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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE INTUITIVE SURGICAL
SECURITIES LITIGATION.

CASE NO. CV-13-1920-EJD

SAN JOSE, CALIFORNIA

JANUARY 21, 2016

PAGES 1 - 31

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFFS: LABATON SUCHAROW LLP
BY: SERENA HALLOWELL
ALEC COQUIN
140 BROADWAY
NEW YORK, NEW YORK 10005

ROBBINS, GELLER, RUDMAN & DOWD
BY: SHAWN A. WILLIAMS
ONE MONTGOMERY STREET, SUITE 1800
SAN FRANCISCO, CALIFORNIA 94104

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED WITH COMPUTER.

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A P P E A R A N C E S: (CONT'D)

FOR THE DEFENDANTS: KEKER & VAN NEST LLP
 BY: MICHAEL D. CELIO
 PHILIP TASSIN
 633 BATTERY STREET
 SAN FRANCISCO, CALIFORNIA 94111

1 SAN JOSE, CALIFORNIA

JANUARY 21, 2016

2 P R O C E E D I N G S

3 (COURT CONVENED.)

4 THE COURT: ALL RIGHT. I THINK I'D LIKE TO CALL THE
5 IN RE INTUITIVE CASE FIRST, INTUITIVE SURGICAL. IF I COULD
6 OBTAIN THE APPEARANCES OF THE PARTIES, PLEASE.

7 MS. HALLOWELL: GOOD MORNING, YOUR HONOR.
8 SERENA HALLOWELL.

9 THE COURT: YOU CAN COME FORWARD TO THE LECTERN.
10 THANK YOU.

11 MS. HALLOWELL: GOOD MORNING, YOUR HONOR.
12 SERENA HALLOWELL ON BEHALF OF PLAINTIFFS.

13 THE COURT: THANK YOU. GOOD MORNING.

14 MR. WILLIAMS: GOOD MORNING, YOUR HONOR.
15 SHAWN WILLIAMS, ROBBINS, GELLER, RUDMAN & DOWD ON BEHALF OF THE
16 PLAINTIFFS.

17 THE COURT: THANK YOU. GOOD MORNING.

18 MR. COQUIN: GOOD MORNING, YOUR HONOR. ALEC COQUIN
19 ON BEHALF OF THE PLAINTIFFS FROM LABATON SUCHAROW.

20 THE COURT: THANK YOU. GOOD MORNING.

21 MR. CELIO: GOOD MORNING, YOUR HONOR.
22 MICHAEL CELIO OF KEKER & VAN NEST ON BEHALF OF THE DEFENDANTS.

23 THE COURT: THANK YOU. GOOD MORNING.

24 MR. TASSIN: GOOD MORNING, YOUR HONOR.
25 PHILIP TASSIN OF KEKER & VAN NEST ON BEHALF OF THE DEFENDANTS.

1 THE COURT: GOOD MORNING. THANK YOU ALL. THANK YOU
2 AND THANK YOU FOR BEING HERE. I'VE LOOKED AT YOUR PLEADINGS.

3 THIS IS A PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

4 AND, MR. CELIO, YOU'RE NOT IN LINE WITH THIS REQUEST FOR
5 CERTIFICATION, SIR. AND I'M JUST CURIOUS ABOUT -- IT SEEMS
6 THAT YOU RAISE THREE OBJECTIONS TO THE PLAINTIFFS' MOTION HERE.

7 MR. CELIO: WE DO, YOUR HONOR. THERE ARE INDEED
8 THREE. WE DO NOT BELIEVE THAT THESE PLAINTIFFS ARE TYPICAL.
9 WE DO NOT BELIEVE THAT THEY'RE ADEQUATE, AND WE DO NOT BELIEVE
10 THAT THE COMMON QUESTIONS PREDOMINATE, AND IF YOU WOULD LIKE ME
11 TO JUST BEGIN, I CAN GO AHEAD AND DO THAT.

12 THE COURT: WELL, I DON'T WANT TO DISRUPT YOUR
13 PLANS. YOU PROBABLY WERE UP ALL NIGHT PLANNING YOUR SCRIPT AND
14 FAR BE IT FOR ME TO INTERRUPT THAT. WE'RE SO CLOSE TO THE
15 OSCAR'S HERE.

16 MR. CELIO: WELL, THANK YOU, YOUR HONOR. I
17 APPRECIATE THE OPPORTUNITY TO GO. I KNOW YOU'VE READ THE
18 PAPERS AND SO I'M NOT GOING TO JUST RESTATE WHAT IS THERE. SO
19 I'D LIKE TO FOCUS, IF I COULD, ON TYPICALITY AND PREDOMINANCE
20 PRIMARILY.

21 THE COURT: YOU KNOW, THAT'S PERFECT BECAUSE I THINK
22 THE ADEQUACY PART IS -- NOT TO SAY THAT -- I DON'T NEED AS MUCH
23 HELP ON THAT, LET ME PUT IT THAT WAY.

24 MR. CELIO: UNDERSTOOD. UNDERSTOOD. THIS IS ONE OF
25 THE MOST ATYPICAL CASES THAT THIS COURT WILL SEE IN THIS AREA

1 OF THE LAW. AND THE REPLY BRIEF REALLY FOCUSES ON THE FACT
2 THAT THERE ARE OTHER CASES IN WHICH AN INVESTMENT ADVISOR HAD
3 THE OPPORTUNITY TO TALK DIRECTLY TO THE DEFENDANTS.

4 BUT THAT'S NOT REALLY AT THE HEART OF WHAT IS SO UNUSUAL
5 HERE. WHAT IS SO UNUSUAL HERE IS THE FACT THAT AFTER HAVING
6 SPOKEN WITH THEM AND AFTER HAVING GONE OUT AND SPOKEN TO
7 SURGEONS WHO USE THE DA VINCI PRODUCT, THE INVESTMENT ADVISORS
8 MADE STATEMENTS THAT CAST DIRECT DOUBT ON THIS PLAINTIFFS'
9 THEORIES OF THE CASES. IN SOME CASES THEY ACTUALLY OPENLY MOCK
10 THEM.

11 I THINK THE MOST DRAMATIC STATEMENT THAT THERE IS IN THE
12 CASE COMES FROM A REPORT WHERE ONE OF THE ADVISORS, BROWN
13 ADVISORY WHO TRADES ON BEHALF OF GREATER PENNSYLVANIA, SAYS
14 LAWYERS LIKE TO GO AFTER SUCCESSFUL COMPANIES BECAUSE THAT'S
15 WHERE THE MONEY IS.

16 AND THEY GO ON AND SAY THE GIST OF A REPORT THAT DISCUSSES
17 THE EXACT ISSUE THAT YOUR HONOR LEFT IN THE CASE SAYS THE GIST
18 OF A REPORT WAS THAT SOME OF THE SURGERIES HAD TURNED OUT
19 BADLY, REALLY, QUESTION MARK, EXCLAMATION POINT, QUESTION MARK,
20 THE DA VINCI SYSTEM IS A TOOL FOR SKILLED SURGEONS, NOT A
21 MACHINE THAT MAKES HACKS INTO WORLD CLASS DOCTORS. AND IT GOES
22 ON THERE.

23 WE HAVE LOOKED AT THE AUTHORITIES THAT OUR COLLEAGUES ON
24 THE OTHER SIDE HAVE GIVEN YOU AND WE HAVE SCoured THE UNIVERSE
25 OF CASES. WE HAVE NEVER SEEN A CASE WHERE YOU HAVE AN

1 INVESTMENT ADVISOR MAKING A STATEMENT DIRECTLY AT ODDS WITH THE
2 THEORIES OF THE CASE THAT A PLAINTIFF IS ADVOCATING.

3 AND WHY THAT MATTERS LEGALLY HERE IS THAT WE WOULD MAKE A
4 BIG DEAL OF THAT AT TRIAL. WHEN MR. KEKER AND I COME IN TO TRY
5 THIS CASE BEFORE YOUR HONOR, IF WE GET THAT FAR, YOU CAN BET
6 THAT'S SOMETHING THAT WE'RE GOING TO BRING TO THE JURY'S
7 ATTENTION.

8 AND THE STANDARD TODAY IS NOT DO WE WIN ON THAT. THE
9 QUESTION IS, IS THAT UNUSUAL? IS THAT SOMETHING THAT IS
10 DIFFERENT ABOUT THIS SET OF PLAINTIFFS THAN WOULD BE DIFFERENT
11 OF THE CLASS MORE BROADLY? AND THERE'S NO QUESTION THAT IT IS.

