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IN THE COMPETITION

Case No.: 1407/1/12/21, 1411/1/12/21-1414/1/12/21:

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22nd November-Friday 23rd December 2022

Before:

The Honourable Mr Justice Marcus Smith
Simon Holmes
Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Hydrocortisone Decision

Appellants

- (1) ALLERGAN PLC (“Allergan”)
- (2) ADVANZ PHARMA CORP. LIMITED & O’RS (“Advanz”)
- (3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & O’Rs (“Cinven”) (4)
- (4) AUDEN MCKENZIE (PHARMA DIVISION) LIMITED (“Auden/Actavis”)
- (5) INTAS PHARMACEUTICALS LIMITED & O’RS (“Intas”)

Respondents

COMPETITION AND MARKETS AUTHORITY (“The CMA”)

APPEARANCES

Mark Brealey KC (On behalf of Advanz)

Daniel Jowell KC & Tim Johnston (On behalf of Allergan PLC)

Sarah Ford KC & Charlotte Thomas (On behalf of Auden/Actavis)

Robert O'Donoghue KC & Emma Mockford (On behalf of Cinven)

Robert Palmer KC, Laura Elizabeth John & Jack Williams (On behalf of Intas)

Marie Demetriou KC, Josh Holmes KC, Tristan Jones, Nikolaus Grubeck, Michael Armitage,
Professor David Bailey & Daisy Mackersie (On behalf of the CMA)

Thursday, 24 November 2022

(10.30 am)

MR JOHN BEIGHTON (continued)

Cross-examination by MS DEMETRIOU (continued)

THE PRESIDENT: Ms Demetriou, good morning.

I do not know if you were going to address us, but we have had drawn to our attention a communication from Morgan Lewis regarding Ms Pattrick and her attendance or non-attendance. Clearly it is a matter for Advanz, whether they --

MS DEMETRIOU: I am not sure my clients have yet received that.

THE PRESIDENT: I see. In that case we can wait until you have seen it, but what I wanted to say was that I would not want the understandable stresses of giving evidence in this Tribunal to deter a witness from coming and anything that we can do to minimise those stresses is something we would of course consider. I mean, you may, as your letter suggests, have taken the view that the cost benefit is simply not worth it and that the evidence is so peripheral that you do not need to rely upon it in which case that is a decision you will make, but if it is a case where you would like to have the evidence and there is something we can do to make the process easier, then that is something that we would

1 obviously want to address.

2 MR BREALEY: I can discuss that with Ms Demetriou.

3 I understand she is quite stressed out about it.

4 THE PRESIDENT: Yes, well, no. It is very clear from the
5 letter.

6 MR BREALEY: It is unfortunate, but I'll discuss it with
7 Ms Demetriou at the short adjournment and then we can --

8 THE PRESIDENT: Very good. Ms Demetriou, you are clearly
9 not -- you don't have sight of the letter that I have.
10 Well, in that case, we will not take it any further, but
11 I am sure you will be filled in in due course.

12 MS DEMETRIOU: Sir, and just in terms of the tribunal's
13 questions for Mr Beighton are you asking me to consider
14 overnight when might be a convenient moment for the
15 tribunal's questions and if this is acceptable to the
16 tribunal, I have got a run of questions now about the
17 second written agreement and when I come to the end of
18 those, I was then going to move on to more discrete
19 areas, so if that sounds like it might work for you,
20 then I can flag when that moment is to the tribunal.

21 THE PRESIDENT: No, that is very helpful and of course it
22 may be in the light of your having concluded we have
23 fewer, if any questions at all, so that is obviously
24 a very sensible way of proceeding, thank you.

25 MS DEMETRIOU: Thank you.

1 Mr Beighton, good morning?

2 A. Morning.

3 Q. I am moving on, as you have just heard, to the second
4 written supply agreement which was signed on
5 25 June 2014, was it not?

6 A. Yes.

7 Q. I am going to ask you some questions about the
8 negotiation of that agreement. You say at paragraph 73
9 of your witness statement that Amit Patel approached you
10 around mid-April 2014 suggesting a new agreement?

11 A. Yes.

12 Q. And in fact, you met with Mr Patel, did you not, and
13 spoke to him on the phone on a number of occasions
14 during the period of April to June, did you not?

15 A. I did.

16 Q. There is not any documentary record of any of those
17 calls. You did not take notes?

18 A. It is not my style to do that, no.

19 Q. Okay. And let us go to {H/414/1}. So you were probably
20 in the room when I took Mr Sully to this email, but it
21 is an exchange between you and your PA about fixing
22 a lunch. So we see that your PA emails you back to say
23 that she'll call him to arrange a lunch.

24 If we scroll back to the bottom of the page:

25 "Took a call from Amit Patel.

1 "Says you wanted to arrange to meet (lunch) soon?"

2 So you would have been -- it seems from this email,
3 you would have been in touch with Mr Patel at some point
4 on or before 4 April, yes, and you had suggested lunch
5 to him. That is what it looks like here?

6 A. It looks like that, yes.

7 Q. If we turn up {H/514/2}. This is your claim for
8 expenses on your corporate credit card. And if we look
9 at line 32, if we can zoom into that, we can see there
10 that you have claimed expenses for a lunch with Mr Patel
11 that took place on 16 May, yes?

12 A. Yes, that is right.

13 Q. But you were in touch with him in April too, I think,
14 weren't you?

15 A. I cannot remember the exact dates, but I was in touch
16 with him on -- from time to time during that period over
17 various issues relating to Hydrocortisone and to
18 Carbimazole.

19 Q. Then let us have a look at {H/444/1}. This is an email
20 from you to Guy Clark on 19 April 2014 and I think we
21 have established that Mr Clark was the chief strategy
22 officer at the time, yes?

23 A. He was, yes.

24 Q. You must have spoken -- let us have a look at it. So
25 you say -- his email to you says:

1 "We did not discuss Hydrocortisone and
2 Auden McKenzie ... shall we discuss next week?"

3 You say:

4 "Yes, this is an interesting one, Amit continued to
5 supply us (unrelated the Carbimazole issue). I think
6 that he is not keen to get into the battle over the
7 orphan drug status and its validity and so probably
8 would do a better deal on better terms.

9 "I have asked Karl what our Aesica cost and volume
10 expectations are and I would say if Amit could get close
11 to them it would be worth having a long-term supply
12 agreement with him.

13 "I am also not keen on having a fight over the
14 status or indeed having customers that see our product
15 as somehow risky."

16 That last bit, "somewhat risky" is a reference to
17 the skinny label, yes?

18 A. Yes, that is right. I cannot remember whether this was
19 before or -- as we speak, I cannot remember whether this
20 was before or after we'd gone out to customers, but
21 I think we were at that stage understanding that there
22 was a significant part of the market that was not
23 covered by our product.

24 Q. You are saying that you think Amit Patel -- so you are
25 saying that you think Amit Patel was keen not to get

1 into a fight over the orphan designation issue and you
2 say at paragraph 73 and 74 of your statement that what
3 you are referring to by that are Auden's threats of
4 litigation in relation to AMCo's own product, yes?

5 A. Yes, at the time he was -- we always had quite a civil
6 relationship, but at the time he was starting to be, not
7 specifically threatening to me, but in general
8 expressing his confidence in the fact that his product
9 would be able to see off any other competition.

10 Q. So he was in effect, I think you say, threatening that
11 he would litigate in relation to the appearance of your
12 reduced indication product. So he wanted, for example,
13 prominent warning labels on the packaging?

14 A. That is right.

15 Q. And what you are saying in this email, if we just go
16 back to it so you have it in front of you, {H/444/1}, is
17 that you are saying that Amit Patel -- you think that he
18 did not want to get into a fight about that, yes?

19 A. That is what I think. That is what I thought at the
20 time, yes.

21 Q. So you are saying that as a consequence of that he would
22 probably do a better deal, a better supply deal on
23 better terms?

24 A. There were two things coming together here. There was
25 my understanding that we were in a very weak position

1 with our own product, not just supply that we have heard
2 about, but also the fact that our product was limited in
3 its uses, so it was actually starting to become more
4 attractive to me to try and do a deal with him.

5 Q. Rather than come on the market with your own product,
6 because you knew that would be more risky?

7 A. Well, we were still pursuing that, as I think you saw
8 from the January board meeting. We were very optimistic
9 at that stage and we were not yet at this stage, indeed
10 at any stage, but particularly at this stage, we were
11 not in the mindset of going cold on our own product.

12 Q. No, but you understood the risks of your own product
13 versus the supply agreement, yes?

14 A. Yes.

15 Q. You understood, I think we can see from this email, you
16 understood that Amit Patel's perspective was either he
17 gets into a battle with you about the orphan drug
18 designation if you launched or he might offer you better
19 supply terms on that?

20 A. I was hoping, always hoping, he would offer better
21 supply terms to us.

22 Q. So you had lunch with Mr Patel on 16 May. We have seen
23 that and I think he sent you a text message over the
24 weekend of 24 and 25 May. Let us have a look at
25 {H/483/1}. So you are saying there:

1 "Hi Amit.

2 "Many thanks for your text over the weekend.
3 Looking forward to talking to you later this week.
4 I thought it would help if I wrote down what we are
5 looking for on Hydrocortisone."

6 You say:

7 "We are looking for Auden McKenzie to supply
8 Hydrocortisone to AMCo for a new 3-year term at a supply
9 price of £1 per pack. I suggest we use the previous
10 contract as the basis for this agreement. We are
11 currently forecasting 12K packs per month."

12 I am going to come back to the contents in a moment,
13 but this suggests in the first line that you had a text
14 from him over that weekend, yes?

15 A. Yes.

16 Q. You then, if we go to {H/486/1}, you then had a call
17 with him later that week on 29 May. That is what this
18 is showing, yes?

19 A. Okay, I am ...

20 Q. You do not remember that call?

21 A. No, I do not -- sorry, I do not remember it being on
22 that specific date. I know that I had a number of calls
23 with Mr Patel.

24 Q. Okay. I think you have said already that your practice
25 was not to take notes during calls?

1 A. Yes, that is right.

2 Q. Then if we go to {H/498.1/1} we see that you spoke to
3 him. If you look at your email in the middle, 3 June,
4 you called him then?

5 A. Yes.

6 Q. Then if we go to {H/498.2/1} we can see that you spoke
7 to him the following day too. Then there was a call, if
8 we go to {H/501/2}. So this next call, if we look at
9 the third paragraph, so I think lawyers were present on
10 this one, right, so this was 6 June and you can see that
11 Rob Sully was present and I think -- yes, so you can see
12 that Pinsents were there as well I think on this one,
13 but Rob Sully was certainly there, you were there,
14 Amit Patel was there and the purpose was to discuss
15 entering into an own label supply agreement. So that is
16 a meeting or a call where lawyers were present.

17 Then if we go to {H/501.1/1}, it looks like you had
18 another call where it says:

19 "Tentative slot to speak to Amit Patel".

20 Then you say:

21 "Please could we try to do this on Wednesday?"

22 Do you remember whether you actually did or not?

23 A. No, in fact all of these slots that I got to speak to
24 Amit, it is quite possible that I did talk to him, but
25 I do not specifically remember.

1 Q. But you remember having a number of calls with him?

2 A. Yes, yes, sure.

3 Q. When you had lunch with him in May, was anyone else

4 present? Do you remember that? Was Mr Sully present?

5 A. No, it was just Amit and me.

6 Q. And would you have kept a note of that lunch meeting?

7 A. I do not think I kept a note. I will have for sure

8 immediately gone back to the office and discussed,

9 talked about some of the content of that discussion with

10 Mr Sully.

11 Q. And that would have been verbally, yes?

12 A. Yes.

13 Q. Now, let us go to {H/186.2/1}. We looked at this with

14 Mr Sully. This is the AMCo competition law compliance

15 manual. If we go to page 2 {H/186.2/2}. That is you,

16 is it not, Mr Beighton, sending this document to all

17 employees in March 2013?

18 A. Yes.

19 Q. You say there that you regard competition law compliance

20 as a very important issue, yes?

21 A. I do indeed.

22 Q. Then if we go to page 13 {H/186.2/13}. The section is

23 called "Trade Associations", but we see that it is

24 broader in scope than that, do we not, because just

25 above the bullets it says:

1 "Essential safeguards for trade associations or
2 other contacts with competitors".

3 Then you see a list of what are called essential
4 safeguards. So things like agendas, minutes recording
5 each meeting, and taking legal advice on proposed
6 initiatives.

7 I think you have already accepted that when you had
8 all these meetings, when you had your lunch meeting and
9 the various calls with Mr Patel, you did not have an
10 agenda, did you, and you did not take notes of your
11 calls?

12 A. I did not.

13 Q. Now --

14 THE PRESIDENT: Mr Beighton, can I just ask this: it is
15 headed "Trade Associations -- a Special Case" and if you
16 read the first paragraph, it is accepting that meetings
17 at trade associations or other trade gatherings are, as
18 it were, an unavoidable part of doing business. You
19 have to go to them.

20 A. Yes.

21 THE PRESIDENT: As part of having to go to them, you have to
22 meet your competitors and that is obviously part of the
23 process, but you have got to be very careful in dealing
24 with that.

25 I can see why this section is directed principally

1 "Trade associations - a Special Case". Would it be fair
2 that I can draw the inference from the thinking here
3 that other meetings with competitors outside meetings of
4 trade associations are even more dangerous and so you
5 need to be even more careful?

6 A. Yes, I think that is true, yes.

7 THE PRESIDENT: Thank you.

8 MS DEMETRIOU: Thank you, sir. If we go to {IR-H/354/1}
9 now. This is a Pinsent Masons competition audit
10 from January 2014 and you will have heard that I took
11 Mr Sully to it as well when he was giving evidence.
12 This first page shows Mr Sully circulating it to the
13 management team in January 2014. That would have
14 included you, yes?

15 A. Yes.

16 Q. So you would have seen it at the time, this document?

17 A. I am sure I did.

18 Q. Then if we look at the end of what Mr Sully is saying,
19 end of paragraph 2, he says:

20 "How easy it can be to hold meetings or have
21 discussions which can create presumptions of guilt."

22 So you would have read that too, yes, at the time?

23 A. I am sure I did.

24 Q. If we go down to page 3, we can see the start of the
25 original document {IR-H/354/3}. I will just give you

1 a moment to read the summary of conclusions. (Pause).

2 You can see what is said there is that a recurring
3 theme is the extent to which employees meet with
4 competitors and they are saying that is problematic in
5 competition law terms. You would have understood that?

6 A. I understood that this was a reference to activities
7 that took place in Amdipharm before we acquired the
8 business, yes.

9 Q. Let us look at page 19, please {IR-H/354/19} and
10 paragraph 8.4.1, if we can scroll down. So we can see
11 there that what Pinsents are saying is that they would
12 suggest that a further investigation is undertaken:

13 "Important to this investigation will be identifying
14 the extent to which Amdipharm employees have met with
15 and/or exchanged information with Auden employees."

16 So they are specifically there raising the concern
17 about informal meetings or contacts between Amdipharm
18 employees and Auden employees, yes?

19 A. Yes.

20 Q. And you would have understood that, that they regarded
21 that as problematic in competition law terms. That is
22 clear on the face of the document, is it not?

23 A. That is on the face of the document, yes.

24 Q. So you would, I think, agree with me that your
25 undocumented lunch and calls with Mr Patel were not

- 1 compliant with this policy?
- 2 A. I would certainly agree that I had lunch with Amit Patel
3 and had calls with Amit Patel without Mr Sully there.
4 I guess my compromise was to fully share with Mr Sully
5 after these meetings and calls what happened during
6 them. I certainly had a very good understanding of what
7 should and should not be discussed at meetings of that
8 nature.
- 9 Q. You understood that the essential safeguards that are
10 listed in your own compliance manual was to take notes
11 and have minutes of meetings, so to keep a careful
12 written record and have an agenda, but you did not do
13 those things, did you, Mr Beighton?
- 14 A. As I said, I safeguarded myself in a different way which
15 was by discussing fully with general counsel after those
16 meetings.
- 17 Q. Is that how you would do things today or do you
18 recognise that was inappropriate?
- 19 A. I do not do those things today, but I do not -- I still
20 do not think that that was inappropriate.
- 21 Q. So if you were meeting a competitor today, would you
22 still have calls that were undocumented?
- 23 A. I do not meet competitors.
- 24 Q. I am asking what would happen if you did. How would you
25 go about it?

1 A. If I was in a different role, it is kind of a little bit
2 hypothetical.

3 Q. Indulge me for a minute, Mr Beighton. If you were
4 meeting a competitor today, would you do what you did
5 then or would you keep a written record?

6 MR BREALEY: Can you be more specific? Meeting a competitor
7 for what reason.

8 MS DEMETRIOU: For any reason. Would you keep a written
9 note of what you discussed with them?

10 A. Not if I was meeting on a social -- for social reasons
11 or if there was a specific business purpose. I am
12 sorry. It just does not happen to me at the moment.

13 Q. You seem reluctant to answer my question.

14 A. No.

15 Q. If you were having these meetings with Mr Patel today,
16 would you have kept a written record?

17 A. Actually, sorry, in hindsight, I would, yes.

18 Q. Thank you. Let us go to {H/479/1}. This is an email
19 from you to Robert Sully on 27 May. I think we have
20 looked at it before. We certainly have with Mr Sully,
21 but this is a draft email to Mr Patel, is it not? Do
22 you want to just quickly read it. It says:

23 "Hi Amit -- "

24 You are sending it to Mr Sully so it is obviously
25 a draft:

1 "Many thanks for your text over the weekend.
2 Looking forward to talking to you later this week.
3 I thought it would help if I wrote down what we are
4 looking for.

5 "This is essentially for Auden McKenzie to supply
6 Hydrocortisone: on the basis of a long supply agreement
7 (3? 5? Years).

8 "We are looking for a supply price of below £1.16
9 and are currently forecasting 12K packs per month. We
10 obviously would prefer our own livery ..."

11 This is following up, apparently, on a text message
12 over the weekend and that text message is not in
13 evidence and I think you have said you cannot recall
14 what -- can you recall what the text message said?

15 A. No.

16 Q. When the CMA was investigating this case, it took your
17 phone, did it not, or probably more than one phone?

18 A. Yes, it took all my phones.

19 Q. How many would that have been?

20 A. I do not know. I cannot remember, two, three.

21 Q. But the CMA could not access those phones, could it,
22 because you could not remember the passwords to open
23 them?

24 A. There was one phone, an old BlackBerry, that they could
25 not access. I did my utmost to help them open it.

- 1 Q. But the upshot is the CMA hasn't seen these text
2 messages, has it, because they were on that phone?
- 3 A. I do not know whether they were on that phone. I have
4 never been asked to -- I could work out the timing to
5 check whether they were.
- 6 Q. All right. Perhaps that is not within your knowledge.
7 Let us go to {H/483/1}. This is the email that you
8 ended up sending to Mr Patel and it was sent the day
9 after the draft to Mr Sully. We can see the date,
10 28 May. It is very similar to the draft that you had
11 sent Mr Sully, but the price is £1 per pack rather than
12 £1.16 and it is a three-year term and you say that you
13 are currently forecasting 12,000 packs per month. That
14 is, I think we agree, double the previous volume of
15 6,000?
- 16 A. Yes.
- 17 Q. And you specify 12,000 packs, because that was your
18 estimate of the sales you would achieve with the Aesica
19 product or rather your estimate for the Aesica product
20 was 10,000 packs. That is right, is it not?
- 21 A. That was the budgeted number of packs that the
22 commercial team had put into what they predicted to sell
23 that year.
- 24 Q. What they predicted to sell. So what you were doing was
25 going back -- you were going to Auden to ask for 12,000

1 packs, because you wanted at least to be able to sell
2 the same number that you could sell with your own
3 product, yes?

4 A. Exactly.

5 Q. Let us go to {H/445/1}. This is an email exchange
6 between you and Karl Belk. Let us go to the top of
7 page 2 to start with {H/445/2}. You can see the date,
8 it is 17 April. Mr Belk is saying to you -- he is
9 talking to you about the Aesica cost, the price that
10 Aesica would charge you, yes, for the product?

11 A. I do not know. Is there a request before that?

12 Q. Let us look at the next?

13 A. No, before that. He is obviously answering a question
14 to me.

15 Q. I am not sure. Let me see if I can dig that out. But
16 let us go on for now to look at the next -- let us go up
17 to see what is said. You then say:

18 "Thanks Karl.

19 "Do you know the current cost price from Auden?

20 "Also do you know the volumes that we currently get and
21 what we are expecting to sell in the new deal? "

22 His response is:

23 "Monthly volumes from Auden is 6000 packs per
24 month ... price is £1. Forecast slightly higher 10000
25 from Aesica."

1 So there he is saying that you are getting 6,000
2 from Auden, but the forecast of what you would sell from
3 Aesica is 10,000. That is what he is telling you?

4 A. Yes.

5 Q. If we scroll up further, you can see you are asking
6 Jane Hill what the size of the market is and she answers
7 you and says that it is 77,000 packs per month, yes?

8 A. Yes.

9 Q. At that stage, that was all Auden's product, that was
10 product they were producing?

11 A. Yes.

12 Q. Through their CMO. We can see that the date of that is
13 22 April, yes?

14 A. Okay.

15 Q. So the dates are flipped, because they are American
16 dates, but it only makes sense as being 22 April.
17 I think we have established already that when you asked
18 Amit Patel for 12,000 packs per month, you had in mind
19 that you would be selling 10,000 of your own packs and
20 you wanted at least to get that, yes?

21 A. Yes.

22 Q. If we go to {H/504/1}. It is a little difficult to
23 read, but these are emails between you and Mr Sully on
24 11 and 12 June 2014. If we look at the middle of
25 page 1, so it is you to Mr Sully and you say:

1 "Amit has agreed to this and to supply us for this
2 month. There are a couple of things that he did not
3 mention the detail of that he wants you to sort out."

4 He says:

5 "The other thing is that he wanted to charge us
6 a higher price (say £3 per pack) and then rebate us
7 back. We can talk about it tomorrow. But it does not
8 stop us achieving £1 per pack under the normal course of
9 business."

10 So I think we can say at this stage £1 per pack was
11 still in play in the negotiation in mid-June, yes?

12 A. It looks like it, yes.

13 Q. Mr Sully was not keen on the rebate arrangement, as we
14 heard yesterday?

15 A. I do not think I would have been either. I did not
16 really understand it.

17 Q. You say in your witness statement, this is paragraph 78
18 in case you want to look at it, but we do not need to
19 turn it up, that Mr Patel countered with £1.78 and you
20 agreed that price, did you not?

21 A. I think that countering happened in discussions between
22 the legal teams, not me.

23 Q. In any event, he came back one way or the other with
24 £1.78 and that was agreed, yes?

25 A. And I agree, I think with Mr Sully that we would accept

1 that.

2 Q. Let us go to {H/517/1}. This is a thread between --
3 there is a thread between Mr Sully and a lawyer acting
4 for Auden who exchange comments on the draft agreement
5 between the 13 and 17 June and it is forwarded to you by
6 Mr Sully on 18 June. We can see -- do you see in the
7 middle of the page there is an email to you and he is
8 forwarding a chain. We see there, if we can just scroll
9 a little bit -- thank you. That he is nearly ready to
10 go back to Auden. They are suggesting that the price be
11 fixed at --

12 A. Sorry, where's this?

13 Q. Sorry. You should see it. Do you see:

14 "John.

15 "I am nearly ready to go back to Auden..."

16 A. Yes.

17 Q. Two points. Looking at the first point is the price.

18 So:

19 "They are suggesting that the price be a fixed £1.78
20 per pack. This is a lot simpler than a rebate system,
21 so are you happy to agree that? I believe that it is
22 around the Aesica cost of goods?"

23 You respond, if we go up now, please, you say:

24 "I am fine with it Rob."

25 You say that it is:

1 "Higher than Aesica [the Aesica cost] though to be
2 honest it is hardly worth fussing over as especially
3 the price is going up in the market and it is over £50
4 now.

5 "My main concern at the moment is that we get the
6 first order this month."

7 On its face, of course, if you did not know the
8 context, £1 to £1.78 that is quite a large percentage
9 increase on the price, yes? But the context is key, is
10 it not, because it was really a drop in the ocean
11 compared to the market price, which had gone to £50?

12 A. Especially as we were in a position of where we did not
13 have our own product to launch and we were starting to
14 get increasingly worried about the orphan drug status.

15 Q. We are going to come back to those things. On wanting
16 to get the supply started you say that was your main
17 concern and that was a concern, was it not, because you
18 had now negotiated or you were negotiating 12,000 packs
19 on which to make a very large margin and so a month is
20 important, is it not? It is worth quite a lot of money?

21 A. Yes, of course, yes.

22 Q. You say at paragraph 84 of your witness statement that
23 you cannot speak on behalf of Auden in terms of why it
24 was doing this. But I want to understand what you
25 understood to be the consequences of the deal for Auden

1 and I think we established yesterday that you agree that
2 if they had not sold these 12,000 packs to you, they
3 would have sold them at market price to their own
4 customers?

5 A. Yes.

6 Q. If the total market is 77,000, which is what you had
7 been told by Jane Hill, this is about 15% of the total
8 market, is it not, that Auden is supplying to you?

9 A. Yes.

10 Q. So what it is doing is foregoing the vast majority of
11 its margin on 15% of the total market. We have done the
12 maths. It is about 7.2 million over the course of
13 a year, but that sounds about right to you, does it?

14 A. Yes.

15 Q. So we are back to where we were before, Mr Beighton,
16 which is how on earth were you able to secure this deal
17 from Auden. Let us have a look now at what Mr Clark
18 told the CMA about this. He was closely involved. We
19 have seen his name in lots of emails. He was closely
20 involved in the strategy, was he not, but he was not
21 there when you were talking to Mr Patel in the
22 negotiations?

23 A. No, no, only at the negotiations which were ongoing
24 about acquiring his business.

25 Q. Thank you. Let us go to {H/1072/1} and this is a CMA

1 interview with Mr Clark on 12 October 2017. You can see
2 that there. If we go to page 3, please {H/1072/3}. If
3 we look near the top of the page, so there is
4 a discussion -- so Mr Groves for the CMA talks about the
5 12,000 packs and Mr Clark says:

6 "That was better than 6,000 packs"

7 Then Mr Groves said:

8 "But could you not have got more packs of product?
9 I mean, was that ever discussed?"

10 Let us have a look at what he says. He says:

11 "I don't know, I was not party to any of the
12 negotiations with Auden McKenzie and I don't know how
13 they arrived at either a 6,000 figure or a 12,000
14 figure. My educated guess on this would be, somewhere
15 there is a balance between what 5% of the market might
16 represent as being our worst case."

17 That is if you entered with your own product, your
18 worst case scenario is 5% of the market. That is what
19 you understood that to be?

20 A. I think so, yes.

21 Q. "So if we were to go it alone, our worse case is that we
22 think what 5% would be, I do not even know what the
23 total market size was, but 5% of that I guess would be
24 less than 6,000, definitely less than 12,000. At the
25 upper end, if we were to standard rule, we'd probably

1 get around 50% if labelling was not an issue at all, and
2 as I think I mentioned earlier, somewhere in between
3 those two is probably the right answer as to where it
4 might or might not end up. Now, and that very much
5 would depend on how important the customers would
6 regard... labelling being an issue. So it could be all
7 the way towards one end, or all the way towards another
8 end. And therefore I can only assume a deal was struck
9 around those volumes, what represented a negotiated
10 balance between the likelihood or not of that happening
11 from both sides ..."

