IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR 2:14-MN-2502

TRANSCRIPT OF MOTION HEARINGS
FRIDAY, SEPTEMBER 25, 2015
BEFORE THE HONORABLE RICHARD M. GERGEL,
UNITED STATES DISTRICT JUDGE

APPEARED FOR PLAINTIFFS:

Christian Marcum, Esquire
Mark Tanenbaum, Esquire
Andrea Bierstein, Esquire
Lisa Ann Gorshe, Esquire
David Miceli, Esquire
Clint Fisher, Esquire
Frank Woodson, Esquire
Beth Burke, Esquire
Aaron Dias, Esquire
Josh Mankoff, Esquire
David Suggs, Esquire
Mitchell Breit, Esquire
Eric Johnson, Esquire
Chad Ihrig, Esquire
Lisa Ann Gorshe, Esquire

APPEARED FOR DEFENDANTS:

Mark Cheffo, Esquire
Michael Cole, Esquire
Sheila Birnbaum, Esquire
Ted Mayer, Esquire
David Dukes, Esquire
Loren Brown, Esquire

* * *

Court Reporter: Amy C. Diaz, RPR, CRR
P.O. Box 835
Charleston, SC 29402

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THE COURT: Everyone looks a little more rested than they did at 5:00 yesterday afternoon, I'm going to tell you that.

Folks, let me raise a couple of issues before we proceed to our additional motions. I just sounded my criminal roster for the November/December term. And usually in that roster one defendant will stand up and say, I want a trial. And the typical trial is often just a couple of days. Today four different defendants indicated they wanted trials: One trial was for two weeks; two of them were for a week and one was four days. The Speedy Trial Act says criminal cases trump civil cases. I, you know, usually am pretty tough on continuances. Are you sure you want to go to trial now? Yup. Yup, we are ready. We want to go to trial. And that gives us in this matter, which is set to start on November 3rd, two options: Option one is that we try -- and some judges have done this -- half-day trials. Literally I start one trial in the morning to go to lunchtime, I do the other one and have two juries going in two different courtrooms. It takes twice as long to try the cases. The other option is to move the *Daniels* case to January.

I would like to hear from y'all about what you would prefer that I do.

MR. TANENBAUM: Oh, gee, not a very important decision, right?

Can we huddle?

THE COURT: Absolutely. Huddle. Mr. Tanenbaum, remember the story of Teddy Roosevelt?

MR. TANENBAUM: Yes, sir. I told my wife that last night.

Your Honor, you recall that tire case that I've got with Judge Duffy? I know that we were going to start the second case in January and the tire case was going to be pushed back, as I recall. You had spoken to Judge Duffy --

THE COURT: I will have -- I will talk to him again if I need to.

Mr. Cheffo, what's your thought?

MR. CHEFFO: I think, you know, um, I think January is the most sensible. You know, it's only a few months. And frankly, with a case like this, and you never know the timing and the issues, I think we all probably would benefit from having a jury, and Your Honor and the lawyers being kind of focused in continuing the trial because it's, you know --

THE COURT: I worry about spreading the case. Of course the trial takes twice as long, right?

MR. CHEFFO: It could be six weeks then.

THE COURT: It could be much longer. So I'm concerned about it. And, you know, I know as a practical matter one or more of those cases may go away, but I won't know in time to get it to deal with this. And --

MR. TANENBAUM: When in January, Your Honor?

THE COURT: Oh, I don't know if we know. Ms. Eunice, do we know the January, when we --

MS. RAVENEL-BRIGHT: We don't have it yet.

THE COURT: I think the answer is we do -- the jury terms are approved after a judge's meeting, which is next Friday. So we do it usually early in the month. And my plan would be, just like we were going to do here, whatever day it is, we would -- we would -- would you remember to ask Lena about when -- but we would literally, you know, draw the jury on the day of jury selection. I'll be busy that day, I'm going to be drawing -- I'm thinking about November. We'll draw the jury and then we would begin the next day. I would -- that would be my plan.

MR. TANENBAUM: The 4th of January is a Monday.

THE COURT: We don't draw juries on Monday. The question would be we do it on the 5th or the 6th, and I don't know that -- or the next week.

MR. TANENBAUM: If not the following week.

THE COURT: You know, I would be speculating. They sometimes are on that -- Ms. Lena, have we even submitted a proposal yet, do we know?

I'm going to send one of my law clerks to ask my judicial assistant if we --

MS. RAVENEL-BRIGHT: I'll call right now, Judge.

THE COURT: She's calling her right now.

MR. CHEFFO: That will help us with experts, too.

THE COURT: Absolutely. Listen, this is the last thing I want to do. I just -- I just got a -- I've got to deal with reality here. And I really -- you know, it's so funny because I am just like really tough on continuances. Y'all have seen me. And it was like, Are you sure you are ready? You've got everything? Yes, sir, we've got everything. All the discovery? Yes, sir, everything. No pending -- oh, no, no. Any Superseding Indictments? No, sir.

So Mr. Tanenbaum knows that shortly after I arrived five years ago he was on his ninth continuance in a case and I denied it. And he called my friends in Columbia and said, What's this Gergel? He's like tough. He won't give us continuances. And then the defendants paid him a lot of money and he winds up thanking me.

MR. TANENBAUM: Like y'all's stories, there are two sides. There is only one today.

THE COURT: It was the ninth continuance.

MR. TANENBAUM: It was.

THE COURT: That part is true.

Ms. Eunice?

MS. RAVENEL-BRIGHT: She's going to e-mail me, Judge. She's looking for it.

THE COURT: Okay. Second issue, I would like additional briefing, very brief, you know, not elaborate, but on the issue of dosage. And I'm going to direct that the parties provide me briefs by September 29th, simultaneously, on issues of whether dosing affects the issue of causation and at what level. And then I'll have -- I will have the parties reply to the other three days later on October 2nd.

Issue of dosage. I asked a question yesterday about dose equivalence. What is so many milligrams of Crestor compared -- because I'm -- you know, intuitively I know that patients move among these various statins, and doctors routinely have to -- have to set dosage levels. And I just went on that most reliable of all scientific sites, on the Internet, and put Crestor/Lipitor dose equivalents, and I obtained numerous tables which were all the same.

So I will ask you to address this issue in your dosage brief to confirm this, but what it indicated on the chart was that 80 milligrams of Lipitor is equal to 20 milligrams of Crestor. That's what the equivalency chart shows that I looked at. Is that correct? Is that disputed?

I won't be able to tell you on the date. For some reason it's January 20th, and I don't want to wait until January 20th. So I'm going to check and see if I can't adjust that. And I'm not quite sure how they set that schedule. It's not something I usually pay much attention

to, but we will address it and try to do it earlier. Very soon I'll let y'all know because y'all need to make proper preparations.

So on the issue is is that disputed, that 80 milligrams is roughly comparable to 20 milligrams of Crestor, okay? I want y'all to address that.

And finally, I think, Mr. Cheffo, you had made some reference to providing the Court the -- those slides you had. And we would like a copy of those before -- you know, because we are having trouble keeping up with all your arguments, and I would like to have the source for those.

MR. CHEFFO: We'll provide them to the plaintiffs. Some of them we didn't know what we were going to use. We'll give them to you hard copy and electronic, as well.

THE COURT: That would be great.

Okay. So where we are at now having those addressed -- I've dropped the biggest bombshell which I'm not too happy about -- we are now going to turn to the issue of efficacy.

And I would like first to address the testimony of Dr. Martin Wells.

MS. BIRNBAUM: Good morning, Your Honor. May it please the Court? My name is Sheila Birnbaum and I'm here representing Pfizer. And I will go right to Dr. Wells, although I did have an opening statement.

THE COURT: You are welcome to do the opening statement. I wasn't trying to cut you off.

MS. BIRNBAUM: Then I'll go to Dr. Wells second, but I think it might help if we just lay it out generally. Because with these experts it's not as complicated as I think it was yesterday.

THE COURT: Yes.

MS. BIRNBAUM: And I would suggest we could handle all of the experts in one fell swoop.

THE COURT: Well, I tell you what, you are a very smart lady and I don't doubt you can do that. I have trouble, because I've got to do it witness by witness, and even where it's a little bit duplicative, it helps me to get down on the weeds in each individual one. So I would have you to do it that way. But I would be glad for an opening statement. And anyway you want to do it, thematically or anything, is fine with me.

MS. BIRNBAUM: That would be fine. And I'll start with Dr. Wells after the opening.

Let's start with the overview here of what we think the plaintiffs are alleging and our response to it. And the plaintiffs' experts, I think -- and I say that "I think," and we'll get to that issue -- they opine that there is no evidence that women should take Lipitor for primary prevention. And we say, Your Honor, that --

THE COURT: Well, do they argue that the defendant simply hasn't proven it or do they argue that it's not effective?

MS. BIRNBAUM: Well, I think they argue both. And that's what I would like to take you through perhaps.

THE COURT: The brief itself says -- I mean, the way I read it -- and, you know, it's hard when you've got lots of material -- but it looks like to me that the defendant's briefing says they are only claiming the defendant didn't prove it. But their experts go further and claim that it's not effective.

MS. BIRNBAUM: You are absolutely right.

And if we go to slide 4. I think we have to see exactly what they are saying and what their experts are saying and what they say in their opposition brief because it's a changing target. It's a moving target here. And I think it doesn't make a difference in the end, as I think we will explain, but in their --

THE COURT: You say it does or it does not?

MS. BIRNBAUM: Does not.

THE COURT: Why is that?

MS. BIRNBAUM: At the end of the day it's two sides of the same coin. They can't shift the burden of proof to us to show that it is effective. So they can't just say, Well, there is --

THE COURT: To say that you haven't proven it's effective doesn't prove anything.

MS. BIRNBAUM: Right.

THE COURT: I mean, you can -- you know, I mean, that just leaves you at -- you know, they say -- they can cross-examine, they can --

MS. BIRNBAUM: They can cross-examine, Your Honor.

THE COURT: -- they can do all that. But in the end, if you have evidence that it's effective and the jury isn't persuaded that that's not scientifically valid or, you know, meritorious in some way, then you win. And in motions I've got -- to the extent you survive *Daubert* -- just saying it's not effective doesn't get them anywhere.

MS. BIRNBAUM: I would agree with you wholeheartedly, Your Honor. And that's why, when we look back at their Complaint, they do allege that the defendants had a duty to disclose that Lipitor was not effective in women. So they start off with that premise. They say we haven't demonstrated that it -- it is effective. And --

THE COURT: Usually a deception is thought that you say something that isn't true, right?

MS. BIRNBAUM: Right.

THE COURT: You misrepresent something. Not that it's debatable, right? That's not normally deception.

MS. BIRNBAUM: I would say, Your Honor, it's not

even debatable in this case any longer that it is ineffective in women. And that the generally accepted science, and that all of the medical groups that are involved in these issues and the FDA and regulatory bodies all come to the same conclusion. The only people that seem to be coming to a different conclusion are plaintiffs' experts. And their conclusion is not supported by the science. It's not supported by certainly the generally-accepted science.

And it is wrong for all kinds of reasons. Because they don't look at the totality of the evidence and they also don't have a biological explanation for how this could work in men for primary prevention and it doesn't work in women.

So for all of those reasons, it just doesn't make any scientific sense.

THE COURT: I want you to start -- if you have -- this is not an esoteric issue of medicine, right? I mean, this has been a subject of tremendous medical research; and understandably, it's the most prescribed drug in the world. Statins are widely used. Tens of thousands of practitioners prescribe it to millions of patients. And there has been a significant body of medical research on these issues. I mean, no question about that. And all the peer-reviewed literature goes one direction, and the -- as to effectiveness, which I mentioned briefly yesterday. It's a little different than this glucose increase. There are --

there is sort of research all over the place, conclusions all over the place on that issue in which everybody has something they can point to to support their argument. But in this one, of the peer-reviewed literature, there really is nothing.

And of course, the case law tells us that when you are offering an opinion in litigation that is essentially -- that every study goes the other way, obviously we approach it with a bit of skepticism. We are looking at methodologies and so forth. But we scrutinize it because how did everybody get it wrong and only the people who are being paid by the parties seeking to advocate it take the opposite position? It obviously is something that demands a level of court skepticism and scrutiny.

And, you know, we don't have any -- you know, when we look at it, there is a lot of attacking of the studies, they weren't done right. That's a sort of theme of all of these, is that when the conclusion comes out a certain way, it's not done right. But what is a problem -- obviously we'll get into it with Dr. Waters -- is he doesn't seem to consider some of the most important current data on this, which is -- which is problematic. I mean, it is.

MS. BIRNBAUM: Well, Your Honor, you've sort of done my opening statement, and so maybe I should just move on. You've done it as -- better than I could have done it,

I think.

But you are absolutely right on several -- on all of these points. One, there is no evidence on the other side. It's only the plaintiffs' experts trying to --

THE COURT: They self-refer. They all refer to each other.

MS. BIRNBAUM: That's exactly right.

THE COURT: It doesn't mean that -- you know, it is certainly plausible that the entire body of medicine got it wrong and these guys got it right. I mean, that's possible, maybe. You know, you wouldn't think the odds are great, but it's possible. So they have their -- they have their opportunity to show their methodology, to show their science, to show what they have and show their data. But when you do that, you realize, hey, you know, they are not showing this study and that study. They didn't consider the underlying data from the American Heart Association. What you are realizing is that they are just basically cherry picking data and really, unlike the issue of the glucose effects of Lipitor, they have almost nothing to point to. I mean --

MS. BIRNBAUM: They don't have one peer-reviewed published study.

THE COURT: There is no equivalent of SPARCL or JUPITER or anything like that. It's just not there.

And so they are left just to bad mouth the other

studies, and, you know, you didn't do this right and that right. And, you know, again, it's possible, I -- I'm prepared to scrutinize it. It's just notable that some of the most compelling evidence seems not to even have been evaluated.

MS. BIRNBAUM: The meta-analysis which they are attacking have been peer reviewed. They are independent. There is no claim that they are not independent. They are brought by world class scientists in this field looking at these issues.

And when we get to the CTT 2015 study -- I think I would like to take you through that study because I think it's very important of what it tells us because it puts to rest any kind of debate there might have been. And what you have --

THE COURT: I mean, that's the study where it says 21 percent reduction and all that? I mean, it's just -- you know, it's a -- I mean, they get it wrong or something, great, let me hear about it. But, you know, when Dr. Wells says he didn't even consider it, that's a problem.

MS. BIRNBAUM: Well, it's like all of these experts. They seem to be -- back in 2004 they attack the ASCOT study as not being gender -- applying to both genders, even though the FDA didn't conclude that.

THE COURT: But they -- you start with something to

talk about, okay? I mean, they -- they -- I mean, you've got the statement that it's, you know, that there wasn't enough evidence to really reach a conclusion. But for other reasons, the FDA concluded that there were -- there was sufficient reason to provide it to men and women. If we stop right then, you might have an argument you haven't proven it's effective.

But there is a whole body of studies that then follow completing -- you know, culminating in the CTT study that you've got to say, okay, unless there is something really wrong with this stuff and you don't have any other studies that -- peer-reviewed studies that tell us anything different, you've got to say that's a tough argument to make.

MS. BIRNBAUM: And if you bear with me. If we go to slide 22. I would like to just pinpoint what this CTT study did.

If you look at what it was meant to do, it was undertaken to answer this exact question, where the statin therapy is effective for both men and women. That would -- and it's the largest meta-analysis done to date. It includes 27 randomized trials, 174,000 patients, 46,000 women, and what do they conclude? This is what is so important. In men and women at an equivalent risk of cardiovascular disease, statin therapy is of similar effectiveness for the prevention of major vascular events.

And their conclusion is even more interesting because it puts to rest any question that there could have been.

Using individual participant data, they went back to the individuals in the present analysis of the CTT collaboration database -- this is one of the largest databases in the world for these issues -- we have been able to demonstrate conclusively, conclusively that among women and men who had similar risks of major vascular events, the proportional and absolute effects of statin therapy on major vascular events and mortality were similar.

And then they get to this. This is true not only among high risk populations with established CVD, but also in statin therapy that was used for the primary prevention of major vascular events in low risk populations. And it isn't only the CTT.

And by the way, Dr. Abramson said that the CTT's meta-analysis is the best that we can get. Nobody questions it, except Dr. Wells who says, Well, they should have left this out. They should have left that out. They should have left something else out.

THE COURT: Didn't he make the statement that he cannot really dispute his conclusions?

MS. BIRNBAUM: That's absolutely right, Your Honor.

THE COURT: If you can't dispute the conclusions, it's over, right?

MS. BIRNBAUM: I totally agree with that, Your Honor.

And just one other -- the Cochrane 2013 -- this isn't the only one, this has been going on for some time. Another objective to assess the effects, both harms and benefits of statins in people with no history of CVD, that's primary prevention. And what do they conclude? Men and women, old and young and people with and without CVD all appear to benefit from statins.

And I would just like to do one more with Your Honor before we move on because -- and I like the conclusion that the Kostis office came to in 2012. So we have been working backwards. But this has been -- this has been decided a long time ago, if there was any dispute at all. And they say: "Meta-analysis by level of risk indicated a statistically significant benefit of statin therapy at all levels of risk in both women and men for the primary event."

And Your Honor talked about what was good for the goose and good for the gander. And they conclude, it seems with respect to statin therapy, what is good for the gander is good for the goose.

And I think the overall -- we have others, but we are not going to go into them now -- but I would like to go to slide 28 because this is also something they have no response to. These are the leading --

THE COURT: I mean, are these folks just sort of shills for Pfizer?