12 BECAUSE FOR YOUR AVERAGE RANK AND FILE INVESTOR, OBVIOUSLY
13 THEY WOULD NOT HAVE TYPICALLY SPOKEN TO THE DEFENDANTS
14 PERSONALLY. THEY CERTAINLY WOULDN'T HAVE GONE OUT AND SPOKEN
15 TO THE SURGEONS ABOUT THE DEVICE AS THESE INVESTMENT ADVISORS
16 DID, AND THEY WOULD NOT HAVE THEN PUBLISHED TO THE ENTIRE WORLD
17 ON THE INTERNET AND DIRECTLY TO THESE PLAINTIFFS BY EXTENSION
18 THEIR DOUBTS ABOUT THIS VERY THEORY.

19 I THINK THAT IS THE VERY DEFINITION OF A LACK OF
20 TYPICALITY. AND, IN FACT, WHEN I PRESENTED THIS TO
21 GREATER PENN'S REPRESENTATIVE AND SAID, YOU KNOW, IT LOOKS LIKE
22 YOUR ADVISOR DISAGREES WITH YOU, HE ADMITTED IT. I THINK
23 THAT'S FATAL.

24 THE REPLY DECLARATIONS REALLY PROVE THE POINT. THEY HAVE
25 SUBMITTED A COUPLE OF DOCUMENTS THAT WERE SUPPOSED TO DISPUTE

1 THESE. AND WHAT IS INTERESTING IS WHAT THEY DON'T DISPUTE.
2 THEY DON'T DISPUTE THAT THE MEETINGS HAPPENED FREQUENTLY. ALL
3 THEY REALLY SAY IS THAT, WELL, WE DIDN'T HAVE MATERIAL
4 NONPUBLIC INSIDE INFORMATION. OF COURSE. WE'RE NOT SUGGESTING
5 THAT ANYONE VIOLATED THE INSIDER TRADING REGULATIONS.

6 WHAT WE'RE SUGGESTING --

7 THE COURT: DOES THAT MATTER THAT NONPUBLIC
8 INFORMATION WAS NOT DISCLOSED AND THAT THERE'S NO DISCLOSURE OF
9 THAT?

10 MR. CELIO: IT WOULDN'T -- FIRST OF ALL, REG FD
11 MEANS THAT YOU COULDN'T DO THAT AND SO OF COURSE THAT DIDN'T
12 HAPPEN AND THAT'S, OF COURSE, NOT OUR ARGUMENT.

13 BUT, MORE IMPORTANTLY, IN A TYPICALITY INQUIRY THE
14 QUESTION IS ARE THESE PEOPLE DIFFERENT? IS THERE SOMETHING
15 DIFFERENT HERE THAT WE CAN ASK ABOUT TO CAST DOUBT ON THIS
16 BECAUSE THERE'S NO QUESTION THAT WHILE THEY DIDN'T RECEIVE
17 MATERIAL, NONPUBLIC INSIDE INFORMATION, THEY HAD EVERY QUARTER
18 AN OPPORTUNITY THAT IS DIFFERENT THAN EVERYONE ELSE IN THE
19 CASE.

20 IT'S UNDISPUTED THAT THEY SAT DOWN DIRECTLY WITH
21 MR. GUTHART, OUR CEO, AND MR. MOHR, M-O-H-R, AND GOT THEM TO
22 ASK QUESTIONS ABOUT THIS VERY TOPIC.

23 AS WE TRIED TO MAKE CLEAR IN THE PREDOMINANT SECTION OF
24 OUR BRIEF, THIS IS NOT A CASE WHERE THERE'S NO INFORMATION
25 ABOUT THESE TOPICS OUT THERE. THERE IS A LOT OF INFORMATION

1 ABOUT THESE TOPICS.

2 ANY TIME YOU'RE A MEDICAL DEVICE COMPANY, OBVIOUSLY THE
3 SAFETY OF YOUR DEVICE IS SOMETHING THAT PEOPLE ARE GOING TO
4 CARE ABOUT AND THAT THE COMPANY CARED DEEPLY ABOUT.

5 SO THIS IS ABOUT AS ATYPICAL A CASE AS YOU'RE GOING TO
6 SEE. I'M, CANDIDLY, NOT AWARE IN THIS AREA OF THE LAW OF ANY
7 CASE WHERE AN INVESTMENT ADVISOR HAS SPECIFICALLY SAID
8 PLAINTIFF, WHAT YOU'RE SAYING IN THIS COMPLAINT IS NOT
9 SOMETHING THAT WE BELIEVE.

10 AND THAT'S REALLY DIFFERENT THAN THE WORLDCOM CASE THAT
11 THEY CITE. THESE STATEMENTS COME AFTER THE DISCLOSURES THAT
12 THEY SAY ARE CORRECTIVE. NOW, WE OBVIOUSLY DISAGREE THAT
13 THEY'RE CORRECTIVE, BUT LET'S GO WITH THEIR THEORY OF THE CASE
14 FOR A MINUTE.

15 EXHIBIT 8 TO MR. TASSIN'S DECLARATION, WHICH IS ONE OF
16 THESE INVESTMENT ADVISOR REPORTS THAT I'VE QUOTED FROM, IS
17 MARCH 21ST, 2013; EXHIBIT 10 IS NOVEMBER 21, 2013. TWO OF THE
18 CORRECTIVE DISCLOSURES IN THIS CASE ARE BEFORE THAT DATE,
19 FEBRUARY 28TH AND MARCH 5TH.

20 SO BY THEIR TELLING OF THE STORY OF THIS CASE, THE
21 CORRECTIONS HAVE BEGUN. THEIR INVESTMENT ADVISORS ARE OUT
22 THERE SAYING, NO, WE DON'T BUY IT. THAT'S VERY ATYPICAL.

23 LET ME MOVE TO PREDOMINANCE. AND THERE ARE TWO POINTS IN
24 THE PREDOMINANCE AREA THAT I WOULD LIKE TO MAKE. ONE IS THAT
25 THERE REALLY ARE INDIVIDUAL QUESTIONS HERE BECAUSE THERE'S A

1 LOT OF INFORMATION OUT THERE. AND LET'S JUST FOCUS ON THE MOST
2 EXPLOSIVE ALLEGATION THAT THEY MAKE THAT WE CONCEALED RECALLS,
3 THEY CALLED THEM SECRET RECALLS. THEY WEREN'T SECRET AND THEY
4 WEREN'T RECALLS BUT OTHER THAN THAT WE AGREE.

5 THE COURT: DOES THE NOMENCLATURE MATTER?

6 MR. CELIO: ACTUALLY IT MATTERS A GREAT DEAL FOR TWO
7 REASONS. ONE IS IN THE FDA SPACE, A RECALL IS NOT THE SAME AS
8 IT IS FOR, SAY, TOYOTA AND ARROW XT.

9 A RECALL IS ANYTHING WHERE YOU MODIFY RELABELLING. SO THE
10 RECALL IN THIS CASE THAT THE WARNING LETTER TALKS ABOUT, AND
11 IT'S ATTACHED TO THEIR COMPLAINT, IS THAT WE NOTIFIED, WHEN WE
12 SENT A LETTER TO EVERY DOCTOR AT EVERY HOSPITAL ABOUT JUST
13 REITERATE INSTRUCTIONS, WE NOTIFIED THE DC OFFICE OF THE FDA
14 AND THERE'S AN E-MAIL TRAIL AND WE PRODUCED THAT. IT'S VERY
15 CLEAR THAT WE DID THAT BEFORE THE FACT, AFTER THE FACT AND
16 AFTER THE FACT.

17 WE DID NOT TELL THE OAKLAND REGIONAL FIELD OFFICE ABOUT
18 THAT BECAUSE WE DIDN'T THINK IT WAS A RECALL. SO WE DIDN'T
19 TAKE THAT ROUTE.

20 THE FDA LATER DISAGREED WITH US. WE STILL DISAGREE WITH
21 THEM BUT THAT IS WHAT IT IS. THAT'S THE RECALL. IT'S NOT A
22 PATIENT SAFETY RECALL.

23 BUT FOR THESE PURPOSES, FOR PREDOMINANCE, THE QUESTION IS
24 IT WASN'T SECRET. FIRST, IT IS SENT TO EVERY DOCTOR AT EVERY
25 HOSPITAL IN THE WORLD SO THAT'S A PRETTY POOR SECRET. BUT

1 LET'S LEAVE THAT TO THE SIDE BECAUSE THEY TAKE ISSUE WITH THAT.
2 LET'S LEAVE THAT TO THE SIDE FOR PURPOSES OF ARGUMENT.

