence, the sentence that used to
6 begin, For the seriously mentally ill. That
7 statement is completely stricken, and it's
8 replaced with the following statement: Zyprexa
9 is generally considered to be a very effective
10 medicine by the psychiatric community, period --
11 sorry -- by the psychiatric community for the
12 treatment of serious mental illness.

13 MR. ALLEN: Can we interrupt? I
14 mean, if he's going to go over it now, we haven't
15 even had a chance to look --

16 THE COURT: Well, I think he was
17 trying to do it -- that's what I was going to
18 suggest, Mr. Jamieson. Why don't I go off
19 record. Some people do things better if they're
20 reading, and that may be true for the Plaintiff's
21 attorneys. So why don't you just show it to
22 them, and if they've got some objections, we can
23 take up the specific objections. If they don't,
24 then I don't need to know exactly what you're
25 going to say. I'll just assume that what you

1 showed them is what you're going to tell the jury
2 panel, and we'll be done.

3 MR. JAMIESON: Thank you,
4 Your Honor.

5 THE COURT: We'll go off record
6 then for a few minutes.

7 (Off record.)

8 THE COURT: Good morning, ladies
9 and gentlemen of the jury. Just let me first
10 make sure, to the extent possible is everybody
11 who is in a seat a prospective juror, as opposed
12 to somebody who is just watching it? Because I
13 would prefer to have the prospective jurors to
14 have the seats, as much as we have them. Okay.
15 Thank you.

16 You have been summoned as
17 prospective jurors in a case entitled State of
18 Alaska versus Eli Lilly Company. My name is Mark
19 Rindner, and I'll be presiding over this trial.
20 The Plaintiff in this case is represented by
21 Brewster Jamieson and several other attorneys.
22 Mr. Jamieson, do -- excuse me -- the Defendant is
23 represented by Mr. Jamieson.

24 Mr. Jamieson, do you want to
25 introduce your other attorneys?

1 MR. JAMIESON: Certainly,
2 Your Honor.

3 Good morning, everyone. My name is
4 Brewster Jamieson. I'm with the law firm of Lane
5 Powell; I practice here in Anchorage, live here
6 in Anchorage with my wife and family. I'm proud
7 to be here with the Lilly trial team who I'd like
8 to introduce now.

9 First we have Nina Gussack.

10 MS. GUSSACK: Morning.

11 MR. JAMIESON: We have George
12 Lehner.

13 MR. LEHNER: Good morning.

14 MR. JAMIESON: We have John
15 Brenner.

16 MR. BRENNER: Good morning.

17 MR. JAMIESON: And we have Andy
18 Kantra.

19 MR. KANTRA: Hello.

20 MR. JAMIESON: And all of them are
21 from the Pepper Hamilton Firm. Thank you.

22 THE COURT: And the State, who I
23 probably should have introduced first and I
24 apologize for that.

25 Mr. Sniffen, do you want to

1 introduce yourself and the other members
 2 representing the State?
 3 MR. SNIFFEN: Hello, my name is Ed
 4 Sniffen. I'm an assistant attorney general with
 5 the State of Alaska. I've been with the State
 6 for eight years and am a 26-year Alaska resident.
 7 In some cases involving unique and specialized
 8 circumstances, the State relies on expertise
 9 outside of our office to help us with litigation.
 10 In this case we have hired some experts in the
 11 pharmaceutical area, and they will help us
 12 represent the issues in this case. And those
 13 are:
 14 Mr. Tommy Fibich from Houston,
 15 Texas.
 16 MR. FIBICH: Good morning.
 17 MR. SNIFFEN: Next to him is Scott
 18 Allen from Houston, Texas.
 19 MR. ALLEN: Hello.
 20 MR. SNIFFEN: And then finally
 21 Mr. David Suggs from Minneapolis, Minnesota.
 22 MR. SUGGS: Good morning.
 23 MR. SNIFFEN: Thank you.
 24 THE COURT: Ladies and gentlemen, I
 25 want to thank you all for coming in. I know that

1 jury service is sometimes seen as a great
 2 inconvenience to everybody. I want to tell you
 3 that jury service, though, is one of the greatest
 4 civic duties that residents of our state can do
 5 because the way we run our system of government
 6 and the way we run trials in this case and the
 7 way we decide litigation, we can't do that
 8 without people such as yourselves who are willing
 9 to perform a civic duty and come in and do their
 10 jury service. And so on behalf of the Court
 11 system, I want to thank you all personally for
 12 doing that.
 13 It's sometimes suggested in the
 14 times that we live in, what can people do to
 15 preserve the American way of life, and -- and our
 16 practices and form of government? I want to tell
 17 you all that you're doing what you can do today
 18 by coming in to serve as jurors in this matter.
 19 And, again, I thank you for that service, and I'm
 20 sure that the attorneys all thank you for that as
 21 well.
 22 In a moment we will proceed to the
 23 selection of the jury in this case. This is an
 24 important stage in a trial, since it is important
 25 to both sides to obtain a fair and impartial

1 jury.
 2 In this case the jury will be
 3 composed of 12 persons and two alternates, and
 4 eventually, what we're going to be doing over the
 5 next couple of days is trying to whittle the jury
 6 down to those 14 people that will actually
 7 deliberate in this case.
 8 The parties in this case are
 9 entitled to jurors who approach this case with
 10 open minds and agree to keep their minds open
 11 until a verdict is reached. You, the jurors,
 12 must be as free as humanly possible from bias,
 13 prejudice or sympathy, and not be influenced by
 14 preconceived ideas either as to the facts or as
 15 to the law. Therefore, counsel for the parties
 16 will have an opportunity to ask you some
 17 questions, and the process of them doing that the
 18 law refers to as voir dire. That's legalese for
 19 speaking truthfully. And during the next couple
 20 of days, as we ask you some questions, that's
 21 what I'm going to ask that you do.
 22 These questions are not designed to
 23 pry into your personal affairs, but to discover
 24 if you have any knowledge or preconceived ideas
 25 as to this particular case. There may be times,

1 however, when the questioning touches on an area
 2 that you would rather not discuss in a room full
 3 of people. Should that happen, just let me know
 4 and we can handle these questions in private.
 5 It is important, of course, that
 6 your answers be as honest as possible. And in
 7 order for that to be assured, ladies and
 8 gentlemen, we're going to administer an oath to
 9 all of you at this time.
 10 Mr. Clerk, will you please
 11 administer an oath to the jury panel?
 12 THE CLERK: Panel members rise,
 13 raise your right hands, please.
 14 (Jury panel sworn.)
 15 THE CLERK: Thank you.
 16 THE COURT: Let me tell you
 17 something about the trial so that you can
 18 consider the questions that will be asked of you.
 19 First, this trial is scheduled to
 20 last for approximately four weeks. It will
 21 probably last until about the 26th, 27th of
 22 March. Could end up sooner, I'm told, but I just
 23 want to give you kind of an outside shot at that.
 24 And deliberations may continue after that,
 25 depending on how long it will take the jury to

1 reach a verdict in this case.
 2 The trial day begins promptly at
 3 8:30 a.m. and ends at 1:30 p.m. So that as you
 4 consider the questions that are going to be
 5 asked, you should bear in mind that you'll be
 6 dismissed most days around 1:30 p.m. and you'll
 7 have the afternoon to go about your private
 8 affairs, returning the next working day. When
 9 you start deliberating, we'll go longer. Once we
 10 start actually deliberating on the case, then the
 11 jury will be deliberating for full days, but the
 12 normal trial day for presenting the evidence will
 13 go until about 1:30 each day.

14 This trial -- I'm going to ask the
 15 attorneys if they would give you some idea about
 16 what this case is about at this time. And who's
 17 going to do that for the State?

18 MR. FIBICH: I am, Your Honor.

19 THE COURT: Please.

20 MR. FIBICH: Thank you. May it
 21 please the Court.

22 I rise to give you a brief
 23 statement of the case that the State of Alaska
 24 has seen fit to bring. The State of Alaska
 25 through the office of its attorney general has

1 State will also present evidence that there were
 2 other drugs available to meet these two mental
 3 conditions, and that Lilly's actions in hiding
 4 the risks were motivated by concern of losing
 5 sales to competitive drugs. These competitive
 6 drugs include Haldol, Thorazine, Seroquel,
 7 Geodon, Abilify, and Risperdal.

8 The State will show that Lilly's
 9 actions violated the consumer protection laws of
 10 the State of Alaska. The Court has seen fit to
 11 divide this trial into two parts, so that those
 12 of you chosen to hear this case will not be asked
 13 to determine the damage, if any, to the State,
 14 but only whether or not Eli Lilly gave a proper
 15 warning of the risk of weight gain,
 16 hyperlipidemia, hyperglycemia and diabetes and/or
 17 used deception, fraud, false pretenses, false
 18 promise, misrepresentation and knowingly
 19 concealed or suppressed or omitted material facts
 20 with intent that others rely upon that
 21 concealment, suppression or omission in
 22 connection with the sale of Zyprexa.

23 Thank you.

24 THE COURT: Ms. Gussack, are you
 25 going to give a statement on behalf of Lilly?

1 sued Eli Lilly and Company, an Indiana-based
 2 pharmaceutical company, for misrepresenting the
 3 serious, yet undisclosed medical risks associated
 4 with one of its drugs, Zyprexa. The health risks
 5 include weight gain, hyperglycemia,
 6 hyperlipidemia and diabetes.

7 Zyprexa was indicated only for the
 8 purposes of treating schizophrenia and bipolar
 9 mania. The State of Alaska will show that Eli
 10 Lilly knew of Zyprexa's health risks, these,
 11 again, being weight gain, hyperlipidemia,
 12 hyperglycemia, and diabetes, knew that they were
 13 associated with Zyprexa, yet Lilly withheld
 14 information and failed to adequately warn of
 15 those serious risks such that doctors, patients
 16 and others in the state of Alaska did not have
 17 adequate warnings.

18 And Lilly used and employed
 19 deception, fraud, false pretenses, false
 20 promises, misrepresentations and knowingly
 21 concealed, suppressed, omitted material facts
 22 with intent that others rely upon in concealment,
 23 suppression or omission in connection of the sale
 24 of Zyprexa.

25 Although not required to do so, the

1 MS. GUSSACK: Thank you,
 2 Your Honor. Good morning.
 3 Nina Gussack to present Eli Lilly
 4 and Company's statement of the case. You are
 5 here because the State of Alaska sued our client,
 6 Eli Lilly and Company, a pharmaceutical company.

7 Lilly discovered Zyprexa and it has
 8 sold this medication around the world for almost
 9 a dozen years. Zyprexa is generally considered
 10 to be a very effective medicine by the medical
 11 community for the treatment of serious mental
 12 illnesses, schizophrenia and bipolar disorder.
 13 Since 1996, doctors in Alaska in private
 14 practice, doctors employed by hospitals, and
 15 doctors employed by the State in facilities such
 16 as API have prescribed Zyprexa. In that time,
 17 the State of Alaska has through its Medicaid
 18 program paid for thousands of prescriptions for
 19 this medication.