MS. BIRNBAUM: I doubt it.

THE COURT: Most of the cardiologists I know are not fans of pharmaceutical companies.

MS. BIRNBAUM: They are not. And this is all based on evidence-based information.

They go and look at the underlying studies, at the meta-analysis. They want -- this is the information they are giving to cardiologists, people who treat diabetes, internists, everybody in the country, doctors. And what do they say? They say statins are recommended because of success in all patients with diabetes aged 40, and if clinically indicated, it's the first-line drug therapy in both primary and secondary prevention. What's the answer to that? They don't have an answer. Dr. Rau (ph) says, I can't -- I can't know whether they did the right thing. I don't have the underlying information --

THE COURT: But it's cited on their -- their statements refer, as I understand it, to the data from which they base those recommendations.

MS. BIRNBAUM: That's exactly right.

THE COURT: It's available.

MS. BIRNBAUM: It's all available, but he didn't bother looking at it.

THE COURT: They talked about some black box on the panel. There are no black boxes on this.

MS. BIRNBAUM: There are no black boxes at all. And they are all available in the public domain.

When you look at the clinicians who didn't give these opinions, that there are their experts, Dr. Singh, he says women benefit clinically from Lipitor, lipid-lowering therapy. He prescribes it for both men and women. This is the real world. This is what clinicians do. This is what thousands of doctors around the country are doing. They are prescribing it for women for primary prevention.

And, you know, Your Honor, in the real world there are real consequences of this. Women die of heart disease. They are undertreated. They are undertreated for prevention. And we think, you know, all of us somehow, that breast cancer is the leading cause of death; it's not. It's heart disease for women. And one out of four women are going to die of heart disease. And they don't get treated the same as men. And they don't -- and they are --

THE COURT: You think they should have more statins; not less?

MS. BIRNBAUM: I take it. I think everyone should take it. I know it's keeping me alive.

THE COURT: I don't know from the *Daubert* analysis it is a particularly important consideration, but I find it

at least of interest that the two plaintiffs who we've designated for bellwether trials continue to take the medicine, not withstanding their role as plaintiffs in this lawsuit. And there may be independent reasons and all that, it's just striking to me that if it was such a toxic medication you wouldn't be taking it.

MS. BIRNBAUM: There is no question, Your Honor.

For diabetics it's a first-line treatment. All diabetics are probably taking some sort of statin. It is a first-line treatment for diabetics. So it's doing something to prevent heart attacks, stroke --

THE COURT: I was talking about high risk, the high risk group.

MS. BIRNBAUM: Let me make one other point and then I'm going to get to Dr. Wells.

THE COURT: I'm going to let Ms. Bierstein respond to your opening statement before you do that, so that we don't sort of --

MS. BIRNBAUM: That would be fine, Your Honor.

THE COURT: Okay.

MS. BIRNBAUM: There are several things here that are undisputed, LDL, low density Lipitor, the bad cholesterol is a risk factor for cardiovascular disease in men and women. Nobody disagrees with that, except maybe Dr. Roberts, which we'll get to. Lipitor reduces LDL in both men and women.

Everybody agrees with that, all of their experts. And they all agree that Lipitor reduces the risk of second heart attack and stroke in men and women.

So next slide. One would ask the question: Why would Lipitor reduce LDL in men and women but only reduce cardiovascular disease in men and not women? Why would Lipitor reduce the risk of a second heart attack in women but not in a first heart attack? And every single one of plaintiffs' experts, when they are asked this question, have no answer. They cannot explain, any of them, how this can be biologically plausible.

And the next slide. And without a reliable biological foundation, plaintiffs' experts' opinion amount to exactly what we have here: Speculation and potentialities that are built on an unsupported hypothesis and are fundamentally flawed.

Your Honor, I think when we look at the entire generally accepted, the totality of the evidence, the recent meta-analysis, what all of the health authorities are doing, is unacceptable, I think, to even argue that this has no benefit for women in primary prevention.

Thank you.

THE COURT: Thank you, ma'am.

Ms. Bierstein?

MS. BIERSTEIN: Your Honor, I'm just going to need

to take just a minute to --

THE COURT: Take your time.

MS. BIERSTEIN: -- to hook up the laptop here because I've got some slides to show the Court.

THE COURT: I'm not trying to disrupt you. I thought you might want an opportunity to answer that.

MS. BIERSTEIN: I appreciate that. I was going to ask for that because I do have an overview and I would like to be able to show it.

Your Honor, I'm going to talk about the lack of evidence of efficacy in women and --

THE COURT: Let me ask you first: Is your position that it -- that the defendant hasn't proven efficacy or Lipitor is not effective in women for primary purposes?

MS. BIERSTEIN: I wouldn't phrase it that way. Our position is more like the former. But I'm going to explain to you why it's not exactly like the former.

Our position is there is no statistically significant evidence that Lipitor is effective for primary prevention in women. We are talking about the lack of evidence. We are not asserting that there is affirmative evidence that Lipitor is not effective in women; we are asserting that there is no evidence of efficacy.

Now, why does that matter in terms of the burden shifting that Ms. Birnbaum referred to? I'm going to get to

that.

But what I was going to tell you about my overview, I've got four points to make in the overview. So I wanted to let you know what I was going to make and the order I'm going to do it.

THE COURT: Well, I don't want to interrupt you, but let me sort of get this. So for those experts who want to testify that it's not -- Lipitor is not effective as a primary prevention for women, that's not part of your claim?

MS. BIERSTEIN: None of our experts want to testify to that, Your Honor.

THE COURT: I frankly read their testimony and --

MS. BIERSTEIN: I understand.

THE COURT: -- and they say exactly that.

MS. BIERSTEIN: I understand.

THE COURT: Particularly Dr. Roberts.

MS. BIERSTEIN: I understand what's in the deposition testimony, Your Honor, what's in the reports. It's the opinions we are offering at trial. What's in the deposition testimony are the personal opinions of the experts that were elicited by Pfizer at their depositions, which they have personal opinions on a lot of things that they are not offering to a reasonable degree of medical certainty.

THE COURT: You wouldn't mind me -- to the extent I allow the not proven testimony -- you wouldn't mind me

granting a motion in limine about anything else?

MS. BIERSTEIN: Um, well, I would have to see the motion in limine. But in terms of the *Daubert* addressed to these expert reports --

THE COURT: Not effective, strike it, won't be allowed to testify to it. You won't have a problem with that?

MS. BIERSTEIN: I haven't seen the motion.

THE COURT: Basically, I think that's a sufficient question. Is that yes or no?

MS. BIERSTEIN: I have no expert report that says it is not effective in women.

THE COURT: Answer my question. If the defendants made a motion in limine --

MS. BIERSTEIN: Yes, Your Honor, I would agree.

THE COURT: Thank you. Okay.

MS. BIERSTEIN: I would agree with that.

I'm going to show you what our experts actually do say. So -- but here is the order I want to do this in. First I want to show you the science, because I think the science is at the heart of what Ms. Birnbaum was talking about. And I think what's been shown to you does not give you an accurate picture on the state of the science of this issue.

After I show the science, I want to show you what

our experts actually say in their reports, the opinions that they are prepared to offer and how they align with the science.

Then I want to show you what we are not saying, and then I want to show you why there is no issue about burden shifting, why what we are saying is both relevant at this trial and sufficient for what we have to prove to make out our case. So that's -- that's the order I want to take this in.

Now, I want to start -- maybe before I get to the first slide because I don't have a slide on this -- with two of the studies Ms. Birnbaum talked about, the Kostis 2012 and the CTT. And what I want to note about those, Your Honor, is those are studies of all statins aggregated.

In the CTT meta-analysis, there are only two studies that actually involve Lipitor. Those two studies are ASCOT and CARDS. And that's what I'm going to be talking about is ASCOT and CARDS because those are the Lipitor-specific studies. The Kostis meta-analysis only includes one study that involved Lipitor and that was ASCOT. Because so far as I am aware, there are only two Lipitor-specific studies on this question, and out of those two are ASCOT and CARDS.

So I want to look at what is the data on ASCOT and CARDS? And I'm not looking at what our experts have said about it. We'll get to that later. What I'm going to show

you in these slides is what Pfizer said about ASCOT and CARDS, what the FDA said about ASCOT and CARDS and what the published literature has said about ASCOT and CARDS. Remembering that anything different in CTT and in Kostis has to do with the fact that they are looking at all the statins and they are telling you statin therapy is effective when you look at 27 studies of different statins, but the only studies that were Lipitor specific there are ASCOT and CARDS.

And by the way, I should mention in the Kostis, if you look on the Kostis article as published on the Web, even the Kostis article says no statistical significance for an effect in women. But let's go to ASCOT and CARDS because I think that's really what's at issue here, okay?

So the Sever paper, the 2003 ASCOT published paper, this is a Pfizer-funded study. This was the analysis of the ASCOT data. What did Sever say? No benefit was apparent among women. Okay. There is some other analysis about why that matters or doesn't matter or what we can extrapolate. What Sever said was no benefit was apparent among women, okay?

Now, this is a little tricky because it's some charts here that may be a little hard to read. This is Pfizer's analysis that they submitted to the FDA.

Now, if you look at the chart at the top, you see there is a solid line at the top and a dotted line at the

bottom. If I knew how to make this point, I would do it. I'm sorry.

MR. MARCUM: I think if you click again it might actually pull out.

MS. BIERSTEIN: Oh, yeah. But I don't want that. I want the chart.

THE COURT: Let me ask you: Is it your -- the plaintiffs' position that I should simply not consider in any of these -- in any of these *Daubert* motions any evidence regarding any other statin other than Lipitor?

MS. BIERSTEIN: That is not our position, Your Honor. But I think the question here is whether our experts have enough basis to say that Lipitor is not effective for primary --

THE COURT: You know, one of -- Ms. Bierstein, one of the complaints I have is we look at one study -- and I don't want to beat up Dr. Jewell any more than we already have -- but he -- you know, he would view a certain set of rules to evaluate a study. And then we go to another study and he uses a completely different set of rules because the one before wouldn't have produced the result he wanted. So it seems to me that one of sort of the hallmarks of proper inquiry is that we measure everything by the same standard.

And you are now arguing that certain -- I guess the argument is is that maybe Crestor is effective but Lipitor

isn't? Is that basically the argument?

MS. BIERSTEIN: Your Honor, the argument is not that Lipitor is not effective; the argument is there is no evidence that it is.

THE COURT: Well, let me ask you this --

MS. BIERSTEIN: There are only two studies that are studying whether it is.

THE COURT: Is there evidence that statins are effective with women?

MS. BIERSTEIN: I am not -- there are published papers that say that. I am not enough of an expert to tell you whether those papers have correctly analyzed the evidence.

THE COURT: That's not my question. Are there peer-reviewed studies that say -- they don't differentiate -- that say that statins are effective in primary care for women?

MS. BIERSTEIN: Yes, there are, Your Honor.

THE COURT: Okay. And those studies deal -- these are -- these are presumably people who are expert in the field, in this area, as they were writing these peer-reviewed articles?

MS. BIERSTEIN: I don't know who wrote the articles and I don't know who funded them. I'm not saying they are not, I'm really not. I'm just telling you -- you are asking

me a question I don't know the answer to.

THE COURT: Let's assume that these are peer-reviewed articles and that these authors presumably placed all these statins together because they felt they were -- that was an appropriate grouping. Obviously they thought that, correct?

MS. BIERSTEIN: I assume since they published it that way that's what they concluded.

THE COURT: And they concluded that statins were effective for men and women, correct?

MS. BIERSTEIN: They -- some of -- there are papers that conclude that, yes, Your Honor.

THE COURT: Are there studies that suggest that certain statins are effective with women and certain statins are not?

MS. BIERSTEIN: Your Honor, each of the statins, as I understand it, was separately studied because each statin had to submit specific information to the FDA to get an indication.

So for example, to get an indication that it was effective for primary prevention in women, pravastatin had to have pravastatin-only studies that established that it was effective for primary prevention in women.

And the same is true for each statin that was demonstrated to the FDA with statin-specific evidence to the

extent that it -- that they have a specific indication. Lipitor does not have any Lipitor-specific evidence about primary prevention.

THE COURT: Yes, sir?

MR. MARCUM: If I could have you take a look at the Web appendix to the Kostis article that was cited by Ms. Birnbaum and Ms. Bierstein. And it breaks down a number of studies of meta-analysis and looks at the primary outcome for primary and secondary studies. And it breaks it out by gender.

And I believe if you look at that, you will see that the JUPITER study for Crestor is, I think, the only one that demonstrates a statistically-significant benefit for women in primary prevention on the primary outcome of the study.

And Dr. Shaddox, who is one of their experts, testified and said in his report that a study is best judged by its primary outcome and so -- we can provide it to you. I'll be happy to provide it to you.

But maybe, to more directly answer the question, I think JUPITER may be the only one that has shown a statistically-significant benefit for primary prevention in women on the primary study outcome.

MS. BIERSTEIN: Your Honor, if you let me get through my presentation, I have a slide about what Pfizer said about JUPITER on that point.

THE COURT: Let me tell you, I do appreciate your argument, but I -- this is ultimately for the benefit to help me decide. So I don't want to disrupt your -- disrupt your presentation, but I'm trying to learn this, and I'm doing the best I can. And asking you questions helps me, and not sort of sitting back like a mummy and waiting for you to tell me stuff.

MS. BIERSTEIN: I would like at the end of your questions to have a chance to make my presentation, as well.

THE COURT: I'm not trying to do that, but I -- you know, I have been on both sides of this. I made lots of argument to courts, and you've got to appreciate that a presentation is just your plan to convince the Judge. In the end you've got to go with the flow and sometimes it doesn't -- the play doesn't quite come out the way you want to. So I'm trying to ask you questions, but I want to give you a chance to make your argument.

Now, I'm just trying to -- I'm struggling with this issue about is there evidence to suggest that among statins it matters about effectiveness? I mean, that is our -- are these drugs -- is there data suggesting that some are effective and some aren't? I'm just trying to figure that out.

MS. BIERSTEIN: Well, I think, as Mr. Marcum explained, in many instances they don't get a result in

women. And the question is, can we extrapolate the result from men?

As Mr. Marcum pointed out, the only study that we know of that was specific in terms of finding the benefit in women is JUPITER.

So in terms of are there studies that are comparing one statin, you know, comparing one to another head to head on efficacy in women? I'm not aware of any.

THE COURT: It does seem to be a premise in these studies that lump these statin studies together -- that they seem to think that there is sort of a general validity. I did make a note, because y'all were making a point, that Lipitor was a subpart of every one of these and that there were specific studies that used Lipitor specifically.

But it does appear that the -- in this peer-reviewed literature, that they think it's a valid exercise to look at statins generically as opposed to simply looking at individual products. I mean, that appears to have been a sort of premise of this. And I'm asking, is there some question, is there some evidence that that premise is inaccurate?

MS. BIERSTEIN: Your Honor, there is definitely a premise that it is scientifically useful to survey the evidence of all the statins. What conclusion the scientists draw from that aggregation or the extent to which some of the

articles find it also useful to break out the statins, as some of them do, is a totally different question. The fact that they think it's useful to look at aggregates is not the same thing as saying they think the results are the same for everybody; it means they think there is some research and educational benefit in looking at the universe. If you drill into it --

THE COURT: They just -- they reach a conclusion: Statins are effective. You may think that is an invalid conclusion to reach.

MS. BIERSTEIN: I don't think it's an invalid conclusion, Your Honor.

Here is what I think: I think if I'm a doctor and I'm prescribing to a woman and I see that statins are effective in women, I have to choose a statin -- I've got the paper that says statins are effective, but now I've got to decide which statin am I going to put this patient on? And when I get to that question I'm going to look at the specific risks and specific benefits of the particular statin. The paper is helpful to practicing doctors to tell them I should be looking at statin therapy for my patient.

But when the the doctor gets to the particular question of, Am I going to give this woman Lipitor? I think that there is an issue of looking at what might it do to her to harm her and how certain are we? What's the evidence that

it will help her?

And so I think the fact that people have put out studies saying statins are effective and aggregating them doesn't mean that those scientists are saying, and it doesn't matter which one you take. I don't think we can infer that from the existence of the paper.

THE COURT: Do the plaintiffs take the position that Crestor is effective with women in primary prevention?

MR. MARCUM: I think that's what the data shows. I mean --

MS. BIERSTEIN: We think the data shows that.

THE COURT: Are there any other statins that are effective other than Crestor?

MR. MARCUM: Primary prevention?

THE COURT: Primary prevention of women.

MR. MARCUM: I would have to look at the Kostis meta-analysis to be sure -- that's the other thing, we need to pay attention to the outcomes of these studies as they were designed and what they were designed to measure. Some of them were designed to measure the prevention of heart attacks or strokes; some of them were designed to study a reduction in mortality, cardiovascular mortality.

And Your Honor, when we are talking about, for example, the 2015 CTT meta-analysis where it finds effectiveness for women is by after the fact creating a

composite end point, not looking at sort of the primary end points of each of the studies as they were designed, but creating a composite end point that includes a lot of different events and doing sort of a post hoc analysis of those.

THE COURT: And I understand, Mr. Marcum, you think that's not a valid -- you are sitting here arguing that's not a valid method. Obviously, the authors of the CTT think it is.

My question is this: Do you have expert testimony that says that methodology is invalid?

MR. MARCUM: I think actually our experts would criticize that methodology.