3 IT'S ON THE INTERNET IMMEDIATELY. AND THEY SAY, WELL,
4 THAT'S A FOREIGN WEBSITE. YOU KNOW, IT WAS IN THE UK.

5 YOUR HONOR, THERE'S NO SUCH THING AS A FOREIGN WEBSITE.
6 THAT'S NOT HOW THE INTERNET WORKS. IT DOESN'T MATTER THAT IT'S
7 IN THE UK. THIS IS -- YOU KNOW, YOU SIT AT YOUR COMPUTER, AT
8 ANY OF THE COMPUTERS THAT YOUR STAFF OR YOUR CLERKS HAVE,
9 WITHIN A WEEK OF THIS, YOU COULD HAVE GONE AND YOU COULD HAVE
10 FOUND IT.

11 THAT'S, AGAIN, IN THE CONTEXT OF A PREDOMINANCE ANALYSIS.
12 IT'S NOT EVERYBODY KNEW. THEY TRY TO SAY THAT WE ARE TRYING TO
13 SAY THAT THIS IS TRUTH ON THE MARKET. NO, THAT'S NOT WHAT
14 WE'RE SAYING. WE'RE NOT SAYING EVERYONE KNEW. THAT WAS THE
15 ARGUMENT AT THE MOTION TO DISMISS.

16 AT THIS STAGE THE QUESTION IS WOULD A SUBSTANTIAL NUMBER
17 OF PEOPLE HAVE KNOWN? WE THINK THERE'S NO QUESTION THAT A
18 SUBSTANTIAL NUMBER OF PEOPLE WOULD HAVE KNOWN.

19 IT ISN'T JUST -- AND IT'S NOT JUST THIS. IT'S ALSO WE
20 HAVE A PATENT APPLICATION OUT THERE AND THERE'S A PRECEDENCE,
21 OH, WHO LOOKS AT PATENTS? I RESPECTFULLY DISAGREE WITH THAT.

22 FIRST OF ALL, AROUND HERE PATENTS ARE A BIG DEAL, AND THIS
23 COURT KNOWS MORE THAN ANYONE. BUT PEOPLE MAKE MILLIONS AND
24 MILLIONS OF DOLLARS TRADING STOCKS. THE IDEA THAT YOU WOULD
25 SAY, OH, PATENTS ARE HARD IN A HIGH TECH COMPANY SO I'M NOT

1 GOING TO LOOK AT THEM. I DON'T THINK THAT ACCORDS WITH
2 REALITY. OF COURSE PEOPLE LOOK AT THEM. AND OUR PATENT
3 APPLICATION, WHICH IS A SELF-AUTHENTICATING DOCUMENT, IT COMES
4 OUT IN 2012, IT SAYS VERY CLEARLY WE ARE CHANGING THIS TIP
5 COVER. WE ARE IMPROVING IT BECAUSE USERS WERE MAKING MISTAKES
6 WITH IT.

7 AGAIN, THAT'S OUT THERE.

8 WE THINK WE HAVE THE RIGHT TO FIND OUT WHO KNEW THAT
9 BECAUSE WE HAVE A DUE PROCESS RIGHT NOT TO HAVE TO PAY MONEY TO
10 PEOPLE WHO ACTUALLY KNEW THESE FACTS.

11 OKAY. THAT'S PIECE ONE OF PREDOMINANCE. WE CAN SET THAT
12 TO THE SIDE.

13 THE COURT: SO HOW DO YOU DO THAT? HOW DO YOU
14 FERRET THAT OUT? HOW DO YOU FERRET OUT WHO HAD KNOWLEDGE,
15 ASSUMING THERE'S BLOOMBERG AND OTHER SERVICES BLAST THIS
16 WORLDWIDE? ASSUMING YOUR INTERPRETATION OF THE INTERNET IS
17 CORRECT, THAT IT'S CONCURRENT WITH HAVING THE INTERNET ALL OVER
18 THE WORLD, THERE'S A LACK OF PRIVACY AND ALL OF THAT.

19 SO WHAT DO WE DO THEN?

20 MR. CELIO: WELL, YOU CAN'T DO IT IN A CLASS CASE.
21 THAT IS WHY WE DO IT IN INDIVIDUAL ACTIONS. SO IF THESE
22 INDIVIDUAL PENSION FUNDS TRULY DIDN'T KNOW, THEN THEY HAVE A
23 DIRECT CLAIM AGAINST US. IT DOESN'T END THE CASE. THEY MAY
24 HAVE A DIRECT CLAIM AGAINST US. WE THINK WE HAVE SOME PRETTY
25 GOOD EVIDENCE THAT THEY KNEW BASED ON THEIR ADVISORS. WE WERE

1 JUST TALKING ABOUT THAT.

2 BUT WE DEPOSED AND WE ASKED THEM, AND WE DO IT THE WAY
3 THAT WE DO EVERY OTHER CASE.

4 BUT THE CLASS VEHICLE, WHEN THIS MUCH INFORMATION IS OUT
5 THERE, IS REALLY AN INAPPROPRIATE ONE.

6 AND I DON'T WANT TO OVERSTATE THE CASE. YOU CAN IMAGINE
7 AN FDA CASE, YOU KNOW, IN THE SECURITIES FRAUD CONTEXT WHERE IT
8 WOULD BE PERFECTLY APPROPRIATE.

9 IF YOU HAVE A DRUG CASE AND THE FDA TOLD YOU SOMETHING,
10 YOU KNOW, YOU KNEW YOU WEREN'T GOING TO GET APPROVED AND YOU
11 CONCEALED THAT FROM THE MARKET, SURE, THAT WOULD BE COMMON
12 BECAUSE YOU HADN'T SAID ANYTHING ABOUT THAT.

13 BUT THIS IS A VERY DIFFERENT CASE. THIS IS A CASE WHERE
14 THERE'S TONS OF INFORMATION AND IT'S OUT THERE AND IT'S, IT'S
15 AVAILABLE TO PEOPLE IF THEY WANT IT.

16 THE LAWSUIT PIECE OF THIS, MAYBE THE MOST DRAMATIC EXAMPLE
17 IS YOU HAVE INDIVIDUAL PLAINTIFFS MAKING THESE CLAIMS STARTING
18 IN EARLY 2012 TO THE POINT THAT THERE'S A FEDERAL MDL ABOUT
19 THIS. AND, AGAIN, WE'RE IN EARLY 2012 HERE. THIS CLASS PERIOD
20 IS SUPPOSED TO GO TO THE MID OF 2013. THERE'S NO WAY THAT
21 ANYONE CAN MAKE THE ALLEGATION THAT AT LEAST THOSE PEOPLE, YOU
22 KNOW, DIDN'T KNOW, AND ANYONE FOLLOWING THAT. ANYONE WITH A
23 PACER ACCOUNT OR ANYONE WITH A BLOOMBERG ACCOUNT, OR EVEN
24 GOOGLE, COULD HAVE FOUND OUT ABOUT THAT. I MEAN, THIS IS IN
25 THE PRESS.

1 THE MDL, MAY 9TH, 2012. YOU KNOW, AND THIS COURT IS
2 INTIMATELY FAMILIAR, PROBABLY MORE FAMILIAR, THAN THE LITIGANTS
3 WITH THE MDL PROCESS SO I'M NOT GOING TO TRY TO SAY ANY MORE
4 ABOUT IT THAN TO GET INTO THAT PROCESS. THERE HAS GOT TO BE AT
5 LEAST SOME MOMENTUM THAT THERE IS SOMETHING OUT THERE; RIGHT?
6 I MEAN, IT'S NEVER THAT THERE'S A SINGLE CASE, AND IT'S JUST A
7 SMALL THING.

8 FINALLY, LET'S TALK ABOUT PRICE IMPACT. AND HERE I GUESS
9 THE POINT THAT I WANT TO MAKE THAT MAYBE DOESN'T COME THROUGH
10 IN THE PAPERS AS MUCH AS I WOULD LIKE IS THAT WHAT THE
11 PLAINTIFFS ARE DOING HERE GIVES NO DEFERENCE TO YOUR HONOR'S
12 ORDER ON THE MOTION TO DISMISS. THE CORRECTIVE STATEMENTS THAT
13 THEY -- THE ALLEGED CORRECTIVE STATEMENTS THAT THEY PUT BEFORE
14 YOUR HONOR ARE EVERYTHING THAT IS IN THE COMPLAINT. YOUR HONOR
15 DID NOT SUSTAIN THE ENTIRE COMPLAINT.