20 To this day, the State continues to
 21 pay for the medication and to this day the State
 22 has never told doctors that Zyprexa is not an
 23 appropriate medicine to be prescribed for the
 24 patients of Alaska. To this day, the State has
 25 not restricted how or when doctors may prescribe

1 Zyprexa. Nonetheless, the State claims that
 2 Lilly deceived it about Zyprexa's side effects.
 3 The State claims that Lilly failed
 4 to adequately warn the State of Alaska and
 5 physicians in Alaska about these alleged side
 6 effects of Zyprexa. Lilly denies these
 7 allegations and stands behind the labeling that
 8 accompanies Zyprexa and behind the science that
 9 supports the use of Zyprexa.
 10 Doctors, employees of the State,
 11 Lilly employees, and expert witnesses will tell
 12 you how the federal government regulates the sale
 13 of medicine across the country. And you will
 14 learn how the Medicaid program here in Alaska
 15 regulates the availability of medications. And
 16 then Judge Rindner will ask you to decide the
 17 issues here. He will tell you the State of
 18 Alaska has the burden of proof to prove its
 19 claims here.
 20 Thank you.
 21 THE COURT: Ladies and gentlemen,
 22 these statements by the attorneys are just to
 23 give you an idea of the type of case you're being
 24 asked to serve on, and to help you in answering
 25 the questions that the attorneys will be

1 answering (sic) later on in the case. Please
 2 understand that nothing I say in these
 3 introductory remarks and nothing that the
 4 attorneys say is to be considered by you as
 5 evidence in this case. The evidence upon you --
 6 upon which you must base your decision is only
 7 what people who are sworn as witnesses say or
 8 documents which are introduced into evidence say.
 9 What we're going to try to do
 10 today, ladies and gentlemen -- I know that you've
 11 all filled out a questionnaire, and the purpose
 12 of the questionnaire was to assist the lawyers in
 13 asking you questions later on. What I'm going to
 14 do today is ask you some questions to qualify you
 15 as jurors in this case. It's a fact that under
 16 our State law jurors have to meet certain
 17 qualifications, and so I'm going to ask you some
 18 questions, and then I'm going to ask you some
 19 questions about your ability to serve on a trial
 20 of this length at this time. After we ask those
 21 questions and get that finished, I'm going to let
 22 you go for the day, asking you to return tomorrow
 23 when the lawyers will -- will ask you some
 24 followup questions and question you individually
 25 and will start the process of narrowing down the

1 jury in this case.
 2 And so let me first ask all of you:
 3 Is there any one of you who is not a citizen of
 4 the United States? If any of the jury panel
 5 members are not a citizen of the United States,
 6 could you please raise your hand?
 7 All of the jurors -- none of the
 8 jurors have responded to that.
 9 Is there any one of you who is not
 10 a resident of the State of Alaska?
 11 All of the panel members are
 12 residents of the State of Alaska.
 13 Is there any one of you who is not
 14 at least 18 years of age?
 15 Everyone appears to be 18 years of
 16 age.
 17 This is my favorite question. Is
 18 there any one of you who is not in possession of
 19 a sound mind?
 20 (Chuckles.)
 21 THE COURT: All of the jurors
 22 believe they are in possession of a sound mind.
 23 Is there any one of you who is not
 24 in possession of all your natural faculties, that
 25 is, the ability to see, hear, smell, taste and

1 touch?
 2 Ma'am, in the back.
 3 VENIREPERSON: I can't smell. I
 4 can't smell.
 5 THE COURT: What's your name?
 6 VENIREPERSON: Carol Ann Woody.
 7 THE COURT: Does any attorney feel
 8 that would disqualify Ms. Woody from serving in
 9 this case?
 10 MR. ALLEN: No, Your Honor.
 11 THE COURT: Neither do I. But
 12 thank you for answering the question, Ms. Woody.
 13 And none of the other jurors have responded to
 14 that question.
 15 Is there any one of you who is
 16 unable to either read or speak the English
 17 language?
 18 No one has responded to that
 19 question.
 20 Is there any one of you who has
 21 ever been convicted of a felony, that's a crime
 22 in which the term of imprisonment is greater than
 23 one year, or -- and not been unconditionally
 24 discharged? That means you don't have any
 25 obligations under probation or anything else. Is

1 there anyone here who is a felon currently?

2 No one has responded to that
3 question.

4 Is there any one of you who is
5 related to any of the parties or witnesses in
6 this case? And we probably should identify the
7 witnesses for the jurors so that they could
8 answer that, although I suspect that's not going
9 to be a problem in this case.

10 Does anyone with the plaintiff just
11 want to give the jury an idea of who their
12 witnesses are?

13 MR. ALLEN: I can start. We have
14 Dr. Brancati from California.

15 MR. SUGGS: Maryland.

16 MR. ALLEN: Maryland. It's close
17 to California. Dr. William Wirshing from
18 California. I knew somebody from California.
19 Dr. John Guerigian, used to work at the FDA. And
20 Dr. Allison from Birmingham, Alabama.

21 Additionally, we may call
22 adversely, Your Honor, via deposition, Ms. Joey
23 Eski, who is employed by Eli Lilly and lives here
24 in Anchorage, Alaska. You probably --

25 THE COURT: Anybody know Ms. Joey

1 witnesses are?

2 MS. GUSSACK: Yes. David Campana
3 here from -- from Anchorage. Dr. Lucy Curtiss
4 who practices here in Anchorage. Dr. Duane
5 Hopson, also from Anchorage. Dr. Karleen
6 Jackson, Dr. David --

7 MR. ALLEN: We had an answer to
8 Karleen Jackson --

9 THE COURT: Read the witnesses and
10 then I'll take -- I'll question people and we'll
11 make a record.

12 MS. GUSSACK: Dr. David Kahn from
13 New York. Dr. Inzuki from Connecticut -- did you
14 mention Dr. Wirshing?

15 MR. FIBICH: Yes.

16 MS. GUSSACK: I didn't hear you
17 say. Dr. Olson from New York, Dr. Schwank from
18 Michigan, Dr. Thomas Schwank, Dr. Feigel.

19 I think that's -- I think that's
20 it, Your Honor.

21 THE COURT: Does anybody here know
22 any of the witnesses listed by Lilly? Sir in the
23 back, could you stand and give us your name?

24 VENIREPERSON: Yes, my is Jim
25 Cloud, James Cloud. And I was serving on the

1 Eski? I think her husband's name is Wayne Eski.
2 E-s-k-i.

3 VENIREPERSON: I might.

4 THE COURT: What's your name?

5 VENIREPERSON: Randy Twenhafel.

6 THE COURT: Okay, Mr. Twenhafel,
7 what I'll do is ask the lawyers to ask you some
8 additional questions later on in this process
9 about that.

10 Sir, your name?

11 VENIREPERSON: Wells, Gary Wells.
12 I may know the husband.

13 THE COURT: Let me ask you both.
14 You both seem unsure if you know these people.
15 Anything about your knowledge of them would
16 affect your ability to be fair and impartial in
17 this case?

18 VENIREPERSON: No.

19 VENIREPERSON: No.

20 THE COURT: Anybody else who might
21 know Ms. Eski or her husband? I don't see anyone
22 else responding. Any other questions?

23 MR. ALLEN: No, sir, Your Honor.

24 THE COURT: And does somebody from
25 Lilly wish to let the jury know who their

1 board of directors for Catholic Social Services
2 and, when Karleen, Dr. Jackson was serving as
3 well.

4 THE COURT: Anything about that
5 relationship that you believe will make it
6 difficult for you to be fair and impartial and
7 treat both sides equally in this case?

8 VENIREPERSON: No.

9 THE COURT: Thank you. Anybody
10 else?

11 Ma'am.

12 VENIREPERSON: I work for the
13 Department of Health and Social Services.

14 THE COURT: We're going to get to
15 that in a second. What's your name, ma'am?

16 VENIREPERSON: Janine Schoellhorn.

17 THE COURT: Janine Schoellhorn.

18 Is there any one of you who has
19 served as a member of a petit jury? That's a
20 jury that serves like this one, on a particular
21 case to decide what the circumstances of that
22 case and to render a verdict in the case. Or a
23 grand jury panel. Grand jury panels hand down
24 indictments in criminal cases. Have any of you
25 served on either of those kinds of jury panels

1 within the past year?
 2 Nobody has responded to this one.
 3 And now as I promised, is there any
 4 one of you who is employed by any of the parties
 5 or witnesses in this case? In other words, are
 6 any of the witnesses that were mentioned are you
 7 employed by -- I don't think anybody is, seeing
 8 as how the comments about knowing the witnesses.
 9 Is there anyone employed by Lilly or the State?
 10 Let me take -- I hate to do this,
 11 but could you stand up, if you've got it, so that
 12 I can then take you one at a time and sit you
 13 down if you're employed by the State.
 14 And let me start with you, ma'am.
 15 Could you give me your name and can you tell me
 16 what -- what do you do for the State?
 17 VENIREPERSON: My name is Rebecca
 18 Cain and I'm assistant attorney general for the
 19 State of Alaska. I worked for the tort section.
 20 THE COURT: Ms. Cain. Anyone
 21 disagree that Ms. Cain be excused on --
 22 MR. ALLEN: She's fine with us,
 23 Your Honor.
 24 (Laughter.)
 25 THE COURT: Ms. Cain, I'd like to

1 excuse you, but I'd like you to get your little
 2 jury card that we should have and bring it back
 3 down to the jury clerk in the jury assembly room
 4 and let them know you've been excused because
 5 it's not appropriate for you to sit on the case.
 6 I suspect they will have other panels for you to
 7 sit on.
 8 And, sir, let me have your name and
 9 why don't --
 10 VENIREPERSON: I'm standing to
 11 allow the assistant attorney --
 12 THE COURT: Oh, sorry.
 13 Ma'am, what's your name?
 14 VENIREPERSON: Amanda Boswell. I'm
 15 employed through the Alaska National Guard full
 16 time --
 17 THE COURT: Excuse me.
 18 VENIREPERSON: National Guard
 19 through the State.
 20 THE COURT: National Guard is fine,
 21 and thank you for answering the question. But
 22 that -- it's appropriate for you to sit on this
 23 panel if you're in the National Guard. You can
 24 sit down.
 25 VENIREPERSON: It's the Department

1 of Natural Resources, more specifically the
 2 Alaska Mental Health Trust Land Office.
 3 THE COURT: Okay. What's your
 4 name, ma'am?
 5 VENIREPERSON: Elizabeth McGinnis.
 6 We manage a million acres of land.
 7 THE COURT: I'm going to let you
 8 stay here. The lawyers may have some questions
 9 at this time.
 10 Okay. Sir?
 11 VENIREPERSON: Okay. My name is
 12 Ted Meyer. I'm a project engineer in the State
 13 in highway construction for DOT.
 14 THE COURT: Nothing about that that
 15 seems to be affected by the subject matter of the
 16 case. Thank you very much. Sir?
 17 VENIREPERSON: Roger Maggard, DOT.
 18 THE COURT: Thank you very much and
 19 I'm -- I want to make a record. So if there are
 20 other people with DOT, I want you to answer the
 21 question. If you're employed by DOT, that will
 22 be fine. In the back corner.
 23 VENIREPERSON: I'm just standing.
 24 THE COURT: Sorry. And you're just
 25 standing. Everybody in the back is standing.

1 VENIREPERSON: No, I work for the
 2 Health and Social Services, for the Governor's
 3 Counsel on Disabilities and Special Education.
 4 THE COURT: I think consistent with
 5 what I indicated pretrial, I think Health and
 6 Human Services is somebody I should excuse in
 7 this matter.
 8 What's your name?
 9 VENIREPERSON: Marilee Rivas.
 10 THE COURT: Ms. Rivas, if you would
 11 come and get your card and stuff. I'm going to
 12 ask -- I don't think this is the kind of case
 13 that you should be serving on, and I'm going to
 14 ask if you would take your card and go back down
 15 and see if they need you for some other --
 16 VENIREPERSON: Certainly. Thank
 17 you. Thank you.
 18 THE COURT: You told me your name.
 19 VENIREPERSON: Janine Schoellhorn.
 20 THE COURT: And for whom do you
 21 work?
 22 VENIREPERSON: I'm an
 23 epidemiologist with the Division of Public
 24 Health.
 25 THE COURT: I think I'm going to

1 excuse you from this panel as well. And ask if
2 you get your card.