THE COURT: Do they --

MR. MARCUM: I think John Abramson, Dr. Abramson's report very directly criticizes the process by which the CTT --

THE COURT: We'll get to whether he has the expertise to make such a criticism.

But the question is -- I mean, I'm -- obviously, these studies seem to think lumping these together, grouping them together, is a scientifically valid thing to do. And do you have testimony, other than you were saying Dr. Abramson makes that testimony -- the family practitioner we are talking about?

MR. MARCUM: Yes.

THE COURT: Other than him, do you have anybody that really has expertise to say, Okay, it's not scientifically valid?

MR. MARCUM: I don't think that the point -- and I don't think even Dr. Abramson would say that conducting a meta-analysis is improper. They are very -- they could be very useful obviously for lots of different reasons. I think his criticisms would go to the creation of a composite end point that wasn't necessarily part of the original study designs.

But I think the point that Ms. Bierstein is trying to get to -- and I think it's very important -- is that when a doctor is making a decision or a patient is making a decision about whether or not to take a particular medication, the primary outcome of the study of the drug that's being recommended to that patient is of critical importance.

And if you have study results, like I think you will see here, that show, for example, that in ASCOT that Lipitor does not reduce mortality in women; and in fact, it was increased. And it doesn't reduce the primary outcome of that study, which is nonfatal heart attacks or coronary heart disease, but in fact, that was also increased, that that's critically important information when making a decision about

taking a particular drug.

So while it's all well and good to look at the whole body of evidence, to make a general decision --

THE COURT: It's so interesting you -- in the ASCOT study when we were talking about the effect of diabetes, Oh, that is a worthless study, not enough women. And then the same group, Oh, that is the end, that is -- I mean, it's just like, you know, okay, what question do we want to answer and then we'll use that standard. Is ASCOT good or not good?

MR. MARCUM: We were happy to use ASCOT to talk about diabetes, but you seem inclined to not let us do that.

MS. BIERSTEIN: We are not being inconsistent here because we think ASCOT doesn't show -- you say we are criticizing ASCOT. We think ASCOT doesn't show a benefit in women. We are not raising the flag of saying we love ASCOT, we are saying --

THE COURT: Here is my complaint --

MS. BIERSTEIN: Can I show you the slide, Your Honor?

THE COURT: Just a moment. Just a moment.

Your problem, it seems to me, is ASCOT is run down on the issue of diabetes because there are not enough women in the pool. And it was recognized that was a weakness of that study. And then you want -- because of this inadequate number, you want to seize upon this, obviously the FDA wasn't

impressed that that meant much. And then there are these subsequent studies, which at least the scientists, the authors writing it seem to think that it can be generally statins are effective for women. And you want to say, Oh, I don't like those studies, they are not Lipitor exclusive. It's just like you want to point to them for other purposes, group studies, because they suit your interest.

We ought to be measuring things by a consistent standard, isn't that sort of the fundamental scientific methodology? So we don't have a little grab bag full of tricks that we pull out when we don't get our result. We predetermine the standard and then we apply it, and the result is the result.

MS. BIERSTEIN: Your Honor, I think that's an inaccurate description of science.

I think the problem here is multiple. I think, first of all, there is not a yes or no answer in science. There is a lot of judgment. And different scientists look at something and they use different judgment. There are also different tools and methods and they are not all appropriate for every circumstance.

So a scientist doesn't simply say: Regardless of the data, regardless of the circumstance, I'm always going to use this particular paradigm. What we have is an exercise -- this is why I'm not a scientist, because it's not

enough for me to read a study and say, I'm going to use the same criteria in every one, and I'll stand in and I'll come in instead of the experts. It's what they got from their training is the experience and judgment. It's like the way lawyers are. We read the same case and we read it differently. And so --

THE COURT: Can you point to any --

MS. BIERSTEIN: And sometimes we think it matters that an interesting point was made in dissent, and sometimes we say, oh, that's only a dissent. And sometimes we say this dicta is really significant, and sometimes we say it doesn't matter, it's only dicta.

THE COURT: I understand that there could be legitimate disputes. Obviously on the issue of diabetes, it's all over the place on that issue.

Can you point to me anybody in the peer-reviewed literature that indicates that Lipitor is not effective -- can you point to anybody, peer-reviewed literature, anybody else who isn't being paid by the plaintiff who takes that view?

MS. BIERSTEIN: We are not contending that Lipitor is not effective.

THE COURT: Can you point to me anybody other than somebody who is being paid by the plaintiff in the peer-reviewed literature that says Lipitor is not effective

regarding women?

MR. MARCUM: Your Honor, you can look -- and we'll provide all of this to you -- you can look at the NCEP, the National Cholesterol Education Program guidelines. They have questioned the effectiveness of not just Lipitor, but statins in general in low risk or primary prevention patients over time. And that's peer-reviewed. That's published.

I mean, Sever was peer-reviewed and published and he said there was no apparent benefit in women. I realize that's just the ASCOT study. But even generally this is a debate that has been ongoing, okay?

And I realize that their position is that it's now been settled by the 2015 CTT, but I think you can very validly criticize whether or not it's been truly settled just because the CTT has said it is.

THE COURT: I mean, it just seems to me, Mr. Marcum, that if you had -- you know, you don't -- you know, I sort of said to the defense, Listen, SPARCL means something, right? SPARCL means something. You've got a valid study that raises legitimate questions, seemingly legitimate questions, legitimate enough that the FDA responded. Label changes were made. It means something.

Now, what it means we can talk about. Your argument is basically attacking other studies. You don't have anything yourself.

MS. BIERSTEIN: Your Honor, our argument is there are no studies. We are not saying that Lipitor is not effective; we are saying there are no studies that says it is. And I haven't gotten yet to why that even matters. But when we say there are no studies --

THE COURT: I'm going to shut up. You sit down.

MS. BIERSTEIN: There are no studies that say it is. All I can do is tell you there are no studies. In the ASCOT study the women on Lipitor had more cardiovascular events than the women in the placebo. And here the -- you see it, that's the -- this is the males. So this is the men.

You see the placebo, you get the cardiovascular events. And on Lipitor -- on placebo is the dotted line and on Lipitor is the solid line.

So what you see is the men -- this is -- Pfizer prepared this -- this is -- the men on Lipitor in ASCOT did much better. They had many fewer over time. So we are looking at over time the number of events, the aggregate number of events. The men are doing better. They are having fewer of those events. The problem is for the women, the curve looks pretty different.

Now, the atorvastatin line is on top. So the women are having more of the cardiovascular events. The people on placebo --

THE COURT: What is the difference in these events

between placebo and actual numbers and between placebo and Lipitor?

MS. BIERSTEIN: I think that's on the next slide. I think that's --

THE COURT: 19 versus 17, is that --

MR. MARCUM: I think that's accurate.

MS. BIERSTEIN: Yeah.

So what you are seeing again on this slide -- this is FDA material on Lipitor for men -- the incidents of the primary end point appears lower in the atorvastatin group compared to placebo almost throughout the study period. So this is what we are talking about that men had fewer cardiovascular events.

For women, however, the incidents of the primary end point actually appears lower in the placebo group throughout most of the study. That's what we are talking about. Women actually had -- the women on the placebo were doing better. FDA overall the results for females are not strong and suggest that a comment in the labeling is warranted.

And then we've highlighted the numbers. Here you see comparing males and females. What you are seeing on the atorvastatin and the placebo for these particular events, the nonfatal MI and fatal coronary heart disease for men you see the numbers working favorably. For atorvastatin for women, you see the numbers going the other way. The hazard ratio

for men on that first one, the nonfatal MI .59. So they did better on the Lipitor. For women it flips, 1.11. You see that again with cardiovascular mortality. Males and females. The men did very well on the study; the women unfortunately did worse on the Lipitor. The same with all cause mortality. So that and what the FDA's analysis of ASCOT was --

THE COURT: I know yesterday you argued there weren't enough numbers of women in ASCOT to take the conclusion about diabetes effects seriously. Is there enough numbers of women in this study in ASCOT to take the results regarding lack of efficacy seriously?

MS. BIERSTEIN: Your Honor, I don't think I made that argument about the diabetes. But the point of that --

THE COURT: Do you consider the ASCOT finding that there is no correlation with diabetes to be a valid conclusion?

MS. BIERSTEIN: Your Honor, we were not looking at the diabetes -- no, we don't consider it valid. No, we do not consider it valid.

THE COURT: That's what I thought.

MS. BIERSTEIN: We do think --

THE COURT: I thought that's what you argued yesterday.

MS. BIERSTEIN: We do think there are too few women

in this study. That might be one of the reasons it doesn't show efficacy.

THE COURT: I just heard your argument to be that there wasn't enough to make a determination, which I think is what the FDA concludes, right?

MS. BIERSTEIN: I think there is not enough to make a determination here, either.

THE COURT: That's my question to you.

MS. BIERSTEIN: Yes. There is not enough here -- I'm not telling you that actually Lipitor makes heart disease worse. That's not my point. My point is this does not provide evidence that it -- that --

THE COURT: I don't think they are claiming it does.

MS. BIERSTEIN: That's what we are going to get to, Your Honor.

THE COURT: I understood their argument to say that ASCOT supports their view, it is that it didn't have enough women. It was obviously a male-focused study. And then there are these later studies that I understood were attempting to address this issue, and then the conclusions of these studies on a meta-analysis basis concluded yes, it is a valid --

MS. BIERSTEIN: There is only one other study that studied Lipitor on this, and this is the CARDS study. When Pfizer published the CARDS results, they didn't break out the

men and women. So we see the efficacy but we don't see a separate breakout for women.

However, Pfizer's expert, Dr. Wei, did his own breakdown of the results in the CARDS study. And what you see in Dr. Wei's breakdown if you compare male/female, if you look at the hazard ratios and the confidence intervals -- I'm sorry, I'm getting a little -- what you are going to --

THE COURT: You know, on the other side they send different teams up and you are doing it all by yourself.

MS. BIERSTEIN: I should have sent Mr. Marcum to do this.

What you see here is that if you break it down, you don't see a statistically significant benefit in women. You are seeing a benefit in women here, we are not -- this is unlike ASCOT where the women actually came out worse.

Here what you are seeing is a benefit. But the difference between the men and the women is that it's statistically significant in the men on I think two of the three, but it's not statistically significant for the women on any of those three end points.

So this is another study. This is Dr. Wei, Pfizer's own expert, he finds the benefit -- he finds no statistically significant benefit for women in the CARDS study. So that's the second of the two studies.

So all we have that are Lipitor-specific, ASCOT and

CARDS. Neither one of them shows a statistically significant benefit in women.

Now, what does Pfizer say about this? So Pfizer has an internal discussion in 2005 about submissions relating to ASCOT. And actually, they are talking about they want to take their past experience with ASCOT to apply to their future with the new study. So this is their past submission experience. And what do they focus on in some of their prior submissions for ASCOT? Lack of effect in women, excess of mortality and cardiovascular mortality in women. This is Pfizer's internal analysis. Here was our experience in our past submissions. This was our problem in some of these agencies with the lack of effect of women in ASCOT, the excess of mortality and cardiovascular mortality in women.

Now, in 2009 Pfizer does an internal analysis of the JUPITER trial, the one that Mr. Marcum talked about, that showed primary prevention benefit -- that showed benefit in treating women.

Pfizer does what is the standard business analysis to do: Strengths, weaknesses, opportunities, threats, what we call SWOT analysis.

In looking at the threats, Your Honor, Crestor is a threat to Lipitor because it has the potential to distinguish itself as the class leader in treating women patients.

What does Pfizer say about Lipitor in the context of

the threat of Crestor? Pfizer says Lipitor does not have robust primary prevention or secondary prevention data in women. And then what else does Pfizer say? Lipitor has not shown significant risk reductions in cardiovascular mortality in women.

So whatever they want to tell you when they are in the courtroom, what they are telling themselves in the boardroom is when they are analyzing the competition, is the competition has data in women, the JUPITER study, and it's a threat to us. It's in the threat column of SWOT because we don't have robust data to show primary prevention in women. And we don't -- we don't have it showing a significant risk. So that's Pfizer's analysis.

THE COURT: That was -- and you are going to provide me your slides, as well?

MS. BIERSTEIN: We will do that, Your Honor. We will provide you the slides.

Now, in terms of what the experts are opining here and how it aligns with what I just told you, what I've told you is not that I don't have a study showing that it doesn't work; I told you there is no study showing that it does. If the reason was there was too few women or it wasn't well done, I don't know what the reason is, but there is no study that shows it.

What do our experts say? Not when they are asked

for their personal opinion at deposition, but in the report that they signed that they said, These are the opinions I'm going to offer to a reasonable degree of medical certainty.

Dr. Roberts' opinion. Lipitor has not been shown to be beneficial in lowering the risk of cardiac events. Okay. So she's just saying it hasn't been shown. She's not saying it doesn't; she's saying nobody has come up with the evidence.

THE COURT: I don't interpret the statement that way. I think that is parsing. It is one thing to say Lipitor hasn't proven it. I mean, that certainly -- you know, part of Rule 403 is I've got to decide not to mislead my jury. I think -- I read that to say it's not effective.

Now, you are -- you are saying that she's just -- she's simply saying Pfizer hasn't proven it.

MS. BIERSTEIN: She's saying there is no evidence as a scientist.

Now here, Dr. Abramson. The ASCOT trial did not provide evidence that Lipitor reduced the incidents of nonfatal myocardial infarction, nor did it provide evidence --

THE COURT: I'm not sure that Pfizer, the defendant, would dispute that second statement, because that's the ASCOT data.

MS. BIERSTEIN: If they are not going to dispute

it, perhaps they will withdraw their motion to this particular opinion in his report. This is one of the 11 opinions Dr. Abramson offers. If Pfizer agrees with it, maybe we'll let him get up and testify to it.

Our other two efficacy experts, this is Dr. Wells, he gives you a little bit more about what the meta-analysis finds. No evidence. He's talking about statins generally. He thinks there is no statistically-significant evidence. He's also in the realm of lack of evidence.

Dr. Fleming. The ASCOT data did not establish the efficacy of Lipitor in women for primary prevention. I assume we get a pass on that, too, because it's clearly what the ASCOT data shows.

So that's what our experts are trying to say.

THE COURT: We are not trying a case based on 2004 data; we are doing it on 2015 data, right?

MS. BIERSTEIN: Depends on for what purpose, Your Honor.

THE COURT: I understand.

MS. BIERSTEIN: For many purposes, yes. But for the failure to warn, we may be in a slightly different scenario, and I'm going to get to that.

Let's talk about what we are not saying. We are not saying Lipitor doesn't lower cholesterol. There is a lot of studies that tell you it does. We are not saying

Lipitor is not effective for primary prevention in men. We know there is a lot of studies that say it is. We don't have any men plaintiffs. We are not saying that it's not effective for primary prevention in men. We are not saying that Lipitor is not effective for secondary prevention.

So if you have a heart attack and your doctor is putting you on Lipitor to prevent another one, we are not saying here that it's not effective. And we are not saying there is affirmative evidence that Lipitor is not effective for primary prevention in women.

THE COURT: Would you say that's disputed?

MS. BIERSTEIN: Would I say --

THE COURT: Would you say the statement that Lipitor is not effective for primary prevention, that's a sort of disputed statement, it's unsettled?

MS. BIERSTEIN: Yes.

THE COURT: And you would say people of good will might disagree with each other?

MS. BIERSTEIN: People might disagree, but the point is -- they might disagree, but there is no actual scientific --

THE COURT: How can you commit fraud if it's just a matter of opinion and unsettled?

MS. BIERSTEIN: That's great, Your Honor, because that's where I'm going next.

We are not suing for fraud. This is not a fraud case. What is our burden? It's not a fraud case. It's not a warranty claim. We are not contending that -- plaintiffs don't contend that they bought a product and it didn't work. We are not saying they lied. We are not saying they committed fraud. That is not part of our case. We don't have the burden to show it doesn't work because we are not claiming that. That's not what our claim is.

THE COURT: Are you going to show me what you are claiming?

MS. BIERSTEIN: I am. That's going to be my next slide.

What do we claim? Plaintiffs claim that Pfizer was negligent in failing to provide an adequate warning about the dangers of Lipitor. This comes back to yesterday on the diabetes part of the case. Plaintiffs' burden -- and this is our burden -- is to show that Lipitor was not accompanied by an adequate warning that would have permitted their doctors to make a proper risk/benefit assessment before prescribing Lipitor. So Pfizer failed to tell the doctors everything the doctors needed to know that they knew of that was accurate so that the doctor could make the correct risk/benefit analysis. And they were negligent in not giving them the information.

So we contend two things: We say that by failing to

tell doctors about the absence of evidence of efficacy in women and failing to disclose the increased risk of diabetes, Pfizer both exaggerated the benefit, because they left doctors with the impression formed in the context of men where it is effective, that there was this evidence they minimize the risk. So a doctor weighing the two thinks, Wow, I know Lipitor is really effective for prevention, I keep seeing it everywhere in the newspapers and on TV, and the doctor doesn't realize that evidence is about men.

When it comes to women, there is no evidence one way or the other. It's an open question. And then they also minimize the risk by failing to disclose the diabetes. So the doctor doing the risk/benefit can't do it properly. They don't know what the true benefit is because they don't know that there is no evidence of a benefit. They don't know the true risk.