16 YOUR HONOR SUSTAINED -- IN THE WAY WE EXPLAINED IT IN OUR
17 PAPERS, THERE ARE SORT OF FOUR CATEGORIES OF STATEMENTS, AND
18 YOUR HONOR DISMISSED THREE OF THOSE FOUR, GAVE THEM LEAVE TO
19 AMEND TO REASSERT THOSE, AND THEY CHOSE NOT TO. THAT'S FINE, A
20 PERFECTLY LEGITIMATE LITIGATION CHOICE. BUT HAD THEY MADE THAT
21 CHOICE, I THINK THEY'RE BOUND TO RESPECT YOUR HONOR'S OPINION
22 AND WHAT THAT MEANS -- AND I THINK IT'S REALLY IMPORTANT TO
23 LOOK AT THE MOTION TO DISMISS AND TO REALLY HONOR THAT, I THINK
24 IT'S ON PAGES 12 THROUGH 14 OF THE ORDER, BUT IT'S REALLY WHAT
25 WE CALL CATEGORY 1, WHICH IS, YOU KNOW, THESE 2011 LETTERS, THE

1 MEDICAL DEVICE REPORTS, THE PRODUCT LIABILITY CLAIMS. THAT'S
2 WHAT YOUR HONOR LEFT IN THE CASE.

3 THE OTHER THINGS, ALLEGATIONS THAT USED TO BE THERE ABOUT
4 OUR FINANCIAL PERFORMANCE, ABOUT THE RISK THAT THE COMPANY MAY
5 FACE FROM PRODUCT LIABILITY LAWSUITS, AND STATEMENTS REGARDING
6 FDA REGULATION, YOUR HONOR THREW THOSE OUT, AND THOSE WERE NOT
7 AMENDED.

8 SO THE ONLY PRICE IMPACT THAT THEY HAVE ARE ON STATEMENTS
9 THAT HAVE ABSOLUTELY NOTHING TO DO WITH WHAT YOU'VE LEFT IN THE
10 CASE.

11 THE STATEMENTS THAT THE -- SO -- AND I REALLY WANT TO
12 FOCUS ON THESE CORRECTIVE DISCLOSURES. WE CAN SHOW IT AS TO
13 THE ALLEGED FRAUD IN THE FIRST PLACE, BUT I REALLY WANT TO
14 FOCUS ON THOSE CORRECTIVE DISCLOSURES.

15 SECURITIES FRAUD 101, YOU KNOW, IF YOU'VE BEEN LYING AND
16 THEN YOU TELL THE TRUTH, THE STOCK DROPS. AMAZINGLY, THERE'S
17 NO STOCK DROP WHEN THE ALLEGED TRUTH IS TOLD.

18 THEY'VE IDENTIFIED TWO STOCK DROPS, BUT THOSE TWO ARE
19 SITUATIONS IN WHICH ONE IS JUST OUR FINANCIAL RESULTS THAT SAYS
20 ABSOLUTELY NOTHING WHATSOEVER ABOUT WHAT IS IN THE CASE ABOUT
21 THE OCTOBER 2011 LETTERS AND THE SECOND CONFERENCE CALL DOESN'T
22 SAY ANYTHING ABOUT THAT.

23 THE COURT: SO THERE'S A LACK OF NEXUS.

24 MR. CELIO: THEY'RE MIXING AND MATCHING. THEY'RE
25 MIXING AND MATCHING. THIS IS ACTUALLY EASIER. HALLIBURTON IS

1 THE CUTTING EDGE, AND IT'S THE SUPREME COURT CASE FROM JUST A
2 COUPLE OF YEARS AGO AND IT'S CUTTING EDGE AND IT'S VERY
3 COMPLICATED. WE THINK WE WIN ON ALL OF THOSE LEVELS BUT THIS
4 IS ACTUALLY A STEP EASIER, WHICH IS JUST THE ONLY PRICE IMPACT
5 THAT THEY COULD POSSIBLY SHOW -- AND THERE'S A DISPUTE ABOUT
6 THE EXPERTS AND WE CAN HAVE THEM COME IN HERE AND WE CAN HAVE A
7 BIG HEARING, BUT WE DON'T NEED TO BECAUSE ALL WE NEED IS YOUR
8 ORDER WHICH SETS OUT THE PARAMETERS OF THIS CASE AND THEN ALL
9 YOU HAVE TO DO IS LOOK AT THE FACE OF THE TWO STATEMENTS THAT
10 THEY SAY ARE THE CORRECTIVE DISCLOSURES AND THOSE DON'T MATCH,
11 THAT LACK OF NEXUS.

12 THE COURT: IS IT THEY DON'T MATCH IT OR IS THERE
13 ANOTHER EXPLANATION FOR?

14 MR. CELIO: NO, THEY DON'T MATCH AT ALL BECAUSE
15 ANOTHER EXPLANATION FOR YOUR RISK -- THIS IS WHERE IT STARTS TO
16 GET INTO HALLIBURTON, RIGHT? THEN YOU MIGHT GET INTO LOSS
17 CAUSATION, AND WE DON'T TALK ABOUT THIS.

18 THE COURT: AND I LOOKED AT THIS AND I THOUGHT ISN'T
19 THIS LOSS CAUSATION? AND IT'S LOSS THAT CREEPS INTO THE
20 CONVERSATION. IT CREEPS INTO THE CONVERSATION.

21 MR. CELIO: IT CREEPS IN. AND I THINK YOU COULD
22 HAVE AN ENTIRE PRESENTATION IN THE NORTHERN DISTRICT ABOUT THAT
23 AND, IN FACT, ONE OF MY ESTEEMED ADVERSARIES AND I ACTUALLY
24 SPOKE ON A PANEL ON ONE OF THESE SUCH TOPICS.

25 IT IS VERY HARD TO DIFFERENTIATE THOSE TWO THINGS, BUT THE

1 SUPREME COURT HAS BEEN CLEAR THAT LOSS CAUSATION GOES OVER
2 THERE AND PRICE IMPACT WE DO GET TO TALK ABOUT.

3 THE COURT: YOU CAN PUT THEM IN COMPARTMENTS THAT
4 WAY, BUT IN THE DISCUSSION AND IN LOOKING AT THE FACTS, WHAT
5 WE'RE TALKING ABOUT NOW, HOW DO YOU DISCERN THOSE TWO?

6 MR. CELIO: WELL, BECAUSE IT'S EASY IN THIS CASE.
7 IT'S NOT EASY IN GENERAL, BUT THIS IS ACTUALLY THE ONE CASE
8 THAT IT MIGHT BE.

9 THE COURT: THIS IS THE ONE?

10 MR. CELIO: YEAH, THIS IS THE ONE. YOU GOT LUCKY.
11 I GOT LUCKY. THIS IS THE ONE BECAUSE THIS IS WHERE THE PRICE
12 JUST GO DOWN ON THE DAYS THAT WE'RE TALKING ABOUT THE THINGS
13 THAT YOU LEFT IN. AND THAT'S THE QUESTION, JUST PRICE IMPACT.

14 AND REMEMBER THAT WHAT WE'RE TALKING ABOUT HERE IS THAT
15 THE COURT DOES NOT NEED TO REACH A RULING ON THE FACTS HERE.
16 WHAT WE'RE TALKING ABOUT IS PRESUMPTION AND WHAT I THINK IS
17 REALLY IMPORTANT IS THAT UNDER F.R.C.P. 301, THE BURDEN OF
18 PERSUASION ULTIMATELY REMAINS WITH THEM. YOU KNOW, THERE'S A
19 PRESUMPTION THAT WE HAVE TO REBUT.

20 THE COURT: YOU'VE GOT A PRESUMPTION.

21 MR. CELIO: YEAH. WE HAVE THE BURDEN OF PRODUCTION.
22 WE'VE BROUGHT THAT FORWARD NOW. AND THEN ULTIMATELY THE BURDEN
23 OF PERSUASION REMAINS WITH THEM.

24 AND I THINK THAT THERE'S A REALLY STRAIGHTFORWARD PRIMA
25 FACIE CASE THAT THERE'S NO DROP ON THE DAYS THAT THERE'S A

1 DISCUSSION OF THE OCTOBER 2011 LETTERS. IT'S JUST THAT'S NOT
2 WHAT HAPPENS.

3 ALL OF THE INFORMATION, AND THIS IS REALLY KEY BECAUSE AT
4 THE END OF THIS CLASS PERIOD, WHERE THEY WANT TO END IT THERE
5 IS THIS WARNING LETTER, BUT, OF COURSE, THAT INFORMATION HAS
6 BEEN OUT IN THE MARKET FOR A VERY LONG TIME BECAUSE THE WARNING
7 LETTER IS ONE OF THE END STEPS IN THIS PROCESS.