12 So we can see what Mr Clark is saying there. He is
13 saying that there was an estimate as to what your market
14 share would be if you entered with your own product and
15 that that his best understanding of why the negotiation
16 ended up at 12 -- the volume of 12,000 packs. That is
17 right, is it not? That really is how it worked in
18 practice. That is what you were thinking when you were
19 negotiating with Mr Patel. We saw that. You wanted
20 12,000 packs, because you could get, you thought, 10,000
21 packs of sales of your own product?

22 A. Because Jane Hill, the commercial director, had put
23 10,000 in the budget. Mr Patel was already giving us --
24 selling us 6,000. I just took a punt and said 12,000
25 and --

1 Q. The link being -- the link with the 10,000 being that
2 you wanted to exceed or at least match -- make sure you
3 could match what you would get if you went to market
4 with your own product?

5 A. Yes.

6 Q. So the premise for a negotiation like this, Mr Beighton,
7 is that if Auden agrees to supply AMCo, then AMCo will
8 not enter the market with its own product, yes, that is
9 the premise of your negotiation? You are doing this
10 instead of selling yourself?

11 A. Yes, but I am not saying that to him.

12 Q. This is all completely consistent, is it not, with the
13 email exchanges between you and Mr Clark in January that
14 we went to yesterday. If we just go back to what he
15 said to Mr McEwan {H/300/1}. If we go to page -- here
16 we are. It is just on this page. So he is saying
17 there:

18 "This gives us more strength -- "

19 So the good news about the prescriptions being open:

20 "Gives us more strength to say to Amit that we do
21 not mind having limited labeling. Pharmacists will use
22 it anyway ... Therefore, we should still be arguing
23 using 100% of the market."

24 This is all completely consistent with what he is
25 saying in the interview and that is how the negotiation

- 1 proceeded, didn't it?
- 2 A. I do not know how the negotiation between Brian and Amit
3 proceeded. I am just thinking in hindsight when we
4 discussed this yesterday, there is a possibility that
5 I was being a little bit defensive. Looking at this now
6 again, actually having that information that we could
7 effectively use the whole market was probably quite
8 helpful to us in those negotiations.
- 9 Q. That is because when you were talking to him you were
10 telling him that if you did not get the supply
11 agreement, you would contest the whole market, yes?
- 12 A. Well --
- 13 Q. Even though you described it as a bluff that was what
14 you were saying?
- 15 A. There was definitely a bluff, because our position was
16 extremely weak. He was very dominant. He had the whole
17 market. In hindsight, actually even at the time, I knew
18 that he did not need to do this deal. It was a very
19 risky situation for us.
- 20 Q. So you say it was a bluff. We will come on to that
21 separately.
- 22 A. Yes, for sure.
- 23 Q. But you were telling him that if you did not do this
24 supply deal you would come on to the market and you
25 could contest 100% of the market, which is what Mr Clark

- 1 is saying?
- 2 A. I do not think I ever told him that, but clearly that
3 was the implication of this.
- 4 Q. But that is the impression you sought to give him?
- 5 A. That he thought that we had a product that was about to
6 be launched.
- 7 Q. Yes, so when you spoke to him on these various calls,
8 you would have been keen to give him the impression that
9 if he did not do the deal, you would come on to the
10 market with your own product and you wanted him to
11 believe you could contest the whole market with that
12 product. That is right, is it not, Mr Beighton?
- 13 A. I think that we wanted to put ourselves in the best
14 light, generally, and clearly we were not in the best
15 situation.
- 16 Q. So when you say "put yourselves in the best light", you
17 mean you wanted to give him the impression that you
18 could contest the whole market and you were not
19 inhibited by the skinny label, is that what you mean?
- 20 A. I suppose what we were really trying to do is to give
21 him the impression that we had some alternatives.
- 22 Q. The alternative being that you were launching your own
23 product?
- 24 A. Yes, of course.
- 25 Q. Let us go to {H/509/1}. You refer to this email in your

1 witness statement and it is an internal AMCo email chain
2 from June 2014. You say there, so it is an email from
3 you to Rob Sully copying some others or rather it is to
4 four people and you say:

5 "Rob.

6 "I agree with Jane. If they fall short they should
7 make up the following month.

8 "Having said that I went in with 12K per month when
9 I knew that Jane had forecast 10K per month with a view
10 that we would have to negotiate -- I suppose at that
11 stage I thought I would settle for 10K."

12 Then you say:

13 "As for the start date yes it is for delivery this
14 month so that Jane can get the sales this month. I told
15 him that if not we can launch our own."

16 Just pausing there, him means Amit Patel?

17 A. I assume so, yes.

18 Q. So what you told Amit Patel, we see here, is that if he
19 did not start supplying you with 10mg tablets that month
20 in June, you would launch your own product, yes?

21 A. That is what it -- yes.

22 Q. They did supply you in June, did they not?

23 A. I think so, yes.

24 Q. And the new two-year deal was signed on 25 June, was it
25 not, about a week after this email exchange?

1 A. Yes.

2 Q. Again, both you and Mr Patel understood that Auden was
3 doing this deal because if it did not AMCo would launch
4 its own product?

5 A. I do not know what Mr Patel understood. As I have said
6 on numerous occasions, I do not really know why he did
7 this, because it just did not seem to make sense.

8 Q. But I think you have accepted already that is the
9 impression you tried to give him and you said it
10 expressly here, did you not?

11 A. That was a bluff, yes.

12 Q. You said it expressly to him, yes? Even though you
13 would say you were bluffing, that is what you told him.
14 You said: if we do not get this over the line, we will
15 launch our own product, yes?

16 A. It looks like I said that, yes.

17 Q. Let us have a look at what you said to the CMA in your
18 interview. If we go to {H/1086/1}. You can see that is
19 an interview held on 20 October. Let us start at
20 page 2, please {H/1086/2} and let us look at line 19.
21 You see the lines there or let us look at line 16. So
22 you say -- you are discussing here this email and you
23 say -- so the question that you are being asked by the
24 CMA is there at line 16. So you move on to the start
25 date for this arrangement and you say it is for delivery

1 this month and then you told him, if not we will launch
2 our own. So what did you mean by that if not we will
3 launch our own and you say there:

4 "We would launch our Aesica product -- "

5 Sorry, I think I have just lost it myself:

6 "We would launch our Aesica product which we
7 couldn't, I knew we couldn't."

8 That is what you mean by bluff?

9 A. Yes, exactly.

10 Q. "So my ... discussion was with -- was always... "

11 "With" presumably you meant to say with Amit Patel?

12 A. I presume so, yes.

13 Q. "Was always 'We're going to launch our own product'."

14 A. Yes.

15 Q. So we can see from this that you are accepting there
16 that when you spoke to him, your discussion was always
17 "we are going to launch our own product". That is what
18 you were doing?

19 A. I think -- yes, I think I would have said that.

20 Q. If we look at the bottom of the page:

21 "But you say, 'if not, we will launch our own'.

22 So if ... I understand that to mean that if Amit Patel
23 was not going to start supplying you that month...

24 "Yes.

25 "... you would launch your own."

1 Then you say:

2 "That is what I told him, which was a bluff, not an
3 agreement, it was a bluff, we did not have a product to
4 launch.

5 "And do you think he understood that that was
6 a bluff?"

7 And you say:

8 "I do not know."

9 And then:

10 "So when we were discussing earlier about leverage
11 that you may have used ... how does the statement about
12 'if not we will launch our own' fit into that?

13 "Well... certainly when we were discussing it
14 before, I hadn't appreciated that I'd said that, but
15 I am sure that it would have been a bluff on my part."

16 So then if we look at the bottom of the page, the
17 question that is being put to you is:

18 "Why would you have raised that you would launch
19 your own product? What impact would that have had on
20 Mr Patel."

21 You say:

22 "I do not know on Mr Patel, but it was a statement
23 by me that was -- I guess to encourage him to give us
24 a better deal."

25 Then if we look down that page at line 16 you are

1 saying you were always concerned he might not come up
2 with the goods. I am just going to take you through
3 some of the things you said.

4 If we go to page 8, lines 2-5 {H/1086/8}. So:

5 "Why are you bluffing here?"

6 That is because you have said it is a bluff:

7 "What are you trying to get from the bluff?"

8 "I am trying to get him to give us stock, either the
9 agreement or give us stock."

10 Then page 28 {H/1086/28}. If we look at line 26, so
11 it is the question, you are saying -- it is talking
12 about the same email. Your saying "There is certainty
13 of launch".

14 Let us go over the page. Your answer:

15 "They brought it up to speed, up to a level where
16 ... I suppose, use it to get the deal done with Auden."

17 You are talking about Aesica bringing the project up
18 to a point where you could use it to get the deal done,
19 yes?

20 A. Sorry, no, hold on. Could I just --

21 Q. Of course, let us go back.

22 A. -- go back?

23 Q. Yes, of course. (Pause) So let us go further up. So
24 it is talking about the Aesica project. So if you look
25 at -- you can see the discussion. Let us go back one

1 page previously to 27 so you get the whole context.

2 {H/1086/27}. You say at the bottom of that page:

3 "I do not remember ever having product available to
4 sell".

5 Yes? The bottom of 27.

6 A. Yes.

7 Q. Thank you. Then let us go to 28. There is then
8 a discussion, so Mr Grove says at line 7:

9 "Reading that email the product was not ready for
10 sale."

11 You say:

12 "Not necessarily, it looks like he hasn't had it
13 packed and therefore not released."

14 So they are talking about the Aesica product there.
15 You look at 17?

16 A. Yes.

17 Q. "But is it your -- I mean subject to those processes
18 taking place, is it your view that the Aesica product
19 was not ready for sale in the UK market?"

20 And you say:

21 "I have to be careful about saying that just based
22 on what an email that Rahul would send."

23 But then what is put to you -- the question at the
24 bottom of the page is:

25 "You are saying that as well in your email that we

1 just looked at."

2 Your email about saying you had threatened to
3 launch. So you are also saying there is certainty of
4 launch.

5 Let us go back over to 29 and you are saying there:

6 "They brought it up to speed, up to a level where
7 I was able to, I suppose, use it to get the deal done
8 with Auden."

9 And then your solicitor asks if you would like to
10 take a comfort break.

11 I think what you are saying there in total, I have
12 taken you through various things, but I think what you
13 are saying there is completely consistent, is it not,
14 with what you've said to the tribunal today, which is
15 that you used this, you used the fact of having your own
16 product as leverage in the negotiations. You used it to
17 get the deal over the line, so you were keen to convey
18 the impression to Mr Patel that you were ready to
19 launch?

20 A. That is true, yes.

21 Q. But that your position is that that was a bluff because
22 you were not in fact ready to launch. That is your
23 evidence, yes?

24 A. Absolutely true, yes.

25 Q. Then let us just look at your second interview with the

1 CMA. If we go to {H/1143/24}. If we look at line 20:

2 "During the last interview, you described this as
3 a 'bluff', and I suppose the question we wanted to ask
4 is why did you feel it necessary to bluff in this
5 way ..."

6 You said there:

7 "I think --"

8 If we go over the page:

9 "I think that I wanted him to understand that we
10 were able to launch."

11 So, again, that is consistent with what you have
12 just said, yes?

13 A. Yes, that was the bluff that we were ready to launch
14 when clearly we were not.

15 Q. We will come back to whether you were or were not, but
16 I am just at the moment interested in how you conducted
17 the negotiation.

18 If we go to page 25 {H/1143/25}. Then Mr Groves
19 says:

20 "What leverage did that give you?

21 "I do not know."

22 Then Mr Groves says:

23 "But you wanted to make him understand it. You must
24 have had a rationale for that? [For wanting him to
25 understand that you were ready to launch.]

1 Yeah, well, I think it was more likely to help him
2 give me some better terms.

3 "And why would that be the case?"

4 You say:

5 "I wanted to make sure that we were able to fulfil
6 as much of the whole of the Hydrocortisone market as we
7 possibly could. I recognised that our product, even
8 when we had it, if we were to have it, was only going to
9 be able to take a certain amount. I think that he would
10 have been much more likely to supply us product if we
11 were just going for the protected sector, for the sector
12 that was affected by the orphan status, and we could
13 easily have tried to attempt that with our own product,
14 and that was the message that I wanted him to get."

15 I think there is a "not" missing there, right?
16 Otherwise, it does not make sense. I think you are
17 saying:

18 "I think he would have been much more likely to
19 supply us product if we were 'not' just going for the
20 protected sector."

21 That then becomes consistent with what you have been
22 saying and with what Mr Clark said in the emails to you
23 and to Mr McEwan. That is right, is it not?

24 THE PRESIDENT: Can you read that through very carefully,
25 Mr Beighton, and see whether you are happy to amend what

1 you said. These are your words after all.

2 A. Yes, this is all very fast moving.

3 THE PRESIDENT: Take your time.

4 A. Yes. (Pause).

5 Yes, I think that what I am saying there is that it
6 would have been better for him to understand that we
7 could try, even though we had limited indication,
8 somehow kind of ignore that, and go for the protected
9 status as well.

10 MS DEMETRIOU: Thank you, Mr Beighton. So in the
11 negotiation when you were conveying this impression to
12 Mr Patel, you knew, did you not, that that was the
13 critical card that you had, because there is no way on
14 earth that there was any reason for him to do this deal
15 if you did not have a product of your own. You knew
16 that, did you not?

17 A. It was certainly the impression I was trying -- as
18 I have said, it was the impression I was trying to give
19 him.

20 Q. All right, thank you. I am going to -- just for the
21 benefit of the tribunal as well, what I want to do next,
22 I thought this might be an appropriate time if that
23 suits the tribunal, but what I was going to go on to
24 next is look at the question of the bluff and whether or
25 not -- so this really goes to the question of whether or

1 not there was a product ready to launch. So it is
2 a slightly different area and so I wondered whether this
3 would suit the tribunal as a time to put your own
4 questions, but I am happy to do it another way if you
5 prefer?

6 THE PRESIDENT: No, we are very happy to proceed as you
7 suggest.

8 Before we get on to that, I wonder if we could just
9 spin back in today's transcript to page 16/17. This is
10 where, Ms Demetriou, you are asking the witness about
11 text messages that haven't been found, because they may
12 or may not have been on the device that was not
13 accessible, despite best efforts of the CMA and
14 Mr Beighton after the event. You are only going so far
15 as to say that this may be an explanation for these
16 texts being missing. You are not putting anything
17 beyond that.

18 MS DEMETRIOU: I think that we know that the texts would
19 have been on the phone that could not be accessed,
20 because the CMA was not able to recover the text
21 messages from this period, but I am not putting anything
22 beyond that.

23 THE PRESIDENT: No. Because one might put further points,
24 but if one was then they would have to be put expressly
25 and you are not doing that.

1 MS DEMETRIOU: No.

2 THE PRESIDENT: I am grateful.

3 Mr Beighton, I am going to start with a few
4 questions, but I am going to start with an apology, an
5 explanation and a warning. The apology is that you have
6 been taken through the agreement which on Auden's side
7 you have said variously was very odd and did not seem to
8 make sense and I am going to want to ask a few questions
9 about that, but I am very conscious you have been asked
10 a great deal about that and I apologise if I am
11 retreading old ground.

12 The reason I am doing that is because this is the
13 only time I get the opportunity to enable you to put
14 everything on the record. We are going to be going
15 through what you say and what others say in closing
16 submissions, but you will not be coming back then so any
17 questions that I have got I want to get sorted out now.

18 A. Yes.

19 THE PRESIDENT: So that is why I am asking them. I am also
20 going to ask them in a fairly pointed way, because we
21 know very much what the CMA is going to be saying at the
22 end of this case. You got a hint of it, if you needed
23 it, in the questions yesterday where the suggestion was
24 you were being paid by Auden, whereas, on the face of
25 it, the transaction was you were simply getting the

1 opportunity to make a large profit at Auden's expense,
2 but that difference in language shows exactly where the
3 battle lines are drawn and I want to make sure that
4 I have got, on the face of it, all of the material that
5 you can give me to assist us in deciding matters.

6 So that is where I am coming from?

7 A. Yes.

8 THE PRESIDENT: Also, you should bear in mind that you have
9 been making points and counsel have been making points
10 about Auden's stance. We obviously haven't heard yet
11 from Auden on what they say and I am very conscious that
12 we are part way through the process and all I am trying
13 to do is ensure that when we debate this at the end, we
14 have got as full a record as possible. So that is why
15 I am asking these questions and I apologise, as I say,
16 for any repetition.

17 Lastly, the warning, it is simply this: judges need
18 to be very careful when they ask questions of witnesses,
19 because there is an unfortunate, no doubt it is out of
20 politeness, there is an unfortunate tendency to agree
21 with the judge when they put a question. I want to be
22 very clear that -- I am sure you will be as courteous as
23 you have been throughout -- but if you want to pushback
24 hard, pushback hard. So I am hoping that you will do
25 that.

1 I can pretty much predict what your answers are
2 going to be to all of these questions, but I am keen to
3 get your evidence in response to those. So that is
4 a rather long introduction to what I hope will not be
5 too many questions, but that is why I am asking them.

6 A. Understood, sir.

7 THE PRESIDENT: I am going back to the agreement which was
8 put into writing later on, the first written and second
9 written agreements, as we call them. I am interested in
10 the involvement you had and the knowledge you had before
11 the agreements were -- the oral agreement was translated
12 into writing. It is the point in time where you were
13 beginning to be involved, so you were less involved than
14 you were later on, but that is the area that I am really
15 focusing on at the moment, just to give you a degree of
16 context.

17 Now, we had an exchange, I think yesterday, where
18 you said, quoting me I think, "You do not look a gift
19 horse in the mouth". Now, one does not look the gift
20 horse in the mouth when one knows exactly the nature of
21 the horse that one is being gifted.

22 A. True.

23 THE PRESIDENT: So if you had a written agreement, you would
24 know exactly the obligations on each side. Going to the
25 point in time before the agreement was reduced to

1 writing, would it not have been important for you to
2 understand what exactly Auden were expecting in return.

3 A. Yes.

4 THE PRESIDENT: So yesterday you said "I thought it was very
5 odd, but I did not really enquire any further". Now, my
6 question to you is why did you not really give either
7 Mr McEwan or someone else an extremely hard time as to
8 the reason for what is, on the face of it, an
9 exceedingly one-sided transaction?

10 A. Yes, and actually overnight, as I have had a chance to
11 think about this again, when we were in the process of
12 acquiring Amdipharm, Mr Sully and I discussed this and
13 discussed a couple of arrangements that seemed to be --
14 that seemed to be a little bit odd. One of them was
15 Carbimazole and the other was Hydrocortisone and there
16 was at that time discussions between Mr Sully and I as
17 to whether these two things might be reciprocal and
18 whether there was an issue with that, which at the time
19 was when we started to talk about making sure that first
20 that we should check and, actually, I do remember -- not
21 me -- but Mr Sully going through a process with
22 Mr McEwan and maybe, I do not know, but maybe Mr Patel,
23 Mr Vijay Patel as well to try and do exactly as you
24 suggest. It was not done by me, but it was done by
25 Mr Sully. Which was then when we heard that, from both

1 of -- also from the Amdipharm guys that the deals were
2 not reciprocal, that they were both fine and they were
3 both OLS agreements. So I think at that stage that was
4 when Mr Sully decided, advised me that we ought to put
5 these into writing.

6 But we did not find out at that stage that -- we did
7 not get any hint that this product was being -- this
8 Hydrocortisone product was being supplied in any
9 agreement not to launch.

10 Actually, again, my thinking at the time would have
11 been the thinking of any person such as Mr McEwan or
12 Vijay Patel that there would be no point at all in
13 having an agreement that allows us not to launch the
14 product in return for 2,000, 6,000, even 12,000 packs
15 when the market is 77,000. So that I suppose -- that
16 kind of logic gave me some comfort.

17 THE PRESIDENT: So the comfort you are articulating is that
18 you were getting less from Auden than you ought to get
19 if you had a product to launch that was a rival?

20 A. Yes.

21 THE PRESIDENT: Okay.

22 A. Because instead of making 6,000 times 38 in sales,
23 I would have made half of 77 times 38. By the way, if
24 you remember, at that point the orphan issue was not
25 known by us, so we assumed that in a normal generics

1 launch we would achieve 50% of the market, maybe more,
2 maybe a tiny bit less.

3 THE PRESIDENT: Yes, I see.

4 A. So I suppose to put myself -- I have been invited on
5 a number of occasions to put myself into Mr Amit Patel
6 from Auden's mind, and I have tried to and I just do not
7 get why he would do this, unless there was some, I do
8 not know, somehow Mr Vijay Patel or somebody else in
9 Amdipharm was able to persuade him for some other
10 reasons.

11 THE PRESIDENT: Yes, I see. I'll come back to that in
12 a moment, but let me just ask one further detailed
13 question. We have seen that the supply agreements were
14 a slightly unusual variant on the own label product in
15 that they were not sold under your own label. They were
16 sold with the same packaging that Auden sold its own
17 goods for.

18 A. Yes.

19 THE PRESIDENT: I understand why you say that was the case
20 and so I do not need to understand that, but does that
21 mean that there was an effect on how your Auden product
22 was sold? In the sense that, was it sold at the same
23 price as Auden's own product or was it sold at
24 a different price or is it something you cannot answer?

25 A. At that time we -- because pricing was sensitive in this

1 case, given that there was only one supplier and there
2 were both of us, we decided to sell the product at
3 the price that pharmacists were being reimbursed for the
4 product at the discount that we were offering to
5 wholesalers at that time, which I think was 7.5% off and
6 our agreement, Mr Sully and my agreement, was that we
7 would effectively track the drug tariff, which is the
8 means by which the price is indicated that the
9 pharmacists get reimbursed.

10 THE PRESIDENT: Would I be right in thinking that Auden
11 would be doing the same thing themselves or is that not
12 something you are able to answer?

13 A. I do not know. I do not know whether they did. They
14 had a slightly different route to market than us. So,
15 no, I do not know.

16 THE PRESIDENT: Right. Short answer, you cannot assist me
17 on whether the own label, if I can use that term, that
18 you were selling was sold at more or less the same price
19 as the Auden label?

20 A. I imagine that it would have been sold at more or less
21 the same price and, actually, it would be interesting to
22 look back at what happened to the drug tariff during
23 that period, because the drug tariff would have been
24 dependent on the prices that the two major
25 wholesalers -- you heard from Mr Sully yesterday--, were

1 AH and Alliance, were selling out at, because those
2 prices are recorded and submitted to the Department of
3 Health. If somebody charged more or less, particularly
4 if they had a bigger market share, then that drug tariff
5 price would move up or down.

6 THE PRESIDENT: Thank you. I think that is as far as I can
7 take that with you, but I think it would be helpful to
8 have some understanding of the pricing of what was in
9 effect the same product during this period. It may not
10 matter.

11 MS DEMETRIOU: We can provide that.

12 THE PRESIDENT: But there is no such thing as a stupid
13 question, I think, so I'll ask it.

14 A. No.

15 THE PRESIDENT: Thank you. The last area that I just want
16 to explore with you is this: you have said that you do
17 not understand what Auden were getting out of this, very
18 odd, we have got all sorts of labels, and I am sure I'll
19 be hearing more about the Auden side in due course. You
20 also said yesterday that you did not see any particular
21 advantage in the transaction or the unspoken transaction
22 that is being put to you. You said that yesterday and
23 I think you said the same today when you indicated that
24 you had a contestable market. If you had a contestable
25 market of 100%, then you would be gunning for half of

1 77 --

2 A. Yes.

3 THE PRESIDENT: -- not 12,000. Now, I wonder if I could
4 just unpack that a little with you to -- just to test
5 what you are saying.

6 You have said that Auden were, effectively, the only
7 supplier of this type of Hydrocortisone tablet, 10mg?

8 A. Yes.

9 THE PRESIDENT: You were trying, you say, to get something
10 that was a rival, but there were various obstacles and
11 we have heard about those and we will hear more.

12 Production was one. Orphan product was the other.

13 I understand that.

14 There is, and this is where I am really going to
15 invite you to pushback, but there is an advantage, is
16 there not, in avoiding competition in that if you have
17 a new entrant into the market, one of the things that
18 happens is that the new entrant differentiates itself,
19 amongst other things, in price and so your new product
20 would likely be sold at a lower price?

21 A. It would have been, yes.

22 THE PRESIDENT: Now that would -- I will not say "no doubt",
23 but could have had an effect on Auden's own price, so
24 the price goes down.

25 A. Can I --

1 THE PRESIDENT: Please.

2 A. Yes. Typically what happens in these circumstances when
3 only one competitor comes to market and this is --
4 remember I am a generics guy so I am used to bringing
5 these products to market. Usually there are -- when
6 a patent expires, there are 10 or 12 competitors come
7 out, coming in at the same time and the market
8 immediately shoots down to barely above cost of goods.

9 In a situation like this where only one competitor
10 comes in, clearly depending on the -- how rational that
11 competitor is, he or she, me, would have come in with
12 Hydrocortisone, for example, at a discount of whatever
13 I felt was needed to take half of the business. I would
14 not go for more than that for rational reasons, because
15 I did not want to see the competitor backlashing in some
16 way and then ending up in that downward spiral just
17 between the two of us. So I would take 50% at, let us
18 say a 10 or 15% discount.

19 So there is obviously always a danger that
20 Auden McKenzie in this circumstance start fighting with
21 me and we end up just at cost of goods, but I do not
22 think that would have happened.

23 That sort of thing usually happens when the
24 competitor is -- does not really care too much or
25 they've got -- they have so many other products.

1 They've got junior product manager looking after them.

2 In this case, Mr Patel would have been very eager to
3 have maintained the value in his business I am sure.

4 THE PRESIDENT: So.

5 A. So do you see? What I am trying to say is that
6 the price in this case would not have dropped
7 substantially.

8 THE PRESIDENT: You would not have had the spiral down to
9 just above cost in your view.

10 A. Yes, exactly, and I think it is a proven view with lots
11 of evidence supporting that that does not happen with
12 two competitors.

13 THE PRESIDENT: Putting ourselves for a moment, and
14 I appreciate that we are speculating here, in Auden's
15 shoes, they might -- if your product entered the market
16 at, say, a 10 to 15% discount on their price, they might
17 have stuck at their existing price.

18 A. Yes.

19 THE PRESIDENT: Provided they maintain their 50% market
20 share on that basis.

21 A. Exactly.

22 THE PRESIDENT: But if the nature of the demand was such
23 that a 10 to 15% discount for what is in effect the same
24 product results in a move away from Auden's product to
25 yours, such that you get -- and I am sure you will be

1 very please about this -- 80/90% rather than 50, then
2 you would have to reconsider your position as Auden.

3 A. He would, though I think that what my position would be,
4 as the competitor, as I have been on a number of
5 occasions, is not to go for -- not to take 80 or 90% of
6 the market, but to take half of it.