So what do we say? We say if Pfizer had said a benefit in women has not been shown, and if Pfizer had disclosed the data for women, that curve I was trying to show you in ASCOT that showed the actual ASCOT results where there wasn't a benefit for women? That statement and that data would have made a difference to doctors prescribing Lipitor, especially if they had also been told about the risk of diabetes. So we satisfy our burden to show that the warnings were inadequate if we can show that Pfizer ought to

have made those disclosures.

If Pfizer ought to have said, Hey, we don't know if there is a benefit in women. If Pfizer should have said that in order to allow doctors to put the risks of diabetes into perspective, then that's part of our claim that there was a failure to warn here. And that's why our claim is so narrow, Your Honor, on efficacy. We are not saying it doesn't work. Our claim is that there was insufficient evidence, and the doctors were all confused because everyone kept talking about the evidence of efficacy in the whole population. And if anyone had told the doctors, Actually we don't know about women, we -- the jury is not out yet -- the jury is not back yet on women.

A doctor making a prescribing decision, at least for Lipitor -- now maybe that's different for other statins -- but when it comes to Lipitor, the doctor -- you know, if a doctor needs to know that the jury is still out, hasn't come back on Lipitor and primary prevention, the doctor says, What statin am I going to give my patient? Well, the jury is still out on Lipitor and we've got this diabetes problem, maybe I ought to look elsewhere. And that is a failure to warn claim, Your Honor. And that is the claim that we are actually making.

THE COURT: So what you are saying is that even though you are telling me that under -- that I should not

credit in the diabetes issue the evidence on ASCOT that shows that there is not an effect on increasing glucose, shouldn't regard it because there is -- there is not enough women in the study, I should find that -- I should say that the cause of action would survive because Pfizer failed to disclose this inadequate data on its label? Is that basically what you are telling me? I mean, in regard to efficacy, that they should have -- in one argument I should find that they committed some wrong by not disclosing it to doctors. I mean, I can't -- I'm struggling with these inconsistent views in the same study.

MS. BIERSTEIN: I'm saying ASCOT is insufficient in both arms. It doesn't show -- I'm saying it's insufficient either way. I'm not telling you that ASCOT is strong one way and weak in another. Everybody knows Pfizer agrees that ASCOT doesn't show --

THE COURT: But Pfizer believes, believed then and believes now, that Lipitor is effective with women, correct? I mean, that's their --

MS. BIERSTEIN: I don't know what Pfizer believes. I have no idea.

THE COURT: They believe it, okay?

MR. CHEFFO: We'll stipulate to that, Your Honor.

THE COURT: They believe it. Now, everybody can be wrong, so their belief might be wrong, but they clearly

believe that.

MS. BIERSTEIN: They believe it in the courtroom, but they don't believe it in the boardroom.

THE COURT: The FDA apparently thought they were right. For whatever reason, crazy as they might be, they approved for men and women, right? After ASCOT.

MS. BIERSTEIN: They did, Your Honor. The label says it's inconclusive as to women.

THE COURT: They approved it.

MS. BIERSTEIN: They said ASCOT is inconclusive as to women on the label. That's what the FDA said you have to put on the label, that ASCOT was inconclusive in women.

THE COURT: They approved it for use in men and women, right?

MS. BIERSTEIN: They did.

THE COURT: Just a simple yes or no would be fine.

MS. BIERSTEIN: They did.

THE COURT: And so the -- and then there is a legitimate point you make that the data yet hadn't been gathered. And now after that data is gathered, your complaint is there is something wrong with the studies. They grouped together these statins, the CARDS study, which even though they found no heterogenetic difference, it really is, when you look down at the numbers, there is a difference. I mean, there is a sort of critique.

So when they come back, none of the studies pass the muster. And for that, it's not necessarily that -- necessarily that Pfizer is wrong, they just can't prove they are right. That's basically your argument, right?

MS. BIERSTEIN: Your Honor, in the world of drugs, it's not sufficient to say you just can't prove you are right. Your drug has to be proven to be effective.

And more important, for a doctor to make a correct risk/benefit analysis, the doctor has to know what the benefits actually are. So as -- on the legal side of it, the issue is what is an adequate warning to a doctor? What does a doctor have to take into account?

And so I think -- and you know in terms of --

THE COURT: We are now talking about the warning label? Based on the data available --

MS. BIERSTEIN: We think they should change the label and we think also -- yes, we believe that the label is inadequate to inform doctors, both about the risk of diabetes and the lack of evidence for primary prevention in women.

THE COURT: At some point we are going to talk about preemption in all this.

MS. BIERSTEIN: We are going to talk about that at some point, whenever Ms. Birnbaum or Mr. Cheffo is ready, because I assume they are going to go first. We are going to talk about that, Your Honor.

But what I was going to say in terms of later data -- just to reiterate and then I'm going to sit down unless you have more questions on this -- is that there is no later data on Lipitor. There is other studies combining those two, CARDS and ASCOT.

THE COURT: You think that method that these other people -- the other scientists have adopted of grouping together is scientifically invalid?

MS. BIERSTEIN: I do not, Your Honor. I don't think it necessarily means what Your Honor thinks it means. I don't think it's invalid. I don't think it's invalid to do a meta-analysis of lots of statins. I think that's a standard technique in the scientific community. But I need an expert to tell me, but what conclusion can I draw about Lipitor from this?

THE COURT: I know what the authors say, they say that they conclude conclusively it establishes. You disagree with that. I take it you disagree --

MS. BIERSTEIN: I don't disagree -- what I disagree with, Your Honor, if we had the author of that paper here, if you asked the author, What do you think about efficacy in Lipitor specifically? I don't know what answer you would get.

THE COURT: That would be the only witness you haven't deposed in this entire case.

MS. BIERSTEIN: I don't think the answer would be, We think it's true for Lipitor, as well.

THE COURT: Maybe you ought to depose that guy if you knew this was important.

MR. MARCUM: Your Honor, we did actually depose Frank Sacks, who they are not bringing as a witness, who is part of the CTT. He is one of the trialists. And he agreed there was no evidence specific to Lipitor, but said you can't just look at that, you've got to look at the whole --

THE COURT: Look at the grouping.

MR. MARCUM: There is a debate over how that is done.

THE COURT: The question is: Where is your evidence that that judgment of grouping is invalid?

MR. MARCUM: I think you have to give the doctors the information about all of the different risks and benefits on the primary end point so they --

THE COURT: Who am I to tell -- I mean, if these experts, these peer-reviewed specialists, have concluded that it is scientifically valid to group them and to make judgments as applicable to all, where is your evidence that that is an invalid method?

MR. MARCUM: We are not saying that it is an invalid method, Your Honor, necessarily. We are saying look at all of the data that went into that study, look at how

they put it together and look at the underlying results. Because when you look at the underlying results, I'm telling you on the CTT, the only way to find that benefit across the board was to create a new composite end point. And you can say that that's great and it's a great way to do it, but there are fair criticisms of doing it that way that our experts are going to offer.

THE COURT: Okay.

MS. BIERSTEIN: If Your Honor has no more questions on this, I'm going to --

THE COURT: You tell your client they need to give you battle pay.

MS. BIERSTEIN: Thank you.

THE COURT: And I would charge them extra every time they stand up behind you.

MS. BIRNBAUM: I just find this argument stunning, Your Honor. We want to stop the clock at 2004.

THE COURT: I've noticed that.

MS. BIRNBAUM: The meta-analysis don't matter.

THE COURT: You know, and if we were bringing this case in 2004 --

MS. BIRNBAUM: There might have been a question, but this is not 2004. Your Honor, 29 million Americans have taken Lipitor. I mean, it's -- it's a stunning number, but they take it every day. That means there are 250 million

patient years of experience.

They want to talk about us? Did you hear about the FDA? You asked the question about the FDA. It's like the FDA had nothing to do with any of this. We have a label. The label is not misleading. The FDA decided what was going to be on the label.

The FDA -- and if you go to slide 14 -- I mean, I didn't hear counsel mention the FDA. They want to go back and reanalyze ASCOT and say the FDA got it wrong. We'll get to preemption. The FDA didn't get it wrong, Your Honor. This is -- this is the label in adult patients with clinically-evident coronary heart disease. Lipitor is indicated to reduce the risks of myocardial infarction, etcetera.

We go to the next slide. Let's look at what the FDA had in front of it. They want to look at only the one piece of this. They forget about the -- there was no heterogeneity, that the gender subgroups showed no difference by gender. The FDA studied this. This was a revolutionary new drug for an indication that was so important to the public health. And, yes, they included a statement, the FDA did, that the results for women were inconclusive, but they had no gender limitation. They thought it works for women and men because they looked at the broader statistics and they found there was no heterogeneity.

Look at Dr. Wells' attempt to try to change this with a kind of statistical model that the FDA doesn't use. And the FDA -- he doesn't even use except for this case and this moment.

Let's go to -- let's go to CARDS. CARDS was the 2005. Again, gender subgroup. Showed no difference by gender. No heterogeneity. And what did they say --

THE COURT: Give me your response to -- I mean, I was a little surprised when Ms. Bierstein was saying that CARDS did not establish it was effective in women. I thought they -- the CARDS' authors concluded it was effective in men and women.

MS. BIRNBAUM: You are right, Your Honor. And look at what the label said. There is no gender limitation. The label says the effect of Lipitor was seen regardless of age, sex, sex, women and baseline --

THE COURT: They disagree with that CARDS. But to say CARDS doesn't support it, that's the conclusion of the authors. The evidence -- and they will go down into the weeds and say, we think that conclusion is incorrect perhaps, you know, we --

MS. BIRNBAUM: They want to rewrite the label? They can't rewrite the label here. We don't do anymore studies of this kind because it's already been found to be effective. You don't redo studies over and over again.

That's -- no one does that. So it's sort of --

THE COURT: Let me say this: Do you think that if Pfizer was engaging in this huge scam affecting billions of dollars of government funds and insurance funds on this treatment that it was not effective, do you think that there would be at least one peer-review study, some inquiry by some, you know, honest, forthright specialist who would come in and looked at this issue and we would not have to rely only on the paid plaintiffs' experts? A party's experts are the only ones who take a view, you know. And contrary to essentially everything else, you need to sort of sit down and say, Whoa, how did they get there? Maybe they are right, maybe lightning has struck, they've got it, they've figured it out, but we've got to look at their methods. And when you look, it's not attractive.

MS. BIRNBAUM: Their opinions -- if we go to the next slide, slide 17 -- let me just show you this, Your Honor, because that's a very good question you are asking. I don't care what she calls it. It's the same coin here. Heads, tails, you can't say there is insufficient evidence. That's saying no evidence. And I could show Your Honor what the plaintiffs' experts have said over and over again. It's in the slides. You can see it when you go back.

But let's look at this. Their opinions are not generally accepted by the scientific community. They are

out there as outliers all by themselves. Dr. Abramson and Dr. Roberts, they have a point of view. They are entitled to their point of view, but it's not -- it's not supported by science. They ignore the totality of the evidence.

They pick -- we'll show you when we get to the individuals -- they pick a study here, they pick a study there and they never really confront the totality of the evidence. They draw conclusions that the study never draw. We will show you that is not the way it operates, either, as part of the scientific method. They are advocates. They do not follow scientific standards. They have got no biological explanation for this. And we'll see, they all rely on Dr. Wells' litigation reanalysis of ASCOT's efficacy data. They just don't have anything.

And going back and showing you what ASCOT looked like, what ASCOT said -- we know what the FDA said, and the FDA approved it for both genders after looking at ASCOT. And they have never taken it back. There have been 12 supplements to the Lipitor label, never changed it, but the plaintiffs want to change it. They can't do it under the science and they can't do it under preemption.

One thing that -- one counsel made a comment I just want to correct, and I think Mr. Cheffo wants to correct one thing, and then we'll move on -- talked about the NIH specifically looked at this issue a decade ago. They looked

at it because Dr. Abramson asked them to look at it. And you know what they said? Statins should be used in women just as in men because of evidence-based science. That was their conclusion cited at Exhibit 39, Your Honor. I'll be happy to give it to you.

THE COURT: Mr. Cheffo, do you have a comment?

MR. CHEFFO: Just quickly, Your Honor, while we are on it -- I'll be really brief -- but there has been a few times where I've suggested that counsel may have misspoken. I think on this one I would suggest it's an absolute mischaracterization. You saw that SWOT internal document, the boardroom different thing.

THE COURT: The threat.

MR. CHEFFO: Again, that's kind of again the questions they've asked. But there is people who have been deposed on that. We are certainly happy to provide that. Bottom line, if you kind of understood, even just reading it a little bit closely, if you take a look back at it, what was basically a Q&A amongst people saying -- I think it was actually even before one of the cardiac big meetings. If we go down, if we get these questions, how are we going to respond? How are we going to do it? They know that. There has been testimony on that. I mean, to put up there and say, Pfizer says this is not efficacious in women, it is just beyond a misstatement of what that document is.

THE COURT: So what was that supposed to be if it wasn't a statement?

MR. CHEFFO: It was a -- it was -- do you have it?

I'm kind of telling you my -- I sat through some of these, it was in the depositions. I defended some of them.

So basically this was in connection -- this is my best recollection and we'll give you the actual testimony cites to it, Your Honor -- but basically what happens, I think this was after JUPITER kind of came out, there was going to be a scientific congress, might have been American College of Cardiology. And they basically were talking about what are some of the things that we could talk about? You know, just like this is some of the marketing and other folks kind of figuring out how they are going to address issues. And then there was questions being asked, what are things -- these were kind of like hypothetical, what is it that someone might say?

THE COURT: These are hypotheticals of what your competing opponent might say about you?

MR. CHEFFO: Right, or another manufacturer. And then saying, Well, if they say that, how are we going to respond to that?

THE COURT: Where is that? I mean, is that part of the document, how we are going to respond? Because it says: "Lipitor does not have a robust primary prevention of

secondary prevention data."

MR. TANENBAUM: It is a 93-page document. We'll provide you with the whole thing.

THE COURT: Is Pfizer endorsing that view or simply stating what somebody else is going to say about it?

MR. CHEFFO: Exactly. This is kind of like, let's get together in a workshop, we may be asked these questions. Someone may take this data and misread it or say it shows X. So instead, let's talk about it in a boardroom.

THE COURT: I don't think Pfizer -- look at the one above it: "Crestor has the potential to distinguish itself as the class leader."

MR. CHEFFO: That's not a great marketing method saying your competitor is much better than you are. What they are saying in the boardroom is telling you something different is just kind of wildly disingenuous, Your Honor.

THE COURT: Okay.

MS. BIRNBAUM: I'm going to try to quickly in the -- if you have anymore questions, I'm going to get to Dr. Wells first. He was not the person I was going to do first, but I would be very happy to.

THE COURT: Let me ask my folks here -- let's take a break before we get to this. Thank you. 15 minutes.

Let me mention something here, it's 1:00. Let's break for lunch. I mean, this is practically -- let's do

that and come back at -- try to be back at 2 or as soon thereafter as you can, okay?

MS. BIERSTEIN: I just wanted to note, I think I mentioned to you yesterday --

THE COURT: I'm going to try to work with you. I have to be somewhere at 4. Once we go through -- we've got the folks under efficacy and then we've got Dr. Abramson and Dr. Fleming. Let's just all work towards getting it finished.

MS. BIERSTEIN: I would say, Your Honor, we would be happy -- on whatever we don't reach, we'll be happy to stand on the briefs on anything that -- because we need to be out of here by about 20 after 3, and I would be fine with staying --

THE COURT: What time is your plane?

MS. BIERSTEIN: About 5. And we've got to get up to the airport.

THE COURT: Let me tell you, this is not New York, our little airport, you won't need that much time. But I'm going to make sure you get there.

MS. BIERSTEIN: We've got to go pick up our stuff, 3:30, something around there. We are happy to stand on the briefs on some of these points.

MS. BIRNBAUM: Thank you, Your Honor.

THE COURT: 2:00 or as soon thereafter as you can

get back, okay?

(Thereupon, there was a lunch break.)

MS. BIRNBAUM: Good afternoon, Your Honor.

THE COURT: Are we ready to talk about Wells?

MS. BIRNBAUM: Dr. Wells? I am, Your Honor.

Well, first of all, he does -- Dr. Wells is a statistician, as we know. His opinion is that there is no -- not that there is insufficient, he says there is no primary prevention evidence for statins for women, which is interesting. I mean --

THE COURT: Well, I was just asking the same question in chambers. I know the lawyers have come in and tried to parse this down to Lipitor, but is the plaintiffs' position that statins are not effective or haven't been proven? Or is it only Lipitor hasn't been proven? What's --

MS. BIRNBAUM: I don't know, Your Honor. Only the plaintiffs can argue that. That's not what the reports say. The reports don't distinguish between other statins and Lipitor. I didn't see it in any of these reports.

THE COURT: The basic argument is, you know, we started off that Lipitor -- I mean, that statins aren't effective, that's the kind of theme. And now we are down to Lipitor hasn't been proven.

MS. BIRNBAUM: Right.

THE COURT: We are back and back and back. But

the -- but as smart as the lawyers are -- and these are smart lawyers on both sides -- the question is, is that what the experts testified to?

MS. BIRNBAUM: It's not what they reported -- look, this is what Dr. Wells said in his report: "There is no primary prevention evidence of statins in women." None. He didn't say there is insufficient; he didn't say let's distinguish between statins. When we get to what he does with the meta-analysis, he doesn't say the meta-analyses are wrong. He doesn't say that the meta-analysis is really about other statins. All he says in the meta-analysis, let's take things out of it. I wouldn't do it this way. I would take JUPITER out. I would take everything out. But the authors didn't think they should be taking anything out. And everybody -- nobody has, in a peer-reviewed publication, ever said anything about that.