3 Ma'am.

4 VENIREPERSON: I work for the
5 University of Alaska Anchorage at the library.

6 THE COURT: What is your name?

7 VENIREPERSON: Natalia Soto.

8 THE COURT: Ms. Soto, I think
9 that's fine and doesn't disqualify you in this
10 case.

11 VENIREPERSON: Dave Reineke,
12 attorney with the public defender for the State.

13 THE COURT: Mr. Reineke, I don't
14 think working for the public defender is a
15 conflict in this case.

16 VENIREPERSON: JoAnn Wallace,
17 Department of Corrections.

18 THE COURT: Ms. Wallace, I don't
19 think working for the Department of Corrections
20 is a problem in this case.

21 MS. GUSSACK: Your Honor, I think
22 there was a question --

23 VENIREPERSON: I've got a question.
24 You want all State agencies?

25 THE COURT: Just for safety's sake,

1 familiarity?

2 VENIREPERSON: No, sir.

3 THE COURT: Thank you. Do any of
4 you know the attorneys in this case or have been
5 involved in a lawsuit or court matter which
6 involved any of the attorneys in this case?

7 Sir in the back, your name again?

8 VENIREPERSON: James Cloud.

9 THE COURT: Mr. Cloud.

10 VENIREPERSON: And I served as an
11 expert witness for Lane Powell in another case.

12 THE COURT: Okay. Anything about
13 that relationship that would keep you from being
14 fair and impartial in this case?

15 VENIREPERSON: No.

16 THE COURT: If you get called into
17 the jury box that will eventually form, I'm sure
18 that other people will have some questions, but
19 at least as a statutory matter, I don't think
20 that keeps you from being a prospective juror in
21 this case, Mr. Cloud.

22 Somebody else, I thought, had their
23 hand up. Sir?

24 VENIREPERSON: Dan Seiser.
25 Defendant in a lawsuit in your court.

1 sir, why don't you -- yes.

2 VENIREPERSON: I'm Timothy Mattoon.
3 I work for State of Alaska, Department of Natural
4 Resources, Division of Forestry.

5 THE COURT: Okay. Thank you very
6 much and I don't think that's a conflict either.

7 VENIREPERSON: I'm an affiliate
8 professor at the University of Alaska Fairbanks
9 although the State does not pay my salary.

10 THE COURT: And what's your name,
11 sir?

12 VENIREPERSON: Peter Cervelli.

13 THE COURT: Mr. Cervelli, I don't
14 think that's a conflict, but thank you for
15 letting us know that.

16 Anybody else who is employed in any
17 way by the State who hasn't answered?

18 Okay.

19 Is there any one of you who
20 otherwise knows any of the parties or witnesses
21 in this case?

22 Sir.

23 VENIREPERSON: Randy Twenhafel.
24 I'm familiar with Eli Lilly and its products.

25 THE COURT: Other than a general

1 THE COURT: Okay. And other than
2 being a defendant in a lawsuit in my court, any
3 of the lawyers involved in that case?

4 VENIREPERSON: No, sir.

5 THE COURT: Thank you very much.
6 Sir?

7 VENIREPERSON: Judge, does that
8 include the names on the list that we filled out
9 on the sheet? I remember a few names on there
10 that I circled. I assume you have those
11 questionnaires.

12 THE COURT: We do have those
13 questionnaires and the attorneys will give them
14 to you at a later time and will probably ask you
15 some more questions about that if you get called
16 into the jury box.

17 Finally, have any of you had
18 knowledge about this case or have any of you read
19 or heard anything about this case other than what
20 you just found out today in the courtroom? And
21 just to help you a little bit, there was an
22 article about this case in the Daily News this
23 weekend, I believe. And there may have been
24 mentions of this case in some articles in the
25 Wall Street Journal or the New York Times in the

1 past week or two. Any of you recall anything
2 about reading those articles?

3 VENIREPERSON: Denise Schmidt. I'm
4 a critical care nurse in the hospital, so I deal
5 with this drug a lot, and I've heard people say
6 that they've had prob --

7 THE COURT: Well, we'll wait about
8 that. Ms. Schmidt, again, anything about that
9 knowledge that you think will keep you from being
10 fair and impartial?

11 VENIREPERSON: No.

12 THE COURT: Again, people may --
13 just so the panel knows. We're doing this in
14 several stages to kind of whittle down people.
15 What I'm trying to do now is see if people
16 statutorily can continue to sit on this case. If
17 you can, the lawyers may still have questions for
18 you down the road and that may present other
19 questions that we have, but thank you very much
20 for sharing that.

21 Who else -- and I don't want you to
22 tell me yet the specific information that you may
23 have heard. I just want to know if you have any
24 knowledge at this point.

25 VENIREPERSON: There was a previous

1 article even farther back with Mr. Gottstein's
2 name mentioned in it in the ADN. I think that's
3 where I read it.

4 THE COURT: What's your name?

5 VENIREPERSON: Tom Barnett.

6 THE COURT: Is there anything about
7 what you've read, without going into the details
8 of it that would keep you from being fair and
9 impartial?

10 VENIREPERSON: I made notes as to
11 what my thoughts were on the form.

12 THE COURT: Okay. I'll let the
13 lawyers ask you more questions as we go on with
14 this matter. Anyone else? Sir? Your name
15 again?

16 VENIREPERSON: Gary Wells. I did
17 see the article, kind of glanced at it. Don't
18 recall much about it, though.

19 THE COURT: Thank you very much,
20 Mr. Wells. Anybody else? Sir?

21 VENIREPERSON: I read the article
22 in the paper. I think it was the Daily news.

23 THE COURT: Anything about that
24 that you think will keep you from being fair and
25 impartial?

1 VENIREPERSON: No.

2 THE COURT: Okay. Everybody should
3 understand that what's in a newspaper isn't
4 evidence in this case, and you're going to be
5 asked to decide this case just based on the
6 evidence. What the question is designed to do is
7 to make sure that you can do that and that you're
8 not going to be improperly influenced by
9 something you may have read in a newspaper
10 article that isn't evidence.

11 Let me ask you this question, which
12 is actually going to be the last question that
13 I'll ask, although it may take some time to talk
14 about it. Is there anyone here -- we told you
15 what the case is about, and we told you the
16 length of trial and how the trial day is going to
17 proceed, that information and who the witnesses
18 are and that kind of thing.

19 Is there anyone here who has an
20 emergency or a personal hardship in your life at
21 this time that would absolutely prohibit you from
22 being present in the courtroom during the trial
23 day of this trial? Just wait. When you answer,
24 please be aware that I am using the words
25 "emergency" and "personal hardship" deliberately

1 and very careful -- carefully.

2 Mere inconvenience cannot excuse
3 you from serving as a jury member should you be
4 selected as part of the panel. I recognize,
5 ladies and gentlemen, that being on a jury is an
6 inconvenience for all of you. What I'm asking
7 here, very deliberately, is whether any of you
8 have an emergency or a personal hardship that
9 will keep you from being able to serve on the
10 panel. And so those of you who feel that that
11 applies to you in this particular case, I'd like
12 you to maybe stand and we'll talk a little bit
13 about what that is.

14 Okay. Let me start -- again, I
15 forget your name, ma'am.

16 VENIREPERSON: The woman who can't
17 smell. I'm Carol Ann Woody.

18 THE COURT: Ms. Woody. Thank you,
19 again. Tell me what your emergency or hardship
20 is.

21 VENIREPERSON: Well, I have -- this
22 is going to sound a bit odd. I just got back
23 from Belize. So I have two things; one is
24 personal hardship, and one is I've got a couple
25 of odd bites from critters that I have to go to

1 the doctor for and I don't know if it's something
2 that's going to be problematic or not. I'm
3 supposed to go in today for that to find out.

4 THE COURT: When are you going in?
5 Today?

6 VENIREPERSON: 4:30. So I was
7 hoping this would be over by then.

8 THE COURT: Well, I'll let you --
9 you will definitely get to the doctor today, Ms.
10 Woody. Like I said, after we ask this question
11 and I confer a little bit with the lawyers, I'm
12 probably going to let you all go for the day and
13 ask the ones that -- the ones of you who I
14 haven't excused to come back, and then the
15 lawyers may have some questions. And we'll get
16 more information about what is happening.

17 To the extent I would ask when you
18 see the doctor today, if you have additional
19 appointments that can be scheduled in the
20 afternoon, that you try to schedule them in the
21 afternoon. But for the time being, I'm going to
22 ask that you stay with us, and I just came back
23 from Belize --

24 VENIREPERSON: But I'm not done
25 yet.

1 THE COURT: Go on.

2 VENIREPERSON: Here's the other
3 part. So, I own and operate two businesses. I'm
4 the sole proprietor and owner of Fisheries
5 Research and Consulting, and I'm one of those
6 people that gets paid when they finish a job --

7 THE COURT: Okay.

8 VENIREPERSON -- and I have a whole
9 series of lectures that start all around the
10 state that begin the end of this week. I'll be
11 flying out to Bristol Bay and I also have some
12 associated university engagements --

13 THE COURT: So what you're saying
14 is you've got business things that are in
15 different parts of the state that you have to be
16 at.

17 VENIREPERSON: Yes, so there's a
18 series of those, and if I don't do them, then
19 part of it will be violating a contract. I could
20 perhaps beg my way out of it and, you know,
21 indicate that I had jury duty --

22 THE COURT: Can these things be
23 rescheduled -- are these things that are --

24 VENIREPERSON: No, no.

25 THE COURT: Ms. Woody, what I'm

1 going to do is ask you to come back tomorrow
2 again. If you get called into the jury box, we
3 may -- we'll probably have some more questions,
4 but I'm not at a point where I'm ready to excuse
5 you right yet.

6 VENIREPERSON: Okay. I can -- I
7 can lay it out for you so you can sort of see
8 what my situation is.

9 THE COURT: There may be some more
10 questions. We'll bring you back and see what
11 that's about.

12 Ma'am, what's your name?

13 VENIREPERSON: Joan Lahey.

14 THE COURT: And what's -- tell me
15 what --

16 VENIREPERSON: It would be
17 financial. I work all the way out in Peters
18 Creek. In fact, I have to go there today.
19 Bookkeeping, payroll, invoices, pay taxes.

20 THE COURT: Can these -- are these
21 the kinds of things that could be done --

22 VENIREPERSON: Usually I work from
23 6:30 in the morning to 4:30.

24 THE COURT: Are they things that
25 could be postponed?

1 VENIREPERSON: No. Payroll -- I
2 think everybody wants to be paid.

3 THE COURT: Are you the only one
4 that does this? Are there other people that help
5 and could fill --

6 VENIREPERSON: Just the lady I work
7 for and she generally is off seeing clients.
8 Comes into Anchorage and sees clients and that
9 sort of thing. There's two of us.