7 THE PRESIDENT: Indeed. What I am putting to you is you
8 might have the intention at a 10/15% discount on the
9 competitor rate to only get 50%, but you cannot be
10 absolutely confident.

11 A. You cannot. With pharmaceutical supply chains you put
12 your forecast in, you say how much stock you have got
13 and you cannot just turn on the tap. So you have to
14 forecast well in advance of how many -- how much product
15 you are going to sell, so, effectively, you would only
16 be able to sell 50% of the market.

17 THE PRESIDENT: It is Keynes' point about in the long run we
18 are all dead. You are saying that in the short run the
19 ability to take over the market on your part is going to
20 be constrained by how much you produce.

21 A. Choose to produce.

22 THE PRESIDENT: Choose to produce, indeed.

23 A. Yes.

24 THE PRESIDENT: But of course if they're flying off the
25 shelves, then you will choose to produce more after the

1 short term.

2 A. There is a balance, isn't there, because what I do not
3 want to do is to provoke the other party to have this
4 downward spiral.

5 THE PRESIDENT: Yes, I see, so you might voluntarily limit
6 supplies in order to avoid provoking Auden from entering
7 into a price death spiral.

8 A. Exactly.

9 THE PRESIDENT: Which is not in your interests.

10 A. Exactly.

11 THE PRESIDENT: That I think is in part an answer to where
12 I was coming from as one of the advantages that Auden
13 might see of this arrangement, which is that one
14 advantage of supplying their product to you at an
15 effectively nominal price was to ensure that you stayed
16 out so that the price would remain at the level that it
17 was.

18 A. I suppose so.

19 THE PRESIDENT: But what you are saying is that actually the
20 dynamic is such that they would lose market share, but
21 they would not necessarily lose very much in terms of
22 headline price.

23 A. Yes, it was -- especially as it was such a measly amount
24 that I was getting. Maybe if he had sold me 50% of the
25 market, then I may have thought twice, subject to my

1 legal colleagues advising me, but you see what I mean.
2 The chances of him having a death wish -- I do not know,
3 I do not know what he would have done. I have not seen
4 but I assume he would not have ended up in a price war
5 with him.

6 THE PRESIDENT: That actually brings me very nicely to the
7 last related area, which is this point that you are
8 making that you only got, well, 12,000 at the end.

9 A. At the end.

10 THE PRESIDENT: But it scaled up to that.

11 A. Yes.

12 THE PRESIDENT: Now, I entirely understand that if you had
13 a product ready to go, if you were reaching an agreement
14 to keep the product off the market, assuming all things
15 being equal the products are identical, in other words,
16 delete orphan status, delete production problems, you
17 have got something ready to go, the deal, and I know
18 your answer to this question, but the deal would be
19 50/50 if you had a product to go. In other words,
20 I will, Auden, provide you on this arrangement with 50%,
21 you stay out of the market.

22 A. Yes.

23 THE PRESIDENT: And we are all happy because we are all
24 selling at the maximum price and we are both --

25 A. Although I am not a lawyer, I know for sure that is

1 illegal.

2 THE PRESIDENT: Yes. So your point is, well, the 12,000
3 does not reflect this rational, if illegal agreement
4 that I am postulating.

5 A. Not to me, no.

6 THE PRESIDENT: Not to you. But could it be that one
7 argument that could be put, and I am putting it to you
8 so that you can rebut it, is that the 12,000 or the
9 6,000 or the 2,000 reflected a bargain, admittedly on
10 this basis it would be an unlawful bargain, a bargain
11 between your company and Auden which reflected the
12 common perception of how easy it was for you to get the
13 goods to market. In other words, if you have got
14 something ready to go, then 50/50 is the likely rational
15 outcome of this unlawful bargain. But if you haven't
16 got something ready to go, if there are some kinds of
17 problems then actually the rational outcome is not 50/50
18 but something less than that.

19 A. Yes.

20 THE PRESIDENT: What I am putting to you is how far is the
21 12,000 or 6,000 or 2,000 simply the reflection of
22 a negotiated outcome between two apparent competitors
23 who are carving up the market by reference to the
24 commonly agreed probability that you are going to have
25 a rival product to go in there, and that feeds into the

1 point about bluff that we were talking about earlier.

2 You see where I am coming from?

3 A. I do, and I think what was happening to me in, I now
4 know, remember, have been reminded of, is the beginning
5 of 2014, was I was starting to think and feel quite
6 different to what I was feeling about this 6,000 because
7 at that point it was really clear to me that it was no
8 question, if we got our product, we'd launch it.

9 As we started to get into these slightly more murky
10 areas of -- forget the production issues, I mean, we had
11 those and you will hear about those later, but they were
12 immensely frustrating, but the thing that started to
13 become apparent was that, that 50/50 scenario was not as
14 likely as it would have been when I thought I'd got just
15 a normal generic.

16 So that made me start to feel, well, you know, maybe
17 until we resolve this issue of -- because as you heard
18 from Mr Sully this was my view as well, it seemed
19 bonkers that we could not launch what effectively was
20 essentially the same product because of something, not
21 that Auden McKenzie had done with their product, but
22 anyway, they were the rules but we felt that somehow
23 those rules should be changed.

24 But I was at that point being constrained by them
25 and, therefore, the 12,000 seemed a little bit more

1 attractive to me than even -- starting to look even more
2 attractive than launching my own product.

3 THE PRESIDENT: I appreciate that we are moving into the
4 realms of what is for you and also for me speculation,
5 but does that answer give us some insight into why this
6 was not an odd or nonsensical bargain on the part of
7 Auden?

8 A. I guess at that stage it was starting to look more
9 sensible for him but the piece that is missing is that
10 there was not a commitment from me not to launch our
11 product under any circumstances and we for sure would
12 have done. I never -- even in the early days, I never
13 said to him that we would not launch and actually apart
14 from the threatening behaviour, there was definitely
15 never a kind of quid pro quo that has been alleged by
16 the CMA. There just was not.

17 So I guess it was starting to look a little bit, but
18 it was still starting to look a little bit more sensible
19 from his point of view at that stage, yes.

20 THE PRESIDENT: In other words, if I can just put it in
21 black and white so it is on the transcript and you have
22 a chance to again push back. The 2,000 or 6,000 or
23 12,000 increase in product supplied to you was
24 a reflection of the bargained outcome, and I appreciate
25 you are going to deny this, was a reflection of the

1 bargained outcome of how likely it was that you had the
2 capacity to bring the product on the market and they
3 wanted to buy you off. In other words, if it is not
4 going to happen -- I mean, if I for instance were to
5 going to say I am going to bring a rival into the market
6 and everyone knows I cannot do it, so you are not going
7 to pay me anything, but if you are getting closer to the
8 ability to introduce a rival, then you would pay more in
9 order to obtain the assurance of the status quo
10 continuing.

11 A. Yes, I suppose that what was developing could have been
12 developing in Mr Patel's head as he started to realise
13 that this orphan thing was even more critical, that he
14 actually could do a deal with us that was not illegal,
15 that was, as you saw, the written agreement, but he is
16 somehow kind of -- he can see a sense in us doing that
17 deal as well.

18 THE PRESIDENT: That is what I am getting at. Mr Beighton,
19 let me be clear, I am asking these hypotheticals because
20 at some point after you have long departed this witness
21 box and when we are writing our judgment we are going to
22 have to work out who is right, whether the agreements as
23 reduced to writing said it all or whether there was some
24 sort of side agreement there.

25 A. Yes.

1 THE PRESIDENT: One of the things lawyers ask themselves is,
2 why is it that a deal was transacted in a certain way
3 rather than another way. So what I am trying to do is
4 articulate what might have been going through Auden's
5 mind in order to explain what is otherwise a very odd
6 transaction.

7 I quite appreciate your evidence is that there was
8 absolutely no promise going from you to Auden and that
9 is something that I have got well on board and we will
10 obviously evaluate. But granted that it would be an
11 illegal deal, it does work in terms of rationality that
12 you are getting more product at a lower price reflective
13 of the probability of your being able to come into the
14 market, the implied understanding being that you do not
15 go in the market even if you can?

16 A. Yes, I can see what you are getting at there. I guess
17 that the difference is that we never stopped wanting to
18 come into the market even though we were mighty relieved
19 when the 12,000 pack second agreement was signed and the
20 12,000 pack started coming, because we continued to have
21 doubts as to -- well not just doubts. We were told, as
22 you heard from Mr Sully, that we were told by our
23 customers they did not want it.

24 THE PRESIDENT: So I think what you are saying, and this is
25 why I suspect the evidence of other witnesses may

1 matter, what we ought to be paying quite a lot of regard
2 to are whether the obstacles to your bringing a product
3 to market were real obstacles or whether they were
4 just --

5 A. Somehow fabricated --

6 THE PRESIDENT: -- fabricated.

7 A. -- by us.

8 THE PRESIDENT: Yes. Is there anything else you want to say
9 about that?

10 A. No. Well, no, that definitely was not the case.
11 Hopefully, we will hear from some people who will
12 explain.

13 THE PRESIDENT: I am grateful, Mr Beighton. Thank you very
14 much.

15 MR MASON: Mr Beighton, I would be grateful if you could
16 just elaborate a little bit on your understanding of the
17 purpose of the rebate arrangement and anything that you
18 can recall about any reasons that Mr Patel gave for
19 wanting a rebate arrangement.

20 A. No. I do not remember why he said he wanted it.
21 I certainly cannot even now think of a reason why he
22 might have. There was a practice many, many years ago
23 when NHS list prices were -- NHS pharmacy reimbursement
24 prices were based on list prices of certain products.
25 So the generics industry used to have list prices at

1 a relatively high level, much higher than the actual
2 selling price, so that their customers could have the
3 profit in between. The Department of Health, quite
4 rightly, wiped that out over time, but why Mr Patel
5 wanted his, I really do not know. I cannot think why.

6 MR MASON: He did not give any particular rationale in any
7 calls or meetings you had with him?

8 A. I cannot remember, but it obviously was not too much of
9 a problem for him. I do not know. Maybe he could have
10 had a big sales target and he has more sales if he has
11 a higher price. I do not know.

12 MR MASON: Right, okay. Thank you.

13 PROFESSOR HOLMES: It is probably a gloss on something which
14 we have already covered, but I want to put it to you
15 directly. When you said yesterday that you accepted the
16 deal at face value that you saw was there, you also said
17 that you wanted to be sure that the deal would continue.
18 Does that desire not make it even more important to
19 understand where your counterparty is coming from,
20 because what might be rational for them today might not
21 be rational for them in three months' time, six months'
22 time. So I would have thought it would make it even
23 more important to be able to understand it.

24 A. Exactly and I have to say -- because if you also
25 understand I did not want to delve too deeply, because

1 I might have suggested to him, that are you really doing
2 this? Do you see what I mean? If I start putting ideas
3 in his head, he is going to pull that deal.

4 PROFESSOR HOLMES: If you were to ask direct with him, but
5 that would not preclude further enquiry internally with
6 your colleagues and so on.

7 A. No, no, that is right, internally and we did, as I said
8 earlier, I recall now that Mr Sully did spend some time
9 talking to Mr McEwan and Mr Patel, maybe Mr Patel, about
10 this to try and work out what they felt that Mr Patel's
11 motivation was.

12 PROFESSOR HOLMES: Thank you.

13 THE PRESIDENT: Ms Demetriou, you may well have questions
14 arising out of that, but would now be a good time to
15 take a break.

16 MS DEMETRIOU: It would indeed, sir.

17 THE PRESIDENT: We will rise for ten minutes.

18 (11.59 am)

19 (A short break)

20 (12.14 pm)

21 MS DEMETRIOU: Mr Beighton, I just want to pick up two very
22 short points arising from your exchange with the
23 tribunal just before this break. I think at -- if we go
24 to the transcript at page 59, which I think is not very
25 long ago, lines 19-22, so I think in response to

1 Professor Holmes' question you were saying -- he asked
2 you whether you would have made further enquiries
3 internally and I think you said that it is Mr Sully that
4 would have done that.

5 Is your evidence that it was Mr Sully, rather than
6 you, that made the enquiries?

7 A. Yes.

8 Q. Okay. Then the other point I wanted to just ask you
9 about is if we go to page 42 and lines 5-9. So you say
10 you thought overnight about it and when you were in the
11 process of acquiring Amdipharm, "Mr Sully and
12 I discussed -- "

13 If we just go back up so we can see the context,
14 just to be fair to you about this.

15 Can we go to the previous page. Bottom of 41. So
16 it is a question the President is putting to you. If we
17 just scroll a bit further up so we can see. Thank you.

18 So this is what Auden were expecting in return, yes,
19 and so the President is saying:

20 "Going to the point in time before the agreement was
21 reduced to writing, would it not have been important for
22 you to understand what exactly Auden were expecting in
23 return?"

24 You said "yes".

25 Then the President said:

1 "Yesterday you thought it was odd, but you did not
2 enquire any further."

3 Then the President asks you: why did you not give
4 Mr McEwan or someone else a hard time as to the reason
5 for this exceedingly one-sided transaction?

6 Then you say actually, I thought about it overnight
7 and when we are the process of acquiring Amdipharm,
8 Mr Sully and I discussed this and discussed a couple of
9 arrangements that seemed to be a bit odd.

10 Just thinking about timing. So you were in the
11 process of acquiring Amdipharm, were not you, in the
12 autumn of 2012, is that right?

13 A. Yes.

14 Q. So I just want to show you Mr Sully's evidence. If we
15 go to {B2/2/8}, the bottom of the page. He says that he
16 only learned about the supply agreement in the summer of
17 2013. Do you see that there? Do you think you might
18 have been mistaken when you said that you discussed all
19 this with Mr Sully in --

20 A. I do not exactly know when I discussed it with him, but
21 it would have been at some point during that time.

22 There was definitely a discussion between Rob and
23 I about the Carbimazole and the Hydrocortisone.

24 Q. Just in terms of the timing, Mr Sully's evidence is that
25 he only found out about the supply agreement in summer

1 2013. Do you think that is wrong? I think you were
2 talking about when you were in the process of acquiring
3 Amdipharm, which would have been much earlier, autumn
4 2012?

5 A. Really, it is such a long time ago. I do not know
6 exactly when it was.

7 Q. All right. Thank you.

8 Mr Beighton, I want to look at the Aesica project
9 now. I want to ask a few questions about that. We have
10 seen that you were involved in the decision
11 in January 14 to get the Aesica development moving
12 towards it being commercialised. That is the point when
13 the board approval was sought. Presumably, you were
14 kept up to date, were you, by your team with what was
15 going on in terms of progress with the Aesica
16 development?

17 A. I assume I would have done, but I also would say that
18 that board meeting happened, as you say, but work on
19 that Aesica product had been ongoing ever since we
20 acquired the Amdipharm business.

21 Q. So you would have been kept up to date, you think, with
22 development, but you would not have been involved in the
23 day-to-day detail of how the development was panning
24 out?

25 A. No, I would not.

1 Q. But you would have been aware, broadly, what needed to
2 be done before the product could be brought to market?

3 A. Broadly, yes.

4 Q. I think it is fair to say that this was below your pay
5 grade in terms of the detail, but you wanted to be kept
6 apprised of the key developments; is that right?

7 A. I suppose my interest was: do we have a product that we
8 can sell or not?

9 Q. Okay.

10 A. The why -- the whys and wherefores were not really for
11 me.

12 Q. Let us go to {H/368/1}. We saw early -- we saw this
13 earlier. This is the thing that we saw earlier. If we
14 go on, we can see -- we saw this that it was
15 a submission to the board and you can see here the
16 launch date there is said to be April 2014, yes, at that
17 stage?

18 A. Yes.

19 Q. And you recall that the timetable slipped in the course
20 of 2014 by a few months, yes?

21 A. Yes, it obviously slipped up until this point, because
22 I think we were supposed to launch at the beginning of
23 2013.

24 Q. Right, we will come back to that possibly, but I am
25 focusing at the moment on 2014. So you recall that by

1 the end of May 2014 you understood that the product was
2 due in July, yes?

3 A. Yes, I think so.

4 Q. If we go to {H/487/1}. So you can see these are minutes
5 of a management -- what does "MPGL" stand for?

6 A. That must have been the management relationship that we
7 as a team had with the Cinven guys.

8 Q. So you can see that you are there present at this
9 meeting and it is 29 May 2014?

10 A. Mm-hm.

11 Q. Let us go to page 3 {H/487/3}. You can see there is an
12 item there, "Hydrocortisone". So can we zoom into that
13 perhaps, please. You can see that what is being said is
14 that:

15 "We are having further problems with our own product
16 which we have developed with Aesica. It is now due
17 in July. We are conscious that it will not have the key
18 'adrenal insufficiency' indication which Auden's product
19 does have and which has orphan drug status protection.
20 Auden have suggested that they would supply us with
21 their OD status Hydrocortisone for a lower COGS than we
22 will get from Aesica, which we are considering. JB and
23 RS are discussing the practicalities of this and getting
24 it checked by Pinsent Masons LP... "

25 So at this stage you understand that there have been

1 problems with the product and it is due in July and you
2 are flagging the orphan designation issue, yes?

3 A. Yes, what date was this?

4 Q. This was 29 May 2014.

5 A. Okay.

6 Q. So there is not, at this stage, I think it is fair to
7 say, that there is not a concern that the Aesica product
8 is simply not going to arrive. Your belief then is that
9 it is going to arrive in July and what you are really
10 focusing on here is the separate issue of the orphan
11 designation, yes?

12 A. Yes, I think that in the January version of this or
13 maybe it was the board meeting, we were going full steam
14 ahead with this.

15 Q. Right. This -- the 29 May, that was less than a month
16 before the second written agreement was signed, yes,
17 because that was 25 June?

18 A. Okay.

19 Q. The focus on the orphan designation issue is consistent,
20 is it not, with the email exchange we saw between you
21 and Mr Clark back in April. Let us look at that. So
22 {H/444/1}. We looked at this a little bit earlier, but
23 your focus there again is on the orphan designation
24 issue and you are weighing up the pros and cons of the
25 supply from Aesica versus the agreement with Auden.

1 A. Yes.

2 Q. The disadvantage you are identifying there is the orphan
3 designation issue rather than the product being ready?

4 A. Yes.

5 Q. Then in your witness statement, let us just go to that,
6 paragraph 90. So that is {B2/1/29}. You say there that
7 two days before the conclusion -- so this is after the
8 email you sent saying to Amit Patel, we will launch our
9 own product if you do not supply us. It is two days
10 before the written agreement is signed. You can see
11 that you are referring there to -- let us read it:

12 "Aesica informed us of further delays ... It told us
13 that (in the best case scenario) the first shipment of
14 finished product would take place during the week
15 commencing 14 July, but this was 'a very aggressive
16 timeline which is based on there being no
17 issues/problems encountered during any stage of the
18 commissioning' ..."

19 You have referred in a footnote to an email. So let
20 us look at that. That is at {H/525/1}. You are not
21 actually in copy on this email, but I guess it is one of
22 the documents, is it, that Advanz's lawyers provided you
23 with when you were preparing your statement?

24 A. I am sure it is, yes.

25 Q. You do not remember seeing it at the time?

1 A. No.

2 Q. So are you in your statement reconstructing events by
3 reference to this email? Would that be a fair summary
4 of what?

5 A. Sorry, am I?

6 Q. At paragraph 90 you have referred to this email?

7 A. I am sorry, yes. I have seen it, yes, of course.

8 Q. Yes. Did you see it at the time? You do not remember?

9 A. At the time when it was written?

10 Q. Yes, because you are not in copy?

11 A. Let me just read it again.

12 Q. Of course, let us have a look at it. (Pause).

13 If we scroll down, it is an email from Kelly Lifton.
14 Do you see -- sorry. The relevant bit wasn't up on the
15 screen?

16 A. No, I did not see this. I would not have seen this at
17 the time. I may have had a verbal update.

18 Q. Just to be clear then, when you are saying at
19 paragraph 90 of your statement that there were further
20 problems with the -- so at paragraph 90 of your
21 statement. If we just go back to that {B2/1/29}. This
22 paragraph which is quoting from this email, that is
23 something you would have written -- you would have seen
24 this email when preparing your statement, but not at the
25 time?

- 1 A. Yes, or somebody would have -- somebody at the time
2 would have explained it to me.
- 3 Q. But you don't have a recollection now --
- 4 A. Whether I saw it or not at that time.
- 5 Q. No. All right. This email is acknowledging, is it not,
6 that the first -- if we go back to the email, please.
7 So we are at {H/525/1}. Thank you. If we scroll so we
8 have the second of the emails. This email is
9 acknowledging that the first shipment might slip back
10 a bit, is it not? But it is clear from this, is it not,
11 that Aesica are very close to having this product
12 packaged and ready to sell, because if you scan what is
13 being said?
- 14 A. They were getting close, yes.
- 15 Q. Now, do you recall that the product was in fact shipped
16 by Aesica at the beginning of August and delivered to
17 AMCo at its warehouse on 8 August 2014. Do you remember
18 that?
- 19 A. I remember it being shipped, but I do not remember the
20 dates.
- 21 Q. So not very long after the July dates here that you have
22 said were an aggressive timetable. Do you remember that
23 the product when it arrived on 8 August was packaged and
24 ready to sell? Do you remember that?
- 25 A. I remember having product in a warehouse in boxes, yes.

1 Q. When you received this, it is right, is it not, that you
2 had no reason to think when you received it that it was
3 not saleable product? You assumed it was?

4 A. I cannot remember.

5 Q. So you do not remember --

6 A. My main memory of this time was that this product never
7 was fit for sale.

8 Q. But you did not know that -- that is not something --
9 when it arrived on 8 August, as far as you were
10 concerned, it was a saleable product, was it not?

11 A. I cannot remember whether I knew that at the time. As
12 I have said, and I think I have said so in my CMA
13 interview, my memory of the Aesica product is that we
14 were constantly having problems and we never had
15 anything that was fit for sale.

16 Q. All right. AMCo did not launch the product, did it,
17 then when it arrived in August?

18 A. No.

19 Q. That was because AMCo had decided to suspend the Aesica
20 project, had not it, because it had signed the supply
21 agreement, yes?

22 A. No, we did not suspend the project.

23 Q. Let us --

24 A. I think -- presumably if we had -- and this is -- I am
25 trying to dredge through my memory. Presumably, if we

1 had just signed the agreement with Auden McKenzie, then
2 we would have needed to give them three months' notice
3 to launch.

4 Q. In the agreement? So you do not remember suspending the
5 Aesica project?

6 A. No, no.

7 Q. Let us look at {H/529/1}. This is an internal email
8 chain and if we look at the top, it is the 25 June,
9 which is exactly the same day as the deal with Auden was
10 signed and you were copied in to that, do you see?

11 A. Yes.

12 Q. You see your name. Let us look at what it says. So it
13 is the summary of an agreement from today's PPRM
14 meeting.

15 Can you just tell the tribunal what PPRM stands for,
16 please?

17 THE PRESIDENT: If you know.

18 MS DEMETRIOU: If you know. You would have known at the
19 time.

20 THE PRESIDENT: If you do not know --

21 A. I would have known it at the time. No, I cannot
22 remember.

23 MS DEMETRIOU: Is it perhaps Project Pipeline Review
24 Meeting?

25 A. Yes, I am sure it is.

1 Q. Thank you. Now, so you were presumably at that meeting,
2 yes, you would have been?

3 A. Maybe, I do not know.

4 Q. Okay.

5 A. I ... I do not -- no, I do not think I went to that.

6 Q. You do not think you went to the meeting. Let us look
7 at what is said so it says "Why". If we go up a little
8 bit so we have the whole thing here. So "Summary of
9 agreement" then "Why:

10 "New supply agreement signed with Auden."

11 Second bullet:

12 "Will not be able to sell our own product (produced
13 at Aesica) in the UK."

14 And then it says:

15 "We will advise Aesica that the project is now
16 parked due to delays but may be restarted in the future
17 [and then in bold] (we do not mention the Auden
18 agreement)."

19 And then:

20 "We will continue with the packing of the three
21 available batches at Aesica to complete this phase of
22 the project.

23 "We will cancel the order for the 4th batch and any
24 subsequent orders that have been placed with Aesica.

25 "We would like to ensure Aesica are fully

1 compensated for their costs..."

2 Then if we go down a little bit it says:

3 "I suggest [this is Mr Belk] that I will write to
4 Aesica detailing these points (plus expressing apologies
5 and regret ... blah blah blah blah at the cancellation
6 of the project).

7 "I will write to Aesica probably on Friday so if you
8 have any additional comments, please let me know before
9 midday Friday."

10 So this was then communicated to Aesica, do you
11 remember that?

12 A. No.

13 Q. Let us look at that?

14 THE PRESIDENT: Just before we move away from this document.
15 Could we go up to the top again. Just looking at the
16 first line "Summary of agreement from today's PPRM
17 meeting."

18 It does not actually say what the agreement was.
19 One can get an understanding arising out of the
20 discussion below, but I think it probably would help us
21 if you put to the witness exactly what you say the
22 agreement you are alleging was, so that we can get the
23 witness's response on the record.

24 MS DEMETRIOU: Yes, the agreement was to cancel the Aesica
25 project. That is the agreement that was reached at this

1 meeting.

2 A. I can see that from this, but I do not think we did.

3 Q. Let us go to the next document.

4 THE PRESIDENT: Go on then, thank you.

5 MS DEMETRIOU: We will go on to the next document. So let
6 us go to {H/529/1}. Sorry, this is {H/539/1}. I have
7 a wrong reference. I think it is {H/539/1}. If we look
8 at page 3, please {H/539/3}. This is an email from
9 Mr Belk to Mr Ross at Aesica dated 27 June, so two days
10 later.

11 "Dear David

12 "It is with disappointment and regret that I must
13 write to inform you that our Hydrocortisone tablet
14 project will be suspended for the UK territory.

15 "The various unfortunate delays to the availability
16 of product in the first part of the year have
17 necessitated an alternate course.

18 "I would like to thank you and the Aesica team for
19 the efforts over the course of this project, with
20 special mention to Kelly Lifton who has been our key
21 contact throughout.

22 "It is feasible, if circumstances change, that we
23 may resurrect the project in the future and we would
24 look forward to working with you again on this product
25 for the UK. We do continue to look to develop other

1 territories for the product and I will be sending you
2 a request shortly for a quotation for a future
3 opportunity in a different region."

4 Then:

5 "We remain committed to the relationship."

6 Then:

7 "In the meantime we would like to close off this
8 project in a neat and mutually acceptable way. To that
9 end, the following is proposed... "

10 Then if you look at 3:

11 "Please cancel your plans for the manufacture of
12 further batches. AMCo will provide a formal PO
13 cancellation via our supply chain groups."

14 You can see here that the fact of the matter is that
15 AMCo wrote to Aesica, did it not, to cancel the Aesica
16 project?

17 A. I can see that. It also says in point 1 that:

18 "The three validation batches should be fully
19 completed, packed, QP released and prepared for delivery
20 in line with current project timelines".

21 Q. Yes, that is what was delivered in August, Mr Beighton?

22 A. So that still needed to be completed. We needed to make
23 sure that we had saleable product. Sorry, I do not
24 remember seeing this. As I said, my memory is that we
25 continued to work on this product.