Next slide. Let's then look at what he does. He disregards the totality of the evidence. He isn't even as bad as some of their other experts are. He relies on his own *Law Review* article that he published in 2008 in which he looked at five -- not a scientific study, a *Law Review* article -- and he talks about five studies that he relies on.

Interestingly enough, only one of those studies is a Lipitor study, three others are pravastatin, and one of those studies are men's only study.

And then we are going to get to CASHMERE. This is the big a-ha moment for Dr. Wells and the plaintiffs. You didn't tell us -- you didn't -- you didn't talk about CASHMERE, and this is a new study. Well, CASHMERE has nothing to do about primary prevention in women. It's a 12-month imaging study of Lipitor, where Lipitor and hormone therapy -- they are looking at the thickness of the artery walls. It has no end point for cardiac incidents, it has fewer than 800 patients, it has a neutral result and it's not designed to study this issue.

But he thinks -- and then he says, Oh, you never published CASHMERE. Well, we included it in the -- on the -- on the Internet and the industry guidelines. But it was like a nothing study. This is not a study that has anything to do with what we are talking about here.

So what does he do now with the meta-analysis? As they say, he says, Well, you know, we should have carved out -- the authors should have carved out JUPITER, revascularization, diabetic patients and data from secondary prevention studies.

Did he test his theory against the hypothesis -- did he test his hypothesis against the total data? No. Did he publish his criticisms in any peer-reviewed scientific literature? No. It's only for this litigation. And it's, of course, contrary to what those authors did.

And remember, these are all disinterested scientists. Nobody has criticized them as having skin in the game. And when he's asked in his deposition:

"Question. Of his 27 trials in the CTT 2510 meta-analysis, have they been published?

Answer. Each one of those trials has been published, yes.

Question. And you haven't reviewed all of them, the even published versions of these studies?

Answer. No, I haven't done any meta-analysis on all the trials."

And then he goes on, he says:

"Question. Among all 27 statins, they reduce the risk of major coronary events. Do you see that?

Answer. Yes."

And he says:

"Question. With significant reductions in both women and men. Do you see that?

Answer. Yes.

Question. Do you disagree with that?

Answer. I don't have the data. I'm just reading what they have written.

Question. So you don't have any way to disagree with him?

Answer. I don't have any way to disagree with it."

So there is no way to disagree with the studies. Does he distinguish that these studies in the meta-analysis were statin -- that they only didn't have Lipitor, that they were statin only? No. These are the grounds in the previous slide that he looks at in the meta-analysis.

THE COURT: He disputes JUPITER. He thinks JUPITER is not valid.

MS. BIRNBAUM: JUPITER should be out. It's not that JUPITER is not valid, JUPITER is changing the equation when they look at it. It's sort of the dominating in his opinion. Well, that's fine, he's entitled to his opinion. But no scientific basis for saying JUPITER should not be in. He has -- it's pure speculation. He has no -- no basis for that scientifically.

And when he's asked about the guidelines, the American Heart Association guidelines, this says:

"Question. The findings support the use of statins to prevent both nonfatal and fatal arteriosclerotic coronary vascular disease, reduce the large burden of disability from nonfatal stroke for which women have a higher risk than men in nonfatal CHD events, correct?"

Answer. That's what it says.

Question. Do you have any reason to disagree with it?

Answer. I don't."

I don't. That's what they are saying. I haven't analyzed the data. Again, he -- he's their expert. He hasn't analyzed the data. Again, I haven't analyzed it. "They are an expert panel, so I don't have any reason to not believe it." That's Dr. Wells.

So what does Dr. Wells do? Well, they had a problem with the heterogeneity analysis in ASCOT, right? Because ASCOT concluded that there is no difference between men and women. But they don't like that result. So what does Dr. Wells do? He's a statistician and he's being paid by the plaintiffs. So he says, Wait, I've got a statistical model -- and that statistical model is not used by the ASCOT investigators and it's not generally used for heterogeneity by gender in most of the time -- but if I use that, then I'm going to come up with a different result.

So what he's done, I believe, is he's came to a conclusion first that he had to get a different result. And then he's doing research to raise that --

THE COURT: Your claim is he's result driven?

MS. BIRNBAUM: Absolutely. And I'm going to show you why in the next slide.

So this is the ASCOT study. It's the most commonly used model. It's prespecified in ASCOT protocol. This wasn't something that they made up after the fact; it's used by the ASCOT authors and it was peer reviewed.

And although I don't want to give Jewell any credit, he was used by Dr. Jewell himself in his gender analysis. This was -- this was the statistical model he used.

And more importantly, it was accepted by the FDA. The FDA didn't ask us to use a different model. This is a model that was perfectly fine for the FDA.

Let's look at Dr. Wells' model. It's not a standard model, Aalen model. He himself never has published any paper using this model. His ASCOT reanalysis is not published or peer reviewed. So no one could look at it and say, A-Ha, this model is ridiculous in this context. He knows of no one else using this model with statin efficacy data, can't point to anyone else using it in this context. And no researcher has rejected the Cox model in ASCOT saying it shouldn't have been used. And he has no real rationale for why he chose that model. It just gave him the number, the statistical number he used. And people, other of their experts, rely on this model.

And I would remind Your Honor the *Paoli* case, any step, any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible. This is true when the step completely changes a reliable methodology or it merely misapplies that methodology. They didn't say you couldn't use this methodology, but he misapplies it.

THE COURT: Ms. Birnbaum, what's the effect of Dr. Wells if I sustain your *Daubert* motion on the plaintiffs' efficacy argument?

MS. BIRNBAUM: On the other -- on the other experts? I think that they rely on his -- anybody who would rely on this analysis --

THE COURT: Has anyone else done any independent statistical work themselves that has the expertise to do it? If his goes, does their testimony go on efficacy?

MS. BIRNBAUM: I think it does, Your Honor. Now --

THE COURT: I'm going to hear what Ms. Bierstein has to say about that. She may have a different opinion.

MS. BIRNBAUM: I'm sure she will.

Now, I would like to stop here for a moment. That's all I have on Dr. Wells.

THE COURT: Okay.

MS. BIRNBAUM: Would you like me to go through the others or to save time can --

THE COURT: I'm really -- the way I'm thinking about this, I would rather hear from the plaintiff on Dr. Wells. It just keeps me focused. And then we'll go to the next one. I think everybody is getting more efficient as the afternoon goes, I appreciate, as the days go.

MS. BIRNBAUM: Thank you.

THE COURT: Okay.

MS. BIERSTEIN: Your Honor, I'm going to be very efficient, because I have essentially nothing to add to what is in our papers on this. And for the most part I want to rest on the papers, other than to point out to Your Honor that under *Daubert* it is not the expert's work that needs to be subject to peer review or publication; it's the methodology. The Aalen model is a tested, peer-reviewed methodology. It's a statistical tool.

I think, as we explained in our papers, there is a very good reason that Dr. Wells explained in his report, in his deposition, and we've set it forth in our brief that I would refer you to, as to why the Cox model, which was prespecified, which is before anyone had any reason to understand that the basic problem here is that the Cox model works great as long as the underlying assumption under it, which is that the ratios don't change over time, as long as that is true, the Cox model is a great tool. You don't know in advance before you do something if that's going to be the case.

Dr. Wells tested for it. He discovered that in this case it appears not to be true, which makes the Cox model completely circular. It assumes something that was not true and then it manages to -- and then you go from there because --

THE COURT: If I concluded that Dr. Wells' use of various models is result driven, would that affect the validity of his testimony?

MS. BIERSTEIN: I'm not sure what you mean by "result driven," Your Honor.

THE COURT: You want him to reach a predetermined conclusion and that he applied methods to -- to accomplish that result, would that undermine his -- the validity of his testimony under *Daubert*?

MS. BIERSTEIN: I think his -- his subjective intent is not the issue in *Daubert*. If he used --

THE COURT: If he manipulated, normally would not have been used, if he did it to produce a result, and I concluded that, would that be a basis under *Daubert* to grant the defendant's motion?

MS. BIERSTEIN: I think it would be a basis, Your Honor. But I think your concluding that would be reversible error. I think your conclusions on the facts would be reversible error, but you would have to reach that legal conclusion.

THE COURT: Perhaps you have appeared before judges who the threat of appealing them is something that disturbs them. I welcome -- I am in the middle of some of the most important litigation in the United States in a whole variety of appeals, I seem to be a magnet for this. If you want to

appeal anything I do, have at it. It doesn't concern me the least. I respect your right to do it. But don't threaten me with it, okay? And I took that as a threat. It doesn't affect me.

MS. BIERSTEIN: I did not mean it as a threat, Your Honor, and I apologize. What I meant to say is since I think I disagree so strongly with the factual predicate of your question, that the conclusion seemed difficult, because I disagree with the factual predicate.

THE COURT: You know, I had a colleague, Judge Hemphill, who is long deceased. I got the privilege of practicing in front of him years before earlier. He used to have in the courtroom a map, a roadmap. And when you walked in there the first time, you don't know why there was a roadmap on the wall of the courtroom. It was a map of the Eastern United States. And when someone made a statement like you, he would look at the map and he said, That's the road to Richmond.

So, you know, I don't expect the prevailing party here on any issue to be happy with me. And I figure someone is going to appeal. I'm going to call the balls and strikes, and I'm going to do the best I can.

MS. BIERSTEIN: I appreciate that, Your Honor. I apologize. I certainly did not mean that as a threat.

I have nothing more to add on Dr. Wells.

THE COURT: Let me ask you this: Did Dr. Wells -- you know, one of the issues is did he consider the full body of the evidence? And is it correct that he did not consider the underlying data in the CTT studies?

MS. BIERSTEIN: I think that -- I'm not sure -- I mean, some of the data that he didn't consider is data that is not publically available, but I'm not certain about --

MR. MARCUM: Your Honor, he doesn't have the underlying data. Again, that's 27 different studies; only a couple of which involve Lipitor.

THE COURT: Don't -- listen, y'all are talking about the Lipitor. His opinion is broader, it's to statins.

MS. BIERSTEIN: But the data is not --

THE COURT: Your testimony is that the data on the 27 is -- none of it is available on the 27?

MR. MARCUM: It is held essentially in secret by the CTT. It was provided to them by the initial trialists. In other words, if I ran a pravastatin trial, I provided it to the CTT, the CTT has publically said they have agreed to hold that data in confidence. So it is not available to us unless we were somehow to obtain it in litigation in this particular case involving just Lipitor. I don't know that it would have been appropriate for us to ask the manufacturer of pravastatin for their underlying clinical data.

MS. BIERSTEIN: It's proprietary data. The

manufacturer, when they run their own trials, it's proprietary data to the manufacturer and they don't typically release it. They didn't release it here.

So it's not that Dr. Wells, when he said, I don't have the data, it's not that Dr. Wells is saying, I can't be bothered to look at the data.

THE COURT: If y'all would have asked me to get it, I would have ordered them to produce it. Do you want it?

MR. MARCUM: Would you get it for us?

THE COURT: I'm just --

MR. MARCUM: If you are making that offer, because perhaps --

THE COURT: I'm just saying, I'm just -- so all 27 reports, none of them -- of the underlying data --

MR. MARCUM: The published studies.

THE COURT: Did he review the 27 published studies?

MS. BIERSTEIN: There wasn't 27 published studies, Your Honor. There is 27 studies underlying one published paper. It's one published meta-analysis. He reviewed the paper.

MR. MARCUM: I think his answer is I didn't review a meta-analysis.

MS. BIERSTEIN: He didn't do an underlying data. He read their meta-analysis, but he could not do his own analysis of the data because he didn't have the data.

In the same way, Your Honor -- just to make a point here -- when the Waters paper came out with the SPARCL TNT and IDEAL data, the main reason for publishing that paper was that the Sattar paper that preceded it didn't have access to Pfizer's proprietary data. Pfizer had not made it available.

So when Sattar did his meta-analysis, he could not include Pfizer studies. Then Pfizer said, We are going to give our data to Dr. Waters. We'll let him do our analysis. It's very common for the data from a company's study to not be available. And Dr. Wells is saying, I didn't look at the data, I didn't do my own meta-analysis.

THE COURT: How about -- also true for the underlying support from the American Heart Association recommendation? Is that also not publically available?

MR. MARCUM: Again, that would be a situation where the published studies that may go into those guidelines --

THE COURT: Did he say he did or did not review the published studies?

MR. MARCUM: I don't recall that off the top of my head.

MS. BIERSTEIN: I don't recall. I think the only study that he had access to is what Pfizer produced in litigation. That's the only data he got was what Pfizer produced, because we had the right in litigation to make them turn over data. That's the only data that he had.

But as -- I mean, what scientists do when papers are published -- I mean, I think what is common in the world of science is a paper is published and other scientists may read it and say, You know that study design described in here, that doesn't really sound very strong, and some other study looked better. And then they will write a paper responding. They don't necessarily look at the underlying data. But there is still a scientific debate that is based on looking at the data.

So for example, Dr. Wells published a letter in circulation in the *Journal of the American Heart Association* criticizing a published study. That was a Dr. Mora study. The circulation study published his criticism. There was another doctor who also published a criticism of Mora, and then I think there is a Mora response. So it's a debate back and forth in the scientific community.

THE COURT: Did he publish the critique of the -- of the CTT study?

MR. MARCUM: I don't know if he published a critique.

Can I address the result driven question? Tell you something he did publish, which is in 2008 --

THE COURT: It's a *Law Review* article.

MR. MARCUM: That is correct. Addressing this ASCOT efficacy issue.

THE COURT: Before I hear a peer review, your peers review it; not lawyers. And wasn't one of the coauthors the editor of the journal? The whole point is you can't get somebody to put it in print, it is whether you are peer reviewed.

MR. MARCUM: He had no reason at that time to find a particular result. His wife's doctor apparently had been told to take a statin. He was curious what the evidence was. He looked at it from that nonlitigation-driven perspective. And he reached a result that's consistent with the one he reached in this case.

MS. BIERSTEIN: It goes to his motive, Your Honor. I understand it's not peer reviewed. But in terms of his motivation, he had no litigation motivation. He came to the conclusion as an independent person.

I think Mr. Marcum's point -- I understand your point about publication. As I said before, *Daubert* is not about whether your result is published; it's about whether your methodology is published.

We go back to the idea of the lie detector test in *Frye*. Like does anyone believe this actually works? Not, Have you published the result when you subjected your particular defendant to the lie detector?

For example, Your Honor, Dr. Wells could not publish any of his analysis of ASCOT. He's precluded from doing so

by Pfizer. Because when Pfizer produced the data, it was produced confidentially, marked confidential, cannot be published, cannot be used by him. He would -- he is legally bound. He's not allowed to take his analysis of it and send it to a peer-reviewed journal unless Pfizer wants to agree and say, We are willing to subject this to peer review. So, yeah, we are going to let you use our data. Submit it and see if you can get anyone to publish it. They haven't said that. But if they did, I'm sure he will be happy to try to get it published.

THE COURT: Okay.

MS. BIERSTEIN: But as I said, Your Honor, I have nothing further from Dr. Wells.

THE COURT: Thank you.

Ms. Birnbaum, do you want to respond to any of that?

MS. BIRNBAUM: Yes, Your Honor, just very briefly.

First of all, experts all the time ask for data. If they wanted the data, they could have gotten it. But that's beside the point --

THE COURT: First of all, they could have asked professionally for it. Secondly, they had something no researcher has, subpoena power, right?

MS. BIRNBAUM: Exactly. But --

THE COURT: And I would have -- you know, I would have helped them. But they don't usually need my help.

MS. BIRNBAUM: They don't want it is the answer. If you go to 56, that's not what he says in his testimony. He's asked:

"Question. Of the 27 trials, have they been published?"

He said:

"Answer. Yes, all 27 have been published.

Question. And you haven't reviewed all of them" -- that has nothing to do about data -- "the even published version of the studies, right?

Answer. No, I haven't done any meta-analysis on all the trials."

I mean, these lawyers keep testifying, but it's not what their experts say. They keep adding things.

THE COURT: Are these studies --

MS. BIRNBAUM: Published? I assume they are. That's the question that was asked. He agreed it was. I'm not sure I can answer that.

THE COURT: Well, you know, I don't take it because he said it was that it was.

MS. BIRNBAUM: I'm sure someone can answer that question in the packed bench. I think they are.

MR. CHEFFO: I think the --

THE COURT: Let me ask you this: We are going to -- the defendant asserts this argument that these things in the

American Heart Association and in the -- and in the recommendation and in the CTT were published. And what I'm going to ask you to do when you submit this response on October 29th -- September 29th -- would you please provide me -- if you want to provide me the underlying studies, or if it's too voluminous, just citations to them. I want to know whether or not they are actually available or not.

I mean, I think to the extent they are available -- Ms. Birnbaum seems to think they were -- that's one issue. To the extent they are not available, the question is: How available were they? You know, when you are in litigation, you can get almost anything like this. I mean, there would be no reason not to be able to get it.

So we might have had to get it pursuant to a confidentiality order or something, but we could have gotten it, and I think we all know that. And it goes to this issue, which is very important, did he consider the data?

I mean, there is -- you know, very strong conflicting data to his opinion that statins are ineffective. That's his opinion. And the lawyers have now reduced it down to, you can't prove it's effective. But his opinion is no statin is effective. And that's his opinion, entitled to it. Wife was prescribed it. He went in and looked at it. That's his conclusion. That's fine. It doesn't mean it meets the satisfactory scientific methodology. And if he

didn't consider certain very important data, that's one sort of strike against him.