10 THE COURT: Okay. What I'd like
11 you to do, since we're going to bring people
12 back, is can you talk to her this evening and
13 explain -- I'm not saying you'll end up being on
14 the jury. It may be that you won't. I just want
15 to get some more information so could you talk to
16 her to see what she says about if you're -- what
17 that would do to you --

18 VENIREPERSON: Well, for four weeks
19 that would kill me financially.

20 THE COURT: Okay. Let me see --
21 somebody from each side. And you're a sole
22 proprietor, ma'am?

23 VENIREPERSON: No, I work for this
24 lady.

25 THE COURT: You work for this woman

1 but you're the only one who works for her?
 2 (Bench discussion.)
 3 THE COURT: Ma'am, we'll excuse
 4 you. What I'd like you to do, again, is to come
 5 up and get your jury card and go back down to the
 6 jury assembly room and let them know that you've
 7 been excused given your circumstances. There may
 8 be shorter trials going on this week that they'll
 9 want you to serve on.
 10 VENIREPERSON: Okay. Thank you.
 11 THE COURT: Okay. So if you'll
 12 come forward and get your card.
 13 VENIREPERSON: Thank you.
 14 THE COURT: And I apologize, why
 15 don't you sit down and we'll just take hands and
 16 that will be easier on everybody. Who else do I
 17 have on this side of the courtroom. You've told
 18 me your name twice.
 19 VENIREPERSON: Amanda Boswell, sir.
 20 I have two training engagements in the Lower 48.
 21 Both being two weeks long for my job.
 22 THE COURT: Okay. And when are
 23 those training --
 24 VENIREPERSON: The first one is in
 25 Albany, New York, and I'm supposed to leave this

1 Saturday or Sunday and get back next week, and
 2 the other one is the 19th of March, and it's in
 3 Mississippi and it's a week-long engagement.
 4 THE COURT: Are these the kind of
 5 training activities that can't easily be
 6 rescheduled?
 7 VENIREPERSON: No, sir, they're
 8 annual or every two years.
 9 THE COURT: Okay. Ms. Boswell,
 10 I'll excuse you and -- because it doesn't appear
 11 that it can be rescheduled and, again, ask that
 12 you pick up your jury card. It may be that they
 13 will use you in other trials that are going on
 14 that won't interfere with your training.
 15 VENIREPERSON: Thank you, sir.
 16 THE COURT: Who else on this side?
 17 Anyone else on this side of the room that
 18 believes they have an emergency or a hardship?
 19 Sir.
 20 VENIREPERSON: Well, Your Honor,
 21 I'll allow you to decide whether this is an
 22 emergency or not. I am contributing --
 23 THE COURT: What's your name again,
 24 sir?
 25 VENIREPERSON: My name is Peter

1 Cervelli.
 2 THE COURT: Mr. Cervelli.
 3 VENIREPERSON: I'm contributing a
 4 scholarly article to a special edition of a
 5 journal, which is due on or about the 28th of
 6 March. I think I would need a letter to my
 7 editor were I to miss this deadline.
 8 THE COURT: Again, Mr. Cervelli,
 9 I'm not going to let you go at this time
 10 partially because it's the kind of work that you
 11 can do when the trial isn't -- if you get asked
 12 to serve on this jury, I'll be happy to let your
 13 editor know that you're doing your civil duty and
 14 serving on the jury.
 15 VENIREPERSON: I appreciate it,
 16 sir.
 17 THE COURT: People may have some
 18 questions about this some more. Anyone else
 19 sitting in the back over here? Let me ask the
 20 people that are sitting in front of the jury box
 21 and in the jury box. Ma'am, in the back, what's
 22 your name again?
 23 VENIREPERSON: Michelle White. I
 24 own my own business.
 25 THE COURT: Okay.

1 VENIREPERSON: And my manager quit
 2 last week on Thursday, and then I also do the
 3 books for my husband's business. And so I'm -- I
 4 only have this week, and I have two employees
 5 going on vacation starting next week. So I
 6 really can't do more than this week.
 7 THE COURT: Okay.
 8 What's the nature of your business?
 9 VENIREPERSON: I own a tanning
 10 salon.
 11 THE COURT: Okay. And nobody else
 12 is in the tanning salon right now because you --
 13 VENIREPERSON: No. I do have a
 14 morning girl, but if it's more than this week, I
 15 have to pay for babysitters.
 16 THE COURT: So that's a problem as
 17 well, too. Any problems -- do any of the lawyers
 18 want to discuss this?
 19 I'll excuse you, but, again, could
 20 you please pick up your card because there may be
 21 trials that only are going to be a couple of days
 22 or just will finish up this week, and if that's
 23 the case, they may need you.
 24 Who else do we have? Let me stay
 25 in the back of the room. Ma'am.

1 VENIREPERSON: Virginia Peterson.
 2 I'm currently unemployed and looking for
 3 employment and have a few job interviews this
 4 week and next week.
 5 THE COURT: When are your job
 6 interviews?
 7 VENIREPERSON: Tomorrow at 2:00 and
 8 then next Wednesday at 1:00.
 9 THE COURT: Is there any chance --
 10 as I've indicated, I'm hoping that you'll be out
 11 of here by then, so I'm going to ask that you
 12 stay with us at least for now. If possible, if
 13 you could move -- I'm hoping that we'll be done
 14 at 1:30 tomorrow. It's possible it could be a
 15 little bit later, and I don't want you to be late
 16 for your interview. If there's a way tonight to
 17 make you a half-hour later, I'll get you out of
 18 here if we need to.
 19 VENIREPERSON: Thank you.
 20 THE COURT: Ma'am.
 21 VENIREPERSON: I'm an in-home
 22 personal care assistant, and my client had
 23 several mini-strokes which caused Parkinson's and
 24 dementia. And I also work in an Alzheimer's
 25 agency, and I cannot afford to have someone come

1 in and take my place because the charges are over
 2 \$20 an hour.
 3 THE COURT: Okay. Basically
 4 financially, given the nature of your job, four
 5 weeks would be too much. When do you perform
 6 these services? Is it during --
 7 VENIREPERSON: 24 hours a day.
 8 He's living in my home.
 9 THE COURT: Okay. Who is watching
 10 him now?
 11 VENIREPERSON: I have a friend
 12 taking him out to lunch, coffee, and I told him
 13 as soon as I get excused, I'll be back.
 14 THE COURT: Okay.
 15 What's your name, ma'am?
 16 VENIREPERSON: Lorraine Ramsey.
 17 THE COURT: Ms. Ramsey. Anyone
 18 have any objection to excusing Ms. Ramsey?
 19 MR. FIBICH: State does not.
 20 MS. GUSSACK: No, Your Honor.
 21 THE COURT: Ms. Ramsey, I will
 22 excuse you but again I will ask you to pick up
 23 your card and let them know because there may be
 24 shorter trials that you could afford to be a
 25 juror on, and I'd like you to let them know down

1 in the jury room what your circumstances are.
 2 VENIREPERSON: Thank you,
 3 Your Honor.
 4 THE COURT: Ma'am in the third row.
 5 What's your name?
 6 VENIREPERSON: Kaycelynn Sharrar.
 7 THE COURT: I didn't hear your last
 8 name.
 9 VENIREPERSON: Sharrar.
 10 THE COURT: Sharrar. Ms. Sharrar,
 11 what's your --
 12 VENIREPERSON: I'm assistant
 13 manager in a bakery. We only have four people,
 14 and my baker is going on vacation for two weeks.
 15 THE COURT: When is your baker
 16 going on --
 17 VENIREPERSON: He's leaving on
 18 Friday. The time I'll be baking is from 4:00
 19 a.m. to 1:00 p.m. in the afternoon. I can do a
 20 little bit beforehand but I'm needed because
 21 we'll be short one person. While he's gone, I'll
 22 be required to work six days a week through my
 23 job.
 24 THE COURT: I take it the nature of
 25 your baking, you don't --

1 VENIREPERSON: You can't train
 2 right away. I'll have a couple weeks to train
 3 somebody.
 4 THE COURT: You need to do this
 5 baking early in the morning as opposed to later
 6 on in the day?
 7 VENIREPERSON: Yeah.
 8 THE COURT: Okay. I will excuse
 9 you as well if you would please get your card.
 10 MR. JAMIESON: Excuse me, Your
 11 Honor. Was this Ms. Sharrar?
 12 VENIREPERSON: Sharrar. Yeah.
 13 There's a lot of Rs, but you don't pronounce
 14 them.
 15 THE COURT: Somebody in the -- sir?
 16 Yes?
 17 VENIREPERSON: My name is Eric
 18 Sowl. My wife is having back surgery three weeks
 19 from today.
 20 THE COURT: Okay. We probably
 21 won't be done in three weeks. I understand back
 22 surgery.
 23 VENIREPERSON: I'm scheduled to be
 24 home a week and a half to take care of her.
 25 THE COURT: I will excuse you. But

1 if you, Mr. Sowl, but if you would please get
2 your card.

3 VENIREPERSON: Absolutely.

4 THE COURT: Maybe there will be a
5 trial you can sit on.

6 VENIREPERSON: Thank you. I can
7 tell you my wife appreciates it very much.

8 THE COURT: Anyone -- ma'am.

9 VENIREPERSON: My name is Pam
10 Shepherd-Bronyaur and I'd like to be excused. I
11 work with severely emotionally disturbed kids
12 typically quite a few hours a week. There is one
13 person --

14 THE COURT: Could you speak up,
15 ma'am?

16 VENIREPERSON: There is emergencies
17 and surprises that come up every week. There is
18 one other person in the office that could handle
19 these crises, but it's important to myself and my
20 employer --

21 THE COURT: Let me ask: Is the
22 nature of what goes on something that could be
23 done after the trial is done; in other words,
24 maybe I'm -- I'm fairly hearing something, but
25 I'm sort of hearing that there's no set hours for

1 what you do and that this is something that might
2 be able to be done after --

3 VENIREPERSON: It's possible, yeah.

4 THE COURT: Okay. I'm going to ask
5 you to stay with us for now, and then the
6 lawyers, I'm sure, will have more questions for
7 you once we get into that part of the process.

8 MR. ALLEN: Your Honor, I couldn't
9 hear the name.

10 VENIREPERSON: Shepherd-Bronyaur.
11 It's hyphenated.

12 MR. ALLEN: Thank you. I
13 appreciate it.

14 THE COURT: Sir.

15 VENIREPERSON: Yes, Your Honor.
16 Steve Stehr. I have surgery scheduled on the
17 26th of this month.

18 THE COURT: I'm not sure we're not
19 going to be done by the 26th. Is it elective
20 surgery or nonelective surgery or --

21 VENIREPERSON: It's an inguinal
22 hernia.

23 THE COURT: Okay. Let me ask the
24 parties what their position is.

25 (Bench conference.)

1 THE COURT: We'll let you go, but
2 if you would come and get your card, too.

3 VENIREPERSON: Yes, sir.

4 THE COURT: Sir?

5 VENIREPERSON: My name is Lynn
6 Soiseth. I'm a financial adviser here in town.
7 I've got several hundred clients. Most of the
8 work is done in the morning because of New York
9 market hours, and the last few months and what I
10 guess will be the next few months, we're finding
11 a lot of financial trauma what with the
12 recession, the bear market, et cetera. I feel
13 that this serving for four weeks would be --
14 would be very tough for both me and my clients --

15 MR. JAMIESON: The name again?

16 VENIREPERSON: Lynn Soiseth.

17 THE COURT: Mr. Soiseth, I'm going
18 to ask you if you'll just stay with us a little
19 longer at least, and we'll talk about this some
20 more tomorrow.

21 Sir.

22 VENIREPERSON: Yes. My name is
23 John Sudderth. I myself with a partner recently
24 had made a company acquisition. We're deeply in
25 the process of reorganizing financial systems,

1 buying new equipment, several trips scheduled to
2 go see equipment and acquire it for our business.

3 THE COURT: Are these the kinds of
4 trips that could be postponed, that others in the
5 business could do if you were serving on the jury
6 or matters that could be attended to either by
7 you or others or in the afternoons?

8 VENIREPERSON: In this case, no.
9 I'm basically the equipment specialist and have
10 to go sign off on the equipment before we accept
11 it.

12 THE COURT: Okay. What's the
13 timing of this that it has to be done --

14 VENIREPERSON: First trip will be
15 late next week, and then depending on that,
16 probably quite a bit the following two weeks
17 after that.

18 THE COURT: And do you have tickets
19 or anything like that done, or have reservations
20 been made or where are you going?

21 VENIREPERSON: Going to Red Deer,
22 Alberta where the manufacturer is. And, no, the
23 reservations aren't made yet. It's typically
24 pretty easy to get a few days ahead of time.