8 THE FORM 43, WHICH IS, YOU KNOW, AT LEAST A MONTH PRIOR IS
9 TOTALLY PUBLIC AND NOTHING HAPPENS. IT'S -- THE FACT THAT
10 THERE'S THIS DISCUSSION THAT I, I MENTIONED ABOUT THE
11 OCTOBER 2011, LETTERS AND WHICH OFFICE THEY WENT TO, THAT'S
12 FULLY DISCLOSED AND CNBC IS REPORTING ON IT AND IT'S OUT THERE
13 NO LATER THAN JUNE 25TH AND THE STOCK DOESN'T MOVE. AND THEIR
14 EXPERT DOESN'T DISAGREE, BY THE WAY. I DON'T THINK THERE'S A
15 DISAGREEMENT.

16 WHAT HAPPENS IS AT THE END OF THE CLASS PERIOD WHERE THEY
17 WANT TO END IT YOU SEE THIS BIG DROP, BUT THAT'S CATEGORY 4.
18 THAT'S WHAT YOU THREW OUT BECAUSE THAT'S THE RISK THAT THE FDA
19 MIGHT DO SOMETHING TO US.

20 AND OBVIOUSLY THAT'S NOT SOMETHING THAT IS A RISK THAT
21 EVERYBODY ALWAYS KNOWS IS OUT THERE. WE DISCLOSED THE FACT
22 THAT THEY DID IT, THAT THEY ISSUED THIS WARNING WITHIN
23 24 HOURS. SO WE DIDN'T CONCEAL THE WARNING LETTER SO THAT
24 CAN'T BE THE FRAUD.

25 AND IT CAN'T BE THE INFORMATION THAT IS IN THE WARNING

1 LETTER BECAUSE THAT INFORMATION IS ALREADY OUT THERE.

2 SO IT'S VERY CLEAR IT'S A CATEGORY 4 ISSUE. THE FDA HAS
3 DONE SOMETHING. YOU'RE TANGLING WITH AN AGENCY.

4 NOW, THAT WAS MANY YEARS AGO NOW. THE FDA NEVER DID
5 ANYTHING, AND IT TURNS OUT EVERYTHING WAS RESOLVED. AND I
6 THINK THAT'S SOMETHING THAT THE COURT CAN KEEP IN THE BACK OF
7 ITS MIND AT CLASS CERT. YOU COULDN'T DO IT AT THE MOTION TO
8 DISMISS STAGE, WE UNDERSTAND THAT.

9 BUT HERE AT CLASS CERT WHEN YOU'RE TALKING ABOUT
10 PREDOMINANCE AND YOU'RE TALKING ABOUT PRICE IMPACT, YOU CAN
11 TAKE THAT INTO ACCOUNT. IT WAS ONE STEP ON A PROCESS OF AN FDA
12 INQUIRY INTO US AND NOW HERE WE ARE EVEN IN THE MIDST OF THIS
13 DOWNTURN THAT WE'RE GOING THROUGH, THE STOCK IS BACK UP
14 HUNDREDS OF DOLLARS ABOVE WHERE IT WAS.

15 NOW, I'M NOT ASSERTING A LEGAL DEFENSE UNDER THE REFORM
16 ACT THAT THE STOCK RECOVERED IN 90 DAYS. WHAT I'M SAYING IS
17 THAT THE COURT DOESN'T HAVE TO BLIND ITSELF TO WHAT REALLY
18 HAPPENED HERE. THERE WAS A DISAGREEMENT WITH THE FDA AND THAT
19 CAUSED SOME PRICE IMPACT BUT THAT'S OUT OF THE CASE, AND THEY
20 DIDN'T AMEND TO DO THAT. I THINK THIS IS THE MOST
21 STRAIGHTFORWARD CASE THAT IS POSSIBLE AND IN A NOT
22 STRAIGHTFORWARD AREA.

23 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. I
24 APPRECIATE IT.

25 MS. HALLOWELL, YOU RISE TO CONCEDE YOUR MOTION?

1 MS. HALLOWELL: I DID NOT, YOUR HONOR.

2 THE COURT: AH.

3 MS. HALLOWELL: YOU KNOW, LISTENING TO MR. CELIO,
4 WHAT BECAME VERY EVIDENT IS ALSO WHAT I THINK IS EVIDENT IN
5 THEIR PAPERS ON OPPOSING CLASS CERTIFICATION THAT THEY'RE
6 TRYING TO CONVERT THIS MOTION INTO SOMETHING THAT IS NOT
7 APPROPRIATE ON CLASS CERTIFICATION.

8 SO WHILE I UNDERSTAND THAT THE MERITS ISSUE HERE CAN BE
9 ADDRESSED TO THE EXTENT THAT THEY'RE RELEVANT TO RULE 23,
10 AMGEN AND HALLIBURTON HAVE CONFIRMED THAT THE ISSUES THAT
11 MR. CELIO HAS POINTED TO TODAY, AND ALSO ON THEIR MOTION TO
12 DISMISS AND ON THE MOTION FOR RECONSIDERATION, ARE ISSUES OF
13 MATERIALITY OF TRUTH ON MARKET, THAT THE TRUTH WAS OUT THERE,
14 THAT THIS WASN'T OMITTED. THOSE ARE ISSUES THAT AMGEN HAS
15 EXPRESSLY SAID ARE NOT APPROPRIATE FOR CLASS CERTIFICATION.

16 THEY CAN HAVE THEIR THIRD SHOT AT THAT. THEY CAN DO THAT
17 AT SUMMARY JUDGMENT, AND THEY CAN HAVE A FOURTH SHOT AT TRIAL
18 BUT NOW IS NOT AN APPROPRIATE TIME FOR THAT.

19 AND AS YOUR HONOR RECOGNIZED, A LOSS CAUSATION HAS CREEPED
20 IN, AND I WOULD SAY IT HAS JUMPED IN. SO THEIR PRICE IMPACT
21 ARGUMENTS REALLY ARE, MANY OF THEM ARE LOSS CAUSATION ARGUMENTS
22 WHERE THEY'RE SAYING THAT THE DROP AND THE CORRECTIVE
23 DISCLOSURES WAS NOT A RESULT OF THE FRAUD ALLEGED HERE. IT WAS
24 THE RESULT OF SOMETHING ELSE. THAT'S A LOSS CAUSATION INQUIRY
25 WHICH IS MORE APPROPRIATE WHEN WE ACTUALLY HAD LOSS CAUSATION

1 EXPERT REPORTS, WHEN DISCOVERY IS CONCLUDED AND SUMMARY
2 JUDGMENT.

3 AND HALLIBURTON SAYS THAT AND CONFIRMS THAT LOSS CAUSATION
4 IS NOT AN APPROPRIATE INQUIRY AGAIN AT THE CLASS CERTIFICATION
5 STAGE.

6 SO, YOU KNOW, WHAT YOU DIDN'T HEAR FROM MR. CELIO IS THAT
7 HE DIDN'T MENTION THE STANDARD ON CLASS CERTIFICATION FOR
8 TYPICALITY OR PREDOMINANCE AND THAT THE BURDEN IS ON THE
9 DEFENDANTS TO SHOW THE LACK, THE COMPLETE LACK OF PRICE IMPACT.

10 SO WITH RESPECT TO THE THREE CONTESTED ISSUES, I'D JUST
11 LIKE TO MAKE A COUPLE OF ADDITIONAL ARGUMENTS UNLESS YOUR HONOR
12 HAD ANY SPECIFIC QUESTIONS.

13 THE COURT: NO, PLEASE.

14 MS. HALLOWELL: SO, YOU KNOW, I APPRECIATED
15 MR. CELIO'S REMARKS EARLIER. YOU KNOW, WE THOUGHT THEY WERE
16 MAKING TWO KIND OF RELATED TYPICALITY ARGUMENTS.

17 ONE, THEY SEEM TO BE SUGGESTING THAT TWO OF THE FIVE
18 INVESTMENT MANAGERS HERE HAD NONPUBLIC INFORMATION BY WAY OF
19 THESE MEETINGS WITH THE COMPANY, WHICH, BY THE WAY, THERE WAS
20 MEETINGS WITH DOZENS OF INVESTMENT MANAGERS, NOT JUST OUR TWO.
21 IT'S STANDARD PRACTICE FOR --

22 THE COURT: DOES THAT MAKE A DIFFERENCE? DOES
23 THAT -- DOES IT MAKE A DIFFERENCE IF THE MANAGERS HAD THESE
24 MEETINGS?

25 MS. HALLOWELL: NO, I DON'T THINK IT MAKES A

1 DIFFERENCE AT ALL. THERE'S ABSOLUTELY NO EVIDENCE IN THE
2 RECORD OF NONPUBLIC INFORMATION BEING DISCLOSED AND WORLD COM
3 DOES HOLD THAT COMMUNICATING DIRECTLY WITH A COMPANY IN WHICH
4 INVESTMENT MANAGERS ARE INVESTING DOES NOT PREVENT THEM FROM
5 RELYING ON THE PRESUMPTION, US FROM RELYING ON THE PRESUMPTION
6 OF RELIANCE.