Mr. Tanenbaum?

MR. TANENBAUM: Your Honor, I apologize. And I'm learning, but there is a difference, as Your Honor knows, between a trial, the data that comes from it and the study that is published.

THE COURT: I completely agree with you. And what I want to know is what was available? I mean, you know, you've got a meta-analysis. In some ways people are relying that the people doing the peer-reviewed meta-analysis reflected some integrity and honesty and so forth, and it reaches a conclusion which is completely contrary to his, okay? And the question is: Did you consider that? I mean -- and he says, Have you reviewed the even published versions of these studies? And his answer is: No, I haven't done it. That's just sort of -- you know, when you've got a major study, it's 2015, major study, completely contrary to your view, no, haven't looked at it --

MR. TANENBAUM: If I could just address one other issue? Because I go through this in the products liability litigation all the time.

For example, we talked about this tire case. I have brought suit against Good Year. It has to do with the halobutyl content and the thickness of the inner liner. No

matter how I tried, I cannot get Michelin's formula for its inner liner or its thickness. The same that would be true with Continental, with all of the other manufacturers. Are the tests that they've done to validate --

THE COURT: So are you representing to me he could not have gotten --

MR. TANENBAUM: I don't have a clue. But I do know if I had asked Your Honor or Judge Duffy to issue a subpoena, the question would not be for us to resolve. We would end up litigating against Nelson Mullins or somebody who would come in on behalf of the manufacturer and contend, of course, of course it's all kinds of confidential, trade secret information, etcetera, etcetera.

You don't -- as Your Honor will recall from your own trial days, you don't end up getting that kind of information from third parties.

MS. BIRNBAUM: This is totally different, Mr. Tanenbaum. We are not talking about --

MR. TANENBAUM: I'll address the Court.

THE COURT: Address me; not Mr. Tanenbaum.

MS. BIRNBAUM: This is stuff that is out there and been examined by --

THE COURT: Let's figure out if it's out there. I think it's a fair question. And let's figure out exactly what is out there.

You know, there is this sort of sense I have -- I want to confirm it, you know, I want to be rigorous myself -- is that he didn't want to see the information. He didn't want it because it's completely contrary to his conclusion. And, you know, what we know from *Daubert* is you can't stick your head in the sand. You can't ignore relevant data and studies and results because they don't comport with your view. That's not the scientific method.

MR. TANENBAUM: I think it's important that we treat the trial --

THE COURT: I agree with you. And I do sort of wonder how, you know, how much of these -- how do you plead of the -- I mean, this is a, you know, fairly significant study, this CTT. And if it's invalid, then -- a good reason to say it's not valid, that's fine, I'm open to hearing it. But simply to ignore it is not good enough.

MR. CHEFFO: We'll go through each one of them and tell you if it was published, where. And if it wasn't, what the best information is. I'm sure once we pour through the data, we will have cross-references. We just don't have it right now.

THE COURT: Anything further on this issue?

MS. BIRNBAUM: No, Your Honor.

THE COURT: Very good.

Let's move to the next person. Ms. Roberts.

MS. BIRNBAUM: If you want Roberts, we'll do Roberts.

THE COURT: This is on efficacy with Dr. Roberts.

MS. BIRNBAUM: Slide 42.

Dr. Roberts says in ASCOT Lipitor was not found to be protective for women. That's something different also. She says CARDS did not provide evidence that treatment with Lipitor lowered cardiac risk. Not only has Lipitor been shown to reduce points like heart attacks, CVD, death or stroke when used for primary prevention in women, no other statin has been shown to do so either.

THE COURT: Statins.

MS. BIRNBAUM: She hates statins, that's fine, but she can't come in because she doesn't have a scientific method.

So let's look at what she concedes. Statins do -- she does admit that statins reduce LDL cholesterol. Well, this is going to get her into a little problem when we get to the bottom of her analysis. She prescribes statins for some women and statins reduce their LDL.

THE COURT: How could you give them if you thought they didn't work?

MS. BIRNBAUM: Your Honor, I do not know. That's what she testified to. Statin clinical trials show secondary prevention in women. So she admits that once you

have a heart attack and you are a woman, then you should take Lipitor because it's going to help you. But she can't explain biologically why statins would prevent a second heart attack but wouldn't prevent a first heart attack.

THE COURT: What method -- I mean, she's not a statistician; she's a cardiologist. Does she rely on Dr. Wells?

MS. BIRNBAUM: Um, not exactly. Not exactly. I'll show you what she does.

THE COURT: You know, what *Daubert* is telling us, if you are going to do a causation analysis, you've got to -- you've got to show that it's statistically significant; not subject to random chance.

MS. BIRNBAUM: Right.

THE COURT: You've got to -- there is a method for this. And to the extent that Dr. Wells has a defensible statistical analysis, I think it's fair game for her to rely on that, okay?

MS. BIRNBAUM: She does not rely on that. Her report is very short.

THE COURT: It's like four pages long.

MS. BIRNBAUM: Right. She relies on these five studies. She doesn't look at the totality of the evidence. She doesn't mention the meta-analyses. She doesn't mention what is done in her own profession by the American Heart

Association, the ADA, etcetera. She looks at these five studies.

THE COURT: Isn't there a problem if you just limit to a finite number of studies when there is a body of contrary information?

MS. BIRNBAUM: It's one of the reasons methodology doesn't work. You have to look at the totality. It's a given in methodology and scientific methodology.

THE COURT: She, in her own practice, can rely on whatever she wants to. That's her business.

MS. BIRNBAUM: She could write whatever book she wants to, and she can say statins are terrible, but she doesn't have a scientific, methodological basis for saying it. She can feel it. She can believe it. I don't have any problem with her. But she can't come into this courtroom because she does not have scientific evidence.

What did she do here? She says JUPITER. We know JUPITER does show benefit in women. I don't even know how she puts JUPITER in here. It's not -- it's not a Lipitor product, we know that, but JUPITER showed effects in both men and women. So she doesn't look --

THE COURT: See, that was sort of part of my point is that I think the plaintiffs' counsel has looked at this record and said, Okay, all we can go, as far as we think we can go credibly, is simply say something the experts don't

say, which is, you just haven't proven it regarding Lipitor. We are going to -- but the experts are out there saying statins don't work for women. That's not -- the subtestimony is just not there. It's not what they say.

MS. BIRNBAUM: Because, Your Honor, the lawyers are backing up. They are back filling. They don't have the evidence. They can't rely on anything, so now --

THE COURT: When did this lawsuit begin?

MS. BIRNBAUM: When did it begin?

THE COURT: Yeah. When did the first set of claims -- 2012 maybe?

MR. CHEFFO: Two years, two and a half years.

THE COURT: Before CTT, right?

MS. BIRNBAUM: Before the CTT. But there were others in 2013. CTT is just bigger.

THE COURT: Right. But what I'm saying is that part -- you know, part of the mass tort world is that you try to get to the courthouse as quickly as you can when you have a potential claim. It's part of the business of it. We all recognize what is going on. And sometimes the science doesn't have a chance to catch up with -- you know, the science lags behind the lawsuit. And I've watched a number of lawsuits -- all of us remember the breast implant litigation.

MS. BIRNBAUM: I was in it, Your Honor. I remember

it well.

THE COURT: And, you know, it was several years into it when the Harvard study came out, and it kind of undermined the position. Could have gone the other way, the plaintiffs' counsel would have looked like geniuses, but the data wasn't there yet.

MS. BIRNBAUM: This is not the case, Your Honor. The data is there. The data is overwhelming. The data has been there. There is general acceptance in the medical, scientific, regulatory community. It is only plaintiffs' experts that have a different opinion.

THE COURT: Let me say whatever evidence there was before 2013 there certainly has been additional comprehensive evidence since 2013 --

MS. BIRNBAUM: Absolutely.

THE COURT: -- on efficacy. And the only way you can do it is attack it or ignore it.

MS. BIRNBAUM: That's exactly right.

She relies on ASCOT. Again, we go back to ASCOT. Everybody goes back to ASCOT.

By the way, when we get to ASCOT and the FDA label, there is nothing anybody hid in ASCOT. ASCOT, the label says it was inconclusive in women. I mean, we'll talk about some of these other experts who really attack the label.

THE COURT: We haven't talked about preemption here.

You know, I understand the plaintiffs' claim to be both labeling and marketing. So I don't think marketing would be preemptive.

MS. BIRNBAUM: I think it would if you are marketing it as indicated, that you are marketing pursuant to the FDA's label. They can't attack our marketing if we are saying it is indicated for women for primary prevention. That's the label. We haven't done anything wrong.

THE COURT: Your view is that the marketing is consistent with the label; it's also subject to peer review.

MS. BIRNBAUM: Absolutely.

THE COURT: I mean subject to preemption.

MS. BIRNBAUM: Absolutely, Your Honor. So again, when she looks at ASCOT, she doesn't rely, by the way, on Wells' analysis, but she just doesn't pay any attention to the heterogeneity situation. So if you rely on medical literature conclusions not drawn in that literature, this is not an accepted methodology.

And last but not least, her opinions are neither disinterested nor objective. She has a point of view that many few people have. She writes a book. It's not a peer-reviewed book. It's a popular book and she's entitled --

THE COURT: Nothing wrong with that.

MS. BIRNBAUM: She can write as many books as she

wants, but she can't come into a courtroom when she doesn't have the scientific methodology.

Very briefly, Dr. Quon. He does say it appears that there is no compelling evidence for women to use Lipitor therapy for primary prevention of CVD. He relies on ASCOT, Mora, which is a meta-analysis, and CASHMERE.

Let's talk about each one of those. ASCOT. We know what the FDA did with ASCOT and there was no finding of heterogeneity.

Now, Mora, I don't understand what he's relying on Mora because Mora found statin therapy in women significantly reduced CVD by about one-third in exclusively primary prevention trials, so I don't get it.

And CASHMERE is a study, as we showed you, I think. So -- and when he's asked:

"Question. Do you agree that statin therapy reduces cardiovascular disease in men and women who are prediabetic?

Answer. Yes."

He agrees with that.

"Question. Have you said in any scientific article that statins, and Lipitor in particular, are ineffective or less effective in women compared to men?

Answer. I don't think so because we have never done -- like I said, we've never done that gender subanalysis."

So that's Dr. Quon.

THE COURT: So what's his opinion? That's not his opinion. What is his opinion?

MS. BIRNBAUM: His opinion is it appears -- it appears there is no compelling evidence for women to use Lipitor therapy for primary prevention.

THE COURT: The standard isn't compelling evidence --

MS. BIRNBAUM: Right.

THE COURT: -- right? That's not the standard.

MS. BIRNBAUM: And he also doesn't discuss the meta-analysis. He stops at about 2008. It's like the rest of time never -- never ended his decision making or his opinion. And he doesn't rely on Wells.

Now Dr. Fleming. We have Fleming next.

THE COURT: Can I do just one thing? I want to hear from Ms. Bierstein on the preemption issue because I didn't get that. I think that's -- I want to hear from her.

MS. BIRNBAUM: By the way, when we are talking about Fleming and we are talking about Abramson, they really go to the heart of the preemption issue because they take the position the label should be changed.

THE COURT: And I agree that's an issue. But I want to give her a chance to address the preemption issue.

MS. BIRNBAUM: Do you want me to do it first?

THE COURT: Why don't you go ahead and let her respond. Fair enough. I thought you had done some of that already, but go ahead.

MS. BIRNBAUM: So let's go to -- let's go to the next slide. Preemption here means that of course it's an impossibility. It's impossible for a private party to comply with both state and federal requirements. And there is -- the Supreme Court --

THE COURT: What year is the label? 2004?

MS. BIRNBAUM: 2004.

THE COURT: So we have ASCOT already?

MS. BIRNBAUM: We have ASCOT.

THE COURT: We have the NDA data?

MS. BIRNBAUM: Right. And we have CARDS. So it's --

THE COURT: We have CARDS.

MS. BIRNBAUM: So it's 2004. And then 2005 --

THE COURT: Okay.

MS. BIRNBAUM: -- they added the CARDS.

THE COURT: So the only study that CASHMERE -- is there one study?

MS. BIRNBAUM: That's the one study that they find which is not a study for this purpose. So we -- the trilogy of cases --

THE COURT: I know the cases. I know the cases.

MS. BIRNBAUM: I'm not going to go into them. The *Bartlett* case is the most recent one, and I will talk about that because they make an argument that we could stop selling the product, which is *Bartlett*. *Bartlett* says that's not an argument. Because if that were an argument you would have no preemption because anybody could stop selling it. That's not what we do here. I'll get to that in a couple of minutes.

So let's look there. Let's cover the next one. Let's see what their experts say. He says -- Dr. Abramson. "I would not have" -- "I would not have Lipitor be indicated for primary prevention in women." The family doctor who has no experience with the FDA makes that determination. Somehow the FDA should not have had Lipitor for primary prevention in women.

And what does Dr. Fleming say? He is a regulatory expert -- and we are moving to strike his opinion altogether -- but here he says: "Pfizer failed to inform doctors about the lack of benefit for women using Lipitor for primary prevention." And then he says: "The Lipitor label is misleading with respect to efficacy in women."

Well, once the FDA approved the label, that's the label we have to go with, so -- I'm not going to take you back to the Complaint.

So let's see what the plaintiffs do not -- do not

dispute. They say the FDA found the primary prevention indications. They admit that. And the FDA had the evidence they had and they found that the label was not false and misleading. It comes back to we can sell --

THE COURT: I understand your argument about impossibility on the labeling. But if you concluded that the information is not accurate. You wouldn't have to mark -- continuing marketing in accord with the label, correct?

MS. BIRNBAUM: Say that again, Your Honor.

THE COURT: You assert it's impossible to change the label unilaterally, right?

MS. BIRNBAUM: Right.

THE COURT: There are certain limited circumstances where you can, but it's got to be based on new data; not old data. But if you became aware from a reanalysis of the old data that, in fact, what you thought was true wasn't true, no one would require you to continue to market the drug in accord with something you now knew wasn't true, right?

MS. BIRNBAUM: Well, I guess we could go to the FDA.

THE COURT: It's not impossible. I mean, that's part of the argument.

MS. BIRNBAUM: It is impossible. And let me tell you why, because you have to make a CBE change, okay? The

cases say the fact that you could go to the FDA and ask the FDA to change your label and the FDA may or may not change your label, that doesn't count. You have to be in a position to unilaterally change your label so that you can get --

THE COURT: I'm saying, okay, let's say you are powerless to change the label. No one can require you to continue marketing in accord with something you now know to be false. I'm not saying you did that. You see what my point is?

MS. BIRNBAUM: Yes.

THE COURT: What I said, I think the analysis regarding labeling and marketing are different because it's not impossible for you to change your marketing. You control your marketing. The FDA doesn't control -- I mean, it controls what you can't say, but doesn't require what you can. If you conclude it's not effective for women, you could say that.

MS. BIRNBAUM: We couldn't change the label.

THE COURT: You can't change the label, but you don't need to go market to women necessarily. That's why I think the analysis is a little bit different.

MS. BIRNBAUM: Let me maybe just read to you from the *Bartlett* decision because it may inform us. Slide 79. This was a 2015 case in the Supreme Court. And the

plaintiffs there argued: "Without impacting its duties under federal law in the slightest, that Pfizer could simply have stopped marketing Lipitor specifically to women without prior history of cardiovascular disease." That's what the plaintiff argues.

THE COURT: In this case.

MS. BIRNBAUM: In this case.

But the Supreme Court says: "This stop-selling rationale is incompatible with our preemption jurisprudence, which presumes that an actor seeking to satisfy both its federal and state law obligations is not required to cease acting altogether in order to avoid liability." And it goes on to say: "To hold otherwise would render impossibility of prevention all but meaningless."

So I think *Bartlett* is an answer to your question.

THE COURT: I'm going to read that more carefully.

MS. BIRNBAUM: And it's 2015. There was a vigorous dissent, but that's the majority on stop marketing.

THE COURT: Okay.

MS. BIRNBAUM: If we can come back to 72 just quickly. Now, to make a unilateral change, this is the only thing, can we make a unilateral change?

And by the way, you can see the plaintiffs' -- the plaintiffs' regulatory expert doesn't argue that we can make a CBE change. I mean, this is so moving that it's hard to

know where they are at in any particular time. A CBE label change must be based on newly-acquired information. But look how the agency defines newly-acquired information. If it's a new analysis of previously submitted data, okay? This is what you were talking about, Your Honor.

THE COURT: Correct.

MS. BIRNBAUM: Let's say a meta-analysis came down and CTT went the other way, it said women. Can't use it in women. If the -- but if you look at --

THE COURT: That could be such data, right?

MS. BIRNBAUM: Right. If you look -- no, but if you look at what they say here: "If the studies, events or analyses reveal risks of a different type or greater severity or frequency than previously included in submissions to the FDA" -- they are talking about risk. That's about -- they are not arguing that diabetes would fall within this. We are talking about indications. It's a very different analysis. And the FDA makes that distinction in its regulations. Yes, you can change -- if you find that it's misleading, you can change it, but not on a reanalysis. It would have to be on new material. And the reason for that becomes clear when you look at some of the other cases.

Let's skip this one. The Court makes the distinction -- somebody is on the telephone-- the Court makes the distinction between what the FDA does at the time of

determining the indication. What material did the FDA have? What material did he get?