1 Q. So you do not --

2 A. So it could be that this was, I do not know, short term
3 suspended, as Karl suggests, and then reactivated.

4 Q. He is not saying short term. He is saying it is
5 possible if circumstances change that the project may be
6 resurrected and you are right to say that three batches
7 were taken -- AMCo took delivery of them and that is
8 what was sent in August, but you can see on the face of
9 this that there is a letter being sent to Aesica to
10 cancel the forward production of the product for the UK
11 territory, yes?

12 A. Yes.

13 Q. Let us look at {H/530/1}. If you can scroll down,
14 please. This is an email to you on 25 June, so the same
15 date as the PPRM meeting and the same date the supply
16 agreement with Auden was signed. It is an email to you
17 saying:

18 "Hi John.

19 "Just been speaking with Jane, and we are a little
20 concerned that the Strategic Projects team may be very
21 demotivated after hearing today at PPRM that all their
22 efforts to get Hydrocortisone ready for launch have been
23 'wasted' because we are now not planning to sell the
24 product. Also, this has a real adverse impact on the
25 'new product revenues' which the whole Strat Dev team is

1 targeted on, and I think we need to somehow recognise
2 that all their hard work facilitated the AM deal, and
3 the main commercial benefit is that we now have
4 long-term supply secured of a product with the full
5 range of indications. This would not have been possible
6 without being launch ready with our own product (or
7 words to that effect).

8 "The Aesica product gives us an excellent back-up
9 [those words again] for a very valuable and important
10 project in line with our in Ops excellence BAP, in the
11 event that our new supply agreement partner defaults on
12 supply (hence we are going to pack our 3 batches and
13 leave in quarantine) ."

14 So the three batches were back up you were being
15 told and:

16 "To somehow think about a compensatory element for
17 their New Product Revenues target, which has been
18 massively impacted in 2014 by not launching this product
19 which they worked so hard to secure.

20 "I am sure there are people in Karl's team that have
21 also worked hard and would also appreciate a note of
22 thanks ... Do you think that is a reasonable idea and
23 let me know if you'd like to help?"

24 Then if we scroll up, we see your reply:

25 "Yes you are right.

1 "... and I agree with everything you say.

2 "Karl, let me know who in your team need recognising
3 for this."

4 So, Mr Beighton, even though you say you do not
5 remember it now, you were obviously at the time fully
6 aware that this project had been cancelled and the team
7 would have felt demotivated?

8 A. I definitely remember this and I remember -- we made
9 a decision to choose the Auden product over the Aesica
10 product. These guys had worked very hard on the Aesica
11 product and for the reasons we all know and we have
12 discussed, the orphan and the issues with Aesica, we
13 chose to go with Auden McKenzie and I think it was just
14 a practical thing to do to express my, you know, good
15 wishes to the team that were involved in the Aesica
16 project.

17 Q. So you chose to go with Auden McKenzie because that was
18 commercially better for you and so these three batches,
19 they were a back-up, were they not, as Mr Belk -- as
20 Mr Clark is saying to you?

21 A. They never were a back-up. That was the future of our
22 Hydrocortisone.

23 Q. At this stage, they are a back-up because you had chosen
24 the Auden supply, that is right, is it not?

25 A. We chose the back-up -- sorry -- we chose the Auden

1 supply because of the reasons that you say: problems
2 with Aesica, problems with -- and then we had these
3 products, because we hoped, as I think you heard from
4 Mr Sully, that at some point we would be able to launch
5 them.

6 Q. At this stage, you decided we are not launching now
7 because we have got the supply agreement. You accept
8 that?

9 A. Well, we decided not to launch, because we could not.
10 There was no one to sell it to and I think later we
11 subsequently found that these products were not saleable
12 anyway.

13 Q. We will come back to what you discovered later and we
14 will come back to the orphan designation, but let us
15 scroll down to the email again and look at the email
16 from Mr Clark. He says -- he suggests that what needs
17 to be recognised is the hard work that -- their hard
18 work, the team's hard work facilitated the
19 Auden McKenzie deal and the main commercial benefit is
20 that you now have long-term supplies secured of the full
21 label product, yes? What he means by that is that
22 having a launch-ready product, which at this stage you
23 had, was the necessary leverage in order to achieve the
24 supply deal, yes? That is what that is saying?

25 A. I do not think it is saying that. It is saying exactly

- 1 what it says.
- 2 Q. How then would having a launch-ready product have
3 facilitated?
- 4 A. Sorry, where does it say "launch-ready product."
- 5 Q. If look at (a) -- it is a bit awkward to look at,
6 because there are some weird formatting issues:
- 7 "I think we need somehow to recognise that all their
8 hard work facilitated the AM deal... "
- 9 That is the Auden McKenzie deal?
- 10 A. Yes.
- 11 Q. "... and the main commercial benefit is that we now have
12 long-term supply ... of a product ..."
- 13 That is what you told the CMA. We went to that
14 earlier. So you told the CMA that, did you not? It is
15 the same thing?
- 16 A. Yes, having our own product helped us do -- yes, yes,
17 get the deal with Auden McKenzie.
- 18 Q. The second reason he gives, so the second thing that
19 needs to be recognised is that you now have, in the
20 Aesica product, an excellent back-up in the event that
21 our new supply agreement partner defaults.
- 22 A. That is what it says, yes, and I accept that I agreed
23 with every word he said at the time. We would have
24 loved to have launched this product, for reasons we have
25 discussed before, but we could not. Nobody wanted it

1 and then we subsequently found that we could not sell it
2 anyway.

3 Q. Now, let us go to {H/534/1} please. This is -- if we go
4 down to see the email from you, so this is an email from
5 you on Saturday, 28 June, so a couple of days later, and
6 it is to the staff that you can see there. So some
7 names are redacted, but those are essentially the staff
8 that would have been actually working on the project
9 with Aesica, yes?

10 A. These are the people that Guy referred to who will have
11 been let down because we did not launch the Aesica
12 product.

13 Q. Let us look at what you say:

14 "Ladies and gentlemen.

15 "I just wanted to drop you a note to thank you for
16 all the effort that you put into bringing the Aesica
17 Hydrocortisone product to a position where we are able
18 to launch."

19 So you are -- first of all, your position at that
20 point was that you had a product from Aesica ready to
21 launch, yes?

22 A. That is what I have said, yes.

23 Q. That is what you understood at that time, yes?

24 A. I cannot remember, but this was the point that -- the
25 point was that I was trying to give them some love for

1 the work that they had done.

2 Q. Mr Beighton, they are the people working on it. So if
3 the product --

4 A. Exactly.

5 Q. -- if the product had not been ready to launch, they
6 would have known about it, yes?

7 A. Yes, they would. They would know.

8 Q. So when you say "the product is ready to launch",
9 I think we can assume that you were telling the truth
10 and you were being accurate with that?

11 A. Yes, I assume so.

12 Q. Then we see:

13 "As you know, we have subsequently signed a deal
14 with Auden McKenzie to source product from them and
15 therefore our own product will not be launched in the
16 UK. The rationale for this arrangement is that their
17 product has an indication, adrenal insufficiency, that
18 our product does not and hence selling their product
19 removes a competitive disadvantage. What I would like
20 to stress though is that the work that you did to
21 provide certainty of launch for our product gave those
22 of us who were negotiating with Auden McKenzie
23 confidence to achieve the best deal possible for AMCo
24 and I am sure that, as a result, Auden McKenzie felt
25 that they should agree to our terms."

1 What you are doing -- let us look at this in some
2 detail. So the second paragraph you say:

3 "Signed a deal with Auden McKenzie and therefore our
4 own product will not be launched in the UK".

5 I think you are recognising there, are you not, that
6 you have chosen the supply agreement over the launch of
7 your own product?

8 A. Yes.

9 Q. You are not going to do both at the same time, are you?

10 A. Not at this time.

11 Q. You say that the reason for choosing the supply
12 agreement is the skinny label issue, yes?

13 A. Yes.

14 Q. In other words, what you are saying is that it is easier
15 commercially to sell the Auden product, because it is
16 full label than your product, which is skinny label,
17 yes?

18 A. Yes.

19 Q. Then the third point is making Guy Clark's point
20 about -- the third paragraph is making Guy Clark's point
21 about the importance of having the product ready to
22 launch, the importance for the negotiations of having
23 that product ready to launch, and that is what you
24 believed at the time, is it not, Mr Beighton?

25 A. I believed that having our own product helped the

1 negotiations to achieve the deal with Auden.

2 Q. When we go back to -- let us go back to your witness
3 statement at {B2/1/29}. Sorry, actually, can I just go
4 back just to show you one thing. So if we go to
5 {H/534/1}, I just want to show you the response from
6 Mr Dhorajiwala. He says:

7 "No worries about the below. I am glad we could
8 help and there was a positive conclusion. We are going
9 to get the stock manufactured anyway and have it
10 available. As Karl mentioned in his mail, we could sell
11 it to the export market or have it available as
12 a back-up stock."

13 So, again, there is somebody else saying it is
14 a back-up in case our supply lets us down and that is
15 how you saw it too, is it not, Mr Beighton, at that
16 stage?

17 A. Actually, what I was thinking about at the time was we
18 cannot sell it. We have got an Auden McKenzie pack. We
19 will sell that. What we actually described this as was
20 neither here nor there.

21 Q. Let us go back to your witness statement at {B2/1/29}.
22 Let us look at paragraph 87 further up the page, please.
23 Let us look at the first sentence:

24 "By the time of my email, the terms [this is the
25 threaten to launch email, just for context] of the

1 second supply agreement had already been largely agreed,
2 and Auden would have been well aware from the terms we
3 insisted were included in it, that our endeavours to
4 develop a Hydrocortisone product were ongoing, that we
5 fully intended to continue with them and to bring our
6 own product to market."

7 Now, when the supply agreement was signed on
8 25 June, we have seen that the project, the Aesica
9 project, was cancelled. So I think you would accept,
10 would you not, that when it was cancelled you cannot
11 fairly be described, at that stage, as fully intending
12 to bring your product to market?

13 A. Well, I think we still did, because, as you heard from
14 Mr Sully yesterday, we wanted to get over this hurdle,
15 which is the key obstacle. Obviously, we believed that
16 Aesica eventually would be able to produce product. We
17 wanted to get over the -- we believed that that would be
18 a -- this would be a better product to sell than the
19 Auden McKenzie product once we'd overcome the orphan
20 issue.

21 Q. Mr Beighton, if you had fully intended to bring your
22 project -- the Aesica product to market, you would not
23 have cancelled the project, would you?

24 A. Well, we had three batches. We could not sell them.
25 There was no point in having more made.

1 Q. Three batches, which we have seen from all of these
2 documents I have just taken you to, that were intended
3 to be back-up, because you had said you cannot sell them
4 because you have the supply deal in place?

5 A. At that point, they were not even back-up, because we
6 knew that customers could not -- were not going to buy
7 them.

8 Q. We are going to come back to the customers' point.

9 Let us go to {H/551/1}. Let us go to the bottom of
10 the page. The bottom email is from Mr Dhorajiwala and
11 he is providing an update on the Aesica project. So
12 this is the 10 July. So can we scroll, please.

13 A. This is after those emails we have just --

14 Q. Yes, after those emails. So the supply agreement has
15 been signed, 25 June. That is all going ahead and it is
16 after --

17 A. Karl's emails to Aesica.

18 Q. Yes. So what you see is that there is an update:

19 "Just a quick mail to keep you all in the loop [this
20 is sent to you amongst others] regarding the batches of
21 Hydrocortisone Tablets with Aesica. I know we have
22 signed the agreement with Auden so this is really just
23 in case you have had any thoughts on where else we could
24 sell this stock or if we just want to hold it at UDG..."

25 What is UDG?

1 A. It is our pre-wholesaler.

2 Q. "All issues with the blister feeding are now resolved,
3 packing is ongoing and is due to be completed today or
4 tomorrow. Testing is also ongoing and should be
5 completed this week or early next week.

6 "We are therefore on track to have three batches
7 (approx. 40-45,000 packs, tbc) released next week and
8 ready for dispatch. We will have confirmation later
9 today or tomorrow. Manufacture of the 4th batch we
10 ordered has been cancelled as advised by Karl in his
11 mail to Aesica."

12 Mr Dhorajiwala is recognising there, is he not,
13 that, yes, these three batches are coming, but the
14 manufacture of onward batches has been cancelled, yes?

15 A. Yes.

16 Q. We then see Mr Clark then -- if you look at the email
17 just above that. Mr Clark -- again, this is sent to
18 you:

19 "If we could get to somehow launch a few boxes into
20 a segment that [Auden McKenzie] will not notice, it
21 would count as a launch ... any chance? It seems a bit
22 harsh to deny the team 'a launch' having done all this
23 work, especially as it has also dropped the New Product
24 Revenues forecast."

25 Then we see if we scroll up a bit, Ms Hill saying:

1 "Hi Guy.

2 "We cannot legally due to the exclusive agreement we
3 have."

4 So your staff are recognising, are they not, that
5 they cannot sell this product because of the exclusive
6 supply deal you have got with Auden, yes?

7 A. Yes, she also knows, because she did the work, that we
8 could not sell it anyway. She did not refer to it here.

9 Q. Let us go to {H/582/1}. This is an email from --
10 actually, if we go down the page. It is an email from
11 somebody who has been redacted to Mike Stokes. Who is
12 Mike Stokes?

13 A. He was one of the technical team.

14 Q. At AMCo?

15 A. At AMCo, yes.

16 Q. So this is 12 August, 2014. That has been redacted too
17 but you can take it from me it is 12 August.

18 What is being asked about is the status. The
19 redacted person is asking Mike Stokes about the current
20 status of Hydrocortisone batches. Sorry, if actually we
21 go down to the top of page 2. I have the wrong
22 reference. {H/582/2}. It says there:

23 "Please would you confirm the following:

24 "The current status of the validation batches? Have
25 they been destroyed?

1 "Do we have plans to manufacture a batch any time
2 soon ..."

3 Sorry, I missed the middle one:

4 "It appears that a commercial batch was manufactured
5 by Aesica late last year. Please what is the status of
6 this batch?

7 Do we have plans to manufacture a batch any time
8 soon ..."

9 Then we see the response on 14 August. If we scroll
10 so we see the response. So that says that the batch,
11 the third bullet, so this is from Mike Stokes:

12 "The batch manufactured at the end of last year is
13 now packed but there is no intention to release it to
14 the market due to contractual reasons."

15 The contractual reasons could only have been
16 a reference, could not it, to the agreement with Auden;
17 that is right?

18 A. Yes.

19 Q. Then if we go to {H/591/1}. A similar thread which
20 originated with a request for validation data for the
21 product. If we go to page 4. {H/591/4}. So there is
22 an email of 14 August. Who is that Genevieve Parent?

23 Do you know who that is?

24 A. She was AMCo.

25 Q. She was AMCo, okay?

1 A. Yes.

2 Q. So:

3 "The batches will not be sold for contractual
4 reasons. They are not rejected."

5 Do you remember what her role was at AMCo?

6 A. She was in the business development team.

7 Q. Thank you. Then you get at the bottom of page 3,
8 {H/591/3} you see there, so from Rahul Dhorajiwala.
9 Then if we scroll to the top of page 4. {H/591/4}:

10 "Apologies ..."

11 "Just for the record we will not be selling these
12 batches in the UK but may do so somewhere else. If they
13 are released and ready to be sold it would be very
14 helpful."

15 So that is a similar observation. If we go to the
16 top of page 3 we see there:

17 "Dear [redacted]:

18 "The original plan was to sell this product in the
19 UK (UK MA, UK packaging) ... however for contractual
20 reasons, we cannot sell this product in the UK.

21 For now it is not known if we will be able to sell
22 the [product] in another market."

23 Pausing here. So no one in these various emails is
24 saying, are they, the product cannot be sold because
25 there is some problem with it?

1 A. No, no.

2 Q. So they are saying it cannot be sold because of the deal
3 with Auden, yes?

4 A. Yes, that is what they're saying.

5 Q. And all of these people or some of these people at least
6 are involved closely on the Aesica project, yes?

7 A. They were -- yes, I think they were -- they were the
8 people whose project it was originally. They are not
9 technical people but ...

10 Q. But they are close to the project?

11 A. Yes, they would have known.

12 Q. If we go to page 1, the second email on page 1.
13 {H/591/1}. This is an email from Mr Thornton and the
14 date of it, because it is redacted, is 8 September. He
15 says that:

16 "Please keep these on hold. Aesica have reported
17 Friday that there may be an issue."

18 Do you recall that the issue -- this is
19 in September -- that Aesica had flagged was the foil
20 issue. Do you remember that?

21 A. Yes.

22 Q. If we see the response from a redacted person at AMCo:
23 "Yes, batches are on hold. Batches will not get
24 released for sale as we are not going to market our
25 product in UK as per our agreement with Auden McKenzie."

1 So this person is essentially saying, are they not,
2 that whatever the problem that Aesica -- whatever the
3 problem that Aesica has flagged with the foil, we are
4 not going to sell the product anyway because of the
5 Auden deal, right?

6 A. Because of the Auden deal and the orphan designation.

7 Q. They are not saying this, are they? That is what you
8 are saying now to the tribunal?

9 A. Well, no, that was the reason we did not launch at the
10 time, but they are not saying it, no. They would not
11 have known about the ins and outs of what our thinking
12 was, except they were alerted to the orphan issue in
13 those thank you emails that I wrote.

14 Q. You haven't mentioned anywhere in your witness statement
15 that AMCo cancelled the Aesica project on the day that
16 the supply deal was signed. Is that because you do not
17 remember that happening?

18 A. I did not -- the cancellation that you call it that Guy
19 wrote -- sorry, that Karl wrote to Aesica I do not
20 remember it. I think it was -- I think we'd already got
21 stock, so we had batches there, so I guess if we'd found
22 a way to get round this lack of customer interest in the
23 product, then we could have reactivated the Aesica deal.

24 Q. Whatever the position with that, and we will come on to
25 it, the position at this stage was that you had ready

1 product from Aesica which as far as you knew was ready
2 to sell, yes?

3 A. It looks like we thought we did.

4 Q. Just a couple of quick questions about the contractual
5 arrangements. So if we go to {H/528/1}. This is the
6 agreement, the June agreement. It is right, I think you
7 have explained to the tribunal, that there is a clause,
8 is there not, that if AMCo entered the market with its
9 own product, there was a clause that required it to give
10 three months' notice to Auden and then Auden had the
11 right to terminate, yes?

12 A. Yes.

13 Q. Let us just look at that. We can see on page 5,
14 clause 2.2. {H/528/5}. That is the point that says --
15 so if you just read 2.2 because I showed this to the
16 tribunal and to Mr Sully but I am just showing it to you
17 so you can remind yourself of it.

18 A. Okay.

19 Q. And we can go over the page when you are ready. (Pause)

20 A. Okay. (Pause).

21 Q. So that is the three months' notice provision, yes?

22 A. Yes.

23 Q. We can see the termination provision on page 18. That
24 is clause 17.2. {H/528/18}.

25 A. Yes.

1 Q. My question is, it was obvious, it would have been
2 obvious to you at time, would it not, Mr Beighton, that
3 if AMCo did choose to enter the market and give the
4 three months' notice, then it was inevitable that Auden
5 would have exercised its right to terminate the
6 agreement, yes, because there would have been nothing
7 for it left?

8 A. I guess so. At the time -- I do not suppose I really
9 thought about it at the time but, yes, they probably --
10 now I am thinking about it they probably would have
11 terminated if we had launched.

12 Q. Because there would not have been any benefit to them,
13 would there?

14 A. No.

15 MS DEMETRIOU: Sir, is that a convenient moment to stop for
16 the lunchtime adjournment?

17 THE PRESIDENT: Yes, indeed. Thank you very much.

18 2 o'clock.

19 (12.58 pm)

20 (Luncheon Adjournment)

21 (2.00 pm)

22 MS DEMETRIOU: Mr Beighton, I want to ask you next about the
23 orphan designation issue. We have seen and you have
24 explained -- we have seen at paragraph 89 of your
25 witness statement you have said that there is no

1 question that you would have launched your own product
2 had you had a product from Aesica and had your customers
3 been interested in it. The reference to lack of
4 interest, I think we have established, is the orphan
5 designation issue, is it not?

6 A. Yes.

7 Q. We discussed some of the detail of this with Mr Sully,
8 but just to recap quickly. When you talk about the
9 orphan designation issue in your witness statement, you
10 are talking about the fact that Plenadren had -- the
11 branded product Plenadren had orphan drug status, are
12 you not?

13 A. Yes.

14 Q. The consequence was that the AMCo product could not be
15 marketed, could it, for adrenal insufficiency in adults?

16 A. That's correct.

17 Q. Because its MA was granted after the grant of orphan
18 status to Plenadren?

19 A. Correct.

20 Q. But the Auden product could be marketed for adrenal
21 insufficiency in adults, because its MA pre-dated the
22 orphan drug designation. That is right, is it not?

23 A. Yes.

24 Q. It is common ground, I believe, that the 10mg product
25 manufactured by Aesica was bioequivalent to the Auden

1 product?

2 A. Yes.

3 Q. So it was exactly the same thing in other words?

4 A. "Essentially similar" I think is the phrase we use.

5 Q. So it was effective in treating exactly the same

6 conditions?

7 A. Exactly.

8 Q. But it was a skinny label product?

9 A. Yes.

10 Q. We saw yesterday with Mr Sully that AMCo took advice

11 from Pinsent Masons about whether there was scope to

12 challenge that and to get around that regulatory issue.

13 Pinsent Masons concluded that there was not any scope

14 for a legal challenge, you remember that?

15 A. Yes.

16 Q. So, in other words, you were aware that your own product

17 had to be a skinny label product, yes?

18 A. Yes.

19 Q. As indeed would any other 10mg product that came on the

20 market during the period of protection given to the

21 orphan drug?

22 A. I think that is what we understood, yes.

23 Q. Now, I know that you are not -- you are also, like

24 Mr Sully, you are not an expert in the regulation of

25 pharmacists, but you understand, do you not, that

1 pharmacists can choose to dispense skinny label products
2 to treat conditions that aren't indicated on the label?

3 A. What I believe is that they can dispense against
4 indications where there is no indicated product
5 available.

6 Q. You are aware, aren't you, that if the prescription is
7 open, so if it does not specify, for example, the
8 condition or the brand, then as a matter of law there is
9 nothing to prevent them dispensing the skinny label
10 product?

11 A. I am not sure about the law, but if you were to ask
12 a superintendent pharmacist on this issue as happened
13 within those chains, the pharmacist would say that if
14 there is a full indication product available, then you
15 have to dispense that product and I guess you can check
16 that with somebody who is an expert later.

17 Q. All right. So I think probably to be fair to you, let
18 us deal with this separately with the experts, because
19 what I am really asking for -- what I am really asking
20 about are the regulatory requirements on the
21 pharmacists, which is not, I think, so much a question
22 for you?

23 A. It is not. Though obviously I have been working with
24 pharmacists in my role in the generics industry for many
25 years and I have a very clear understanding that

1 a pharmacist is not allowed to dispense a skinny label
2 product if there is a proper labelled product available.

3 Q. And you say that is a legal requirement, do you?

4 A. I do not know if it is legal. Pharmaceutical regulation
5 and law overlap to some extent.

6 THE PRESIDENT: I think what the witness is saying, but
7 I will articulate what I am getting from this so that
8 either of you can correct me, is that you are not
9 holding yourself out as giving evidence as to what the
10 law is, but your perception of what a dispensary or
11 pharmacy would do is that if there was a full label
12 alternative to a skinny label, then for that indication,
13 i.e. the full label indication, there would be
14 a practice of prescribing the full label product even if
15 the skinny label would have done as well.

16 A. Exactly, yes.

17 MS DEMETRIOU: Can we go, please, to -- I want to take you
18 to a diagram in the CMA's Decision. Let us go to
19 {A/12/163}. If we have a look at the top figure, 3.20,
20 perhaps we can zoom in on that.

21 A. Yes, please.

22 Q. Sorry. It is the second one I want, 3.21. So this is
23 "Hydrocortisone tablets shares of supply by value". Do
24 you see that?

25 A. Yes.

1 Q. Then there is a colour code, do you see? So
2 Auden/Actavis is blue and if you look at the date -- So
3 the dates run along the bottom. Do you see that? So
4 in July 15 they had the whole market, which is why it
5 goes up to 100% in blue, yes?

6 A. Yes.

7 Q. Then you have Alissa, which came in next, they are red
8 and so what you can see is that they took -- within
9 quite a short space of time, you can see that Alissa
10 came in and then Bristol Laboratories, the
11 Resolution Chemicals and AMCo is the light, the pale
12 blue colour. So you can see when they all came in and
13 what you can see is that quite quickly those skinny
14 label products took 40% of the market by volume. Do you
15 see that?

16 A. Yes, for a time.

17 Q. Sorry, by value. It is mislabeled. This is mislabeled.
18 This is the volume. So I think we are writing or have
19 written to the tribunal about this. So this is by
20 volume rather than by value. This is mislabeled.

21 A. Right, and what is the source?

22 THE PRESIDENT: I think there may be some --

23 MS DEMETRIOU: So sorry.

24 THE PRESIDENT: I was getting the sense there was some
25 pushback on that, no?

1 MR BREALEY: The volume is the first one. The figure 3.20
2 is the volume. We know that is a slightly bigger --
3 lower percentage. The value is the higher one. That is
4 the one we are looking at, at the moment.

5 THE PRESIDENT: Ms Demetriou --

6 MS DEMETRIOU: Sir --

7 THE PRESIDENT: We better be clear before we ask the witness
8 anything what you are talking about here, because 3.20
9 is by the volume, 3.21 is by value.

10 MS DEMETRIOU: All right. So I think it is -- 3.20 is
11 supposed to show the value. It may be that I do not put
12 this to this witness, because there is some confusion.

13 THE PRESIDENT: No, I do not think we can expect the witness
14 to answer something where we are not sure what is being
15 put.

16 MS DEMETRIOU: No, I think that is a fair point and I will
17 move on.

18 THE PRESIDENT: Okay.

19 MS DEMETRIOU: At the time -- so let us go, please, to
20 {IR-H/303/1} and we have seen this before so we can take
21 this very quickly. You will remember this. I am just
22 showing it to you. This is -- if we scroll down. So
23 this is Mr Clark talking about the 22%, yes, so we have
24 seen this a couple of times now.

25 What he is saying here, I think we established

1 yesterday, is that the data shows that 78% of
2 prescriptions are open, yes, which leaves scope for
3 pharmacists to dispense a skinny label product and then
4 you respond saying:

5 "Very interesting, thanks."

6 Yes?

7 The reason why it was interesting or very
8 interesting was because it showed that there was real
9 scope to take market share from Auden, yes?

10 A. Yes, yes, exactly, we were very hopeful at this point.

11 Q. Then if we look at the CMA's Decision at {A/12/112} and
12 the paragraph towards the bottom of the page, 3.237, you
13 can see, and this isn't challenged in this appeal, the
14 CMA found that during the infringements, prescribers
15 overwhelmingly issued open prescriptions which did not
16 distinguish between on-label and off-label use of
17 Hydrocortisone tablets. That prescribing behaviour did
18 not change after skinny label tablets entered.