25 THE COURT: I'm going to ask if

1 you'll stay with us a little bit longer. The
 2 lawyers may have some questions for you tomorrow.
 3 Ma'am.
 4 VENIREPERSON: I'm Valerie
 5 Stroud -- or Jane -- but Stroud is what I'm
 6 listed under. I currently started a job about a
 7 week and a half ago. And, financially, it's not
 8 possible for me to miss that long. I work for
 9 the Armed Services YMCA and I'm taking over for a
 10 lady whose mother is currently very ill, and she
 11 only has a certain amount of time to train me.
 12 THE COURT: Let me ask you: Many
 13 witnesses, and I don't know about the Armed
 14 Services YMCA, continue to pay people if they
 15 have jury duty.
 16 THE WITNESS: I'm hourly and not
 17 salary, and I've already asked them.
 18 THE COURT: And you're -- are you
 19 your own sole financial support? In other words,
 20 does somebody else --
 21 THE WITNESS: I'm married, me and
 22 my husband, but we just bought a house and so
 23 we're kind of --
 24 THE COURT: Need your salary.
 25 VENIREPERSON: We can't get by

1 without.
 2 THE COURT: It will put you in a --
 3 fall behind. I will excuse you, and I'll ask you
 4 if you can pick up your jury card, because it may
 5 be possible --
 6 MR. JAMIESON: Your Honor, is that
 7 Ms. Stroud; is that correct?
 8 VENIREPERSON: Stroud.
 9 THE COURT: Anyone else?
 10 VENIREPERSON: My name is Thompson
 11 Wofford. I'm an active duty member in the United
 12 States Air Force, and I will be departing Alaska
 13 here in April. And due to flights and some other
 14 outprocessing issues, I may not be able to attend
 15 the full-day sessions. I just wanted to bring it
 16 up front at the initial --
 17 THE COURT: Okay. And when you say
 18 that, if your commander, if that's the right
 19 term, knows that you're on jury duty, can the
 20 things that you need to do be --
 21 VENIREPERSON: Yes, sir, I have
 22 some flexibility. I just wanted to bring it up
 23 initially. But three weeks, I depart here April
 24 4th, so --
 25 THE COURT: Okay. Mr. Wofford,

1 we'll be done in this case by then. I'm going to
 2 ask you to stay with us.
 3 VENIREPERSON: Yes, sir.
 4 THE COURT: If you get called into
 5 the jury box later on, the lawyers may have some
 6 questions more for you. But I appreciate you
 7 bringing that to our attention.
 8 VENIREPERSON: My name is John
 9 Withers. I'm already involved in two cases.
 10 I've got a deposition next week. I'm an ER
 11 physician at Providence. One is on a wrongful
 12 death, and I have a criminal case coming up at
 13 the end of the month.
 14 THE COURT: And when you say a
 15 criminal case, you're going to be a witness or --
 16 VENIREPERSON: Yeah, just a
 17 witness. Then, I also work in the emergency
 18 room, and I'm able to just move my schedule
 19 around, but for three weeks I'd have to bring
 20 another physician from the Lower 48, and that
 21 wouldn't -- that probably wouldn't happen.
 22 THE COURT: Let me see the lawyers.
 23 (Bench conference.)
 24 THE COURT: Were it just the
 25 testimony problem, I would keep you on, but given

1 that you're going to have to bring in somebody
 2 from the Lower 48 and that will be a hardship,
 3 I'm going to let you go. Again, could you please
 4 your card and --
 5 Anyone else then who -- let me take
 6 you in the back, sir.
 7 VENIREPERSON: Derrick Chang. I
 8 split my time between Alaska and California on a
 9 monthly basis, so I cannot commit to a four-week
 10 trial. Nevertheless, I'm actually leaving on
 11 Wednesday night for business reasons.
 12 THE COURT: For what?
 13 VENIREPERSON: For business
 14 reasons.
 15 THE COURT: Okay. And what is your
 16 business?
 17 VENIREPERSON: Real estate
 18 development.
 19 THE COURT: Okay. And do you have
 20 these tickets already?
 21 VENIREPERSON: Yes.
 22 THE COURT: Okay. Are they
 23 refundable in any way?
 24 VENIREPERSON: I have a large
 25 construction project in San Francisco. I cannot

1 be missed.

2 THE COURT: Okay. I'll let you go,
3 sir. But, again, I would like you to perhaps let
4 them know downstairs and see if your jury duty
5 can be rescheduled at a time that you're not
6 already planning to be away.

7 VENIREPERSON: Thanks.

8 THE COURT: And there was one other
9 person. Sir.

10 VENIREPERSON: My name is Roy
11 Olsen. I'm a construction worker, and I don't
12 always work all the time. Like right now I got
13 about two or three more weeks of work, and I'll
14 probably be laid off for a little bit. And I
15 have a live-in girlfriend with a child, a young
16 child, and she's not employed. So I don't have
17 any trouble with coming to a trial, but if it's
18 going to take a while, it could hurt me
19 financially.

20 THE COURT: Okay. And you say --
21 are you working now?

22 VENIREPERSON: Yes.

23 THE COURT: Okay. And you're
24 working on a job in town that's --

25 THE COURT: I'm working on the

1 14-story building there between -- off of 36th
2 between the two Alaska USAs there, the big --
3 it's a 14-story building.

4 THE COURT: Okay. I know which
5 one.

6 VENIREPERSON: Yeah, I'm working
7 there. We've only got like about two or three
8 weeks of work left.

9 THE COURT: Okay. And I take it
10 that if you're sitting on the jury, you're not
11 going to get paid in any way by your employer?

12 VENIREPERSON: No, I will not get
13 paid in any way. That would be the main issue
14 with having a child and a fiance at home, you
15 know.

16 THE COURT: Okay. What's your
17 name, sir?

18 VENIREPERSON: Roy Olsen.

19 THE COURT: Mr. Olsen, I'll excuse
20 you. Again, I'll ask if you will get your jury
21 card and let them know what happened down in the
22 jury room.

23 Anybody else that we missed?

24 And, again, for those of you who I
25 did not immediately excuse, I don't know whether

1 you'll be called into the box. When you -- if
2 you are and the lawyers ask you some questions,
3 we'll -- may get some more information and I'll
4 excuse you at that time, or the lawyers may agree
5 to excuse you.

6 Thank you. Can I see a
7 representative from each side?

8 (Bench conference.)

9 THE COURT: Ladies and gentlemen
10 that are here, what I'm going to do at this time
11 is let you go for the day. The lawyers will go
12 over the questionnaires that you asked and then
13 just so you know how the process is going to be,
14 we're going to bring you back in here and -- at
15 8:30 tomorrow morning. And what I'd like you to
16 do is come here -- I'd like you to come here.
17 We'll make sure that we've got everybody who is
18 supposed to be here. And then what we're going
19 to do is call 22 names that will be sitting in
20 these chairs and in the jury box.

21 And the lawyers will begin the
22 process of asking you questions. Those of you
23 who don't get called may, depending on the
24 answers that get asked, replace people in the
25 jury box. And the people that don't get called

1 may end up getting on the jury and the people
2 that do get called may not be done.

3 But the lawyers will then go
4 through this process of asking you both
5 individually and as a group questions about -- to
6 make sure that we can get as fair and impartialal
7 a jury as we can in this case. If they believe
8 you can't be fair and impartial because of the
9 nature of the case and the nature of your
10 questions -- and you shouldn't really worry about
11 this. Everybody has their biases; everyone has
12 their preconceptions, and you're entitled to
13 them. Nobody is judging you for that. It just
14 may mean that in this particular case you can't
15 be an appropriate juror, but it doesn't mean that
16 there's anything wrong with you having those
17 things.

18 So I'm going to ask you to respond
19 as candidly as you can if you get called into the
20 box. If you don't want to discuss a subject that
21 people talk about, just tell me and we'll go back
22 in the room. And I know that people sometimes
23 don't want to talk about certain matters in front
24 of a room full of people. And so what we'll do
25 is we'll go back into my chambers, just me and

1 representatives from each side, and we'll talk
2 about it in there so you can have a little more
3 privacy about these matters.

4 But, again, the purpose of this
5 isn't really to unduly pry into your personal
6 affairs and circumstances. It's to get as fair
7 and impartial a jury as we can. And once that
8 process goes on, the lawyers will be allowed to
9 exercise what the law calls peremptory
10 challenges. These are extra challenges that they
11 don't have to have a reason. Before that, if
12 they ask me to excuse you, they'll need a reason
13 for that, but they're allowed a certain number of
14 challenges which they don't have to have a
15 reason. Again, that's one more effort we make to
16 get as fair and impartial a jury as we can.

17 Once that happens, we'll know who
18 our jury panel is. We're going to have 12 jurors
19 and two alternates. The alternates will be what
20 we call blind alternates. In other words, we're
21 not going to designate who the alternates are
22 until after all the evidence is in. That way if
23 people get sick or have a personal emergency or
24 something, we don't have to start trying this
25 case all over again with a different panel

1 because we don't have enough jurors in this case.
2 That's why we'll have alternates in this case.

3 The hope is that we can get through
4 the picking of a jury, and I'm optimistic about
5 that, by the end of the day tomorrow, and then
6 we'll start with opening statements on Wednesday.
7 If necessary, we may do a little more picking of
8 the jury on Wednesday, but I'm hopeful we won't
9 have to.

10 And then we hope to begin the
11 presentation of the State's case. The State gets
12 to go first because it has the burden of proof in
13 this case -- putting on their case. And that
14 will start on Thursday.

15 I'll give you some more
16 instructions as we go along. Any reason why I
17 shouldn't excuse the panel at this time to come
18 back tomorrow at 8:30?

19 MS. GUSSACK: No, Your Honor.

20 MR. FIBICH: State joins in that,
21 Your Honor.

22 THE COURT: The, ladies and
23 gentlemen -- ma'am, did you have a question?

24 VENIREPERSON: Do we come back to
25 the fourth floor, sir?

1 THE COURT: You should come back
2 into the courtroom. And, again, you can either
3 sit in -- we've excused a couple of people, so
4 there's a little more room here, but you can
5 either sit in the jury panel, sit where you can
6 sit, and we'll try to get started about 8:30 in
7 the morning.

8 Mr. Jamieson.

9 MR. JAMIESON: One housekeeping
10 thing. There are going to be a lot of people in
11 the hallway tomorrow. The lawyers will be coming
12 in and out, and we may -- they may think us rude
13 by not saying good morning or making eye contact.

14 THE COURT: Thank you. The lawyers
15 and the witnesses they have and the people that
16 are working with them on the case, and there are
17 a lot of them, all know that they are not to have
18 any contact with people who are jurors. And I'll
19 give instructions to the jury when we actually
20 have one, but I'll tell all of you now, and tell
21 the lawyers that they're instructed; they're not
22 to have anything -- they're not to have any
23 contact with anybody who might be a juror on this
24 case. And the reason for that is we just want to
25 make sure that nobody does or says anything or

1 you don't overhear anything that would make it
2 difficult for you to be fair and impartial in
3 this case.

4 So if you see any of these people
5 or the people you see them with who aren't
6 acknowledging you or don't want to have a
7 conversation with you, that's the reason why.
8 And you shouldn't think that they're being rude
9 or anything like that.

10 The other thing I would tell you is
11 there will -- there has been and I have no doubt
12 there will be publicity about this case. If
13 tonight there are things on TV or tomorrow there
14 are things on the radio or the Internet, please
15 don't watch it and don't read it; just pass it
16 by. I'll give the jury panel a very specific
17 instruction about that later on.

18 What I'm asking you now is that if
19 you see there's going to be a story about this
20 trial involving the State and Eli Lilly, turn off
21 the TV or the radio. Don't do any research on
22 the Internet to find out what you can about the
23 facts of this case. You're going to hear it in
24 court. You shouldn't be doing any
25 investigations. And, again, there will be an

1 instruction about that. And so I'd appreciate it
2 if you'd try to avoid developing or being exposed
3 to any information that might affect your ability
4 to be a fair and impartial juror in this case.
5 And there will be further instructions about that
6 when people are actually picked as jurors in this
7 case as well.