7 THE COURT: WHEN DOES, WHEN DOES IT BECOME A
8 PROBLEM? WHEN DO THOSE CONVERSATIONS MORPH INTO A PROBLEM?

9 MS. HALLOWELL: WELL, YOU NEED ACTUAL KNOWLEDGE,
10 RIGHT? AND THERE'S BEEN ABSOLUTELY NO EVIDENCE OF ACTUAL
11 KNOWLEDGE HERE. IN FACT, THE EVIDENCE THAT WE SUBMIT IN THE
12 DECLARATIONS THAT WE SUBMITTED UNDER SEAL, EXHIBITS 8 AND 9 TO
13 OUR REPLY MEMORANDUM, SUGGEST JUST THE OPPOSITE, AND I WON'T GO
14 INTO THE SPECIFICS BECAUSE THEY WERE FILED UNDER SEAL.

15 BUT EVEN IN THE CASE OF ACTUAL KNOWLEDGE I WOULD SAY THAT
16 THERE WAS A CASE RECENTLY THAT IS NOT IN OUR BRIEFING. I HAVE
17 COPIES FOR THE COURT AND FOR DEFENSE COUNSEL FROM FACEBOOK. IT
18 JUST CAME DOWN. THERE WAS ACTUAL KNOWLEDGE THAT WAS FOUND, AND
19 THE COURT STILL CERTIFIED THE CLASS.

20 SO I'D SAY YOU NEED TO AT LEAST SHOW ACTUAL KNOWLEDGE, AND
21 THERE'S ABSOLUTELY NO EVIDENCE OF THAT HERE. IT'S PURE
22 SPECULATION, AND THE ONLY EVIDENCE IN THE RECORD IS THAT THEY
23 DIDN'T HAVE ACTUAL KNOWLEDGE.

24 THE OTHER PART OF THEIR TYPICALITY ARGUMENT AGAIN SEEMS TO
25 BE KIND OF A RIFF ON THIS TRUTH ON THE MARKET ARGUMENT THAT

1 THEY KNEW ABOUT THE WARNING LETTERS OR THEY KNEW ABOUT ASPECTS
2 OF THIS FRAUD.

3 AGAIN, THAT IS COMMON TO THE CLASS. THAT WOULDN'T BE
4 SPECIFIC TO THESE PARTICULAR INVESTMENT MANAGERS. THEY'RE
5 SAYING THE TRUTH IS ON THE MARKET AND THEY ANALYZED THAT TRUTH.
6 THAT'S AN ISSUE THAT GOES TO MATERIALITY AND AMGEN SAYS THAT'S
7 NOT APPROPRIATE AT THE CLASS CERTIFICATION STAGE. AGAIN,
8 THAT'S SOMETHING THAT IS APPROPRIATE FOR SUMMARY JUDGMENT AND
9 FOR TRIAL.

10 SO IT WOULDN'T EXPOSE THEM TO UNIQUE DEFENSES. AND, YOU
11 KNOW, TYPICALITY IS JUST ASKING WHETHER THE CLAIMS AND DEFENSES
12 OF THE REPRESENTATIVE PARTIES ARE TYPICAL OF THOSE OF THE
13 CLASS.

14 YOU KNOW, THERE'S ABSOLUTELY NO EVIDENCE IN THE RECORD TO
15 SUGGEST HERE THAT THAT'S NOT THE CASE. AND ANY ARGUMENTS THAT
16 DEFENDANTS HAVE MADE TO THE CONTRARY ARE TRUTH ON THE MARKET
17 ARGUMENTS THAT WOULD APPLY EQUALLY TO ALL CLASS MEMBERS AND
18 THERE ARE SEMANTICS OF SOME CLASS MEMBERS AND NOT ALL. THERE'S
19 NO EVIDENCE, YOU KNOW, OF IT --

20 THE COURT: MR. CELIO MENTIONED IN HIS PAPERS
21 SOMETHING ABOUT POTENTIALLY UNIQUE, UNIQUE DEFENSES THAT MIGHT
22 ARISE WHICH MIGHT CAUSE SOME PROBLEMS IN REGARDS TO TYPICALITY
23 AND ADEQUACY I THINK ALSO. THEY KIND OF FILTERED TOGETHER. I
24 DIDN'T HEAR HIM TALK ABOUT IT.

25 MS. HALLOWELL: YOUR HONOR, I DON'T THINK THAT

1 MR. CELIO OR DEFENDANTS HAVE PRESENTED ANY ACTUAL PROOF OF ANY
2 UNIQUE DEFENSES THAT WOULD THREATEN TO BECOME THE HEART OF ANY
3 TRIAL.

4 YOU KNOW, IF ANYTHING, THEY'VE PRESENTED TRUTH ON THE
5 MARKET ARGUMENTS THAT THEY'VE KIND OF REHASHED OVER AND OVER,
6 AND I EXPECT THAT WE'LL SEE IT AGAIN AT A LATER STAGE.

7 BUT I WOULD SUBMIT THAT AT THIS STAGE IT'S NOT APPROPRIATE
8 FOR THEM TO RAISE IT.

9 WITH RESPECT TO PREDOMINANCE, THERE SEEMS TO BE TWO MAIN
10 ARGUMENTS HERE. AND, ONCE AGAIN, LET ME JUST STATE THAT
11 PREDOMINANCE IS JUST ASKING WHETHER COMMON QUESTIONS
12 PREDOMINATE OVER INDIVIDUALIZED ONES TO ENSURE THAT THE
13 PROPOSED CLASS IS COHESIVE ENOUGH TO WARRANT CLASS TREATMENT.

14 IT'S UNDISPUTED HERE THAT SCIENTER, LOSS CAUSATION,
15 MATERIALITY, FALSITY AND SUPERIORITY ARE ALL COMMON TO THE
16 CLASS.

17 IT'S ALSO UNDISPUTED THAT PLAINTIFFS HAVE MET THEIR BURDEN
18 OF SHOWING AN EFFICIENT MARKET.

19 DEFENDANTS' EXPERT DOESN'T CONTEST THAT. OUR EXPERT DOES
20 AN ANALYSIS OF TEN DIFFERENT FACTORS.

21 THE COURT: I DON'T THINK THAT'S AN ISSUE. I DON'T
22 THINK --

23 MS. HALLOWELL: YEAH, RIGHT. SO UNDER THESE FACTS
24 ALONE WE THINK THAT THOSE INDIVIDUALIZED ISSUES WOULD NOT
25 PREDOMINATE.

1 IN RESPONSE, DEFENDANTS ARGUE THAT THERE IS ACTUAL
2 KNOWLEDGE HERE SO THAT WOULD REQUIRE INDIVIDUALIZED RELIANCE
3 ISSUES WHICH WOULD DESTROY PREDOMINANCE.

4 AS I'VE SAID BEFORE, AGAIN, I THINK THAT THEIR ARGUMENTS
5 RELY ON A TRUTH-ON-THE-MARKET DEFENSE WHICH IS, AGAIN,
6 INAPPLICABLE AT OR SHOULD NOT BE ALLOWED AT THE CLASS
7 CERTIFICATION STAGE AS IT GOES TO MATERIALITY AND AS RECOGNIZED
8 BY AMGEN, IT'S A VERY FACT SPECIFIC INQUIRY THAT REQUIRES SOME
9 DISCOVERY, REQUIRES THE EXPERT DISCOVERY AND IS MORE
10 APPROPRIATE ON SUMMARY JUDGMENT.

11 IN TERMS OF THEIR ARGUMENTS WITH RESPECT TO THE INDIVIDUAL
12 RELIANCE ISSUE, YOU KNOW, THE FOCUS ON WHAT HAS BEEN RELEASED
13 TO THE MARKET, WE, IN OUR REPLY PAPERS, TAKE A -- WE DO RESPOND
14 TO EACH OF THE THINGS THAT THEY SAY WHAT WAS OUT THERE IN TERMS
15 OF THE PATENT APPLICATIONS AND THE FOREIGN WEBSITES AND
16 WHATNOT.

17 BUT, AGAIN, I WOULD ASK THE COURT NOT TO GET LOST IN THOSE
18 DETAILS BECAUSE, ONE, THEY HAVE ALREADY HAD AN OPPORTUNITY TO
19 PRESENT THOSE ARGUMENTS TO YOUR HONOR ON THE MOTION TO DISMISS
20 AND THE MOTION FOR RECONSIDERATION AND THEY'LL DO IT AGAIN FOR
21 SUMMARY JUDGMENT, BUT NOW IS NOT A TIME FOR THEM TO DO THAT.