19 You were aware of that at the time?

20 A. I do not think I was, but I am not surprised.

21 Prescribers would not even be thinking about this issue.

22 Q. If we go to paragraph 53 of your statement, so
23 {B2/1/18}. We see there that you say that -- so you
24 arranged for your market intelligence team, do you see
25 that:

1 "I also arranged for [and there is a redacted
2 name]..."

3 A. I can see it.

4 Q. "And our small market intelligence team in Mumbai to
5 investigate the indication issue further. Initially
6 this person came back with some promising views but
7 those were later corrected and it became clear that the
8 market for reduced indication 10mg HT for children was
9 negligible."

10 You are asking -- is that -- were the promising
11 views the ones that then filtered through into the email
12 that we just saw, which was the 78%?

13 A. I do not know. They may have been.

14 Q. So you say anyway that those views were later corrected.
15 If we look at paragraph 54 of your statement you say:

16 "The business development team reported in
17 late January 2014 that the Aesica reduced indication
18 product only covered a small percentage of the market."

19 There is no -- there wasn't any written report, was
20 there, from your business development team?

21 A. I do not know. I do not think so.

22 Q. You haven't exhibited one to your statement?

23 A. Okay.

24 Q. The CMA hasn't found one. Do you recall whether the
25 business development team actually used those words, "so

1 only covered a small percentage of the market" or are
2 these your words?

3 A. These are my words. I believe the percentage is
4 something like 2.

5 Q. When you are talking about percentage being 2, what does
6 that relate to?

7 A. The patients who were prescribed Hydrocortisone 10mg,
8 I think 2% of those patients were covered by our
9 product's indications.

10 Q. I see, so it is not relating to the numbers of open
11 prescriptions?

12 A. Oh no, no, sorry. I will reiterate. I very much accept
13 the prescriptions are open. The prescribers would not
14 even be thinking about this issue.

15 Q. So for the 2% do you accept that 2% does not represent
16 the portion -- you are not restricted to contesting 2%
17 of the market, are you, because if there is an open
18 prescription you can contest a larger part of the
19 market. The question is how much?

20 A. No, no, we cannot. We can only have our products
21 dispensed against those 2% indications.

22 Q. That is not quite right, is it, Mr Beighton, because --
23 let us say you have an adult with adrenal insufficiency
24 and the prescription that the doctor writes them is an
25 open prescription and they take it to the pharmacist,

1 the pharmacist can dispense the skinny label product,
2 can they not?

3 A. Only if they do not have available the full indication
4 product.

5 Q. That was your understanding at the time?

6 A. That is my understanding now.

7 Q. Now, if we go to paragraph --

8 THE PRESIDENT: Again, just to be clear, your understanding
9 is based less on what the law might strictly require and
10 more on what the practice in pharmacies is or
11 a combination of the two.

12 A. Yes, it is -- I believe it is a combination of the two
13 and if you were to ask a superintendent pharmacist what
14 he or she would advise their pharmacists to do, they
15 would say if there is a full labelled product then you
16 have to dispense that product against the prescription
17 for let us say in this case adrenal insufficiency.

18 THE PRESIDENT: Okay.

19 MS DEMETRIOU: Mr Beighton, if we go next to paragraph 57 of
20 your statement on the next page {B2/1/19}. You say
21 that:

22 "During April and May... "

23 Do you see that it is the second sentence:

24 "During April and May 2014, believing that we would
25 soon have saleable product from Aesica, we began to test

1 the market for a reduced indication 10mg Hydrocortisone
2 with our customers."

3 You say that is when you became really aware of the
4 severity of the OD issue and you say:

5 "There was no interest from our customers at all."

6 Then you learned that Auden had been trying to
7 disparage your product, yes?

8 A. Yes.

9 Q. If we look at paragraph 60 as well, {B2/1/20}. So you
10 say there that the market feedback you were getting
11 regarding the Aesica product was catastrophic and by
12 "market feedback" you mean this, do you not, relating to
13 the orphan designation issue?

14 A. Yes.

15 Q. Now, there is not really any documentary record of this
16 market research and so I just want to understand the
17 chronology a little bit better.

18 We know that there was a board meeting right at the
19 end of January 2014, on 29 January. If we go to
20 {H/268/11} and we have this update and we can see that
21 it reports a positive outlook, so:

22 "However, Mr Beighton was hopeful that contracts
23 would soon be signed. It was noted that, as a result of
24 a more positive outlook on the group's own
25 Hydrocortisone product that is being developed by

1 Aesica ... it was hoped that the group would be able to
2 obtain its own fully compliant product in the next
3 4 months and thereby move away from sourcing
4 Hydrocortisone from Auden. Mr Beighton explain that the
5 issue with the development was that Auden had obtained
6 orphan drug status for their product which AMIL and AMCo
7 were currently investigating. It was currently thought
8 that AMIL's own version would be able to compete with
9 the Auden product, even if it does not have this
10 indication, but investigations continue ..."

11 So you are saying at that stage -- so I think it is
12 fair to say that this flags the orphan designation
13 issue, does it not, and says that there is going to be
14 further investigations of it?

15 A. Yes, and I think this was around the time of the
16 Guy Clark and Pradip Mukagee(?) intelligence that
17 suggested that it was reasonably good news.

18 Q. Right. But then you had already had -- so just taking
19 this in stages. You had already had the Pinsent's
20 advice that you could not mount a legal challenge at
21 this stage, had you not?

22 A. I do not know. I take your word for it.

23 Q. So the next step would have been speaking to customers,
24 yes?

25 A. Yes.

1 Q. And you did not do that, I think you have said,
2 until April or May. That is what we looked at before.
3 So that happened in April or May, yes?

4 A. Okay.

5 Q. So despite the fact -- so you thought at this point in
6 time, because this is January, you thought the product
7 would be ready to launch in April or May, but you were
8 not conducting market research at this point in time.
9 I think that is right, is it not?

10 A. I think that is right, yes.

11 Q. Now, Mr Sully's evidence yesterday was that AMCo's
12 commercial team had gone to customers in April and May
13 and been told that they were not interested in a skinny
14 label product. I think you were in court when he gave
15 that evidence?

16 A. I was, yes.

17 Q. Now, you haven't exhibited any documents showing AMCo's
18 market research and the CMA did not find any documents.
19 I am assuming there were no documents produced recording
20 the market research?

21 A. There were no documents. I think the CMA interviewed
22 Jane Hill who conducted this research for us.

23 Q. Okay. In fact, Mr Sully's recollection was the same.
24 So he said that Ms Hill would have conducted the
25 research?

- 1 A. Yes.
- 2 Q. His recollection was that the feedback from her would
3 have been verbal to you and to him. Is that also your
4 recollection?
- 5 A. I think it was verbal, yes, unless you found some
6 emails.
- 7 Q. The CMA just -- so you know, the CMA did not find any
8 record of emails sent out to customers or anything like
9 a survey or anything like that. Do you recall any wider
10 reporting of the results of the customer research that
11 Ms Hill conducted?
- 12 A. Other than to me and Mr Sully, no.
- 13 Q. So not to the management team or to the board?
- 14 A. I cannot remember. I think the board eventually were
15 informed.
- 16 Q. You think they were informed about the market research,
17 the results of the market research?
- 18 A. Yes, the fact that customers did not want to buy this
19 product.
- 20 Q. Right. Now, Mr Sully, we haven't been able to find any
21 detail in board minutes about the market research
22 itself, but no doubt Mr Brealey will take you to that if
23 there is a record of that.
- 24 As you say -- so as you and Mr Sully have both said,
25 this was a verbal report given to you by Ms Hill.

1 Actually, before we get on to that, let us just have
2 a look at the April board minutes. Let us just have
3 a look at those. Let us look at {IR-H/411/1}. Let us
4 go to page 6. Page 6 is actually -- there are lots of
5 blank pages left intentionally blank and page 6 is the
6 first page. You see the date of the board meeting at
7 the top, 30 April. You can see that you were in
8 attendance, yes?

9 A. Yes.

10 Q. Then let us go to page 13 {IR-H/411/13}. If we look
11 down, so if we can scroll to look under "Update on
12 Compliance Audit". I am not sure to what extent this is
13 confidential, so I am not going to read it out, but
14 would you mind just reading it to yourself. (Pause).

15 A. Okay.

16 Q. So there is a reference there to the Pinsent's advice.
17 You do not actually mention any market feedback there,
18 do you?

19 A. No, I am not sure if it was done by then.

20 Q. But you do say at the end that there were going to be
21 further investigations. So is that, do you think,
22 a reference to the market research?

23 A. Possibly, yes.

24 Q. Now, Ms Hill was the UK Commercial Director at that
25 time, was she not, and she had extensive experience, did

- 1 she not, in the industry?
- 2 A. Yes, yes.
- 3 Q. So she would have been very knowledgeable about the way
4 in which the market operated?
- 5 A. Yes, very.
- 6 Q. So presumably you would have trusted that she could give
7 a good insight into issues like this?
- 8 A. Yes.
- 9 Q. Now, let us just have a look -- you mentioned her
10 interview with the CMA. So let us just have a look at
11 that at {H/1088/1}. This is her interview on
12 23 October 2017. Do you remember -- is this a document
13 that you've looked at in preparing for giving evidence?
- 14 A. I have seen it before.
- 15 Q. If we go to page 5 {H/1088/5}. You can scan what she is
16 saying there. It is really about her experience, but
17 she is describing her experience there and she is
18 explaining that it is extensive. She had actually
19 worked as a generics rep, had she not, visiting
20 independent pharmacies. Do you remember that?
- 21 A. I am -- no, but I am sure she had.
- 22 Q. She moved to Goldshield and do you remember when she was
23 there she was promoted pretty quickly to senior posts?
- 24 A. She was, yes.
- 25 Q. Presumably because she was good at her job?

1 A. I knew her. She was brought in at a relatively senior
2 position.

3 Q. Let us go to page 12 {H/1088/12}. If we start at
4 line -- so let us look at the question around line 17.
5 So the question is:

6 "We are aware of the supply arrangement with
7 Auden McKenzie."

8 That is the sort of prompt and then she says:

9 "Okay, so from my recollection we had, I think, it
10 was approximately 6,000 packs a month and I tended to
11 sell it to the same two customers, which was AAH and
12 Mawdsleys."

13 Just pausing there. AAH was a full-line wholesaler,
14 yes?

15 A. Yes.

16 Q. And is this right, there were just three full-line
17 wholesalers, so there was AAH, Alliance and Phoenix?

18 A. Yes, and Mawdsleys, which I have seen there, Mawdsleys
19 was also a full-line wholesaler.

20 Q. Mawdsleys was a full-line wholesaler rather than
21 a short-line wholesaler?

22 A. In the early days it was. I am not sure -- it changed,
23 it developed, but it did keep a full line of products in
24 the past.

25 Q. All right. So where you say then at 113 of your

1 statement, paragraph 113, so that is {B2/1/37}. If we
2 could scroll to 113. Sorry, I think we need to start
3 at 112. So you say there that your strategic focus was
4 on AAH and Alliance?

5 A. Yes.

6 Q. Then you say at 113, I think the combination of 112 and
7 113 is you are suggesting that in this period AMCo was
8 only really selling to AAH and Alliance, subject to
9 these two exceptions that you refer to in 113, yes?

10 A. Which two exceptions?

11 Q. You say -- if you look at 113, you say:

12 "There were two exceptions. First, given its
13 historical relationships with other wholesalers, we
14 continued to supply some commodity generic products on
15 a 3PL model to any wholesalers that approached us."

16 Then there is a second point there about after
17 acquiring Focus you then had relationships at that stage
18 later on with other wholesalers?

19 A. Yes.

20 Q. Is it your -- I think it is your recollection in your
21 witness statement that as regards Hydrocortisone, it is
22 really only AAH and Alliance that you can remember
23 dealing with, yes?

24 A. That is what I thought, yes.

25 Q. Now, if we go to {H/886/2}, this is data on AMCo sales

1 of the 10mg tablet between 2013 and 2016. The first
2 line is AAH, yes, do you see that?

3 A. Yes.

4 Q. Second is Barclays. Barclays is part of Alliance, is it
5 not?

6 A. Part of AAH.

7 Q. Part of AAH, thank you. Then the ninth row down is
8 Mawdsleys. Do you see that?

9 A. Yes.

10 Q. And the bottom row is Waymade?

11 A. Yes.

12 Q. So if we can bear those in mind for a moment. Waymade
13 was a short-line wholesaler, was it not?

14 A. Yes.

15 Q. Then if we go to page 3, {H/886/3}. So what we can see,
16 if we look at May 2013, you were supplying Barclays and
17 Waymade, yes?

18 A. So I see, yes.

19 Q. Then let us scroll through 2013. So we go to the next
20 page {H/886/4}, it is the same picture for the remainder
21 of 2013 and then in 2014, if we can go on, go on a bit
22 more, please. So we see in June we see a sizeable
23 volume going to Mawdsleys too, yes, in June 14 and that
24 was just after the renegotiation, so you had more volume
25 at that stage, so presumably that is what explains that,

1 is it not?

2 A. Yes.

3 Q. If we -- if we scroll on, we can see these same three
4 until March 2015 and then after March 2015 there is much
5 more of a proliferation of different wholesalers that
6 you are selling to, yes?

7 A. Yes.

8 Q. So it is not right, is it, that AMCo supplied
9 Hydrocortisone just to AAH and Alliance?

10 A. It would seem not.

11 Q. So Ms Hill, we can see, was right about Mawdsleys, was
12 not she?

13 A. Yes.

14 Q. And you both forget about Waymade, did you not?

15 A. Yes.

16 Q. Now, if we go back to Ms Hill's interview, so
17 {H/1088/23}. If we look at line 19 onwards, she said
18 there:

19 "When we were getting close to launching our own
20 product, I got asked to go and speak to some customers
21 to find out what their feedback would be if we launched
22 the product without the main indication and I cannot
23 remember what disease it was for, but anyway, I guess
24 that is irrelevant. So I went to two or three customers
25 to find out what their view would be and these were

1 customers with their own pharmacies."

2 In other words, just pausing there, that would mean
3 vertically integrated wholesalers of pharmacies, yes?

4 A. Yes.

5 Q. "So I went to Day Lewis to, what's his name? Toby, so
6 I asked him about Hydrocortisone and it was quite
7 interesting because he said, 'Oh, I've had a letter
8 about this telling me somebody's going to launch and
9 I thought - I wondered if it was going to be you' and
10 I just said 'So, you know, what are the thoughts? What
11 is your chief pharmaceutical officer's thoughts about
12 this indication?' And he said, 'Absolutely not, we
13 would not be able to use your product without that
14 indication on there, we have had a letter'. And I think
15 he then sent me the letter on email, but you guys will
16 know whether that was in my email ... I then had
17 a telephone conversation with Darren Walker at Alliance
18 and he said pretty much the same, that the Boots chain
19 of pharmacies would not entertain using the product
20 without that main indication."

21 I think we have established already that Alliance
22 and Boots were vertically integrated, yes?

23 A. Yes.

24 Q. Day Lewis was a large pharmacy chain, was it not, with
25 some wholesaling function?

1 A. Yes.

2 Q. So the market research seems to have consisted of
3 conversations with these two customers, yes?

4 A. Yes, so it seems.

5 Q. So it is fair to say it was not a particularly extensive
6 exercise? That is fair, is it not?

7 A. In terms of the market it covered it was fairly
8 extensive but -- because these two companies have single
9 buying policies.

10 Q. Now, you are not aware exactly, are you, what Ms Hill
11 was told by them?

12 A. Only it is pretty much in line with what I can see here.

13 Q. But based on her evidence, she did not speak to
14 Mawdsleys and Waymade, did she?

15 A. So it seems.

16 Q. Ms Hill said that the feedback from these two customers
17 was that they would not want to use the product without
18 the main indication. That is what we are seeing in her
19 evidence and she refers to a letter being sent to
20 Day Lewis and that was a letter from Auden, was it not,
21 and that was part of its campaign that you discuss in
22 your witness statement?

23 A. I think so, yes.

24 Q. If we go to -- let us go to paragraph 72 of your witness
25 statement. That is {B2/1/24}. You refer to that here.

1 If you go about halfway down, it says that:

2 "Jane Hill forwarded me an email that she had been
3 sent in confidence from a close business contact at
4 Day Lewis. This email made it clear that Day Lewis was
5 not going to buy any reduced indication product and most
6 likely nor were any other customers. It also revealed
7 that Auden had been out in the market actively
8 frightening people off."

9 Let us look at the email from Day Lewis forwarding
10 the letter. That is at {IR-H/488/1}. I just ask you
11 to, first of all, note -- so it is halfway down. There
12 is an email. There are redacted names, but can I just
13 ask you to note the name. I am going to call this
14 person TM. You see the initials?

15 A. Yes.

16 Q. It is to Jane Hill and on timing this came to you
17 on May 29th. Do you see that?

18 A. Yes.

19 Q. So a matter -- so just as a matter of timing, this
20 cannot be the email which caused you in April, as you
21 say in your statement, to say that the feedback from
22 customers was catastrophic, could it, because you only
23 found out about this at the end of May?

24 A. I do not know. It may have been, if Jane had seen this
25 whilst she was with this gentleman.

- 1 Q. This is when -- so what we see here is:
- 2 "Hi Jane.
- 3 "Sorry for the delay in sending you this attached
- 4 letter."
- 5 I think this is when it was actually sent to her?
- 6 A. Yes.
- 7 Q. It stresses that it is confidential. Now, on the
- 8 substance of the email, so just looking at what is said
- 9 by TM, this does not say, does it, that Day Lewis was
- 10 not going to buy the skinny label product, does it, on
- 11 its face?
- 12 A. I do not think so, no.
- 13 Q. It does not say that other customers will not buy it
- 14 either, does it?
- 15 A. No.
- 16 Q. Did you, Mr Beighton, did you at the time speak to
- 17 anyone from Day Lewis?
- 18 A. No.
- 19 Q. Did you speak to any other customers?
- 20 A. No.
- 21 Q. If we go to {IR-H/1241/1} this is a note of a call
- 22 between the CMA and Day Lewis, do you see that, as part
- 23 of the investigation? The same person TM is present on
- 24 the call. Do you see that from Day Lewis?
- 25 A. Yes.

1 Q. Let us go to page 3 {IR-H/1241/3}. Let us have a look
2 at paragraphs 3.3. So:

3 "TM believed that Auden McKenzie sent this letter to
4 preempt the launch of a competitor. Once they received
5 Auden McKenzie's letter, Day Lewis believed there would
6 soon be competition for Hydrocortisone tablets."

7 Moving on:

8 "TM explained that the letter did not influence his
9 views on skinny label tablets. As a pharmacist TM
10 understood the rigour involved in proving
11 bioequivalence. The process and tests that skinny label
12 tablet suppliers had to go through (including the assay
13 release and dissolution requirements) meant that there
14 was no pharmaceutically differentiating process between
15 full and skinny label tablets and that the products were
16 not pharmaceutically distinguishable. TM was very
17 confident that there would have been no risk of patient
18 harm from using skinny label tablets. TM considered
19 this to be a matter of licensing and regulation, not
20 a patient safety issue. In his opinion, TM believed
21 that Auden McKenzie's motivation in sending the letter
22 was purely financial, attempting to reduce the
23 attractiveness of the skinny label product."

24 And at 3.5:

25 "However, Auden McKenzie's letter did not influence

1 Day Lewis's appetite to stock skinny label tablets.
2 Day Lewis would have listed skinny label tablet as and
3 when they were marketed, but would have ensured they
4 were differentiated from full label tablets on its
5 system by include a note that skinny label tablets had
6 reduced indications."

7 Then at 3.6:

8 "TM confirmed there was never any question that
9 Day Lewis would stock skinny label tablets when
10 available. Day Lewis would have taken skinny label
11 tablets had they been available earlier, including at
12 the time of Auden McKenzie's letter in 2014. It would,
13 however, have been important for Day Lewis to demarcate
14 between full and skinny label tablets on their system.
15 There was no reason to believe that the market would
16 have evolved any differently had skinny label tablets
17 been launched earlier."

18 So you can see, can't you, that this person was
19 a pharmacist, yes?

20 A. I know him and I can see that what he is saying is --
21 here is at odds with what he told Jane Hill at the time.

22 Q. But you did not pick up the phone and ask him yourself
23 at the time, did you?

24 A. No, Jane Hill did.

25 Q. So what you are now referring to is the comment that

1 Jane Hill has referred to in her CMA interview. You
2 cannot remember any further detail about any of the
3 exchange between him and Jane Hill?

4 A. I remember discussing it with Jane, which is the basis
5 of our understanding of how this market would react.

6 Q. We do not, as far as you know, have any contemporaneous
7 documentary record of Ms Hill, or anyone else, reporting
8 the views of Day Lewis?

9 A. No, I do not think so.

10 Q. Let us go back to Ms Hill's interview at page 41. So
11 {H/1088/41}, please. If we look towards the bottom of
12 the page, so line 25 and that is Ms Hill:

13 "I am sure they -- Auden would have known that they
14 have got orphan drug status and that we could launch our
15 own but we were never going to have that indication. So
16 it would be a very empty threat because we could launch
17 at any time but not have access to the whole market."

18 And then if we go down, we see Mr Grove saying:

19 "So would you not have tried to sell to customers?"

20 Jane Hill says:

21 "You could have tried to sell more to independents,
22 so obviously the big, the large groups or whatever,
23 Lloyds, Boots, Day Lewis..."

24 So pausing there, Boots and Day Lewis are really the
25 only people she has had feedback from, are they not,

1 that is reported back to you?

2 "They will be led by their chief pharmaceutical
3 officer. An independent makes their own decision. So
4 there will be some independents that would not care, it
5 would be about price. Because this isn't the first drug
6 that this happened to in that sense, there has been lots
7 of generic products over the years that have got
8 a different sort from the brand originator and the brand
9 originator tries to say it will not work because it is
10 a different sort, and you know, that is quite a common
11 thing in that way and eventually it does disappear but
12 it can take quite a long time. So there will be some
13 independents that just want to buy the cheapest and do
14 not really care what indications, but the big groups, so
15 the big groups, I think from memory, are about 60% of
16 the market, so you would only have access to 40% of the
17 market of which 80% of that 40% are the main
18 indication."

19 So leaving aside the percentages, what she is saying
20 there is -- her evidence to the CMA is, first of all,
21 I think we can agree, that AMCo would not have had
22 access to the whole market, yes?

23 A. True.

24 Q. But that it could have tried to sell to more
25 independents, yes?

1 A. We could have tried to sell to more independents, but
2 that would be -- the issue that we have here is
3 obviously feedback from customers but also a stance that
4 we would have wanted to take at the time, and I remember
5 thinking about this and discussing with colleagues, that
6 if we had gone to independent pharmacists and somehow
7 tried to sell this product based on price, we would have
8 had to explain to them very clearly that they could only
9 use this product on 2% of the market, otherwise we would
10 have been encouraging them to break their own pharmacy
11 rules, which we chose -- we really did not think it was
12 the right thing to do.

13 Q. Mr Beighton, just on that last point, obviously after
14 you did enter the market you were selling it to
15 independents, were not you?

16 A. In the end, yes.

17 Q. But you were not asking them to break their rules then,
18 were you?

19 A. No.

20 Q. Right, okay. Now, let us go back to the interview,
21 page 44 {H/1088/44}. Let us see why Ms Hill does not
22 like selling to independents. So what is put to her by
23 the CMA in the middle of the page:

24 "You just explained you had tried to fill that gap
25 by selling to independents. Then you were talking

1 earlier about speaking to AAH and Alliance."

2 And then she says:

3 "Customers had already said that Auden had written
4 to them."

5 So she says:

6 "At that point those cannot be my first targets
7 because they've already said no, you have got to go
8 somewhere else."

9 Then what is said at the bottom of the page was:

10 "Well, was that ever a consideration then, to just
11 think, okay, well 60% of the market may not be keen on
12 the product, but why not just go and try with these
13 other 40%, albeit that it is a lot more difficult
14 because there are probably several."

15 Then she says this, she says:

16 "Yeah, but we did not have -- because the way that
17 we were set up, we did not have a team, a large team, of
18 generic reps out in the field to go and target those
19 independents.

20 "Because we'd gone into the dual and then later on
21 solus deals with Alliance, in order to go and hit that
22 40% of independents would have been met getting in my
23 car, driving around the UK trying do that or hiring
24 a sales in order to do that. So we, were not built up
25 to be able to do that easily without an investment of

1 some sort."

2 So she is explaining there, and you understand that,
3 do you not, she is saying we could in principle have
4 sold to the 40% of the market that is the independents,
5 but we were not really set up that way as a company,
6 because we did not have these reps travelling round
7 trying to sell. Do you agree with what she's saying?

8 A. I agree with what she said, but also, on this particular
9 issue, it would have been terribly difficult for a rep
10 to sell a product for 2% of the market.

11 Q. Mr Beighton, I am a bit confused about the 2% of the
12 market, because when you then eventually entered into
13 the market, you were not confined the 2%, were you?

14 A. No, but that is what we were thinking at the time.

15 Q. That was wrong though, was not it? Nothing changed
16 between then and when you entered in terms of the
17 regulatory context?

18 A. At that time I was not quite so involved in the
19 business, but, nevertheless, we did -- the new guys who
20 were coming in were pushing to launch the skinny label
21 product. My view at that time was that we take 2% -- we
22 would have struggled to take 2% of prescriptions
23 without, I suppose, trying -- having to explain to
24 customers -- pharmacists, what they should be doing.

25 Q. Mr Beighton, let us look at {A/12/336}. This is in the

1 CMA's Decision. The figure 4.4. If we could zoom in
2 a little bit. Now, the dark red is -- so this is, if
3 you see, these are the proportions of full and skinny
4 label 10mg Hydrocortisone product over time. So you see
5 at the bottom of the axis of the graph at the time
6 is June, sorry, July 15 onwards.

7 The dark red is full label, yes, so we see before
8 there is market entry, that is 100% of the market. You
9 see the dark red going up to the top?

10 A. I can see it. I do not know what the source of this is.
11 Do you?

12 Q. This is the CMA's analysis based on data submitted by
13 the parties to the investigation. The light red or the
14 pink is skinny label product, yes, and it is obvious
15 from this when you look at the proportions, it is
16 obvious, is it not, that skinny label products, first of
17 all, are not confined to contesting 2% of the market.
18 We can say that with some certainty, can we not,
19 Mr Beighton?

20 A. Yes, I think we are maybe talking at cross-purposes
21 here. The 2% of the market are the 2% of prescriptions
22 that the pharmacist is supposed to dispense the skinny
23 label against, not the pharmacists who choose to do
24 something different.