Now, if after that there is new information, not --

THE COURT: I get it, Ms. Birnbaum. I get that point.

MS. BIRNBAUM: Let me just go now --

THE COURT: I want to give Ms. Bierstein the opportunity to address --

MS. BIRNBAUM: Do you want me to stop here?

THE COURT: Yeah, I want you to stop here and give her a chance to do that, please.

MS. BIERSTEIN: Your Honor, before I address preemption, I want to register our strong objection to any discussion of Dr. Quon in this context for the reason that I set forth yesterday, it's nowhere in Pfizer's briefs. Plaintiffs have never been on notice that Dr. Quon was part of this motion. It's not in the opening brief; it's not in the reply brief. There is a listing specifically in the open brief, here are the four experts that this brief deals with. He's not on the list. We strongly object to their ability to amend the motion on the second day of --

THE COURT: Let me say something to you about formalities: I have -- I try to interpret the rules in a way that produces a just result based on the best evidence. And over the strenuous objections of the defense, I allowed y'all

to let Dr. Jewell file a very elaborate rebuttal report that is broader than any rebuttal report that I've ever allowed. I did that because I thought the interests of justice were served by that to give y'all the full opportunity. You have a big responsibility, lots of people's claims, I thought it was appropriate. If I had focused on strict interpretation, it wouldn't have been allowed. I tried to infuse the decision with fairness.

I am not going to -- having taken that approach, if these folks in this incredibly complicated process overlook adding Dr. Quon -- I read his opinions that covered this, I understood it was part of it -- you know, that technicality, I'm not going to say, Gotcha, you get -- you prevailed because they didn't do it. No. I'm not doing that. I'm going to apply -- the same measure and standard of fairness and flexibility that I have applied to y'all, I'm going to apply to the defense.

MS. BIERSTEIN: Your Honor, we didn't have an opportunity to brief it. We were not on notice. We did not know that this was part of it. It's not in our brief.

THE COURT: That is a fair comment. If you -- when you file your brief on September 29th, if y'all wish to address that, I'll be glad to address that.

MS. BIERSTEIN: I appreciate that, Your Honor. I still want to note my objection for the record to the

process, but we will use that opportunity.

THE COURT: But I welcome additional information that you have on that.

MS. BIERSTEIN: Your Honor, with respect to preemption, I do want to differentiate here. And again, I have not prepared an argument on Dr. Quon, that will be in the papers, but I do want to differentiate here the opinions of Dr. Wells -- I'm sorry, Dr. Fleming on --

THE COURT: Before you get to that, I just -- I wondered how you on this distinction between the label and the market of whether if preemption were to apply to the label, does it necessarily apply to market?

MS. BIERSTEIN: I guess it depends, Your Honor. I was a little confused about what Your Honor meant by marketing, because marketing can mean selling and marketing can mean advertising. I think *Bartlett* says you don't have to stop selling it. I thought Your Honor was suggesting but you could stop.

THE COURT: Marketing. Promoting it. Seeing you are a detail person, to promote.

MS. BIERSTEIN: You could still sell the drug. You shouldn't be doing advertising that you know is false.

THE COURT: My point was that I think the analysis, you don't have the power -- I mean, under -- their argument may be good that you don't have the power to change the

label. You don't have unilateral right to do that. And I respect that. But if you come to a conclusion based on reanalysis, or whatever else, that it is not accurate, you -- and even though you may be powerless to change a label, you send your people out to sell it on the basis that you now know is no longer valid. I'm not saying that was their situation. It just struck me analytically it's a different situation under preemption.

MS. BIERSTEIN: I think it is.

But again, what you are saying, which I agree with, is they don't have to stop selling the drug. I think that's what *Bartlett* said.

THE COURT: Are you going to market it to women?

MS. BIERSTEIN: Yeah. When you do your ads, you shouldn't be saying anymore something that you know isn't -- isn't true. And nothing --

THE COURT: I don't think the FDA preempts you from doing that.

MS. BIERSTEIN: No.

THE COURT: Now, whether there is a lot of steps before then that I -- I -- I'm not necessarily there, but I just -- it just struck me analytically they were different.

MS. BIERSTEIN: Your Honor, I agree with that. I do want to differentiate among our experts because I think there is a distinction here. Dr. Fleming does give an

opinion about the label and about the approval. Our other experts on this topic, though, do not.

I mean, again, they've got the quote from Dr. Abramson from his deposition. But if you look at the opinions he's actually offering, which if I remember correctly are in paragraphs 11 to 22 of his report, you will see that his opinions are that there is no evidence of primary prevention. And he's not giving an opinion about what the FDA should or should not have done. I understand if you ask him what does he think the FDA should have done he's got an opinion.

THE COURT: So what's Doctor -- what's the scope, as you understand it, of his opinions?

MS. BIERSTEIN: Are we -- I wanted to talk about -- if we are going to do the whole Abramson --

THE COURT: You raised it. I'm just confused.

MS. BIERSTEIN: He's got a lot of different opinions. He covers a very broad range.

THE COURT: There are parts about Abramson's testimony that some of my colleagues have, other District Courts having addressed about marketing and so forth, which they feel like he is -- he's capable, has the expertise to do. To me it's a pretty close question. I want to study it more carefully.

But then when he starts talking about statistical

methodologies based upon something he did 30 years ago in a fellowship, I'm wondering about that. I do -- I question -- you know, the -- I've seen experts and they start off and they are writing their expertise, and then they will ask them some question. I remember one time it was an orthopaedic surgeon and he was giving heart advice. Once you declared him an expert, he was going to be an expert on everything in medicine and not just everything in his expertise.

So Dr. Abramson may be, for certain purposes, may be recognized to offer an opinion, but it doesn't turn him loose just to offer all kinds of evidence on things which are really outside of his expertise and which he has not established expertise, and statistics is one of them. I don't buy that you get a little bit of fellowship -- you get a fellowship and you get some statistical background and then you don't apply it for your whole career and then you come into my court and you are a statistical expert. I don't buy that.

MS. BIERSTEIN: Your Honor, I don't think he's claiming to be a statistical expert or that he didn't apply the expertise. Dr. Abramson's expertise is he reads the studies and he compares what the studies -- the published papers say to what Pfizer said in their marketing. His expertise in reading the published papers comes, yes, from the training in his fellowship, which is about how to read

and evaluate studies and published papers. It also comes from his practice as a physician. Because it's -- one of the things practicing doctors are expected to do is to read studies and understand --

THE COURT: I'm not going to -- his expertise, I'm not going to have a backdoor into statistical methodologies that may not be -- it's not a backdoor to get statistical evidence in that he doesn't have the expertise to perform. There are going to be things within his expertise as a doctor that he might be able to testify to and I've got to sort these out. Some of these are kind of theoretical about how -- what might be acceptable and what might not be. He's not a statistician, and it's not going to be a backdoor to getting statistical evidence in that is not offered by someone with expertise.

MS. BIERSTEIN: I agree he's not a statistician. He may be able to rely on other statisticians for his opinions.

THE COURT: I think that is the -- all of these I have been kind of asking, you know -- I mean, the cardiologist, who is also a statistician, is going to be a rare bird out there. And I'm not going to require you to find that unique animal because they are two different disciplines. So if you are a cardiologist or you are a family physician, or whoever relies on somebody that is a --

is approved as a statistician, that's just foundational building to put up your case. I wouldn't require it.

But what happens on Dr. Abramson on that if Dr. Wells doesn't survive? That's one of those questions. What then happens? Because it looks like to me -- and just like we got into this Dr. Jewell situation -- some of that evidence is foundational, some it it isn't for y'all --

MS. BIERSTEIN: I think, as Ms. Birnbaum conceded in Dr. Roberts, she's not relying on Dr. Wells. Dr. Abramson has 11 discrete opinions.

THE COURT: I just need to go through them and analyze them. Because I think -- I would say I'm kind of leaning towards letting some of this stuff in. And I read with a great deal of care the two cases. And I do respect the judgment of my colleagues. I mean, it's not final, but it seems to me that there may be some merit to that. But I want to study it more carefully. But I need to do it -- you know, it's very hard to -- issue by issue because it might matter.

MS. BIERSTEIN: As long as -- if you are going to be looking at the cases on that -- and I appreciate you taking a careful look -- there were some points from their reply brief on Dr. Abramson that I want to address very quickly and then I do want to get back to preemption because I have some important things to say on that.

But with regard to the other cases dealing with Dr. Abramson, Pfizer suggests in its reply brief that Doctor -- that Judge Weinstein's opinions allowing Dr. Abramson to testify were overruled in the Second Circuit.

THE COURT: Other grounds, I thought.

MS. BIERSTEIN: Completely other grounds, Your Honor. I just wanted to be sure.

THE COURT: I knew that.

MS. BIERSTEIN: It had nothing to do with him. And I wanted to be sure there was no confusion about that.

THE COURT: No confusion about that.

MS. BIERSTEIN: I wanted to note that there was some suggestion that because the written opinions there were cursory, that perhaps this wasn't a carefully thought out decision. And I wanted to note that Doctor -- that Judge Weinstein held evidentiary hearings and actually heard Dr. Abramson testify before he reached his ruling. And to the extent --

THE COURT: That doesn't have any weight whatsoever.

MS. BIERSTEIN: To the extent that -- to the extent that he was making an evidentiary ruling, I just want to note that he was the author of a treatise on evidence. But the other --

THE COURT: I mean, I know.

MS. BIERSTEIN: The other point I wanted to make in

terms of the case law is there is a lot of discussion in Pfizer's papers about the *Trazalon* case and the *Reslin* case and neither of them are about Dr. Abramson. Those are other experts and Pfizer is trying to make an analogy.

THE COURT: That's not -- I'm going to go to what Dr. Abramson says. I'm not worried about this other stuff. I am not making a judgment on any of that.

MS. BIERSTEIN: Great.

THE COURT: I wasn't impressed with any of that.

MS. BIERSTEIN: Just wanted to be sure.

Coming back to preemption. I think the place where I would start in my disagreement with Ms. Birnbaum is that we don't concede that changes would only be made to reflect newly-acquired information.

Now, I think we went either way. I'm going to get to why we went under newly-acquired information. But here is the problem: The FDA regulation changed in 2008. The words newly-acquired information didn't appear in the regulation until that time. In 2004 is when the indication came out on the label allowing them to have the indication for primary prevention.

So this CBE question that we are asking, the first question: At any time between 2004 and 2008 was Pfizer free to make unilateral changes to the label even if it had no new information? Now, there is an issue, Your Honor, about

whether the change in 2008 merely clarified and made explicit what the existing rule had always been, which I think is what I imagine is what Pfizer would contend, or whether it was a new requirement. Certainly the words never appeared in the regulation before then.

I should mention a couple of points in *Wyeth vs. Levine*. The Supreme Court didn't reach the question of whether the 2008 changes were new or a mere codification. They decided they didn't have to get there. But they did consider a different FDA change that was an attempt to kind of rewrite things backward looking and rejected it and said, Well, that's not what you were doing before and you can't come in all these years later and say we always meant that. So I think that provides some guidance even though it was dealing with a different issue.

As I say, when they came to this question about whether newly-acquired was retroactive or whether or not it's an open question, so you know, it may be something for the Court to consider. We believe that it was not required that it be newly-acquired information.

Even if it is required to be newly-acquired information, Ms. Birnbaum says yes, but that only applies to information about new risks; she says not information about new indications. She says that based on the definition of newly acquired. But the problem is she's ignoring the actual

CBE regulation. The cite to that is 21, CFR, Section 314.70 and the subsection -- I know my eyeballs are starting to spin, (C)(6)(3)(i)(d).

THE COURT: You know it's always bad at the end of the little I's.

MS. BIERSTEIN: Then you know you are in trouble.

And this is what tells you the specific items that you are allowed to make a unilateral change for. This is the regulation that says, you know, Here are the changes you have to get preapproval for. Here are the changes you can do this way. Here are the changes you can do unilaterally. In this Subsection D, you can make a unilateral change to delete false, misleading or unsupported indications for use or claims for effectiveness.

So the notion that CBE is only for risk factors and increased risk I think is flatly contradicted by the CBE regulation itself. And I don't think the definition can be read to override that. I think if anything, the definition, that might be a reason to suspect that newly acquired may not actually affect this portion of it. But either way, the regulation is quite clear that CBE does apply to indications and claims of effectiveness. So I think -- I think that's pretty clear.

So I think the question now, Your Honor, is assuming that newly acquired was retroactive, we all agree that after

2008 any label changes were going to have to be newly acquired.

Now, we don't agree -- I think with Ms. Birnbaum's interpretation of that, even of the definition about the new analyses, I read this to say it can include new analyses of previously-submitted data.

The Supreme Court in *Wyeth vs. Levine* certainly thought that new analyses of old data were okay. We think that there are new analyses of the old data in the period between -- after -- after 2008. There is the analysis of the data in the Eisenberg and Wells article that we talked about earlier, this 2008. I understand it's not peer reviewed, but it's new information. If Pfizer was aware of it, if they had wanted to change the label -- I'm not saying they could have -- they should have drawn that conclusion, I think they should have, but --

THE COURT: What was that evidence?

MS. BIERSTEIN: I'm sorry. That's the article that Ms. Birnbaum referred to as the *Law Review* article, the article by Dr. Wells and Mr. Eisenberg.

THE COURT: So you -- do you have any indication that Pfizer was aware of the *Law Review* article?

MS. BIERSTEIN: I don't know whether they were or not. I think for preemption or not I think it was whether they were precluded. Even if Ms. Birnbaum is right about

what newly acquired means, the law would not have precluded them from doing that. The issue isn't whether they were; the issue might have been whether they should have been. In the negligence claim what you need to warn about or change your indication meant --

THE COURT: Other than the *Law Review* article, anything else?

MS. BIERSTEIN: Yes, Your Honor.

There are an exchange of letters in the American Heart Association Journal circulation in 2010 that also provide new analyses of some of the existing data.

And, Your Honor, I know there has been a lot of discussion of CASHMERE, and I'm not going to beat a dead horse with it, but I think the whole idea it was in looking at the carotid artery was it was supposed to be a marker for atherosclerosis. I don't care about the artery itself, it was to see if it would help prevent --

THE COURT: I've seen --

MS. BIERSTEIN: To think that CASHMERE is new data that could have provided a basis for a clarification about the state of the evidence regarding -- regarding the efficacy for women, for primary prevention that would not have been precluded, would not be impossibility for preemption.

Finally, we think the new risk information about diabetes would support a clarification on the indication or

the claim of effectiveness because, as I think we've made clear, we think it's the excess risk of diabetes that makes it so important to make clear what the real status of the evidence was.

THE COURT: The 2012 label change, is that what we are talking about?

MS. BIERSTEIN: Well, the 2012 label change recognizes that diabetes risk, but we think the evidence on diabetes was emerging over the years between the 2004, when they got this indication, and the point at which, you know, depending on what the end point is, any particular plaintiff who might be suing.

And so we think the accumulating information would also be new information.

THE COURT: Our clock is running from basically 2004?

MS. BIERSTEIN: Anything from 2004 on would meet the requirement of new information.

THE COURT: Our first claim, do we know when she started?

MR. TANENBAUM: If I could? On case specifics, I actually have a whole presentation on this.

When the information changes after the 1996 label is approved, there is new information that emerges after that, between 1996 and 2003 when Ms. Daniels was diagnosed with --

THE COURT: She was -- I'm sorry -- what year is that?

MR. TANENBAUM: 2003.

MS. BIERSTEIN: Your Honor, none of this affects the *Daniels* case because this whole question about whether they could have changed the label, it's all after Ms. Daniels' diagnosis.

THE COURT: Mr. Tanenbaum has a different argument about that.

MR. TANENBAUM: Correct. And there is --

THE COURT: We'll get to case specific. Make sure you remind me to address that issue.

MS. BIERSTEIN: He's going to talk about what they knew between the first label and 2003. I'm focusing on what they knew from 2004 on, but it doesn't affect --

THE COURT: I knew from prior statements by Mr. Tanenbaum that he had a slightly different argument. I was trying to figure out where we were.

MS. BIERSTEIN: It doesn't affect Ms. Daniels and it doesn't affect Ms. Hempstead, either. She's also diagnosed by the time this new label goes into effect.

THE COURT: Of course, I'm writing something for this whole case and I need to address far broader than these two.

MS. BIERSTEIN: That's right.

The last point I want to make on this. There are two cases that Pfizer cites on preemption. The *Prohias* case and the *Celexa* case. We discuss them in our brief, but I wanted to make a couple of additional points. And I think this relates a little bit to the discussion we had earlier today. Both *Prohias* and *Celexa* are consumer fraud cases; they are not failure to warn cases. In both cases the plaintiff alleged that the label was false and misleading. We are not alleging that the label was false and misleading; we are alleging that the label provided an inadequate warning, which is quite a different claim.

When the FDA approves the label as neither false nor misleading, it's a different -- we know under *Wyeth* that the fact that they have approved it doesn't mean that it's adequate. That's what *Wyeth* tells us. It's the floor; it's not the ceiling.

THE COURT: So you are not alleging it's false or misleading?

MS. BIERSTEIN: That's correct. We are alleging that the warning is inadequate and not that it's false or misleading.

THE COURT: Isn't the regulation on preemption that they -- one of the CBE things -- under the CBE is that to delete false, misleading --

MS. BIERSTEIN: Or unsupported. We believe it was

unsupported; not false or misleading. The problem is it's unsupported because there is no evidence for it.