8 Anything else that anybody has any
9 questions about or that the lawyers would like me
10 to inform the panel?

11 MR. JAMIESON: No, Your Honor.

12 THE COURT: Okay. Then, ladies and
13 gentlemen, once again, thank you very much for
14 coming in for jury service today. We hope that
15 we will move this along efficiently. I realize
16 that there are going to be times when we've got
17 delays -- and this morning -- and most things are
18 necessary, but I appreciate it your being here
19 and indulging your patience in this matter, and
20 I'll see everybody tomorrow at 8:30.

21 THE CLERK: Off record.

22 (Break.)

23 THE CLERK: On record.

24 THE COURT: We're on record, and
25 the record should reflect that there are no panel

1 members that are here. I think we did better on
2 the hardship front than I thought we were going
3 to. So we seem to have quite a few jurors, and
4 I'm hopeful we'll have no problem ending up with
5 a jury tomorrow and hopefully finishing up
6 tomorrow if everybody is efficient.

7 Before we go on to other matters,
8 anything anyone wishes to put on the record about
9 what happened with the jury panel or anything
10 like that?

11 MR. FIBICH: Your Honor, I would
12 like, if the Court has a list -- you may not -- I
13 couldn't understand all of the names that were
14 given. The ones I'm concerned about are the ones
15 that were excused. If someone could give that to
16 us.

17 THE COURT: Okay. You guys have a
18 list, don't you?

19 MR. FIBICH: We have a list, yes,
20 sir. The ones that were excused.

21 THE COURT: You just were bad in
22 your recordkeeping?

23 MR. FIBICH: My ears don't work
24 real well.

25 THE COURT: Okay. We'll get you --

1 the log notes will reflect that, right?

2 THE CLERK: Yeah.

3 THE COURT: Okay. You should be
4 able to do that and get your transcript and that
5 will reflect it. If we have some more problems
6 with that, we'll try to get better information
7 for you.

8 Also, to the extent that either of
9 you -- there are a couple of people that I've
10 left, at least, to come back and be questioned.
11 Given the number of people that we have, if in
12 the morning you both want to agree that somebody
13 can be excused, I'll excuse them in the morning.

14 MR. ALLEN: We may have another
15 issue that Mr. Fibich forgot. It was James Cloud
16 who has worked as an expert for one of the
17 defense lawyers for Eli Lilly. He's been
18 employed by, paid by --

19 THE COURT: Well, I don't think
20 being an expert witness -- he's not really an
21 employee as such.

22 MR. ALLEN: He's an independent
23 contractor, I assume.

24 THE COURT: That's not normally why
25 statutorily I will do that. I'll certainly let

1 you, if he's called to the box question him some
2 more and then we'll take that --

3 Mr. Jamieson, did you want to --

4 MR. JAMIESON: Yes. For the
5 record, I've worked with Mr. Cloud. He is
6 employed or retained by my client, not by me.
7 He's paid for -- his time is paid for by my
8 client, not by me.

9 MR. ALLEN: I'm not here to debate.

10 THE COURT: What kind of an expert
11 is he, Mr. Jamieson?

12 MR. JAMIESON: Banking practices.

13 THE COURT: Banking practices. You
14 can go into that more tomorrow. I'm not going
15 to --

16 MR. ALLEN: I just wanted -- it
17 wasn't a point of debate. I just wanted to point
18 out he's an expert for the defense.

19 THE COURT: I -- he laid that out
20 and we -- you can follow that up in voir dire
21 tomorrow, if you do that, and then we'll take up
22 any challenges that may be appropriate.

23 MR. ALLEN: Yes, sir.

24 And I had -- with the Court's
25 indulgence, the exhibits? Or you've got other

1 things --

2 THE COURT: No, no, no. That's
3 what I've wanted to -- we've got a little bit of
4 time. I thought we might take a short break. I
5 don't know if you guys were able to huddle on
6 some of these things, and if you are --

7 MR. ALLEN: We were. On some of
8 them I think there's agreement, if I'm not
9 mistaken. But we'll take a break and tell you
10 what they are.

11 MR. JAMIESON: One additional voir
12 dire matter, Your Honor.

13 THE COURT: Sure.

14 MR. JAMIESON: Excuse me. One of
15 our panel members made a statement without
16 probably thinking about it and --

17 THE COURT: Before I could keep
18 them from saying it.

19 MR. JAMIESON: Exactly. And we
20 would like to overnight develop what we might
21 want Your Honor to do, if anything, in response
22 to that. But we would also like to avoid
23 eliciting such comments in front of other panel
24 members in the State's opening voir dire.

25 THE COURT: Well, that's -- no,

1 that's fair. I don't want to have a -- for both
2 sides that's actually fair. What I don't want to
3 do is if you want to ask about what they know
4 about this case or know about things, I want you
5 to very carefully think about -- what I don't
6 want to do is lose this whole panel because then
7 you're not going to get your witnesses on on
8 Thursday and Friday because somebody blurts out
9 things.

10 And so there may be questions that
11 you're going to need to ask -- I don't know if
12 there are questions that you're going to need to
13 ask individually, but I think you all are -- I
14 know you all are good enough attorneys that you
15 could ask, for example, have you heard anything
16 about this case and is there anything about --
17 without revealing it, is there anything about
18 what you've heard that you think will make it --
19 that's going to affect your ability to do that.

20 Then if they say yes or you want
21 to, we can take what they heard outside the
22 presence of the jury so we don't contaminate the
23 whole pool. That's how I would like those
24 questions to be handled. I mean, I don't want to
25 get into having to do individual voir dire with

1 everything.

2 Okay. So we need to make copies?

3 THE CLERK: They've got copies.

4 THE COURT: Oh, okay.

5 Anything else that anyone feels
6 they need to make a record about?

7 Then what I'd like you to do is
8 maybe huddle and we'll come back on record in
9 about 10 or 15 minutes and take up the exhibits
10 some more.

11 Oh, and one more thing. I just
12 received filed in court today a motion to
13 preclude the testimony of Joey Eski that the
14 defense is filing today. I assume the State has
15 gotten a copy just now?

16 MR. ALLEN: Yes.

17 THE COURT: Okay. The -- we don't
18 need to decide -- I don't need to rule on this
19 today or until next week, so when -- can you get
20 me something by Friday that I can look at this
21 weekend?

22 MR. ALLEN: Your Honor, to be
23 honest, I probably couldn't get it by Friday with
24 all the trial preparation, opening the witnesses.
25 Can I agree to get it to you?

1 Well, we'll get something done, I
2 guess, somebody is telling me. I know I can't do
3 it.

4 THE COURT: What I'm just saying is
5 I can't -- I don't want her to testify obviously
6 until I rule on this and I'd like at least a --
7 at least an evening to have both side's briefs
8 before I rule on it.

9 MR. ALLEN: Okay. You know what,
10 Your Honor, I don't think -- I'm probably -- we
11 have Ms. Eski's testimony. We've gotten the
12 Court's ruling. I'm not going to require anybody
13 to come back from vacation. Let me look at the
14 deposition tonight, if I have time, and I will
15 just play the deposition that I have.

16 THE COURT: Well, that would be
17 great, except I think the motion isn't just
18 dealing with her ability. It's -- they want
19 to -- they say she shouldn't be allowed to
20 testify period.

21 MR. ALLEN: And I understand that,
22 Your Honor. Let me look at it and I'll report
23 back tomorrow.

24 THE COURT: Okay. Again, if --
25 this isn't the kind of thing I need to decide

1 tomorrow, so that's why I was going to suggest
2 Friday so I can work on it this weekend. But why
3 don't you look at it and give me an idea of when
4 it is, but everyone should know I'm not going to
5 rule on this. She's not going to testify until I
6 have a chance to rule on the motion.

7 MR. JAMIESON: The record should
8 reflect that I'm handing up the deposition
9 transcript of Ms. Eski's deposition.

10 MR. LEHNER: Ten minutes?

11 THE COURT: Yeah, 10, 15 minutes.

12 MR. ALLEN: Fifteen.

13 THE CLERK: Off record.

14 (Break.)

15 THE COURT: Please be seated.

16 We're back on the record, and we're
17 outside of the presence of the jury. Am I
18 correct that both sides got a copy of the clerk's
19 record of juror attendance with those panel
20 members who were excused for cause identified?

21 MR. ALLEN: Yes, sir.

22 MS. GUSSACK: Yes, Your Honor.

23 THE COURT: Good. Have the parties
24 been able to reach any further resolution on
25 these preadmitted exhibits?

1 MR. ALLEN: Yes, sir.

2 MR. LEHNER: We have, Your Honor.
3 I think we've done some good work and we've
4 actually conferred, so maybe the best thing to do
5 is just go through the list and where we -- we'll
6 just let you know where we are with respect to
7 those?

8 THE COURT: Okay.

9 MR. LEHNER: And this is on the
10 first list that you read. There was an
11 objection -- there was a question with respect to
12 1215. That's now withdrawn by Lilly. So that
13 can be --

14 THE COURT: Okay. So 1215 is --

15 MR. LEHNER: -- preadmitted.
16 1605 would be preadmitted.

17 THE COURT: Okay.

18 MR. LEHNER: 3924, we had an
19 objection, which we will maintain based on our
20 motion in limine on profits and price, which I
21 think Your Honor has ruled on previously. So we
22 would maintain the objection to that.

23 THE COURT: 3924, did you say?

24 MR. LEHNER: Yes.

25 THE COURT: Okay. Other than that,

1 is the foundation authenticity --

2 MR. LEHNER: We won't contest
3 foundation or authenticity, so...

4 THE COURT: Okay. Then, 3924, I'll
5 overrule the objection and admit 3924.

6 MR. LEHNER: And the same thing
7 with 6215. We would maintain our motion in
8 limine objection, but insofar -- we will not
9 contest --

10 THE COURT: And 6215, then, the
11 objection's overruled and 6215 is admitted.

12 MR. LEHNER: That's correct. And
13 then, 7802, we will withdraw our objection.

14 THE COURT: Okay. 7802 is
15 admitted.

16 MR. LEHNER: Yes. 7822, we will
17 maintain our objection on profits and price --

18 THE COURT: Okay. What about --

19 MR. LEHNER: -- on the motion in
20 limine.

21 THE COURT: What about the
22 foundation?

23 MR. LEHNER: We will not contest
24 foundation.

25 THE COURT: Okay. 7822 is

1 admitted. I'll consider doing something, if you
2 want me to, with the redacted portions, but you
3 have to tell me what you want for me to figure
4 out if I'm willing to do it.

5 MR. LEHNER: I think we're going to
6 submit a supplemental jury instruction, perhaps,
7 that you can use as appropriate that would just
8 of indicate that the parties had agreed pursuant
9 to various pretrial procedures. We'll work out
10 something and you can contest it if you don't
11 like it, but -- something that would indicate how
12 the redactions arise and that they were -- relate
13 to other medicines, I think, is principally what
14 they are and that would be consistent with the
15 prior ruling.

16 I think the next one was 10017. We
17 would maintain our objection made in our motion
18 in limine that these deal with foreign regulatory
19 action.

20 THE COURT: Is the foundation --

21 MR. LEHNER: The foundation, we
22 will not object to foundation.

23 THE COURT: Then, 10017 is admitted
24 and the objection preserved.

25 MR. LEHNER: 10064, we will

1 withdraw our objection.

2 THE COURT: 10064, then, is
3 admitted.

4 MR. LEHNER: 10068 we'll put in
5 abeyance that counsel has indicated that they do
6 not intend to use that in opening. So we'll --
7 we'll leave that open for the time being.