25 Q. No, exactly. So the 2% -- those are prescriptions for

- 1 the reduced indications that are shown on your label?
- 2 A. Yes.
- 3 Q. But the point is that you were not confined, and indeed
- 4 the other skinny label producers were not confined, to
- 5 contesting just that 2% of the market, were you? You
- 6 could contest -- any time there was an open
- 7 prescription, you could contest that part of the market?
- 8 A. I do not think we can. I actually do not think we can
- 9 and you can check this again with people who know more
- 10 about this than me.
- 11 Q. Mr Beighton, do you remember when you introduced
- 12 a product to the market, what percentage of the market
- 13 did you end up capturing when you came on to the market?
- 14 A. Which -- with our --
- 15 Q. With your own product?
- 16 A. I do not know.
- 17 Q. It was a lot more than 2%, was not it? Do you recall
- 18 that?
- 19 A. No, no, I do not.
- 20 Q. You do not remember.
- 21 A. I -- yes, sorry. I just need to remind myself when that
- 22 was.
- 23 Q. Do not worry for now.
- 24 A. Okay.
- 25 Q. Stepping back, Mr Beighton. What we have seen is that

1 we do not have any documentary record in this case of
2 any market testing by AMCo of its customers or with
3 pharmacists, there is nothing that we have seen there,
4 nothing you can show us, is there?

5 A. Well, other than Jane Hill's.

6 Q. What she said in her interview?

7 A. And to us at the time.

8 Q. And there is no contemporaneous record of any internal
9 discussion about this within AMCo, is there?

10 A. Is there not? I am very surprised.

11 Q. About the market research? And the only evidence we
12 have is from Ms Hill's interview. She's not here as
13 a witness, but we know that the exercise she carried out
14 was very limited, because she's explained that she spoke
15 to two customers and they were not independents, were
16 they, they were big pharmacy chains?

17 A. They were not independents. They were people who had
18 superintendent pharmacists.

19 Q. We know and the CMA accepts, for example, that Boots had
20 no appetite to dispense a skinny label product, but the
21 point was that she is saying there were independents who
22 would view things differently, but she did not speak to
23 them because she thought that was not the part of the
24 market that was very easy to capture, that is right is,
25 it not?

1 A. And the question is for us whether we want to encourage
2 that type of behaviour.

3 Q. Encourage what type of behaviour?

4 A. Dispensing against prescriptions where our product is
5 not indicated.

6 Q. I am a bit bemused by this, because when you did finally
7 come onto the market you were no doubt trying to sell to
8 pharmacists who were dispensing on open prescriptions,
9 were you not?

10 A. As I said at the time when we were considering
11 launching, I was very much against doing that. Clearly,
12 we ended up -- and I guess what my colleagues would have
13 argued at that point, is that people were already doing
14 it. So why wouldn't we -- we would not be having to
15 encourage people to behave inappropriately.

16 Q. You are not saying that you did behave inappropriately
17 when you entered the market?

18 A. No, no, I assume we were fulfilling existing demand for
19 this skinny label, rather than persuading people to
20 dispense off-label.

21 Q. Let us go to {H/1087/10} and this is your interview with
22 the CMA on 20 October 2017 and let us start at page 10.
23 If you look at line 14, you can see here -- I am not
24 going to read it all out because we have now looked at
25 this email lots of times, but it is the Guy Clark email

1 which talks about the 22% of prescriptions and the CMA
2 were asking you about that email. So you have that
3 email in mind now, haven't you, Mr Beighton?

4 If we go to page 11 {H/1087/11}. You say -- I am
5 looking at line 6:

6 "We went to our customers and asked them whether
7 they wanted it. They said they did not but we believed
8 that we could still achieve some sales if we had the
9 product, so we continued to try to bring it to market."

10 And then let us go on to page 12 {H/1087/12} and
11 then let us look at line 9. Again, if we just look up
12 you say -- sorry, let us go to the bottom of the
13 previous page so we get the context. You are saying
14 towards the bottom of the page that most prescriptions
15 were for adrenal insufficiency. I do not think you are
16 saying there that most prescriptions were closed
17 prescriptions that specified adrenal insufficiency. If
18 you were saying that, you would be wrong, because the
19 CMA found that the vast majority of prescriptions were
20 open and that has not been challenged in these
21 proceedings, but I do not think that is probably what
22 you are saying. I think you might be saying that the
23 vast number of prescriptions may have been open, but
24 they were dispensed with adults with adrenal insufficiency
25 to people -- adults with adrenal insufficiency. Is that

1 what you meant?

2 A. Yes.

3 Q. Then the question is:

4 "I appreciate that is obviously right, probably
5 right."

6 Then over the page:

7 "Probably a small number of prescriptions that are
8 actually for adrenal insufficiency outside of the adult
9 indication."

10 That is the 2%, yes?

11 A. Yes.

12 Q. "But here it is irrelevant anyway because they are
13 bioequivalent and when you look at what is happening in
14 the market today, there seems to be quite a lot of entry
15 from suppliers who have this skinny label product. I am
16 trying to understand what is the concern."

17 You say:

18 "Well, I mean this wasn't going to stop us from
19 launching."

20 So you thought it might be difficult, but it is not
21 going to stop us from launching, yes?

22 A. Yes.

23 Q. Then if we look at -- if we go on a bit it says -- you
24 say:

25 "It was really just going to stop us from achieving

1 the market share that we always feel that we should have
2 if we launch a generic, which is, would be at least 50%
3 of the market. And economically that is loads, I mean
4 that is loads better than just taking 12,000 packs
5 a month."

6 You then say -- so then it is put to you:

7 "Does this mean your strategy is not impacted by
8 these figures or would it have some bearing?"

9 And you say:

10 "Not on developing the product, no."

11 Then if we go to page 14 {H/1087/14}. I am sorry,
12 let us go to the top of page 13. You say:

13 "It would have had a bearing on what we could have
14 sold."

15 Yes?

16 A. Yes.

17 Q. Not on developing the product, but on how much we could
18 have sold.

19 Then if we go to page 14, {H/1087/14}, it was put to
20 you that you did not perceive the orphan designation as
21 a blockage and so we see that towards the -- we see your
22 answer towards the bottom of the page. You say:

23 "We did not see it as a blockage to enter the
24 market, just we knew that when we launched our two big
25 customers were not going to take the product, so we'd

1 have to find some other means."

2 Is this a fair summary then, Mr Beighton, of your
3 evidence: so you believed that the orphan designation
4 would limit the market share you could obtain with your
5 own product, yes?

6 A. Yes.

7 Q. As compared to the position if you had a fully indicated
8 product when you had hoped to get 50% of the market?

9 A. Yes.

10 Q. But there would still be some demand for your product.
11 It wasn't a blockage, as you were saying?

12 A. Yes, and I suppose what I am saying is that whether that
13 demand would be appropriate for us to stimulate.

14 Q. So you are accepting that there would be some demand for
15 your product, but you are worried that it is going to be
16 difficult and that the demand is going to be limited.
17 Is that a fair summary?

18 A. And that we may be seen to be encouraging off-labeled
19 dispensing. By the way, I do not actually approve of
20 this orphan indication. It just seems crazy to me that
21 these products, as Mr TM suggested, are absolutely
22 bioequivalent so there is no patient danger, but there
23 is a regulatory issue in this that we should not have
24 been seen to have been encouraging at the time.

25 Q. Now, let us go to the transcript from yesterday. So it

1 is {Day 2/59:20}. This is Mr Sully's evidence. I am
2 sure you will remember it, but I am just showing it to
3 you so you can see it. If you look at line 20. I asked
4 him:

5 "Can I get this right, is it your position that you
6 would have made zero sales, zero sales, you had no
7 market at all or is it that the market would have been
8 difficult?"

9 And he said:

10 "Zero sales."

11 He repeated that a number of times, I think you will
12 remember, but your evidence is that you do not agree
13 with that, do you, it would not have been zero sales?
14 There was no blockage, as you told the CMA. It just
15 would have been difficult.

16 A. It would have been difficult, virtually impossible. You
17 could say zero sales, but this is partly because of this
18 issue of the right and wrong of promoting a product in
19 an indication where pharmacists are not supposed to
20 dispense.

21 Q. But as far as that is concerned, the regulatory position
22 did not change between then and when you entered the
23 market, so far as you can recall, did it?

24 A. No, it did not and I think that what happened in the
25 end, when we launched our product, was that the market

1 had been created. We were not stimulating that demand.

2 Q. So I think what you are saying is that when somebody
3 entered the skinny label product, and Alissa was the
4 first one, that stimulated the market, made it easier
5 for you.

6 A. And people were -- pharmacists were making their own
7 decisions not decisions that had been stimulated by us.

8 Q. There is no reason why you could not have been the
9 Alissa, was there, and entered the market to
10 stimulate --

11 A. Yes, I am sorry. This is the point I am making that we
12 would not have wanted to -- we would not have wanted to
13 go against something that our customers, our
14 superintendent pharmacist customers particularly, would
15 have disapproved of.

16 Q. You have got no evidence of them saying they would
17 disapprove of it?

18 A. Okay, I do not. I just feel that I know and I suggest
19 if we got one or two of them in here, that is what they
20 would tell us.

21 Q. Now --

22 A. As did the superintendent pharmacists at Boots to
23 Jane Hill.

24 Q. Of course, what we see Day Lewis -- what we have seen
25 Day Lewis has said to the CMA is that they would have

1 had no difficulty in dispensing skinny label product?

2 A. So I see, even though he said something different to
3 Jane Hill originally.

4 Q. If we go to {H/445/1}. We have seen this email before,
5 but the volume from Auden was 6,000 a month at this
6 stage, so this is in April 2014. And the forecast
7 volumes from Aesica for AMCo's own product were 10,000
8 a month, yes?

9 A. Yes.

10 Q. So that is not zero, is it, those were the forecast
11 volumes you thought you would sell?

12 A. Yes.

13 Q. Then if we go to {H/445/1}. Sorry, we are on that. So
14 Mr Belk sent that information on to you, do you see
15 that? You said it would be good to see the size of the
16 market and Jane Hill said 77,000 packs per month.

17 I think we can take it from this that the internal
18 estimate at this stage was that if you entered the
19 market, AMCo would take say 10 to 15% of the overall
20 market, yes?

21 A. Yes, I think this was before we started thinking about
22 the orphan indication issue.

23 Q. Let us go to {H/509/1}. We have seen this before as
24 well. It is the email thread during the last part of
25 the negotiation with Auden, so after the market

1 research, yes? There is a discussion whether to hold
2 out for 12,000 and Jane Hill thinks yes and you refer to
3 the forecast of 10,000 packs, yes?

4 A. Yes.

5 Q. There is no suggestion here that there is no customer
6 demand for the skinny label product. You are referring
7 back to the same 10,000 pack forecast, aren't you?

8 A. That was what Jane had put into the budget. So we
9 were -- as I explained, we were trying to achieve more
10 than from that Auden McKenzie.

11 Q. Yesterday you told the tribunal that you thought the
12 whole premise of the CMA's case did not make sense
13 because the economics were hugely in favour of AMCo's
14 new product. So let us just look at the transcript,
15 page 169. Let us look at what you said.
16 {Day2/169:8-22}. If we look at lines 8 through to 22,
17 you are saying:

18 "Why would I not launch my product as soon as I got
19 access to 40,000 packs a month? I promise you that the
20 economics of this were hugely in favour of launching my
21 own product."

22 And if we go back to page 167 in the same transcript
23 {Day2/167:11-13}, you say:

24 "The product will not be 6,000. We would have been
25 able to launch 40,000 packs a month."

- 1 A. Yes.
- 2 Q. But we can see, can we not, that the trade-off in terms
3 of volumes that you are considering at the time that you
4 are deciding to conclude the supply agreement with Auden
5 is not 40,000 packs, is it?
- 6 A. No, I think, as we discussed this morning, the orphan
7 indications skewed the picture and certainly made it
8 more interesting for us to do a deal with -- for
9 a smaller number of packs than 40,000 with
10 Auden McKenzie.
- 11 Q. Both you and Mr Patel would have known at the time, he
12 knew that your product -- we know that he knew that your
13 product was a skinny label?
- 14 A. He knew it was a skinny label product.
- 15 Q. You both would have understood -- you definitely would
16 have understood, but you assume he would have understood
17 that there were certain customers, such the big
18 wholesalers, who would not buy it perhaps?
- 19 A. I do not know whether he understood that.
- 20 Q. The unknown for you was how many other customers would
21 switch to Auden following product launch. That was
22 uncertain for you, was it not?
- 23 A. Would stay with Auden.
- 24 Q. Sorry, would switch from Auden to your skinny label
25 product if you entered the market. That was unknown.

- 1 That was uncertain.
- 2 A. It was uncertain, but we had a pretty good idea it would
3 not be many.
- 4 Q. And it was --
- 5 A. Especially, if we approached it in an ethical way.
- 6 Q. Putting yourself in Mr Patel's shoes and knowing -- you
7 do not know exactly what he is thinking -- but you
8 imagine from his perspective there was a risk, which we
9 have seen you leveraging, that you would enter
10 independently and take significant market share, yes?
- 11 A. I do not think we leveraged a risk. I notice you keep
12 using the word "leverage". I felt at the time we had no
13 leverage. We were just hoping for a bit of luck with
14 this based on a bluff.
- 15 Q. Let us use different words. I am not going to use the
16 word "leverage", but you were -- to take Mr Clark's
17 words -- pushing back, were you not, on the basis that
18 you could contest 100% of the market?
- 19 A. I think we were pushing back on probably his insistence
20 of price or volume. We certainly -- we were pushing for
21 more volume.
- 22 Q. On the basis that if you entered you could contest 100%
23 of the market. You were not saying to him, were you,
24 you were limited?
- 25 A. No, we were not.

1 Q. So from your perspective, I think you would agree, there
2 was a clear risk that you would not be able to match
3 that 12,000 packs a month if you entered the market with
4 your own product at that stage, yes?

5 A. Absolutely, and in fact there was going to be a risk at
6 launching this product at all for some of the reasons
7 that I have mentioned, reputational risk.

8 Q. And the way for both sides to avoid each risk was to
9 take the supply from Auden and not to enter
10 independently, was it not? So you were taking
11 a commercial view. It is risky to enter and so let us
12 take the supply instead and Mr Patel was doing the same
13 from the other side of the table?

14 A. I cannot speak for what was in his mind. As I have
15 questioned on a number of occasions, I am really
16 sometimes do not -- not understood how and why he
17 behaves, though I think on this one, after the second
18 deal, it was good for him and it was good for me because
19 I was able to use this as a stopgap at a later date to
20 launch our own product.

21 Q. Mr Beighton, let us go to the July board meeting
22 minutes, so they are at {H/568.1/1}. That is the board
23 meeting on 31 July 2014. I will just show you the first
24 page so you can see you were there and you can see the
25 date. Do you have that?

1 A. Yes.

2 Q. We are going to go to page 6. {H/568.1/6}. At this
3 stage the supply deal had been signed, yes. Let us
4 start at the bottom of page 6.

5 We see that Mr Sully advised that a supply agreement
6 had been entered into to avoid a dispute threatened by
7 Auden arising out of the orphan drug status.

8 Then let us just read on so you see. He said it was
9 extremely irritating that "due to the orphan drug status
10 of the Auden product, the Hydrocortisone product
11 developed by the company did not (and could not) include
12 the key adrenal insufficiency indication on its licence
13 and SPC. As a result, it was inferior to the Auden
14 product and so a supply agreement had been made by
15 Amdipharm in order to stay in the market while it
16 considered its options."

17 So he is saying the supply deal has been signed to
18 avoid a dispute, yes?

19 A. That is what he is saying yes.

20 Q. The AMCo product was inferior because of the skinny
21 label, yes?

22 A. Yes.

23 Q. And AMCo was considering its options; that is what he is
24 saying?

25 A. Yes.

1 Q. There is no suggestion here, to the board, is there,
2 that your product, the AMCo product is completely
3 hopeless because there is no commercial demand at all?

4 A. I assume Rob would have explained at the time some of
5 the detail and background to what we are discussing now
6 because the board for sure, if we had a product that was
7 saleable, it is saleable in appropriate circumstances,
8 would have wanted us to launch.

9 Q. Mr Beighton, this is all consistent, is it not, with
10 your understanding that your skinny label product,
11 AMCo's skinny label product could have competed with
12 Auden for part of the market but the reality is that you
13 did know that there was scope for your product to
14 compete but you saw it as a commercial risk because your
15 product was a skinny label product?

16 A. Not just a commercial risk as I said before, a
17 reputational risk. This issue of dispensing off-label
18 is not something that pharmaceutical companies want to
19 get involved with.

20 Q. Your own company did when you entered the market?

21 A. Yes, and I am saying to you that that was after the
22 market had opened up.

23 Q. After --

24 A. And pharmacists were already doing this dispensing.

25 Q. Because Alissa had entered and stimulated demand, yes?

1 A. Yes. By the way I think they did that in an
2 inappropriate way. I think they had a leaflet that they
3 were putting out suggesting that adrenal insufficiency
4 was on their label and were reprimanded for that.

5 Q. That is not in your statement. Is that something you
6 just remembered?

7 A. That is something I know now, yes.

8 Q. You have explained in your statement, and I do not think
9 we need to go back through all of this, but you have
10 explained that Mr Patel was making threats in relation
11 to your skinny label product, yes? Did you know -- and
12 presumably you would accept that the reason he was
13 making those threats was because he was concerned about
14 you entering the market, otherwise there would be no
15 need to threaten you, would there?

16 A. Yes, I assume so.

17 Q. I think also it is obvious, is it not, that if his
18 campaign had succeeded -- I think you call the campaign
19 Project Guardian; is that right?

20 A. I think he called it that.

21 Q. He called it that, thank you. So if the campaign had
22 succeeded, so if it were correct that no -- if he had
23 persuaded wholesalers and pharmacists that they should
24 not purchase skinny label products, then if that
25 campaign had been successful, then there would not have

1 been any generic entry, right, so it obviously was not
2 successful?

3 A. What happened, happened. I do not know why. I cannot
4 make any comment on the success of Guardian.

5 Q. Were you aware -- so there is a letter that was sent
6 to -- let us have a look at this. {IR-H/635/1}. So
7 this is a letter to Auden sent by NHS England Chief
8 Pharmaceutical Officer in May 2014. Let us just look at
9 what it says. He says that -- so it is talking about
10 the product and he says -- it says that your product was
11 authorised before Plenadren, so it can include the
12 orphan protected indications, but others cannot have
13 that. Then let us just scroll down, please. Then he
14 says:

15 "I noted that you are in contact with clinicians and
16 patient support groups."

17 That is probably as part of his Project Guardian:

18 "Based on the advice I have received so far, I do
19 not see that there are any risks to patient safety that
20 would warrant any communication to senior pharmacists.
21 However, I would be happy to reconsider should evidence
22 arise to the contrary."

23 Were you aware of this letter at the time? I assume
24 not, were you?

25 A. No.

1 Q. You can see, can't you, that it wouldn't have given
2 Auden any comfort that it could prevent skinny label
3 entry?

4 A. Yes, and -- yes.

5 Q. Let us go to paragraph 96 of your statement, please.
6 I am about to move onto something else. Is this a good
7 time for the short break or would you like me to carry
8 on for a little longer, sir?

9 THE PRESIDENT: No, it sounds like a good time. We will
10 rise for ten minutes until 20 past.

11 MS DEMETRIOU: Thank you.

12 THE PRESIDENT: Thank you.

13 (3.09 pm)

14 (A short break)

15 (3.24 pm)

16 MS DEMETRIOU: Mr Beighton, let us go back to your statement
17 at paragraph 96, please, which is {B2/1/32}. Now, you
18 say that:

19 "Following the signing of the second supply
20 agreement, we continued pushing ahead on both the Aesica
21 and the MIBE/Dermapharm projects, looking to obtain
22 saleable product and in the hope that market conditions
23 would change. We also added the Focus/Lamda ... project
24 after acquiring Focus Pharma in October 2014."

25 I am going to come back to Aesica and Focus, but

1 just in terms of the MIBE/Dermapharm project, that was
2 a historic Mercury project, was it not?

3 A. Yes.

4 Q. It pre-dated the merger? Which had pre-dated the
5 merger?

6 A. Yes.

7 Q. It was far less developed, was it not, than the Aesica
8 project?

9 A. Yes.

10 Q. So when you were concerned about supply from Auden
11 falling through, it is really the Aesica product you
12 were looking at primarily, was it not?

13 A. Yes.

14 Q. The MIBE product would also have been a skinny label
15 product, would it not?

16 A. I think in the end it would have been. We were
17 attracted to it in the early days because I think it
18 avoided this orphan restriction in Germany, but I think
19 when we started discussions with MHRA we found that it
20 was going to be a similar problem.

21 Q. I think, just as a matter of fact, that product was
22 never brought to market, was it?

23 A. I do not think it was.

24 Q. We know -- we have established that after the second
25 written agreement we have seen the documents which

1 establish that you cancelled the Aesica project at that
2 point in time. We looked at those earlier. But you did
3 return to the Aesica product in January 2015. Do you
4 recall that?

5 A. I do not recall -- except as you have shown me today,
6 I do not recall ever cancelling it and I always felt --
7 I may have been wrong -- but I always felt that it was
8 alive.

9 Q. Let us go to {H/660/1}. This is from you and if we go
10 down to the middle of the page, so it is 27 January 2015
11 and you say:

12 "Given the Auden news please could we have a session
13 on Hydrocortisone products -- either at PPRM or some
14 other time soon?"

15 If we go to {H/661/1} and the middle of the page.
16 So it is Mr Clark to you and he says:

17 "The main issue now is whether Actavis will continue
18 to supply. We should get ready to sell our own product,
19 just in case."

20 So the issue here, do you remember this, is that
21 in January 2015 there was some concern that the deal
22 with Auden might come to an end when it was acquired by
23 Actavis, do you remember that?

24 A. Yes, I do.

25 Q. So again, the Aesica product is being treated, is it

1 not, as a back-up product in case the supply deal falls
2 through, yes?

3 A. It was being got ready in order to make sure we have
4 some Hydrocortisone to sell and I do not think that it
5 was ever ready for sale when we thought it was going to
6 be, so there was still some work that needed doing on
7 it.

8 Q. Right. You then say that -- you say:

9 "Agreed, if I remember though there is some work to
10 do to get it ready."

11 Which I think is what you have just said now?

12 A. Yes.

13 Q. Then Mr Clark says:

14 "Not at a lot though".

15 Do you see that?

16 A. Yes.

17 Q. Neither of you -- just one point, neither of you are
18 saying at this point, are you, that there is no point in
19 getting the Aesica product ready because there is no
20 demand for it from customers, are you?

21 A. No, we are not saying that there.

22 Q. Do you recall that action was then taken to get the
23 Aesica product ready to launch? Let us have a look at
24 {H/675/1} to see if this helps. There is an email -- if
25 we scroll down -- from Mr Dhorajiwala on

1 12 February 2015 with a summary "Brief notes from our
2 discussion this morning" and it is a summary of
3 a discussion on Hydrocortisone sourcing. Can you see
4 that?

5 A. Yes.

6 Q. Can you see -- you can read that the team is getting
7 ready -- you can see that the team are taking steps
8 towards getting the product ready, including solving the
9 foil thickness issue. Can you see that in the middle?

10 A. Yes.

11 Q. If you look at then the exchange above, so you see:

12 "Hi Rahul.

13 "So we are definitely going to sell Hydrocortisone
14 ex Aesica?

15 "Dear Gen ... "

16 Who is Gen, sorry?

17 A. She was in Rahul's team, Genevieve.

18 Q. "It is all still in the air! The additional batches are
19 an insurance policy and I can elaborate tomorrow when we
20 meet. We will only use them if required."

21 So again, the Aesica product being an insurance
22 policy is completely consistent with the strategy to
23 date, is it not? That is what we have seen
24 consistently?

25 A. Yes, and I think, as I said earlier, I always thought

1 that the Aesica product was being prepared and available
2 for sale.

3 Q. In case the supply agreement fell through?

4 A. In case the market opened up and we were able to sell
5 it. Clearly, there was an added urgency if we felt that
6 the supply of our existing product was not going to be
7 available anymore.

8 Q. If we -- in the end though the Aesica product was not
9 required, was it, because the supply continued on the
10 same terms after the Actavis acquisition, that is right,
11 is it not?

12 A. I think so, yes.

13 Q. Let us go to {H/720/1}. Let us go to the bottom of
14 page 2 first so we can see the context. {H/720/2}.
15 There is an email from Mr Clark. Do you see that on
16 20 May 2015? It starts with some discussion about the
17 Focus product, including Focus products in monthly
18 sales. So that is the context. Then if you look at the
19 bottom of page 1, which is the same day shortly
20 afterwards, you can see there that Mr Clark is saying:

21 "With regards Hydrocortisone, Focus will soon be
22 getting an MA approval for 10mg and 20mg tablets, which
23 we currently source from AM (soon to be Actavis)."

24 He is asking, and let us just go over the page, if
25 you just scan this email, he is looking at the -- he is

1 asking about strategy on the Focus deal with Lamda in
2 relation to 10mg Hydrocortisone. Now, Lamda was the
3 CMO, was it not, for the Focus product?

4 A. Yes.

5 Q. The question is whether the deal between Focus and Lamda
6 changed AMCo's strategy on Hydrocortisone, yes?

7 A. Yes.

8 Q. And particularly -- and we can see there is a reference
9 to 12% royalty. Particularly because a clause in the
10 agreement -- there was a clause in the agreement
11 requiring 12% royalties on Hydrocortisone which was not
12 acquired from Lamda, correct? Do you remember that?

13 A. No.

14 Q. If you look at that:

15 "Question is how we want to manage the Lamda
16 Hydrocortisone product. Deal terms are 20% revenue
17 share, or 12% on royalties of sales of Hydrocortisone
18 for product not acquired from Lamda."

19 And then "Options?" And if you look at option (d),
20 option (d), Mr Clark's option (d), is to source some of
21 the supply from Focus particularly now that Auden's
22 product has been sold to Actavis.

23 But there are other options too. So if you look at
24 (a). (a) is terminating the deal with Lamda and (b) is
25 continuing the deal with Auden and paying Lamda a 12%

1 royalty.

2 These options aren't options which involve entry
3 with your own product as the priority, are they?

4 A. With the Aesica product?

5 Q. Yes.

6 A. No, no. He is obviously trying to struggle with this
7 Hydrocortisone that we have just acquired with some --
8 it has this strange agreement to pay 12% of presumably
9 our Auden McKenzie Hydrocortisone that we are selling to
10 the market.

11 Q. Yes, that is right. That is what we think that is
12 referring to. If we scroll up, there is a response from
13 Mr Van Tiggelen. Let us scroll -- yes, down a bit,
14 please. So he says:

15 "Good point Guy. Since AM has taken 50% market
16 share ... of the Carbimazole --"

17 I am not even going to try and pronounce the next
18 one and:

19 "Might do the same if they get their hands on PST,
20 how about us exploring option (d) and aim for a larger
21 share?"

22 He suggests exploring option (d) which was entry
23 with the Focus product and trying to grow share. Then
24 if we look at what you say, you say:

25 "Of course, the Focus product doesn't have the AI

1 indication."

2 So in other words, you are reminding him that the
3 Focus product would also be skinny label, yes?

4 A. Yes.

5 Q. You are not saying there there is no point in trying to
6 grow share with the skinny label product because we know
7 there is no demand for it, are you?

8 A. I think that was the implication.

9 Q. Then let us look at what Mr Clark says if we go further
10 up. So he says:

11 "Do we think that is going to be an issue? Will
12 Actavis be as smart at pursuing this as Amit was?"

13 Then you say:

14 "According to Amit Actavis will continue his
15 strategy."