22 AND AS I'VE RAISED EARLIER IN TERMS OF THE TYPICALITY,
23 THEIR EVIDENCE OF ACTUAL KNOWLEDGE HERE THAT DESTROYS RELIANCES
24 IS SPECULATIVE AT BEST. THERE'S NO DECLARATIONS HERE. THERE'S
25 NOTHING MORE THAN THEM SAYING PEOPLE MAY HAVE KNOWN BECAUSE OF

1 X, Y, AND Z. THAT'S SOMETHING THAT IS GOING TO GET LITIGATED
2 DOWN THE ROAD, BUT IN TERMS OF PREDOMINANCE, WE'RE ASKING
3 WHETHER THE CLASS IS COHESIVE ENOUGH TO PROCEED AS A CLASS
4 ACTION RIGHT NOW REALLY DOESN'T HAVE MUCH BEARING.

5 THE COURT: I SHOULDN'T LOOK AT THOSE FACTORS AT
6 THIS POINT, AT CLASS CERT? SHOULD I LOOK TO SEE WHETHER OR NOT
7 THE CLASS AS IT'S PROPOSED IS APPROPRIATE?

8 MS. HALLOWELL: ABSOLUTELY, YOUR HONOR. THAT DOES
9 GO TO PREDOMINANCE, AND I WOULD SAY THAT YOU SHOULD LOOK AT
10 WHETHER THERE ARE COMMON ISSUES AND COMMON QUESTIONS OF FACT
11 AND LAW HERE. AND, AGAIN, IT'S UNDISPUTED THAT ISSUES OF
12 SCIENTER AND FALSITY, THE DEFENDANTS ARE THE SAME, THE CLAIMS
13 ARE THE SAME, WHICH IS WHY TYPICALLY SECURITY CLASS ACTIONS ARE
14 EXACT APPROPRIATE TYPE OF A CASE TO -- WHERE PREDOMINANCE IS
15 FOUND AND TO PROCEED AS A CLASS ACTION.

16 THE COURT: AND HOW MUCH PROBING SHOULD I LOOK AT AS
17 TO THE ISSUES THAT MR. CELIO RAISED AS TO THESE POTENTIAL
18 INDIVIDUAL DIFFERENCES THAT MIGHT EXIST?

19 MS. HALLOWELL: I'M SORRY, YOUR HONOR?

20 THE COURT: SHOULD I LOOK AT THOSE AT ALL?
21 MR. CELIO SUGGESTS THAT THERE MIGHT BE SOME PROBLEMS WITH SOME
22 OF THE INDIVIDUALS. AGAIN, I GUESS THIS GETS TO THIS UNIQUE
23 DEFENSE ISSUE AND SOME OF THESE OTHER ISSUES.

24 MS. HALLOWELL: RIGHT. YES, YOUR HONOR, I THINK
25 EVEN IF THERE WERE SOME UNIQUE DEFENSES, WHICH I DON'T THINK

1 MR. CELIO HAS PROVEN HERE, I DON'T THINK THAT HE'S OFFERED ANY
2 EVIDENCE ACTUALLY SHOWING THAT THERE'S INDIVIDUALIZED KNOWLEDGE
3 WHICH WOULD DESTROY PREDOMINANCE OR WHICH WOULD BE AN ISSUE IN
4 TERMS OF TYPICALITY. AS I MENTIONED THE FACEBOOK CASE, IT
5 DIDN'T DESTROY PREDOMINANCE AND IT DID NOT RESULT IN THE CLASS
6 NOT BEING CERTIFIED.

7 THE SECOND POINT THAT MR. CELIO RAISES WITH RESPECT TO
8 PREDOMINANCE IS PRICE IMPACT. AND I WOULD JUST FOCUS ON THE
9 FACT THAT, AGAIN, OBVIOUSLY MARKET EFFICIENCY HASN'T BEEN
10 CONTESTED HERE. DEFENDANTS' BURDEN IN REBUTTING MARKET
11 EFFICIENCY IS TO SHOW COMPLETE ABSENCE AND LACK OF PRICE IMPACT
12 AND THAT MEANS AN ABSENCE BOTH ON THE MISREPRESENTATIONS AND AT
13 THE CORRECTIVE DISCLOSURES.

14 AND IF YOUR HONOR WERE TO LOOK AT THE ARANAZ CASE, I MAY
15 BE MISPRONOUNCING THAT, IT'S CITED IN OUR PAPERS AND THE
16 BARKLEYS CASE AND GOLDMAN, THEY ALL POINT TO NEEDING TO HAVE A
17 COMPLETE PRICE IMPACT IN ORDER TO REBUT THE PRESUMPTION OF
18 RELIANCE.

19 HERE IF YOU LOOK AT THE CORRECTIVE DISCLOSURES, AND
20 THERE'S FIVE CORRECTIVE DISCLOSURES, OUR EXPERT, MR. KAUFMAN
21 HAS OPINED THAT THERE ARE STATISTICALLY SIGNIFICANT PRICE DROPS
22 ON EACH OF THOSE DISCLOSURES.

23 AND IN RESPONSE DEFENDANTS' EXPERT, DR. LANE, ACTUALLY
24 CONCEDES THAT THERE ARE STATISTICALLY SIGNIFICANT PRICE DROPS
25 ON TWO OF THOSE DISCLOSURES.

1 HIS ARGUMENTS WITH RESPECT TO TWO ADDITIONAL DISCLOSURES
2 ARE ISSUES THAT HE RAISES, ISSUES OF LOSS CAUSATION THAT THE
3 FRAUD COULDN'T HAVE BEEN REVEALED. IT WAS SOMETHING ELSE THAT
4 CAUSED THE STOCK DROP TO HAPPEN AND TRUTH ON THE MARKET THAT,
5 THAT THE FRAUD WAS ALREADY REVEALED. THIS WAS ALREADY OUT ON
6 THE MARKET.

7 BOTH OF THOSE ARE IMPROPER INQUIRIES, AS I'VE SAID MANY
8 TIMES BEFORE, AT THE CLASS CERTIFICATION STAGE.

9 SO I THINK THAT HIS ARGUMENTS FAIL IN THE FACE OF THE
10 EVIDENCE THAT WE'VE PRESENTED AND THEIR EXPERT HAS PRESENTED
11 THAT THERE IS, IN FACT, A PRICE IMPACT. NOTWITHSTANDING THAT,
12 IT'S NOT OUR BURDEN. IT'S THE DEFENDANTS' BURDEN TO SHOW A
13 COMPLETE ABSENCE OF PRICE IMPACT AND THEY HAVE NOT DONE THAT.

14 THE COURT: LET ME ASK OVER YOUR SHOULDER,
15 MR. CELIO, AREN'T YOUR ARGUMENTS, MR. CELIO, MORE APPROPRIATE
16 FOR AN MSJ?

17 MR. CELIO: YOUR HONOR, I WOULD BE HAPPY TO PRESENT
18 THEM ON AN MSJ, BUT I THINK THEY'RE ALSO APPROPRIATE HERE.

19 THE COURT: YOU CAN STAY AT THE LECTERN IF YOU WOULD
20 LIKE.

21 MR. CELIO: CERTAINLY AS TO PRICE IMPACT, THE
22 QUESTION IS NOT WHETHER THERE WAS FRAUD GENERALLY.

23 THE QUESTION IS: IS IT THIS FRAUD? AGAIN, THIS IS THE
24 MIX AND MATCH POINT THAT I'M TRYING TO MAKE.

25 YOU KNOW, IF YOU COME IN AND YOU SORT OF SAY, WELL, YOU

1 KNOW, THERE WERE A BUNCH OF THINGS IN THAT PRESS RELEASE AND IT
2 WAS THIS ONE, NOT THAT ONE. THAT'S LOSS CAUSATION, AND YOU
3 CAN'T DO THAT AND WE'RE NOT TRYING TO DO THAT. WE'RE SAYING
4 THIS IS A VERY SIMPLE INQUIRY.

5 JUST AS A FOUNDATIONAL MATTER, AS A FIRST STEP IN THE LOSS
6 CAUSATION ARGUMENT, AND I'M SORRY, NOT THE LOSS CAUSATION BUT
7 THE PRICE IMPACT ARGUMENT, THE CORRECTIVE DISCLOSURE HAS TO BE
8 A CORRECTIVE DISCLOSURE AND YOU HAVE TO MEET THE THRESHOLD
9 QUESTION. IS IT EVEN ARGUABLE, COULD ANY REASONABLE JURY,
10 LET'S DO IT AT THAT -- I THINK I'M TAKING ON A HIGHER BURDEN
11 THAN I HAVE, BUT LET'S DO IT AT THAT SCENARIO, COULD ANY
12 REASONABLE JURY LOOK AT THESE DISCLOSURES AND THINK THAT
13 THEY'RE CORRECTIVE WITH THE THINGS THAT YOUR HONOR HAS LEFT IN
14 THE CASE? IT DOESN'T REQUIRE A SEARCHING INQUIRY. THE COURT
15 DOES NOT NEED TO PARSE ANYTHING.