8 MR. ALLEN: Yes.

9 THE COURT: 10068 is left open.

10 MR. ALLEN: I'm not going to use it
11 in opening, I can tell the Court.

12 THE COURT: Okay.

13 MR. LEHNER: 10095, we would
14 maintain our motion in limine objection
15 concerning '07 regulatory events -- recent
16 regulatory events, and also argue, Your Honor,
17 that as I mentioned -- and I think I did mention
18 this to you earlier on, that this is the -- this
19 is the "Dear Doctor" letter that followed the '07
20 label change. But since the State has admitted
21 and taken the position that the '07 label change
22 itself is adequate, we do not see the relevancy
23 of this particular document, so object on
24 relevancy grounds as well.

25 THE COURT: So 10095 right now is

1 at issue, and I don't believe I've ruled on that.

2 MR. ALLEN: Your Honor, I could
3 address, of course -- it's actually the letter
4 notifying the health care professionals of the
5 label change and attaching the new label, which
6 is -- which is an essential element of the case.
7 Once this went out and was received and was in
8 the possession of individuals, it -- but this is
9 the very event that we've been looking for in the
10 case, that is a new warning that was necessary.
11 This is the warning that was issued. And this --
12 Your Honor's addressed this in the motion in
13 limine on regulatory matters and it's been
14 admitted.

15 MR. LEHNER: Your Honor, the
16 relevancy argument goes -- is related to the
17 motion in limine that we filed on recent
18 regulatory events, but it seems to me to be both
19 redundant and necessary as well, cumulative.

20 MR. ALLEN: It's the only evidence
21 of the warning.

22 MR. LEHNER: Other than the warning
23 itself, which you've admitted is adequate.

24 MR. ALLEN: It also establishes the
25 date of the warning.

1 THE COURT: Is the objection as to
2 subsequent remedial measure withdrawn?

3 MR. LEHNER: Yes, Your Honor.

4 THE COURT: Then I'll admit 10095.

5 MR. LEHNER: All right. Then, that
6 brings us, I think, to what was referred to as
7 Attachment C.

8 MR. ALLEN: I also withdrew
9 objections to -- also, I said I will not use in
10 opening 3238.

11 THE COURT: Okay. This is in
12 Attachment C?

13 MR. ALLEN: Yes, I think it is
14 Attachment --

15 THE COURT: Yeah, it is. 3238 I
16 have listed as Attachment C.

17 MR. LEHNER: This is Attachment C.
18 We'll just go down the list. It is part of
19 Attachment C.

20 MR. ALLEN: All right. I'm sorry.

21 MR. LEHNER: So there's seven
22 documents in Attachment C, Your Honor. The first
23 we filed and would maintain our objection. It's
24 19 -- 1941.

25 And the objection here, Your Honor,

1 is the objection that we had made generally about
2 now marketing materials in light of your summary
3 judgment decision that deal with promotional
4 activities related to activities around the label
5 itself. We argued that the other day in our
6 request for clarification of your summary
7 judgment motion, and so we would maintain that
8 this document should not be admitted into
9 evidence as irrelevant.

10 THE COURT: Okay. 1941, then, if
11 that's the objection, I'll admit that. Again, I
12 believe that evidence could -- is relevant to
13 more -- can be relevant to more than one claim,
14 and it was not the intent of -- my summary
15 judgment ruling was intended to remove a claim,
16 not intended to remove evidence relevant to that
17 claim which was also relevant to other claims.

18 MR. LEHNER: 21 --

19 MR. ALLEN: -- 33. Why don't we
20 come to that one. That's our biggest area of
21 dispute. So I think we can go through the rest
22 of the list. I have a dispute.

23 MR. LEHNER: We'll come back to
24 2133.

25 3238, counsel has indicated that

1 they're not going to use that in opening.

2 MR. ALLEN: That's correct.

3 MR. LEHNER: 3278, we have no
4 objection to.

5 THE COURT: That's admitted.

6 MR. LEHNER: 10003, we have no
7 objection to.

8 THE COURT: That's admitted.

9 MR. LEHNER: 10035, I think you've
10 indicated you're not going to use that in opening
11 either.

12 MR. ALLEN: Yes, sir.

13 THE COURT: Then, 10035 is not
14 being ruled on, but it's not going to be used in
15 openings.

16 MR. LEHNER: And 10153 -- yes, that
17 one would be subject to our motion in limine
18 concerning regulatory matters, '07, and we have a
19 hearsay objection which -- as well. If it were
20 to be admitted, it would be admitted -- we would
21 request with just the notice restriction. This
22 is a letter from the FDA to Lilly in August of
23 '07 concerning a possible label change. And this
24 would have been covered by the motion in limine
25 we dealt with on subsequent regulatory matters

1 which are -- Your Honor denied. But we also have
2 a hearsay objection as well. It's the last
3 document.

4 THE COURT: Sorry, I was having
5 trouble finding the thing. One more time, then,
6 on 10153.

7 MR. LEHNER: Yes. This would have
8 been subject or is subject to the motion in
9 limine that we filed concerning regulatory
10 documents in '07 --

11 THE COURT: Okay.

12 MR. LEHNER: -- which you
13 previously have denied, so we want to maintain
14 that objection. We also object as to hearsay in
15 the document, and if the Court were to overrule
16 that objection --

17 THE COURT: Let me ask: Why is it
18 hearsay in light of your position about FDA
19 documents being good for the goose --

20 MR. LEHNER: -- good for the
21 gander?

22 THE COURT: Yeah.

23 MR. LEHNER: Well, if Your Honor is
24 admitting those, I think we would withdraw the
25 hearsay objection, Your Honor, with respect to

1 that.

2 MR. ALLEN: You looking to me for a
3 response, Your Honor?

4 THE COURT: Yes.

5 MR. ALLEN: I told Ms. Gussack -- I
6 don't think I've told Mr. Lehner -- I'm going to
7 get with her on that. I may well agree with that
8 position. I've just got other people I have to
9 answer to. I hear the Court and I understand.

10 THE COURT: Okay. I'm going to
11 just say that I'll be consistent to both sides,
12 whichever way I rule on that subject, and I'm
13 inclined to find these FDA documents to be public
14 records exceptions to hearsay.

15 MR. ALLEN: I hear you. I think we
16 only have a fight over one.

17 THE COURT: So we'll just take that
18 up -- I'm going to defer for a second. I'll
19 defer on 10153, at least, subject to that ruling.
20 To the extent the objection is made based on
21 prior motion in limines, I'll overrule that. I'm
22 not sure whether there was another one to 10153.

23 MR. LEHNER: No, I think that was
24 the last one. The only one that was outstanding
25 was 2123 that we came back to.

1 THE REPORTER: What was that number
2 again?

3 MR. LEHNER: 2133.

4 THE COURT: Right. And that's a
5 document, Health Canada?

6 MR. LEHNER: That's correct,
7 Your Honor. I think on the face you will see
8 that one deals with another product, Risperidone.
9 It deals with another company, Janssen. It deals
10 with another product by another company,
11 basically, in Canada. On its face it doesn't
12 relate to diabetes or hyperglycemia. It
13 discusses the cerebralvascular warning that
14 Risperidone was putting on its product in Canaca.
15 It says clearly that it was not to be used in the
16 field and -- not approved for use in the field.

17 THE COURT: That's what I noticed,
18 but --

19 MR. ALLEN: I have a very good
20 response to this, because all of what he said is
21 true, but that is not why we're going to offer
22 it. And I took the deposition (sic) on this as
23 soon as I can have the podium. Are you through?

24 THE COURT: I understand the
25 objections. Go ahead.

1 MR. ALLEN: Your Honor, as you
2 know, this case is based upon a failure to warn
3 and false and deceptive trade practices
4 concerning the issues of a warning. This
5 document, as Mr. Lehner said, does in fact deal
6 with a black box warning in Canada on a
7 competitive second-generation antipsychotic. And
8 when the -- and if you look at the recipients of
9 this e-mail, they include Robert Baker, Alan
10 Bryar, the Defendant Lilly's expert, Patricia
11 Cavazone, and other members of the Zyprexa
12 product team received this e-mail.

13 What's important here is when Lilly
14 got the black box warning and the red box warning
15 in Japan concerning diabetes, diabetic
16 ketoacidosis and all the diabetic warnings in
17 Japan --

18 THE COURT: And just so that -- I
19 think I understand. But a black box warning is a
20 warning that goes in a black box and a red box
21 warning that goes in a red box?

22 MR. ALLEN: Literally. It's not a
23 figurative statement; it's actually a literal
24 statement. And why I said red box is the
25 Japanese black box, which is a U.S. black box,

1 the Japanese is a red box. But as you see, this
2 document in Canada, it must be a black box.
3 Okay. But when the black box or red box warning
4 was issued on Zyprexa in Japan, which Eli Lilly
5 was well aware of, they did not send their sales
6 representatives out into the field to inform the
7 doctors here in the United States of the
8 information that came from Japan. Now, they're
9 going to testify, and I understand and you've
10 already overruled their -- their motion in limine
11 on this. They said they didn't want that warning
12 to come in. You've already overruled the motion
13 in limine.

14 But it is my position in this case
15 that when they are put on notice of a problem
16 with Zyprexa in a foreign country concerning a
17 black box warning, they have both a capability
18 and ability and the responsibility to inform
19 Alaskan doctors, Alaskan -- the State of Alaska
20 and Alaska patients of the black box or red box
21 warning in Japan. They say they don't. They say
22 it's not their responsibility.

23 Now, in this case -- this exhibit
24 demonstrates when their competitive product got a
25 foreign label black box warning concerning health

1 risks with the competitor's product, they
2 instructed their sales force to take their
3 competitor's black box from a foreign country and
4 go out and detail doctors about it in order to
5 gain a competitive advantage. So it clearly
6 indicates that Eli Lilly had both the ability and
7 wherewithal to, in fact, go out and inform
8 doctors concerning foreign regulatory matters if
9 it benefitted them.

10 THE COURT: So what you're offering
11 the document for is to show that Lilly had --
12 when Lilly was required to black box something,
13 the allegation is they -- on Zyprexa, they didn't
14 do anything about it, but when a competitor was
15 asked to black box something --

16 MR. ALLEN: They did.

17 THE COURT: -- they did and make a
18 point of letting people know what had happened to
19 their competitor.

20 MR. ALLEN: Right. So -- yes, sir,
21 that's exactly right. That's exactly right.
22 They have the ability, capability and
23 responsibility, and they had no hesitancy when it
24 was a competitive product. When it was theirs,
25 they did not.

1 THE COURT: Well, what do I do --
2 what is the language -- this is what's bothering
3 me. I understand your argument. But it says,
4 the attached letter is not approved for use in
5 the field. So was this ever done?

6 MR. ALLEN: Yes, sir. If you --
7 the attached letter was not. But assume
8 hypothetically it was not done, but it says it
9 was. If you down at the bottom it says, do.
10 There's a do's and don'ts column. I have it. If
11 you look in the second page of this 2133, it
12 says: We -- and I'm starting in the middle of
13 the sentence. This is Mike Bandick, too, I
14 think. Let me see who the e-mail is from. Yes,
15 sir. It's from Michael Bandick, and this is
16 important.

17 Michael Bandick was a Zyprexa brand
18 manager in the United States, and he was also the
19 marketplace manager. You're going to hear his
20 testimony in a video deposition. Here's what he
21 says on page 2. We would like to point out
22 actual label changes such as the recent addition
23 of a black box warning pending finalization of
24 language to the Risperdal label in Canada
25 regarding cerebrovascular adverse events. If

1 questioned further on the matter, suggest that
2 the Janssen representative may be able to provide
3 the information and get back to selling the
4 dependable control of Zyprexa.