THE COURT: Is my memory right? Isn't there a fraud claim in the Master Complaint?

MR. TANENBAUM: There is a negligent misrepresentation claim, Your Honor.

THE COURT: Well, I might be confused about this.

MS. BIERSTEIN: We've taken out the fraud claim, Your Honor.

MR. TANENBAUM: Negligent and negligent misrepresentation.

MS. BIERSTEIN: We've taken out the fraud claims.

MR. TANENBAUM: But the fraud has been taken out.

MS. BIERSTEIN: And the negligent misrepresentation doesn't go to this statement; it goes to the issue about the diabetes.

THE COURT: Master long form, is that amended; not amended?

MS. BIERSTEIN: Your Honor, it's the short form. It's the most recent amendment.

THE COURT: Short form.

MS. BIERSTEIN: It's in *Daniels* and *Hempstead*. The long form still has those -- still has those in there. But even if it's preempted for consumer fraud -- and I just wanted to add one last point on this.

THE COURT: I believe it says -- I'm looking at paragraph 10 of the Short Form Complaint: "Further, the following claims and allegations are asserted by plaintiffs' eighth cause of action fraud and misrepresentation."

MR. CHEFFO: And I also think to the extent they may have had -- that's only -- I think they only amended as to one specific case. I mean, the bigger issue here is they still have claims.

THE COURT: Are we dropping fraud and misrepresentation from the entire MDL?

MS. BIERSTEIN: We are not dropping fraud and misrepresentation in the entire MDL. Even in our fraud claim we are not alleging statements that efficacy were the part that were false and misleading.

I believe what is false and misleading -- what is misleading -- it's misleading rather than false, but, you know, the fraud can also be from that, statements about diabetes. So I think our fraud --

THE COURT: So the statement about and fraud and misrepresentation are different. I mean, there is some similarity. But I mean, a fraud is a very discreet meaning.

MS. BIERSTEIN: The heart of this case is a failure to warn case. This is primarily a failure to warn case.

To the extent that there is a separate preemption argument on some of these ancillary causes of action, I don't

think either side have briefed that separately. Your Honor might want supplemental briefing -- hopefully not part of the September 29th brief -- but I think neither side has addressed whether there is a difference among the different causes of action.

THE COURT: I just want everybody to put their feet in the cement and let's stay in one place so I can figure out -- you know, I have a colleague who does not do any oral argument anymore. And her explanation for that is every time she does it, the lawyers who don't seem to be winning the argument change their argument in the middle of the argument because the one they had made doesn't work anymore.

And, you know, I certainly don't take that view, but I do require my counsel to fix your position and not keep moving on me. And I do need help on this. If fraud and misrepresentation are in, fraud is out, fine. You know, there is a discreet issue about what fraud is. And if it's misrepresentation, what is the misrepresentation? I just need to know what the target is.

MS. BIERSTEIN: The last point I wanted to make on the case law that doesn't go on the distinguishing the cases, but back to the point about what would suffice under the CBE regulation, in the *Celexa* case -- and *Celexa* is a case where the plaintiff flat out refused to point to anything new because the plaintiffs' theory was, No, we think the FDA got

it wrong. But in *Celexa*, the Court said that a new study showing lack of efficacy would suffice under CBE. So the notion of lack of efficacy would be sufficient --

THE COURT: But your experts think the FDA got it wrong.

MS. BIERSTEIN: As to whether they personally believe the FDA got it wrong, only Dr. Fleming offers that as an opinion in this case. Dr. Roberts, Dr. Abramson -- and as I said, I'm putting Dr. Quon in, but they --

THE COURT: They don't think -- I mean, they disagree implicitly because they think statins are ineffective.

MS. BIERSTEIN: No, Your Honor. They think there is no --

THE COURT: That's not what they say. Listen, I know you say that and I respect that you say that.

MS. BIERSTEIN: It's what they say in their reports, Your Honor.

THE COURT: No.

MS. BIERSTEIN: It's what they say in their reports. I think I can read that to you verbatim from the report, the exact language that they use. Dr. Quon: "There is no" --

THE COURT: I'm going to go back --

MS. BIERSTEIN: "There is no convincing evidence

that there is a clinical benefit." That's what his report says.

THE COURT: You recognize no convincing evidence is not a legal standard, convincing evidence is not a legal standard?

MS. BIERSTEIN: The lack of convincing evidence just takes you back to zero.

THE COURT: No convincing -- that's a very high standard.

MS. BIERSTEIN: If we are in the courtroom and the plaintiff produces no evidence and the plaintiff loses, they don't lose because the Court finds the defense was right; they lose because there was -- there was insufficient evidence.

That's -- so that, to me, is the distinction. When we say there is no evidence, we are like -- we are like the criminal defendant who says the Government hasn't proven its case. You want to say, Well, that's the same as saying I'm innocent. We all know the defendant doesn't have to prove he's innocent; all he has to do is say the defendant -- the plaintiff -- the Government didn't meet its burden.

Now, I tried to show you this morning why and from a legal standpoint in terms of our burden that's sufficient, but in terms of the semantics of what the expert means when an expert says there is -- there is no evidence, there is no

convincing evidence, there is not sufficient evidence for me as a scientist to draw this conclusion, that is not the equivalent of saying, I'm ready to go out and say it's false. It's saying the Government's case is unproven, or in this case, the case is unproven. It is not the same thing, Your Honor. And I think it's a distinction that keeps getting lost. I think it's in Pfizer's interest for it to get lost. It's very important to us that the Court keep in mind --

THE COURT: You wouldn't mind me granting a motion in limine to keep any testimony out that Lipitor is not effective in women?

MS. BIERSTEIN: I wouldn't mind you keeping out testimony that's an affirmative statement that any scientific evidence shows that it's not. I would have no problem with that. We do not have an expert who we are offering to say there is a study that shows it is not effective. We are not offering that testimony.

THE COURT: Regardless of studies?

MS. BIERSTEIN: No one is offering the opinion.

THE COURT: They aren't going to say that Lipitor is not effective in women; is that correct?

MS. BIERSTEIN: As long as you are differentiating that from them saying there is no evidence that it is.

THE COURT: Yes. Okay. Good. Thank you.

MS. BIRNBAUM: I heard arguments before, Your

Honor, and I have been in dozens of these kinds of cases, where science --

THE COURT: They say you are well traveled.

MS. BIRNBAUM: I'm well traveled, Your Honor. I've got a lot of years on me. But, you know, it's just -- it's just shocking to think that an expert -- first of all, their experts, we've showed you before, say there is no evidence. That is, No, we didn't really mean that. There is insufficient evidence. I've seen no difference. It is --

THE COURT: I'm worried about -- I want to make sure that what is communicated to my jury isn't misleading.

MS. BIRNBAUM: It is misleading.

THE COURT: I don't want to have something that you think they said one thing and it gives the impression of saying something.

MS. BIRNBAUM: Their experts are going to say there is no benefit here because there is no efficacy in the end of the day. And when we do a risk/benefit analysis, if there is nothing to support benefit, then the risks outweigh the benefits. That's not the way this works. They have the burden of proof. This is not a criminal case that the Government has to prove their case. They have to prove their case and they can't.

Now, I'm stunned that if there is a *Law Review* article somehow that's new evidence that Pfizer has to go to

the FDA and change their label. It's ludicrous to make the argument. It's ludicrous to respond to the argument.

And I have another problem that goes to they keep on -- by the way, I just -- my folks who keep track of all these things tell me that they have never made this retroactive argument in their oppositions. I'm not making an argument --

THE COURT: You know, I just said to Ms. Bierstein, she makes an argument that has merit. The fact that she doesn't make it, I'm not going to worry about it.

MS. BIRNBAUM: I'm not making that argument. Don't worry. I do want to have an opportunity to respond to it. They can make any argument they want.

So this is all about CBE change, right? This is what they say, we could have made a CBE change because there are reanalyses of old evidence or new evidence.

Let me see what their expert says. 75.

THE COURT: Dr. Fleming?

MS. BIRNBAUM: Their regulatory expert, right? What does he say? I didn't see any report. We asked him:

"Question. You are providing an opinion about any specific instance in which Pfizer should have used the CBE process in its regulatory history, am I correct?

Answer. I don't have an opinion that they failed to properly use the CBE process at any point in its history,

that is correct." Not in his report.

"Answer. I'm simply wanting to provide a sense of the mechanisms by which a company can amend a label. And the CBE, of course, is one, just one, but it is one.

Question. Okay. But your opinions are not about Pfizer's failure in any given instance to use the CBE process, is it?

Answer. That's correct."

That's their expert. That's the only regulatory expert they have. He doesn't say they should use the CBE process because he knows you couldn't or shouldn't or wouldn't use the CBE process because there is no new evidence, there is no new data, there is no reanalysis of the old data. I mean, it's sort of being made out of whole cloth. And they don't rely on any new information.

76. This is Dr. Abramson.

"Question. So even using the analysis that Pfizer submitted and the approval, you would have essentially rewritten the indication or think the FDA should have rewritten the indication based on Pfizer's own analysis?

Answer. I think the problem could be easily fixed."

He wants to change the label by bringing the sentence up that says the results for women were inconclusive into the indication section and then plaintiffs can make their own decision.

"Question. So you think the way the FDA has treated it is wrong?

Answer. Yeah."

That can't be done. He can't testify to that. Neither can anybody else. That is preempted.

And one last slide, Your Honor -- or two, if you don't mind, and then I'm going to really sit down. I thank the Court for its indulgence and patience in this.

Slide 78. We certainly have a different reading of the *Celexa* case, that's a First Circuit case, 2015, hot off the press.

THE COURT: I read it. I've read it.

MS. BIRNBAUM: Then I'm going to leave it here. We think it's very much on point. We think you should follow the analysis. It was a different kind -- it was a consumer case, but the analysis fits exactly. And they are making the same argument here. The FDA looked at all of the evidence at the time of the label, 2004, time of the indication. That's the FDA's job. The FDA found that the label was not misleading. They found that it could be used for men and women.

THE COURT: Ms. Birnbaum, I'm sort of -- you know, I think there -- I've got to finish sort of my full analysis on this, but I find the argument about preemption as to the label more persuasive than I do about marketing. And I don't

mean quitting to sell; I'm talking about you send your detail people out and talk to doctors. And if you are pushing men and women -- I'm sure they are trying to sell everyone they can legitimately do -- I'm just not sure that the impossibility to change the label preempts their ability. And part of the claim, as I read it, is that there is a claim of misleading labeling and misleading marketing.

MS. BIRNBAUM: I don't think there is a mislabeling marketing, Your Honor.

THE COURT: I've got to go back and read the Complaint again, but it looked like to me there was a complaint of that.

MS. BIRNBAUM: Yes.

MR. CHEFFO: One point. I think the one thing -- you might want to take a look closely at this -- remember with respect to marketing of pharmaceutical products, it's regulated, highly regulated. So basically, you can't say anything inconsistent with the label in your marketing. So it's not a situation like you are selling toasters and you find an issue and you can say anything you want. So you are required to only --

THE COURT: Let me say this: Let's just assume -- and I'm not there, I'm saying let's assume -- a hypothetical that you -- in 2004 you believed in good faith that it was effective in men and women. And then subsequent evidence

came out to you, the reanalysis of that data you relied on came out, and you took the interpretation, I can't unilaterally change the label. I would have to go back to the FDA to get permission. I can't unilaterally amend my label.

Are you saying to me that even though you had made that conclusion, you could still have your detail people trying to sell to women, promoting the sale to women, even though you know now that through your reanalysis -- you can't change the label, that's out there -- but you still are just, like, involuntarily must argue sell to women because you are like a robot because of the label? I don't think that can -- that can't possibly be the law.

MR. CHEFFO: What I was really trying to say is it's not a situation where you have kind of a free hand to change marketing.

THE COURT: I don't think you could add things.

The thing is, you know, if you -- if you had reason to believe that it's not effective in women, are you then obligated to keep telling them what is effective, even though you don't think it is based on a reanalysis? I just think that you could end up -- and I'm not saying I'm there -- but you could end up arguably reaching a conclusion that the labeling is one approach. Could be that the labeling dispute is preempted but not marketing. I don't know yet. I'm

just saying that I see --

MR. CHEFFO: I do see.

And I guess what I would just say finally -- and I'll turn it back to Ms. Birnbaum -- when you spin this out, how would you do that? You essentially get to nonselling. Because then you go in and you would only put up a poster that only women shouldn't buy it. So --

THE COURT: That's different. I think if you had to put up posters, then you are really competing with your labeling. It's a question of how you market.

But listen, it's an area I need to think -- to spend a little more time on and think through.

MS. BIRNBAUM: Your Honor, if Your Honor wouldn't mind? Maybe that's one of the things we could brief, as well.

THE COURT: Please don't do -- we don't have anymore space.

MS. BIRNBAUM: Two paragraphs if we find anything on it. Because I really do think it's an interesting hypothetical. This is not the case here.

THE COURT: I do it in some ways rhetorically because I'm not there yet. It just -- it just seems to me conceptually different. That's all.

MS. BIRNBAUM: It's not the case here factually either.

THE COURT: We are not supposed to read preemption broadly. I'm just saying it's just one of those issues that I need to think more deeply about.

MS. BIRNBAUM: Your Honor, unless you have any other questions --

THE COURT: No.

MS. BIRNBAUM: -- I am going to be finished. I want to thank you, Your Honor. It has been one of the most interesting arguments of my entire career. Thank you so much.

THE COURT: We went back over lunch and looked at -- I'm not quite sure how my -- there had been the clerk's suggestion -- the clerk's office suggestion that January 20th would be the jury draw date. We have changed that to January 5th, and January 6th would be the first day of the trial.

MR. CHEFFO: Two things, Your Honor. Obviously we will be guided by that. It's a little different -- I know that Mr. Dukes, for example, I think has a family vacation on that. So if we could maybe push that to the middle of January because for practicalities, being a little selfish for all of us.

THE COURT: Would you prefer that we start on the Monday after that, that would be January --

MR. CHEFFO: Yes, Your Honor.

THE COURT: We are talking vacation.

MR. TANENBAUM: Thank you, Your Honor.

THE COURT: What date would that be?

MR. TANENBAUM: That's the 12th.

THE COURT: Let me just say: I can't -- we'll talk -- I think we have some control over that. And if it suits better, we may just end up drawing the jury that week and -- because I do think there is some benefit of me telling the jurors, you know -- our only problem, of course, is we have now noticed them. We've asked this --

MR. TANENBAUM: Sent the questionnaires out.

THE COURT: So be it. It's just -- I hate -- you know, there are a lot of other reasons I'm not happy with doing it. It's just, practicalities are practicalities.

You've got an airplane to catch.

MS. BIERSTEIN: I'm worried about my flight.

MR. TANENBAUM: Dave Suggs has a car.

THE COURT: By the way, 3:44 to 5:00 -- you have a 5:00 flight? My son will be leaving at 4:15.

MR. CHEFFO: Should we use the 15 minutes and see if we can deal with Abramson?

MS. BIERSTEIN: No, I'm serious.

THE COURT: I think we've had enough. I mean, I think -- believe me, I have been through this stuff and I'm going to go through it more. You have all given me a lot to

think about and the performance of the art of the people who did the argument has just really been spectacular.

MR. MAYER: I really think -- can I mention two things on Fleming? One is that -- and we discussed this before when we thought we were going to be arguing -- that we are filing a motion in limine next week with regard to all foreign labeling. It's broader really than our 702 motion, but if it's --

THE COURT: I'm going to tell you right now, I'm not impressed with keeping the foreign labeling issue out. I want to hear what you've got to say, but I want to give you a little forecast that I'm not -- you are going to have to do some persuading of me on that.

MR. MAYER: So I would urge you to look at that brief before you decide.

THE COURT: I will. I promise you.

MR. MAYER: The second is that one of the things I had hoped to do in this argument on Fleming was to walk Your Honor through in an organized way to help the Court as to those -- there is a lot of opinions and subopinions that Dr. Fleming gave. And a number of them he actually withdrew in the course of his deposition. And I wanted to lay that out for you.

THE COURT: I'm not sure I appreciate that. If you've got slides or whatever, get them -- you know Mr.

Cheffo is going to give me the slides.

MR. MAYER: We will do that.

THE COURT: I would welcome that.

MR. MAYER: Ted Mayer, M A Y E R.

MR. TANENBAUM: In regards to the foreign labeling, Your Honor, there is a code section that requires notice be given to the FDA of any change required by foreign --

MS. BIERSTEIN: We are not going to argue that now.

MR. TANENBAUM: I understand that.

THE COURT: Ms. Bierstein, you can leave. He's not going to --

MS. BIERSTEIN: As much as I love Charleston, I don't want to spend the weekend here.

MR. TANENBAUM: Before His Honor makes decisions about the labeling issues, which I see he's in the process of doing, I think it's important to note that once the Japanese required their people to change, there is a code section that requires Pfizer to notify the FDA of that, which they did not do. And --

THE COURT: And I'm sure Pfizer has an argument about why.

MR. TANENBAUM: I'm sure they do.

THE COURT: And I'm willing to deal with all those issues. I just think, as a matter of just a general relevance concept, it just seems to me it's a potentially

relevant matter. But I want to hear their arguments to the contrary and hear them out.

You know, they say that on a good day half the people leave the courthouse mad at you, and then on a bad day they all leave mad at you. I think I have managed to accomplish that.

Y'all have a good weekend.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Amy C. Diaz, RPR, CRR October 1, 2015

S/ Amy Diaz