16 IT'S NOT THERE. ONE OF THEM IS A REPORT OF OUR FINANCIAL
17 RESULTS. YOUR HONOR REJECTED THAT. THAT'S NOT IN THIS CASE.

18 SO -- I THINK IT'S REALLY --

19 THE COURT: YOUR COLLEAGUE OPPOSITE SUGGESTS THAT
20 YOUR EXPERT AGREED THAT THERE WAS A STATISTICALLY SIGNIFICANT
21 FLUCTUATION IN THE PRICE.

22 MR. CELIO: FOR THINGS THAT ARE NOT IN THE CASE.
23 NOW -- YES, HE DID. I THINK HE SAID THAT THERE'S A DROP ON
24 THOSE DATES. I THINK THE STOCK DOES GO DOWN ON THOSE DATES.

25 BUT, YOU KNOW, IT'S NOT HIS JOB TO SAY WHY. I MEAN, I

1 THINK THAT ACTUALLY POINTS TO HIS HONESTY AND HIS
2 TRUSTWORTHINESS. HE SAYS, LOOK, IT GOES DOWN. IT GOES DOWN
3 RIGHT THERE. HE'S NOT ONE OF THESE GUYS THAT ARE GOING TO SAY
4 WHATEVER THE LAWYERS TELL YOU.

5 BUT THEIR BURDEN, AND I BELIEVE STRONGLY, IT IS THEIR
6 BURDEN TO PERSUADE THIS COURT UNDER RULE 301. THEY'VE GOT TO
7 MEET THAT FOUNDATIONAL STEP, WHICH IS IT -- COULD ANYBODY
8 BELIEVE THAT IS CORRECT? WHEN YOU LOOK AT THE STATEMENT THAT
9 IS OUR -- JUST OUR FINANCIAL REPORT, IT SAYS NOTHING ELSE, HOW
10 COULD THAT BE A CORRECTIVE STATEMENT? THAT'S LIKE SAYING THE
11 DAY THAT WE HAVE A NEW PRODUCT COME OUT, THAT THAT COULD BE A
12 CORRECTIVE DISCLOSURE.

13 IT'S NOT A CORRECTIVE DISCLOSURE ANY TIME WE TALK TO THE
14 MARKET. THAT'S NOT RIGHT.

15 AS TO THE TYPICALITY ARGUMENTS, I THINK MY COLLEAGUE
16 OPPOSITE HAS SAID SOMETHING REALLY IMPORTANT. I BELIEVE SHE
17 SAID, IF I WROTE IT DOWN RIGHT, MR. CELIO HAS NOT PROVEN THAT.

18 CONCEDED. NO JURY HERE. THE COURT IS NOT SITTING
19 AS A FACT FINDER. BUT THAT'S NOT MY BURDEN, AND THAT'S NOT THE
20 STANDARD HERE.

21 THE STANDARD IS ARE THERE GOING TO BE ISSUES THAT ARE
22 UNIQUE? AND I WOULD ASK THE COURT TO LOOK CAREFULLY AT PAGES 6
23 AND 7 OF OUR BRIEF -- 6 THROUGH 8 OF OUR BRIEF AND EXHIBITS 6,
24 7, 8, 9, AND 10. I RESPECT MY COLLEAGUE, BUT I JUST DISAGREE
25 THAT THERE'S NO EVIDENCE HERE.

1 YOU HAVE THEIR INVESTMENT ADVISOR SAYING THINGS LIKE WE
2 ARE SOMETIMES AMAZED ON HOW MARKETS CAN BE MOVED BY VERY POOR
3 ANALYSIS, AND WE HAVE THEIR INVESTMENT ADVISOR SAYING THINGS
4 LIKE -- WELL, ACTUALLY NOT SAYING, BUT ON PAGE 7 OF OUR BRIEF,
5 LINES 2 TO 3, "BROWN ADVISORY WENT SO FAR AS TO DISCUSS THE
6 SAFETY ALLEGATIONS DIRECTLY WITH SURGEONS."

7 SO, I MEAN, THERE'S SOMETHING AGAIN THAT IS UNIQUE. YOU
8 HAVE PEOPLE, NOT EVEN JUST TALKING TO THE DEFENDANTS, WHICH
9 THEY CONCEDED THEY DID, BUT THEY ACTUALLY WENT OUT THERE AND
10 TALKED TO THE DOCTORS AND SAID WHAT DO YOU THINK OF THIS
11 DEVICE? IS IT SAFE? IS IT EFFECTIVE?

12 AGAIN, WE DON'T HAVE TO PROVE THAT WE WIN TODAY. WE HAVE
13 TO PROVE THAT THAT IS A QUESTION THAT IS UNIQUE TO THEM AND
14 THAT WE WOULD BE ABLE TO MAKE HAY AT TRIAL, AND I THINK THERE'S
15 NO QUESTION THAT WE WOULD BE.

16 THE COURT: ALL RIGHT. THANK YOU. YOU GET THE LAST
17 WORD.

18 MS. HALLOWELL: THANK YOU, YOUR HONOR. THERE'S NO
19 DISPUTE AS TO MANY OF THE ISSUES THAT OBVIOUSLY WE'VE RAISED ON
20 OUR CLASS CERTIFICATION MOTION SO I WON'T SPEND ANY TIME ON
21 THAT.

22 THE DISPUTES THAT HAVE BEEN RAISED, AS I THINK THAT IS
23 PLAIN, ALL ADDRESS SOME SORT OF PERMEATION OF THE TRUTH IS OUT
24 THERE AND TRYING TO PARSE OUT WHAT THE DROPS HERE.

25 CLEARLY THERE ARE DROPS, AND THEY'RE STATISTICALLY

1 SIGNIFICANT. BOTH OUR EXPERT AND THEIR EXPERT AGREE THAT AT
2 LEAST FOR TWO OF THE DATES THE DROPS ARE SIGNIFICANTLY
3 SIGNIFICANT.

4 WHAT THAT RELATES TO IN MORE DETAIL THAN WE HAVE ALREADY
5 GOTTEN INTO IN OUR COMPLAINT AND AS DISCUSSED AT THE MOTION TO
6 DISMISS STAGE IS AN ISSUE FOR LOSS CAUSATION TO BE DEALT WITH
7 DOWN THE ROAD.

8 IN TERMS OF THE STANDARDS AND CLASS CERTIFICATION AND WHAT
9 AMGEN AND HALLIBURTON HAS SAID IS APPROPRIATE AT THIS JUNCTURE,
10 WE BELIEVE WE HAVE MET OUR BURDEN AND WE WOULD RESPECTFULLY ASK
11 THE COURT TO CERTIFY THE CLASS AND ALSO TO APPOINT HAWAII ERS
12 AND GREATER PENNSYLVANIA CARPENTERS AS CO-REPRESENTATIVES AND
13 TO APPOINT LEAD COUNSEL AS CLASS COUNSEL.

14 THE COURT: THANK YOU VERY MUCH.

15 MS. HALLOWELL: THANK YOU.

16 THE COURT: THANK YOU. I APPRECIATE YOUR HELP.
17 THANK YOU VERY MUCH. THE MATTER IS UNDER SUBMISSION. THANK
18 YOU.

19 MS. HALLOWELL: YOUR HONOR, WOULD YOU LIKE ME TO
20 HAND UP FACEBOOK?

21 THE COURT: OH, YOU HAD A CASE YOU WANTED TO SHARE
22 WITH US; IS THAT RIGHT? THIS IS THE FACEBOOK CASE?

23 MS. HALLOWELL: THANK YOU, YOUR HONOR.

24 (HANDING.)

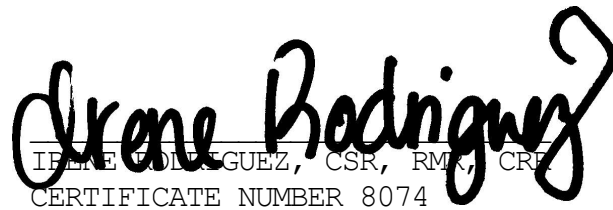
25 (COURT CONCLUDED AT 9:45 A.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.


IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: MARCH 11, 2016