5 Now, here's what it says right
6 there. We've got a little more to read. It
7 says, what we're going to do is we're going to go
8 out and tell doctors about a black box warning on
9 our competitor's product product, and we're going
10 to put the issue out there and then we're going
11 to tell the doctors, ask the Janssen rep to
12 explain it to you. So he's acknowledging that
13 they have the ability to do that.

14 Now, if you go down to the last
15 paragraph right above the Summary it says:
16 Finally, this label change is segment-specific,
17 limited to elderly dementia, so you may want to
18 share this information on a very limited basis
19 with key customers in this segment -- involved in
20 this segment. And then it finally goes down and
21 says: Do. Do -- do share information
22 selectively as appropriate. Set the record
23 straight about actual product labeling.

24 So what -- what they're doing here
25 is exactly what they didn't do in regard to Japan

1 and that's the whole point. And they have the
2 ability, capability and understanding when they
3 get a foreign label change. There's nothing in
4 the world to prevent them to go tell doctors
5 unless they don't want to. And with Risperdal
6 they had no problem. On Zyprexa, they did. And
7 that's why it's relevant, not because of any
8 other reason.

9 MR. LEHNER: Your Honor, I don't
10 think we could disagree more with some of the
11 characterizations that have been made about what
12 was done or not done with respect to the Japanese
13 label. I think you really need to look at this
14 argument -- this document on its face, not in the
15 context of all the arguments that could be made
16 to which we would substantially disagree.

17 The most important thing is that
18 this is a black box warning arising in Canada on
19 a very different event. Its not hyperglycemia;
20 it's not diabetes. I don't think it goes at all
21 to suggest what the regulatory obligation is or
22 is not of Lilly. It says, not approved for use
23 in the field. There's no evidence whatsoever
24 that this was -- was anything other than an
25 internal e-mail that Mr. Bandick wrote to a

1 number of people in the company outlining some
2 thoughts about what might or might not be done.
3 I think it introduces yet one of those
4 mini-trials within a trial that we seem to be
5 embarking upon here. And I think it would be
6 highly prejudicial and irrelevant, essentially,
7 to the issues before the Court over the next
8 couple weeks.

9 THE COURT: Okay.

10 MR. ALLEN: Well, the
11 characterization of what I said is inaccurate,
12 and that's -- it is relevant to their state of
13 mind and abilities and thoughts, and it couldn't
14 be more clear that this is Zyprexa -- the fact
15 it's not dealing with hyperglycemia is
16 unimportant. The fact is, it's a competitive
17 product and a second-generation antipsychotic
18 with a black box and they have the ability to go
19 tell doctors.

20 THE COURT: I will admit 2133. I
21 find it to be relevant to the question of what --
22 or at least to the allegations at this point in
23 the opening and the question of Lilly's ability
24 and desire to change labels and whether that was
25 their view of that, the need to change labels --

1 and advise -- advise physicians of changes in
2 labels was different as to Zyprexa versus their
3 competitor's products. And I'll admit it for
4 that purpose.

5 MR. ALLEN: Your Honor, two more
6 matters. I just provided Ms. Gussack and
7 Mr. Lehner -- again, it's probably more -- this
8 is a CD. Can I approach and give this to you so
9 you can look at it?

10 THE COURT: Sure.

11 MR. ALLEN: It's about three
12 minutes long -- I hadn't finished. Let me
13 finish.

14 THE COURT: I'm not going to look
15 at anything unless the other side's had a chance
16 to look at it.

17 MR. ALLEN: They have. No, they
18 have.

19 THE COURT: My ability to look at
20 things on CDs is -- you're talking to a less than
21 technologically --

22 MR. ALLEN: I think I'm going to
23 relieve a lot of stress level here. That is a
24 copy of Jordan Exhibits 9 and 10, which I
25 introduced in the deposition of Jack Jordan, who

1 was Eli Lilly's U.S. marketing director. Those
2 are videotapes made in-house at Eli Lilly
3 concerning the primary care launch in October of
4 2000. I may -- and this is may -- but I'm under
5 the obligation by the Court, want to play 30
6 seconds. I think it's 30 seconds of that launch
7 of the -- in the primary care market. I haven't
8 made the CD myself. Somebody did it. So I don't
9 know what order it's in, but I could even -- we
10 could come here tomorrow and I'll bring a player
11 and we can look at the 30 seconds I'm thinking of
12 playing. But I wanted you to have it and the
13 opponents to have it, because I'm required to
14 give it to you.

15 THE COURT: I'm not going to rule
16 on this now, obviously, until I see what Lilly's
17 position is. It would be really helpful to know
18 what the 30 seconds were.

19 MR. ALLEN: Well, I'll tell you
20 what the 30 seconds are -- but I'll show it to
21 you tomorrow. I know I didn't expect a ruling
22 tomorrow. I just wanted to follow the orders of
23 the Court.

24 There's one last thing my
25 co-counsel wanted me to bring up to the Court

1 that the Court may find important. There's a
2 case that was decided today on the issue of
3 preemption, Warner Lambert versus Kent, a
4 decision that was pending in the U.S. Supreme
5 Court. It was affirmed in favor of the
6 plaintiffs in that matter in a four to four per
7 curiam order today.

8 THE COURT: That was the one that
9 was just argued like four days ago?

10 MR. ALLEN: Yes, sir. The one that
11 you had actually read the transcript, I think,
12 when you were making your preemption rulings.
13 That case was decided. I think -- I can't
14 remember -- was it Roberts, but it may have been
15 Scalia. I can't remember who had to recuse
16 himself because he held stock in Warner Lambert.

17 THE COURT: That was the one that
18 dealt with this Michigan statute that was --

19 MR. ALLEN: Yes, sir. Yes, sir.

20 THE COURT: -- dealt with sort of
21 preapproval of -- or sort of fraud on the FDA.
22 I'm forgetting now already the name of the
23 Supreme Court case.

24 MR. SUGGS: Buckman.

25 THE COURT: Yes. Thank you.

1 MR. ALLEN: I knew you had read
2 that transcript of the argument. I knew you were
3 watching these issues. You know, I do think -- I
4 don't want to predict the future. I think it was
5 a good opinion, a good result for us. And I just
6 thought the Court would want to be aware of it.

7 THE COURT: I appreciate you
8 bringing that to my attention. I assume all they
9 do is say that it's affirmed in a four to four
10 per curiam; it's affirmed by an equally-divided
11 Court.

12 MS. GUSSACK: Uh-huh.

13 MR. ALLEN: Right.

14 THE COURT: Okay. I appreciate you
15 bringing that to my attention. I don't know
16 whether that helps at all in looking at the tea
17 leaves.

18 MR. ALLEN: It may not.

19 THE COURT: I guess it would depend
20 on what Justice didn't participate as to trying
21 to predict tea leaves. But I've got to take the
22 law the way it is today, not the way it may be in
23 a year.

24 MR. ALLEN: I agree. Thank you,
25 Your Honor.

1 MR. LEHNER: Your Honor, I think I
2 can just assure you that we'll file some
3 objection to the videotape, and we'll let you
4 know that tomorrow.

5 MR. ALLEN: It's their videotape.

6 THE COURT: Just so that I'm clear
7 on the record. So at this point we've dealt with
8 all of what was Attachment A preadmission
9 documents, I believe, and all of Attachment C --

10 MR. ALLEN: Yes, sir.

11 THE COURT: -- Preadmission stuff?

12 MR. ALLEN: Yes, sir.

13 THE COURT: We still have the new
14 stuff and that was filed, I guess, today for
15 which I don't have -- in a binder that said SOA's
16 Index of Documents for Court's Review, March 3rd,
17 2008, which has a few more exhibits. And we've
18 still got to take up Lilly's tabs which have
19 gotten to which the State has objected, which you
20 just gave me the binder a little while ago and I
21 haven't reviewed those.

22 Was there any, though -- let me
23 just ask: If I adhere to my decision that
24 internal FDA regulatory documents like that are
25 public records, is there any other obj -- I'm

1 sure there may well be. I'm just trying to
2 decide if that's going to decide it all or if
3 there's some other critical things.

4 MR. SUGGS: Well, the other thing
5 was relevance, Your Honor. I mean, there's been
6 no showing that I'm aware of --

7 THE COURT: Well, if that's going
8 to be the objection, I think I do see the
9 relevance in that. I think Lilly is -- to the
10 extent that there's a lot of allegations being
11 made about what Lilly should have done, shouldn't
12 do, didn't do, concealed, I think Lilly is
13 entitled to put on a case that shows that they
14 did do these things or did not conceal or that
15 they were advising, and whether or not those
16 advisements and things were adequate you can both
17 argue about. But I certainly am going to give
18 them the opportunity to put on that defense. So
19 if relevance is the objection, I'm pretty sure
20 it's going to be overruled.

21 MR. SUGGS: There's two grounds,
22 Your Honor. We have hearsay and relevance. We
23 understand Your Honor's ruling.

24 MR. ALLEN: You understand our
25 objections?

1 THE COURT: I will -- I understand
2 the objections; I understand the things. I'm
3 going to actually look at the documents and make
4 sure of that, but I think it's likely that I'll
5 be admitting the 16 documents in the binder.

6 MR. LEHNER: We'll provide you our
7 objections to their supplementals so you'll have
8 them tomorrow. And we may be able if there's --

9 THE COURT: To the extent you can
10 narrow that down this afternoon, that would be
11 great and we'll do that. If we have time
12 tomorrow -- well, I've got to give you some time
13 to try to rule on those things whether I -- if
14 you can get me something this afternoon, I can
15 try to read it at home tonight and deal with
16 these two binders that are left over. And then
17 we'll have rulings on all of them and put it on
18 the record either first thing tomorrow or after
19 we get the jury picked tomorrow.

20 MR. ALLEN: Mr. Lehner and I -- on
21 that notebook, we've agreed to talk to each other
22 this afternoon on that, so -- and that's very
23 small. I bet we agree on those. That's my
24 prediction.

25 THE COURT: Okay. Am I correct

1 that those are the -- and you're going to give me
2 kind of -- after you rule on these things, here's
3 what we'd like you to work on next kind of on the
4 list.

5 MR. ALLEN: Yes, sir. That's going
6 to be video cuts, because we probably will have a
7 video if we have some space. I'm going to get
8 you that.

9 THE COURT: Again, if you can give
10 me that in the order of who you want me to take a
11 look at first.

12 MR. ALLEN: I will.

13 THE COURT: I'll try to handle
14 these. I'll try to get -- rather than working on
15 things that you don't need for another week or
16 two, I'd rather work on things that you need.

17 MR. ALLEN: We'll do that. I
18 really have cut these down. They were 40 hours.
19 I think I've got them down to seven now. So, I'm
20 working.

21 MS. GUSSACK: What time would you
22 like counsel tomorrow, Your Honor?

23 THE COURT: I don't think we'll
24 need to be started before -- well, why don't you
25 be here at 8:15 whether we actually need to get

1 started. It's going to be a little problematic
2 to get much time in the morning because I have a
3 feeling we'll have prospective jurors coming in
4 and stuff. If need be, we can keep them out in
5 the hall, but I'm going to try to avoid that.
6 I'd rather make sure we get our jury picked
7 because that seems to be the most critical thing.

8 Then, if we have to, I'll bring you
9 back at 4:15 or something -- well, actually I
10 have a hearing tomorrow at 4:00, but I'll --
11 we'll get you in time, so I can make a record of
12 what I'm ruling so that you can do your opening
13 statements on Wednesday. I'm optimistic that
14 we -- that openings should be able to go on
15 Wednesday, and we won't have any problems with
16 your witnesses for Thursday and Friday subject to
17 the kinds of things that always come up in trial
18 like snow and sick jurors and those kinds of
19 things.

20 MS. GUSSACK: Thank you, sir.

21 THE COURT: I'll see, then,
22 everybody tomorrow at 8:15.
23 (Proceedings concluded.)

24
25