16 So you have had a conversation, have you, with
17 Amit Patel and he has told you that Actavis will
18 continue with supply on the same terms; is that right?

19 A. It seems to be, yes.

20 Q. So the same strategy, being supply from Actavis and no
21 independent entry by AMCo?

22 A. Well, presumably to allow us to continue our -- there
23 may have been a change of control clause in the contract
24 which would have entitled them to drop our deal.

25 Q. Actually, what happened was that, was it not, so Actavis

1 continued the supply on the same terms, did it not?

2 A. Yes, until I think --

3 Q. Until they gave notice?

4 A. Yes.

5 Q. Now, to complete the picture on the Aesica product, to
6 complete the picture on that product, do you recall that
7 just before this email exchange in May 2015, AMCo and
8 Aesica had entered into a supply agreement for a minimum
9 of 3 batches of tablets, do you remember that?

10 A. Not exactly, but, yes.

11 Q. In fact, Aesica did manufacture more batches for AMCo
12 and those were released in February 2016. Does that
13 ring a bell?

14 A. February? I thought it was later, but -- released,
15 sorry.

16 Q. Released?

17 A. Yes.

18 Q. I think what you are thinking of is May 2016?

19 A. We sold some.

20 Q. The tablets that you entered the market with in May, is
21 that what you are thinking of?

22 A. Yes.

23 Q. It is right, is it not, that when AMCo sold its own
24 product in the market, Auden ceased supplying under the
25 supply agreement?

1 A. I think so. I was no longer CEO at that point.

2 Q. I want to look at -- ask you a few questions about
3 Focus, the Focus product. AMCo acquired
4 Focus Pharmaceuticals on 1 October 2014. That is right,
5 is it not?

6 A. Yes.

7 Q. Focus Pharmaceuticals had a pipeline project, did it
8 not, for 10mg Hydrocortisone?

9 A. Yes, the one -- the Lamda product we have referred to
10 earlier.

11 Q. The Lamda product, but it did not have an MA, did it,
12 when it was acquired by AMCo. Do you remember that?

13 A. No, but maybe it did not -- it would have been trying to
14 get an MA.

15 Q. Its product was not expected -- I think actually it got
16 its MA in October 2016. Does that ring a bell?

17 A. No, I think I was very much on my way out by then.

18 Q. All right. I think you have just said that the CMO for
19 Focus was Lamda?

20 A. Yes.

21 Q. We have already seen this slightly odd clause in the
22 agreement about the 12% royalties or at least we have
23 seen reference to it. If we look at {H/720/1} this is
24 the same -- sorry, I have got the wrong reference.
25 {H/767/1}. This is an email from Graeme Duncan who

1 I think was global marketing director, is that correct?

2 A. I am not sure what he was at that time. He was -- yes,
3 he was on his way to take over from me, but I do not
4 think he did at that stage.

5 Q. So he was very senior?

6 A. Yes.

7 Q. It is the 18 August 2015. He seems -- if you look:

8 "I have developed some draft responses in all
9 questions in track changes mode."

10 If you just scan this, he seems to be talking about
11 preparing responses to questions for -- if you see the
12 subject line -- a "Cinven/AMCo/Banks Check Point Call".
13 Do you recall what that was?

14 A. I think it was the process we were going through to sell
15 the business.

16 Q. Okay. There is an attachment that says "LEK Management
17 questions."

18 LEK was a consultant firm. That is right, is it
19 not?

20 A. Yes, I may be wrong in this, but I think they were
21 engaged by the buyers of our business to ask questions
22 of us.

23 Q. So I think you are right. I think that they were
24 working with Concordia?

25 A. Yes.

1 Q. Who were in the process of acquiring AMCo from Cinven.
2 Does that sound right to you?

3 A. Yes.

4 Q. Let us look at the document he attaches. That is at
5 {H/765/1}. Let us go to page 3, please, {H/765/3}. At
6 the bottom of the page, "Hydrocortisone, " you can see
7 there the question:

8 "Could you comment on the factor limiting supply to
9 AMCo of 10mg tablets? For example, is it limited
10 availability of the API, or limited supply by
11 Auden McKenzie of the finished product?"

12 And then it says:

13 "Limited supply to AMCo of the finished product."

14 So what is being said is that the factor limiting
15 supply was the limited supply from Auden, yes?

16 A. Yes.

17 Q. Then how will the Focus acquisition provide access to
18 more supply of the 10mg tablets? The proposed response
19 is:

20 "The new MA will give us the ability to negotiate
21 a greater volume supply. Our expectations are a total
22 supply of 24K units a month which equates to circa 30%
23 [market share]."

24 So in other words, that is double -- this is ability
25 to negotiate a greater volume supply from Auden, is it

1 not?

2 A. That is what Graeme's suggested in this answer, yes.

3 I am not sure -- well, I am pretty sure it is not true.

4 Q. It has been true so far, has it not? So you have

5 managed to negotiate increasing volumes from 2,000 to

6 6,000 to 12,000?

7 A. Anyway, it did not happen.

8 Q. So:

9 "Our expectations are a total of 24K per month."

10 That is double the current volumes from Auden and

11 then if you look at the final point, this says:

12 "The orphan indication supplies some barrier to

13 entry."

14 That is consistent, is it not, with your view that

15 there would be some demand for skinny label products?

16 There is some barrier to entry, but it is not, as you

17 said to the CMA, a total blockage?

18 A. We can go over it again, but it was our decision not to

19 launch because of that indication and the restricted

20 access to patients and, by the way, that expectation of

21 24K a month is not something that I agree with at all.

22 Graeme may have put it in this document for whatever

23 reason, but I definitely would not agree with that.

24 Q. Presumably that is what he thought at the time though?

25 A. Or he was trying to suggest to the people who were

1 buying the business that our Hydrocortisone sales could
2 increase even further.

3 Q. Let us look at the report that LEK prepared. That is at
4 {H/853/1}. That is the front page, just so you can see
5 the date, 21 August 2015. Let us go to page 83.
6 {H/853/83}. So you can see there that it says:

7 "AMCo anticipates c. £15 million in revenues in 2018
8 from hydrocortisone, primarily driven by the 10mg
9 tablets boosted by the Focus acquisition ... "

10 Yes? Then if you look at the second bullet:

11 "With the addition of a new supply route through the
12 Focus acquisition, AMCo's forecasts that revenues from
13 the 10mg formulations will reach £14.2 million in 2018."

14 Then it says:

15 "AMCo indicate that its current supply is sourced
16 from Auden, and it has been limited in its ability to
17 meet demand due to lack of supply.

18 "The Focus acquisition ... is anticipated to provide
19 them a more competitive position to seek increasing
20 supplies from Auden."

21 So you see the same point reflected in the report?

22 A. The report will have been written as a result of
23 Graeme's couple of points on the previous document.

24 Q. I am sure that must be right. You would have seen this
25 report at the time?

1 A. Possibly.

2 Q. You cannot remember one way or the other?

3 A. No, no.

4 Q. It is likely you would have seen it, is it not?

5 A. It is likely it would have been on my desk.

6 Q. Now, do you recall that Focus came up with an idea to
7 implement this project which involved creating a new
8 company to manage the Lamda project?

9 A. Yes, I did.

10 Q. If we go to {IR-H/755/1}. This is an email from --
11 again, the name is redacted -- I am going to say RB at
12 Focus to you and to Mr Clark. We can see the date,
13 5 August. It is the American dates again. So,
14 5 August 2015. You can see attached it says:

15 "Is the outline proposal for the management of the
16 Hydrocortisone tablets from Lamda."

17 If we go to {H/756/1}, we can see the proposal. It
18 is headed indeed "Tablet Proposal".

19 If we read the objective:

20 "To maximise revenue for AMCo from the Lamda/Focus
21 Hydrocortisone tablet development without cannibalising
22 the AMCo revenue from its existing product and meeting
23 the obligations of the contract with Lamda."

24 So that is the objective.

25 Just pausing there. The existing AMCo product is of

1 course the Auden product, is it not, because it is
2 talking about cannibalising the existing product? So
3 that is the only one you had at that stage, is it not?

4 A. I do not know what he means. Whether it is that one or
5 our actual product. AMCo revenue, yes, sorry, it must
6 have meant --

7 Q. The Auden product?

8 A. The Auden product.

9 Q. That is right. Then if you look at the proposal, that
10 is saying that a new company is going to be created to
11 hold the rights and licence for the new product and that
12 company pays a proportion of its profits to AMCo and we
13 do not see it here, but that new company would have been
14 called Roma, is that right?

15 A. That eventually became the name of these guys' business.

16 Q. I just ask, because at paragraph 102 of your statement
17 you refer to "Roma". So I am just trying to bottom out
18 and it is the same -- you say there -- that is at
19 {B2/1/33}.

20 A. Yes, there was definitely a Roma. I am just not sure
21 whether it completely links to -- yes, I can see.

22 Q. Now, going back to the document that we were on, so that
23 is {IR-H/756/1}. So there are two scenarios. So
24 scenario 1, NewCo agree a supply deal with Auden to
25 avoid the issue of the orphan indication and scenario 2

1 is that NewCo manufactures and supplies from their own
2 licence, yes?

3 A. Yes.

4 Q. Those are the two scenarios. If we go to page 3 and
5 read "Actions". So looking at these actions -- so the
6 fifth bullet says:

7 "NewCo to negotiate supply from Auden or arrange
8 production via Lamda."

9 So again, these two things are seen as alternatives,
10 aren't they? So we will either negotiate with Auden
11 using the fact that we have got our own product or we
12 will make our own product, yes?

13 A. Yes.

14 Q. In the same way that supply from Auden and production
15 via Aesica were alternatives too, yes?

16 A. They were all, I suppose, mutually exclusive to each
17 other.

18 Q. Okay. If we go back to paragraph 102 of your statement,
19 {B2/1/33}, your response to the CMA -- so the CMA refers
20 to these various points in its Decision and you are
21 responding to that here and what you are saying is
22 that -- you say that in the end AMCo did not pursue the
23 Roma proposal and that is right, is it not? You did not
24 pursue it?

25 A. I am sure that is right, yes.

1 Q. But that is not really meeting the CMA's point in the
2 Decision, is it? Because the point is that your
3 intention was to use the Focus product as a means of
4 getting even more volumes from Auden. That was
5 scenario 1, was not it, that we have just seen on this
6 document?

7 A. That wasn't my document. That was a proposal from
8 somebody else.

9 Q. We saw that that document had been sent to you?

10 A. Okay, but we rejected it.

11 Q. Let us go back to it at -- let us go to {H/771/1}.

12 Page 2 {H/771/2}. The bottom of the page is the
13 original email with the Focus proposal. Do you see:

14 "Please see attached the outline proposal for the
15 management of the Hydrocortisone tablets from Lamda."

16 So that is sent to you from I assume it is the same
17 person at Focus to you and to Mr Clark. If we then go
18 to page 1 {H/771/1}, we can see an email from Mr Duncan
19 to you and Mr Clark. That says -- so that is saying
20 that there is going to be a telecon -- TC -- I assume
21 that means, presumably with Focus to further the
22 Hydrocortisone discussions. Do you see that?

23 A. Yes.

24 Q. Which have already taken place. What Mr Duncan is
25 querying here, if you look at the email, is whether AMCo

1 should try to negotiate a different profit share
2 arrangement so a higher slice of the profits for AMCo?

3 A. Yes.

4 Q. Then let us just scroll up to see what you say. So you
5 say:

6 "The most important job they have to do for us is
7 negotiated with Actavis/Auden and get the highest level
8 of monthly volume (and keeping it there ongoing).

9 "I wonder if there is a way that we could come up
10 which rewards them for doing this."

11 So your view at the time, was it not, Mr Beighton,
12 was that the most important job for Focus was to
13 negotiate with Auden to get more supply, more volumes?

14 A. At that time, yes.

15 Q. They would do that, would not they, by telling Auden
16 they had a product close to launch?

17 A. I guess so.

18 Q. That is what you had in mind, is it not?

19 A. Sorry, it was not me that had this in mind. This was
20 somebody else's idea that I had seen and commented on.

21 Q. Is that right, because you are saying -- you are
22 expressing your own view here, are you not, you are
23 writing to them and you are saying in relation to the
24 Focus product -- you are being sent something from
25 Mr Duncan.

1 He is saying, well, maybe we should have a different
2 profit share arrangement and you are saying -- you are
3 commenting yourself, are you not, you are saying the
4 most important job they have to do is negotiate with
5 Actavis and get the highest level of monthly volume and
6 keep it ongoing?

7 A. Yes.

8 Q. That was your view?

9 A. In the end, I chose not to pursue this.

10 Q. That is right, but at that time your view was that that
11 was the most important role?

12 A. Yes, at that time, but I decided against it at a later
13 date.

14 Q. You did. But at that time, focusing on this time at the
15 moment, the reason why you thought Focus had this
16 important job was because you could use the fact they
17 had their own product launch to persuade Amit Patel or
18 not Amit Patel -- I do not know if it was him at stage.

19 A. It was not.

20 Q. We have moved on. It was Actavis -- Actavis to give you
21 more volume. That is right, is it not?

22 A. Yes.

23 Q. If we go to {H/802/1} --

24 THE PRESIDENT: Just pausing there. Could we go back to the
25 document we were just on. It is slightly a re-run of

1 the questions we had earlier on today, but did you have
2 any discussion with Mr Duncan, who is stepping into this
3 situation, about the parameters of any negotiation that
4 would inform what you could get out of Actavis/Auden?

5 Let me unpack that a little bit. Clearly -- I do
6 not want to go through it again -- we have got what you
7 say looked like an odd deal where you are effectively
8 getting not quite something for nothing, but something
9 for very little and, therefore, there might be a degree
10 of pushback if you said I want to get volumes up to
11 24,000 from 12.

12 A. Yes.

13 THE PRESIDENT: What, if anything, did you tell Mr Duncan
14 about the aces in the hand that you had, if you had any,
15 in order to persuade Auden to go up in that way?

16 A. I would have told Graeme Duncan everything. We worked
17 very closely together. He came into the team and was
18 destined -- as I said to counsel -- to take over from me
19 at some stage. He would have fully understood the
20 situation.

21 THE PRESIDENT: So his understanding would have been this is
22 an odd transaction.

23 A. Yes.

24 THE PRESIDENT: And we are getting something --

25 A. Yes, he may have thought it not quite so odd at this

1 stage. As you remember, after we discussed the orphan
2 indication, it probably looked a little bit more
3 sensible at this stage, but I think he definitely
4 understood that we were using this Auden situation, even
5 though it was very nice and profitable, we were using
6 the Auden product as a kind of a stopgap until we were
7 able to free up the market to sell our hopefully 50%,
8 getting more and more difficult at this time, because
9 competitors were starting to come in, but, no, he was
10 absolutely up to speed.

11 THE PRESIDENT: Thank you.

12 MS DEMETRIOU: Let us go to {IR-H/802/1}. This is an email
13 from Mr Duncan to someone at Focus, copied to people at
14 AMCo, although I do not think you, and it is dated
15 27 November 2015 and he summarises the situation with
16 Hydrocortisone. So he says:

17 "We have our own product we currently sell, which we
18 get from Auden now Actavis. We have our own product MA
19 which we source from Aesica and we have stock but we do
20 not sell it. This is a back-up in case Auden pull our
21 supply. It is not as good a product as it does not have
22 the orphan indication, but it is a reserve."

23 Now, here is another person -- so this is
24 Mr Duncan -- referring to the Aesica product as backup.
25 We have already had Mr Thornton, Mr Belk and Mr Clark

1 refer to it in the same terms. I think you would
2 accept, would you not, that these people are not all
3 wrong. It was a back-up product.

4 A. At this point, it was clearly not as good a product as
5 the product that we were selling. Whether you call it
6 a back-up or not is -- I suppose my point about the
7 back-up is that originally it definitely was not. It
8 was our prime product that we were going to launch.
9 I guess that when we got to this stage, we still wanted
10 to launch our own product and overcome these regulatory
11 issues, but at this time the Auden McKenzie product was
12 the best one for us to be selling, regardless of what
13 name you put on the alternative.

14 Q. Okay, thank you. Then let us go to {IR-H/806/1} and go
15 to page 4, please {IR-H/806/4}. This is from RB again.
16 We know he is from Focus, yes? And it is to Mr -- it is
17 to him?

18 A. To Mr -- yes.

19 Q. Actually, if we go below.

20 A. From Mr --

21 Q. It is the second email I want. It is from RB to
22 Mr Duncan. We saw this with Mr Sully. Here RB explains
23 that AAH and Alliance have said that there is a product
24 on the market currently without the full indications.
25 We have said that they -- we have seen that they say

1 that they only want to purchase a full label product,
2 yes? So we know that there is some market research that
3 has been done at this time, yes?

4 A. Yes.

5 Q. He also says that there is already a skinny label
6 product on the market. Do you see that? That is in the
7 larger paragraph.

8 A. Presumably that is the Alissa product.

9 Q. This must be the Alissa, yes. It is being sold at a
10 heavily discounted price. He explains the first choice,
11 if we go to the next paragraph, the first choice for
12 Focus would therefore be just to negotiate a supply
13 agreement from Actavis, which would allow us to sell the
14 product to the entire market. If Actavis are not
15 willing, then we will use Lamda as a supplier, but this
16 will limit sales due to the following reasons.

17 And he says -- he gives the reasons. So he says:

18 "Only a small part of the market (less than 30%) is
19 willing to use the product. There is already a product
20 being sold into this limited market."

21 Again, what is being said here, I think, is that the
22 Lamda product is the alternative to supply from Auden,
23 but it would be less lucrative because of the skinny
24 label issue, yes?

25 A. As we discussed earlier, yes.

- 1 Q. Also less lucrative because of the need to compete on
2 price with the entrant that has already come in?
- 3 A. Now we can see that as well, yes.
- 4 Q. So again, this is inconsistent, is it not, with the idea
5 that there was an intention to launch the Focus product?
6 Really the intention at this stage was to use that
7 product to try and persuade Auden to give you higher
8 volumes, was it not? That was your preference?
- 9 A. From my comment earlier, at that specific snapshot of
10 time, it was.
- 11 Q. All right. Then you can see that Mr Brown -- his
12 estimate that less than 30% of the market was willing to
13 use the product and I think there he is probably
14 referring to independent pharmacies, is he not, when he
15 talks about 30%?
- 16 A. Yes, for sure.
- 17 Q. So that is consistent, is it not, with Ms Hill's
18 evidence to the CMA?
- 19 A. Well --
- 20 Q. She said that the big pharmacies will not want it, but
21 independents are different?
- 22 A. That is -- yes, it is -- not all independents would
23 dispense off-label, but a small proportion of them
24 might.
- 25 Q. Here they say less than 30%. So at that stage that was

1 the thinking.

2 A. Yes.

3 Q. Let us go to {H/791/1}, please. This is an email from
4 Mr Duncan to you on 20 October referring to changes in
5 the market. Do you see that:

6 "Hydro market is going to change a little."

7 It is at the top.

8 A. Oh, yes.

9 Q. If we go down, the next email shows that Mr Duncan was
10 forwarding information that Alissa were planning to
11 launch their own product. So you can see -- do you see
12 where it says:

13 "Graeme.

14 "Yes Alissa are planning to launch their own
15 product, ie they as yet have not done a deal."

16 Presumably, "they have not yet done a deal" means
17 they had not done a deal with Auden. Is that how you
18 would understand that phrase? So:

19 "Alissa are planning to launch their own product,
20 ie they as yet have not done a deal. It is our
21 understanding from the market that the volume
22 expectations are reasonable and therefore as long as
23 Actavis do not overreact the market should stay fairly
24 stable."

25 So we take the words "as yet have not done a deal"

1 to mean have not yet done a deal with Actavis. Is that
2 how you would understand those words?

3 A. I do not think so, no. I have no idea what Alissa would
4 or would not have done. I am not sure why they would
5 have access to Actavis.

6 Q. Just so you know, these are -- this email --

7 A. Or maybe it does mean that. I do not know. It could.
8 It could mean that.

9 Q. These are -- this email is to the same -- is to
10 Mr Duncan, but it is sent from someone at Focus and one
11 of the other recipients is RB at Focus?

12 A. Yes.

13 Q. We know, do we not, that Alissa did in fact enter the
14 market in October 2015, do we not?

15 A. Yes.

16 Q. Do you recall that after the email that we were looking
17 at where Focus said they wanted to proceed with supply
18 from Auden rather than launch their own product, there
19 were discussions in January 2016 between AMCo and Focus
20 to put in place the royalties agreement discussed
21 earlier in August? Do you remember that at all?

22 A. No, I am afraid not.

23 Q. Let us just have a look at {H/813/1}. Here you can see
24 a record at that point in time, so that is January 2016,
25 of discussions between Focus and AMCo about the

1 royalties arrangement. I think in the end, to cut to
2 the chase, as you explain in your witness statement, the
3 agreement did not go ahead, did it?

4 A. No.

5 Q. If we go to {H/837/1}, this is an email from Mr Duncan
6 to you dated 9 March 2016 and he is forwarding an email
7 from someone else. Let us have a look at it. So if we
8 go down. So that says:

9 "Graeme

10 "Another generic is now on the market. There is
11 a product from Resolution Pharma which has adult
12 indications (although apparently worded differently to
13 the Auden product) ... I believe their intention is to
14 place 5,000 packs/month in the market. Their price will
15 be competing against the Auden/Actavis product, not the
16 other generics. I would imagine that this strategy
17 could change if the Bristol product takes a significant
18 market share, on top of the Alissa product, as buyers
19 are likely to be buying hand to mouth from now on.

20 I mentioned to you the other day the length of time it
21 is taking for our allocation of stock to be released for
22 sale following delivery from Actavis. Would you be able
23 to remind Quality that there is no obligation for us as
24 third party wholesalers?"

25 And then:

1 "With the market as fluid as it is at the moment
2 I would like to avoid any unnecessary delay in placing
3 our stock."

4 Then if we go up and read his email to you, so that
5 is what he has forward to you, he says:

6 "John,

7 "We need to discuss this and agree a plan next week.
8 The imperfect storm is brewing and the digging I have
9 done ... is strengthening my views and recommended
10 approach.

11 "We cannot delay any longer as we:

12 "Roma needing to instigate set up work and they will
13 not do this at risk,

14 "Have more arrivals entering the market,

15 "Have our own agreement up for renewal in the
16 summer... "

17 That is the Auden agreement. Yes, that is what that
18 would have been.

19 "Are starting to find it a little tougher to sell.

20 "Need to agree MA holders to our new Hydro
21 products ..."

22 So he is saying there, is he not, that you cannot
23 delay any longer with your own product, with your Aesica
24 product, and the reason why you cannot delay any longer
25 is because of the changing market situation, yes? That

- 1 is the point he is making?
- 2 A. Either that or he is asking for a decision quickly on
3 that Roma suggestion. I think that is what he is
4 saying. We cannot delay any longer.
- 5 Q. All right. That is because of the changing market
6 situation that he is describing?
- 7 A. Yes, because there are now a few skinny label products
8 coming into the market.
- 9 Q. If we go to {H/838/1}, and let us go to the top of
10 page 2 {H/838/2}. That is the email that we saw before
11 that was forwarded, yes?
- 12 A. Yes, saw that.
- 13 Q. And then there is a follow-up. This is -- so you see
14 there Mr Duncan to you, do you see that, 10 March 2016?
- 15 A. Mm-hm.
- 16 Q. "Further power to launching in my view.
17 "I am thinking we go ahead and launch Assica (or
18 however you spell it) product asap."
19 So I think he was referring to the Aesica product,
20 was not he?
- 21 A. Okay.
- 22 Q. Can we go up further. So he then says:
23 "As discussed, in light of some major changes to the
24 market that have come through from the sales team this
25 week I think we need to a) not proceed with any

1 agreement with Roma and b) explore launching our own
2 product onto the market.

3 "The launches of these products, that we are not
4 expecting, changes my view of the market significantly.

5 "That is my recommendation and I have asked John for
6 an urgent meeting on Monday to gain his agreement."

7 You see his recommendation being sent to Mr Sully.
8 So not go ahead with Roma and launch your own Aesica
9 product?

10 A. Yes.

11 Q. He is trying to secure your agreement and you did agree,
12 did you not, to that?

13 A. I am sure I did, although he pretty much had the whip
14 hand by this stage anyway.

15 Q. But you did agree?

16 A. Yes, he would have asked for my agreement.

17 Q. So your agreement, and this strategy of market entry
18 with the Aesica product, we have seen from these
19 exchanges. That was to a large extent because of the
20 recent market movements, was it not?

21 A. Yes.

22 Q. So really in other words the other skinny label
23 entrants.

24 A. Yes, they had created a market and people were
25 persuading some types of pharmacy to buy this product.

- 1 Q. They stimulated demand?
- 2 A. Yes.
- 3 Q. Now, let us go to {H/951/1}. This is a Concordia
4 presentation from July 2016. Do you recall seeing this
5 at the time?
- 6 A. I have seen many of these.
- 7 Q. Okay. Let us just have a look at it and see. If we
8 look at page 2 {H/951/2}, we can see that there was
9 a case study on Hydrocortisone. That is the last
10 bullet?
- 11 A. Okay.
- 12 Q. Then if we go to page 3 {H/951/3} we can see:
13 "July month missed forecast due to Hydrocortisone
14 competition effects... "
- 15 Do you recall that your forecast was missed in July?
- 16 A. No.
- 17 Q. It is a small detail and it is a long time ago. Then:
18 "Competition challenges... "
- 19 The first bullet on Hydrocortisone £2.7 million.
20 That, again, would have been because of the effect of
21 skinny label entry which was to decrease prices, yes?
22 Do you agree?
- 23 A. Sorry, what am I looking at?
- 24 Q. I am looking -- if you look at the first --
- 25 A. Oh, sorry, yes, £2.7, yes.

- 1 Q. And if we go to --
- 2 A. Yes, it would have been as a result of competition.
- 3 Q. Thank you. If we go to page 13 {H/951/13}, this is the
4 Hydrocortisone case study. It refers to three SKUs for
5 10mg, one from Actavis, which it says is full label,
6 a Focus, full label. I think that is an error, is it
7 not? Focus could not have been full label. I think we
8 established that earlier. Under development and a third
9 skinny label product and it shows the budget and the
10 assumptions which have turned out to be wrong. What we
11 see is, we see, the deficit at the bottom, do you see
12 that in brackets, 7, versus the budget?
- 13 A. Yes.
- 14 Q. We can see then the assumptions, which were the basis
15 for the forecast and you can see that the first
16 assumption is:
- 17 "We would continue selling the Actavis product
18 throughout all of 2016. 12,000 units at a sale price of
19 £68."
- 20 So by this stage it has gone all the way up to £68,
21 yes, the market price?
- 22 A. Okay.
- 23 Q. That turned out to be wrong, because the supply from
24 Auden stopped in July 2016, did it not?
- 25 A. Yes.

1 Q. Then launch -- another assumption is launch of the Lamda
2 product, but that had not been launched, had it?

3 A. No.

4 Q. The famous product?

5 A. At that point, it had not.

6 Q. And it was not launched?

7 A. Okay.

8 Q. That is what you say in your statement. You say it was
9 never launched.

10 A. Whether it was launched subsequently, I do not know.

11 Q. I see. Okay, it was not launched at that point?

12 A. Yes.

13 Q. So I think you are right to pick me up on that.

14 Then if we go to -- if we then look, the skinny
15 label, that is Aesica, SKU would not be launched and
16 that was wrong as well, because it actually had been
17 launched by this stage, had it not?

18 A. Yes.

19 Q. And then price stability, that was another assumption,
20 would continue through the whole year given no
21 additional competition. That was wrong too, because of
22 the competition from other skinny label suppliers, was
23 it not?

24 A. Yes.

25 Q. Then if we go to the next page {H/951/14}, "the perfect

1 storm". That explains how this all came about and it
2 came about (1) because of the end of the Actavis supply.
3 That is point 1 in June 2016. (2) Delays in the Lamda
4 launch and (3) the fact of competition from other skinny
5 label suppliers. Do you see that?

6 A. Yes.

7 Q. Then looking at the graph, we can see from the graph
8 below that this competition had already had a very
9 significant effect on price, had it not?

10 A. It certainly had --

11 Q. Let us look --

12 A. Yes, yes.

13 Q. -- at the table. So the full label product was £72
14 from January to March and by July to December it had
15 gone down to £47 and the competing skinny label products
16 were being sold for £39?

17 A. Yes.

18 Q. Yesterday do you remember we spoke about the market
19 price. When Cinven first acquired Amdipharm in October
20 2012, the market price was £35, was it not? We talked
21 about that yesterday. There had been a very significant
22 increase in price, had there not, to £72, which then
23 started dropping once the skinny label entrants came on
24 to the market. That is the right?

25 A. Yes.

1 MS DEMETRIOU: Thank you very much, Mr Beighton. I have
2 reached the end of the road with my questions.

3 Mr Brealey will probably have some questions for you.

4 MR PALMER: I do have some questions which have not been
5 asked this time so, with your leave, I will do that now.

6 THE PRESIDENT: Of course.

7 Cross-examination by MR PALMER

8 MR PALMER: Mr Beighton, let me introduce myself first from
9 amongst this bewildering array of lawyers in front of
10 you. My name is Robert Palmer, I am a barrister who
11 represents the Intas appellants and they are concerned
12 with a period which came much later, January 17 onwards.

13 So your evidence has been largely not concerned with
14 that period. Your focus in the evidence is apparent
15 from paragraph 4 of your witness statement. No need to
16 turn it up, but that is
17 obviously October 2012-June 2016, the period of the
18 alleged 10mg agreement, which pre-dates Intas's
19 involvement, but I do want to ask you about your
20 evidence on the effect of the orphan designation and how
21 that affected the market leading up to 2016 and beyond.
22 That is going to be the focus of my questions for you.

23 You clarify at paragraph 110 of your witness
24 statement that references to your customer base are to
25 full-line wholesalers, largely AAH and Alliance?

1 A. Yes.

2 Q. In a number of places you refer in your statement to our
3 customers or our customer base not being receptive to
4 skinny label HT products and, in particular, we have
5 heard, we will not go back over the approaches that were
6 made in April and May 2014, but you also
7 mention December 2015 as a time when some enquiry was
8 made of your customer base.

9 So if we go to paragraph 59 of your witness
10 statement, we can see that the concern that you report
11 was expressed by your customer base was in relation to
12 compliance and the risks presented by off-label
13 dispensing. That is what you say in your paragraph 59.

14 That is further explored in your statement too.
15 I focus on why that was. If we go to your paragraph 72,
16 which has been explored by Ms Demetriou, so I will not
17 go back over it in detail, but that is where you give
18 the specific example of the communication from Day Lewis
19 in May 2014. That is the information provided to you by
20 Jane Hill. We have seen her interview. We do not need
21 to go back to that.

22 But you will recall that she said she went to two or
23 three customers with their own pharmacies and we heard
24 the detail in her interview about approaching Alliance
25 and Day Lewis at that point in particular.

1 A. Yes.

2 Q. Although Alliance and AAH are the full-line wholesalers,
3 Day Lewis, we know, as well as having its own network of
4 pharmacies is a short-line wholesaler too?

5 A. Yes.

6 Q. So those were whom the enquiries were made of at that
7 point in time. I think the point you were making to the
8 tribunal here is you were getting the same message from
9 both the full-line wholesaler and the short-line
10 retailer Day Lewis as to the unacceptability, at that
11 point, of taking a skinny label product?

12 A. Correct.

13 Q. I am not going to go back over that again, because the
14 tribunal has seen that. So I am going to move on
15 to December 2015.

16 Paragraph 103 of your statement when you say
17 in December 2015, three lines down, you again reached
18 out to your key customers, as you put it, AAH and
19 Alliance, seeking orders to sell a skinny product. So,
20 again, you are going to the full-line wholesalers at
21 that approach. You did not approach Day Lewis or any
22 short-line wholesalers at that point?

23 A. Not that I remember.

24 Q. Or any other pharmacists at that point?

25 A. No.

1 Q. But then we can see in paragraph 104, just below, you
2 say:

3 "AAH's response was interesting because it explained
4 that whilst the majority of the market continued to only
5 use full indication HT, a small part of the market --
6 being some independent pharmacists -- were starting to
7 purchase small volumes of reduced indication 10mg HT."

8 That is following the entry of Alissa in
9 October 2015. That was the first entry for 10mg, was it
10 not?

11 A. Yes.

12 Q. You say that they were making sales to those
13 pharmacists. Who you say six lines down in
14 paragraph 104:

15 "Small levels of sales to independent pharmacists
16 who were not concerned about the compliance issues and
17 were therefore dispensing off-label."

18 I think what you are saying there, but putting it to
19 you to comment, is that those independent pharmacists
20 did not share your view of the compliance risks at that
21 time?

22 A. My view or the view of the superintendent pharmacists in
23 the full line -- the full line chains.

24 Q. We will come to superintendent pharmacists later, but
25 you appreciate that they took a different view --

- 1 A. Yes.
- 2 Q. -- from you? It was not that they were being
3 deliberately disregarding of any and had no interest in
4 compliance for its own sake. They just took a different
5 view of what was compliant or are you not in a position
6 to say?
- 7 A. No, I am not in a position to say, because I do not know
8 what was driving them. Yes, there are some pharmacies,
9 as those of us who work in this world know, that will
10 absolutely stick to the rules at whatever cost, if I may
11 say that. Whereas others are prepared to sometimes cut
12 corners in order to make profits.
- 13 Q. As you know, there is a dispute, Ms Demetriou put it to
14 you, as to what the rules here require in relation to
15 off-label dispensing and I am not going to debate that
16 issue with you. We have an expert coming on Advanz's
17 behalf who is going to give evidence on that. But
18 Ms Demetriou put it to you there was in fact no
19 objection to off-label dispensing of a bioequivalent
20 product, such as a skinny label HT, and I think you
21 disagreed with that suggestion?
- 22 A. I disagreed with two things. First, I disagree with the
23 fact -- because I do accept that there is no safety
24 issue at all between these two products.
- 25 Q. Yes, exactly.

1 A. But what I understand, have always understood, is that
2 labels are there to be adhered to when it comes to
3 dispensing.

4 Q. When it comes to promotion, certainly, which is what you
5 were concerned about. I think you were criticising
6 Alissa, you were suggesting, promoting --

7 A. Promoting and dispensing.

8 Q. They were not dispensing. It is the pharmacists who
9 were dispensing.

10 A. Yes, sorry.

11 Q. You were criticising Alissa for promoting their skinny
12 label product and you were making clear you would not
13 promote your product to pharmacists for dispensing to
14 treat adrenal insufficiency in adults?

15 A. True.

16 Q. But you were quite happy to supply those tablets later
17 on when, as you said, the market had developed and that
18 pharmacists were asking for it to dispense it off-label.
19 You had no difficulty with that?

20 A. Well, I am not sure that is the case. This, as
21 I explained earlier, I was coming to the end of my
22 tenure and we had sold the business at this stage and
23 I was -- it was just a different approach.

24 Q. You know that by that stage around 50% of the market had
25 switched to the skinny label products and were

1 dispensing it largely off-label. As you know, the vast
2 majority of the use of those tablets was to treat
3 adrenal insufficiency in adults and they must have all
4 formed the view that there was no compliance issue in
5 doing that?

6 A. I did not know that 50% were doing that.

7 MR BREALEY: You cannot make that statement, I am afraid.

8 MR PALMER: He can be re-examined on it.

9 THE PRESIDENT: Sorry. What is the objection?

10 MR BREALEY: That they could have all formed the view. How
11 can the witness possibly -- because they have bought it,
12 how could the witness possibly have formed the view that
13 they were dispensing off-label? I mean, I will
14 re-examine in a moment, but that is an inappropriate
15 question.

16 MR PALMER: It is not an inappropriate question, if I may
17 say so, because I think you, on your own evidence,
18 Mr Beighton, have accepted that the vast majority of the
19 use of this tablet was to treat adrenal insufficiency in
20 adults.

21 A. Yes.

22 THE PRESIDENT: Let us just make sure we are all on the same
23 page here. Speaking for myself, Mr Beighton, I am not
24 taking what you are saying as in any way a statement of
25 what the true legal position is. You have your views

1 and I will take them as the views of someone who is in
2 the market, but who is not a lawyer and you are not
3 going to get any criticism from me if you get the law
4 wrong.

5 What we are talking about here is your perception of
6 how other people react when they are dispensing
7 medicines?

8 A. Yes.

9 THE PRESIDENT: I think we want to be very clear that is
10 what we are talking about. It is your perception as
11 a market insider of what other people think.

12 A. Yes.

13 THE PRESIDENT: That's how I am taking your evidence.

14 So what we get about what is going on elsewhere in
15 the market that you do not know about, well, you do not
16 know about it. I will not attribute knowledge to you
17 when you express your opinion. So when you say, for
18 instance, as you did a couple of pages ago on the
19 transcript:

20 "Yes, there are some pharmacies, as those of us who
21 work in this world know, who absolutely stick to the
22 rules at whatever cost, if may say that. Whereas others
23 that are prepared sometimes to cut corners in order to
24 make profits."

25 I am taking that as your understanding, your

1 subjective understanding, as to how the market works?

2 A. Yes.

3 THE PRESIDENT: Now, that evidence clearly would have some
4 weight, but you are, at the end of the day, not
5 a dispensing pharmacist. You are selling to them and
6 that is how I am going to treat your views. I do not
7 know, Mr Palmer, if that assists.

8 MR PALMER: That does assists. What I am concerned about is
9 establishing there were different perceptions in the
10 market as to compliance at different times.

11 THE PRESIDENT: Yes. Mr Brealey, I hope that answers your
12 concern. I am not treating this witness as an expert
13 who ought to know about what is going on at the front.
14 I am treating him as someone who was in the market, who
15 has got a view about what is going on there, because it
16 is commercially of significance to him at the time and
17 that is how I am going to regard his evidence.

18 MR BREALEY: Thank you. Well, yes, I will leave it there,
19 but thank you, yes.

20 THE PRESIDENT: You will take it how you wish in
21 re-examination, but I do not want there to be any sort
22 of crossfire on the questions that are being asked.
23 I understand why they are being asked.

24 MR BREALEY: He must have formed the view, there are other
25 reasons that we might explore.

1 THE PRESIDENT: Yes, Mr Palmer.

2 MR PALMER: Thank you, sir.

3 You had no reason to think that short-line
4 wholesalers were not concerned about compliance, as
5 a broad proposition?

6 A. Sorry, could you repeat that?

7 Q. Short-line wholesalers, you had no reason to think they
8 were not concerned with being compliant?

9 A. No, though full-line wholesalers would generally
10 absolutely stick to the rules of -- the reason that we
11 chose to start working directly with AAH and Alliance
12 was that we knew that they had the reputation for
13 absolutely sticking to the rules and --

14 Q. We will come to the business --

15 A. It is not a surprise to anybody that some short-line
16 wholesalers are not like that.

17 Q. We will come to the business you did with short-line
18 wholesalers in a moment, but those views as to what you
19 say were the rules, as you put it, were informed in part
20 by what customers like Day Lewis and Alliance and AAH
21 were telling you on these occasions when you interacted
22 with them?

23 A. Yes.

24 Q. But not the MHRA or any other regulator. It is nothing
25 that they told you which informed this perception as to

1 compliance of dispensing skinny tablets off-label?

2 A. We were given advice by the MHRA about what we were
3 supposed to warn pharmacies of, but not --

4 Q. That one letter which Ms Demetriou asked Mr Sully about
5 yesterday --

6 A. Yes.

7 Q. -- which I am not going to go back over, because it has
8 been dealt with. But do you remember the suggestion was
9 put that Mr Sully had misinterpreted that letter and
10 what the MHRA was in fact doing was smoothing the path
11 for the dispensing of off-label Hydrocortisone tablets?

12 A. Okay.

13 Q. But there was nothing else you would like to point to?

14 A. No, thank you.

15 Q. So nothing else from the MHRA or any other regulator or
16 indeed from NHS England, the Department of Health or any
17 other part of the NHS?

18 A. No.

19 Q. So let us turn to your 105 then, just at the bottom of
20 your page, if we can go down to that, where the
21 commercial -- new members of the commercial team you say
22 arrived and were keen to launch the reduced indication
23 that had been received in November 2015, but you were
24 still nervous about these developments and you refer to
25 the history of the MHRA's intransigence on the OD issue.

1 What you mean by that was their upholding of the
2 rules which require that there be no full label MA given
3 in light of the OD designation afforded to Plenadren?

4 A. Yes, even though the Plenadren indication, orphan
5 indication, was given to that specific product because
6 of the work that they had done on this indication and,
7 actually, the 10mg immediate release product was just
8 a lucky beneficiary of that and I actually believe that
9 some regulators would have changed the rules to allow
10 that orphan indication not --

11 Q. You will remember the legal advice that you got from
12 Pinsent Masons, which was that could not be done because
13 it all stemmed from the EU regulation. It would not be
14 in the power of the MHRA just to change, would it?

15 A. I do not know.

16 Q. That is a matter for lawyers.

17 THE PRESIDENT: Mr Beighton. How are you feeling? We have
18 been going all day. You have been in the witness box
19 all day and we are now hitting 4.30pm. Just give me
20 a sense of how --

21 A. I am fine. Thank you for asking and I am keen to finish
22 today, if possible.

23 THE PRESIDENT: No, I understand, but I would not want you
24 to not give of your best.

25 A. Yes, okay.

1 MR BREALEY: I haven't made enquiries of Mr Beighton.
2 I understand he has a board meeting tomorrow, so I think
3 that is why we wants to press on. I do not know how
4 long Mr Palmer has.
5 MR PALMER: I hope not very long at all.
6 THE PRESIDENT: No, I do not want anyone to feel under any
7 pressure here, but, equally, I do not want the witness
8 to feel that we are through the process being oppressive
9 and I am not saying you are. I am simply referring to
10 the process. But, Mr Palmer, do go on.
11 A. Thank you for the concern but I am fine.
12 MR PALMER: So those matters you refer to at 105 relate to
13 that orphan designation issue, the fact that only
14 a skinny label rather than a full label was available to
15 you.
16 A. Yes.
17 Q. There is nothing there about off-label dispensing by
18 pharmacists?
19 A. No, there is not, but I hope that I have explained my
20 opinions about that.
21 Q. Yes.
22 A. Which I hold now and I held at the time.
23 Q. And you do say that you held at the time in 106 where --
24 you just over the page -- you come to the fact that your
25 nervousness, as you put it, was in fact informed by the

1 experience in relation to Pregabalin, which you see
2 three lines up from the bottom of that paragraph, and
3 you said -- you say you were concerned that:

4 "The MHRA may promptly shut down such off-label
5 dispense or litigation could ensue similar to the
6 litigation that was known in the industry to be ongoing
7 at the time in relation to off-label prescribing of
8 Pregabalin."

9 A. Pregabalin.

10 Q. So I just want to put that Pregabalin experience into
11 some context. Could we have page {H/666/1}, please.

12 Within that, please, first of all, page 2 {H/666/2}.

13 This is a PSNC newsletter. That is the Pharmaceutical
14 Services Negotiating Committee, is it not?

15 A. Yes.

16 Q. That is a body which promotes the interests of NHS
17 community pharmacies in England. When we say "community
18 pharmacies" that includes the big chains as well as the
19 small independents in the NHS?

20 A. Yes.

21 Q. So they issue this newsletter. If we can turn to
22 page 3, please. This is February 2015 and if we focus
23 on the green box, please:

24 "Important: dispensing of Lyrica/Pregabalin.

25 "At present the generic Pregabalin is listed in

1 Part VIIIA of the tariff as a Category C line with
2 reimbursement currently based on Lyrica. Where
3 a generic prescription for Pregabalin is presented to
4 the pharmacy, if the pharmacy is minded to dispense the
5 generic, they should first satisfy themselves that it is
6 not being provided for the patented indications
7 (peripheral and central neuropathic pain). If it is
8 being provided for those indications, the pharmacy
9 should dispense Lyrica and may wish to advise the
10 prescriber."

11 That reflected the fact that there was ongoing
12 litigation at that time, January/February 2015, between
13 Warner-Lambert and Actavis precisely over this issue.
14 Are you familiar with what that issue was that was being
15 litigated?

16 A. I was familiar with it. Just --

17 Q. Can I remind you? It was concerned with what was called
18 a "second use"?

19 A. Yes.

20 Q. A second use patent when existing medication -- someone
21 puts some work in, some research in, some development to
22 discover that an existing medicine can actually be used
23 in a new way to treat a new condition and because these
24 things are not arrived at lightly or randomly, a patent
25 called a second use patent is available to protect the

1 use of that medicine in that way?

2 A. Yes.

3 Q. Then it operates like a patent. So it was -- the action
4 was concerned with a breach of that patent if then just
5 some other generic Pregabalin was being dispensed when
6 it was being used to treat that new condition and that
7 is what the MHRA was concerned about and that is what
8 the litigation was concerned with.

9 But that was a patent issue and not an orphan
10 designation issue, wasn't it?

11 A. Agreed.

12 Q. So we can see at page 687 {H/687/1} a letter from the
13 PSNC, which we can see is to Auden McKenzie, on
14 6 March 2015, so about a month after that newsletter:

15 "Thank you for your letter dated 5th March asking
16 PSNC to support your request for guidance from NHS
17 England on Hydrocortisone.

18 "The status of Hydrocortisone is not comparable to
19 the situation with Lyrica/Pregabalin. The guidance from
20 NHS England, issued following a judgment of the High
21 Court, and the guidance We have given was issued in
22 order to alert contractors of the risk of litigation for
23 breach of patent law.

24 ... we raised the issues relating to the differences
25 in licensed indications between manufacturers in the

1 past, and the Department of Health was not willing to
2 intervene. We note your intention to approach the
3 Department of Health and NHS England on this matter.
4 PSNC does not believe that the patent case will provide
5 the justification to make a further approach to the
6 Department, and so we are unable to offer support."

7 So that was the explanation given to -- did you ask
8 the PSNC or anyone else --

9 A. Not the PSNC, no.

10 Q. -- or anyone else about the relevance of the Pregabalin
11 case?

12 A. No.

13 Q. In the context of Hydrocortisone?

14 A. No.

15 Q. But if we go back to {H/666/1}, we see the internal AMCo
16 response to that newsletter. If we start at the bottom
17 of that page. The first email is to Guy Clark:

18 "In line with discussions last week in PPRM with
19 regards to an innovator patented indications and skinny
20 SPCs -- please see the comment below about the generic
21 prescription of Pregabalin and the patented
22 indications."

23 So she is raising it. Then just above that, that
24 middle email, Guy Clark says:

25 "Thanks.

1 "I have copied Graeme and John as well, who will be
2 interested to read this."

3 That was sent on to you, Mr Beighton, and then in
4 red it indicates:

5 "We discussed this ruling ... which could
6 potentially affect use of Hydrocortisone without
7 indications, because pharmacies are being instructed not
8 to use products that have a skinny labelling e.g. as
9 a result of orphan drug designation."

10 Which we know is wrong:

11 "They may ignore the guidance, but it is an issue we
12 may need to think about, particularly if supply of AM
13 product dries up now that it is being acquired by
14 Actavis."

15 And then Graeme Duncan at the top puts it all in the
16 right context:

17 "This is not of major importance to us. However,
18 should be noted for our UK promotional activities in
19 case we for example started to promote Hydrocortisone
20 and some of the use is off-label in some instances
21 (obviously we will never promote this way but clinicians
22 can decide to use this way). It looks as though
23 pharmacy are being asked to pick up on this scenario."

24 So he was recognising first and foremost this was
25 guidance to pharmacies, not to pharmaceutical

1 manufacturers or suppliers like you and, secondly, he
2 was noting that this was not of major importance, given,
3 presumably, it had concerned patents rather than orphan
4 designation?

5 A. He was.

6 Q. So that was drawn to your attention and explained at the
7 time?

8 A. He did explain that. I can see it.

9 Q. Then going back to your witness statement at
10 paragraph 107, we move on now to April 2016 when you
11 explain that you were asked by the DE Pharmaceuticals ,
12 a short-line wholesaler, to supply it with a skinny
13 product which you hadn't then launched but went on to
14 launch within weeks in May 2016. That is right, is it
15 not?

16 We can see your reaction to that news if we go to
17 {H/363/1}, please. At the bottom of the page, please,
18 first of all, the last email. We can see it is an email
19 to Graeme Duncan. If we just flip up to the top half we
20 can see who it is from. It is from the MD at
21 DE Pharmaceuticals. Do you see that?

22 A. Yes.

23 Q. So let us flip down to the bottom again to read what
24 what the MD at DE Pharmaceuticals has to say:

25 "Thanks for a very productive meeting today.

1 "I can confirm that market dynamics have changed
2 dramatically this month [that is April 2016] for
3 Hydrocortisone 10mg. Our pharmacy customers have become
4 more accepting of the Hydrocortisone 10mg non-Auden
5 line. Sales have increased 6-fold from only a month
6 ago. In April we anticipate selling somewhere in the
7 region of 3,000/1,000 units in favour of the non-Auden
8 line.

9 "The team and I look forward to developing
10 a successful partnership between our two companies
11 building already on the strong foundation we have
12 built."

13 Then the AMCo response is above. From Graeme, again
14 forwarding on at least to you, because it is you who
15 responds:

16 "Yes, I agree."

17 "Hi gentlemen

18 "Please see the below an email. This is a very
19 interesting and significant change in market dynamics.
20 At this morning's meeting DE shared the detail of these
21 changes in the Hydrocortisone marketplace. Retail
22 pharmacy seem to now be significantly more accepting of
23 a product without the orphan indication. This is very,
24 very different to all previous market feedback we have
25 had. The prediction from DE is that the market will

1 swing heavily towards slimmer labelled products that are
2 most cost effective. Kate and Sue have picked up
3 similar feedback from Lexon and AAH in the last 48
4 hours.

5 "I think we should now reconsider our approach to
6 the market based on this changing purchase behaviour."

7 So by this time, whatever the responses you were
8 getting in 2014/2015, by this time, April 2016, you are
9 getting the message from both short-line wholesaler and
10 indeed full-line wholesaler that there is significant
11 interest at pharmacy level, they do want this product
12 now in the way that they did not want it before?

13 A. Yes, and I think that we had similar feedback from AAH,
14 some months before.

15 Q. You had had feedback in December 2015 from AAH, you tell
16 us that they did not want it?

17 A. No, but they were explaining that the market was
18 developing.

19 Q. The marketplace was changing so everything they said,
20 including from their supervisory pharmacy offices, was
21 changing in this respect?

22 A. I do not know whether -- as I have said before, I was
23 handing over to Graeme at this time but I wonder whether
24 AAH and Alliance, Boots and Lloyds are now dispensing
25 these products. It does not matter.

1 Q. We will look at precisely that in just a moment. Let us
2 just look first of all in the Decision, page {A/12/153}.
3 Just to remind ourselves of the timeline here. That
4 table, please, 3.13 which is the dates of independent
5 entry. Can we focus on that table at the top. You
6 might be able to see it.

7 A. Yes, I can.

8 Q. You can see Alissa coming in as the first skinny label
9 product in October 2015. But then a big change really
10 comes in March 2016, two more competitors come in,
11 Resolution and Bristol, and then that change in April
12 leads to your launch in May and then in 2017 two more,
13 Teva, obviously a big player, Genesis Pharmaceuticals
14 and then in February 2019 Renata. So that is the
15 timeline in which the competitors are coming into the
16 market, and that reflected a change in those market
17 conditions as well as at the same time creating that
18 change in market conditions; is that right?

19 A. Yes.

20 Q. And the change in market conditions that it reflected
21 was a change in perception as to the desire, the demand
22 for pharmacists for the skinny product?

23 A. Okay.

24 Q. I am putting to you, is that something you are able to
25 agree with, that there was growing demand from

1 pharmacies?

2 A. It would appear to be, yes.

3 Q. In doing so let us just return to the position of
4 Day Lewis. You remember what they told you or via
5 Jane Hill in April/May 2014 with the supervising
6 pharmacy officer saying it is a complete no no. You
7 have since been shown, I will not go back to, what
8 Day Lewis said subsequently in their interview, which
9 they said well, we would have been happy to have skinny
10 products even earlier. So if both accounts are true,
11 then there must have been a change at some point after
12 what they said to Jane Hill and subsequently as to their
13 assessment of the risk.

14 We can see that change happening if we look at page
15 {H/1053/1}, please. You will not have seen this
16 document before. At least I will be surprised if you
17 have. This is the dispensing data from Day Lewis and
18 you can see as of April 2016 they are not in fact,
19 whatever was said subsequently, they are not in fact
20 supplying skinny 10mg Hydrocortisone tablets at all.
21 They are only providing the Actavis product
22 in April 2016 and that is true also in May 16
23 and June 16. A pretty small number then follows
24 in July 16.

25 If we can go to the next page. August 16, again,

1 a very small number but then suddenly it flips, does it
2 not? Can you see that in September 2016, which I do
3 appreciate is after your involvement and indeed after
4 the end of the agreement and the time period with which
5 you are concerned with up to June 2016. But you see
6 that flip from Day Lewis, suddenly their demand is being
7 met by skinny products from September 2016?

8 Bearing in mind what you say they told Jane Hill
9 that is only explicable, is it not, by a change of view,
10 at least at some point before September 2016, we
11 obviously do not know when, as to the risk, the
12 compliance risks associated with supplying skinny
13 products?

14 A. It looks like it, yes.

15 Q. So a change of view at some point, that would make sense
16 to you, by the supervising pharmacy officer.

17 Let us also look at AAH which you mentioned a moment
18 ago, who also began taking a different view, did they
19 not? We know that Lloyds, their own pharmacy continued
20 to prefer full line indication but AAH do not restrict
21 themselves only to Lloyds, do they?

22 A. No, no, of course.

23 Q. They supplied others with substantial quantities of
24 skinny label products.

25 Can we look at the Decision {A/12/142}, please. And

1 again, just focusing on that table. That is table 9
2 from the Decision. And you can see AAH is the second
3 row, do you see that, and you can see their overall
4 purchase volumes of Hydrocortisone tablets firstly in
5 2016 and then in 2017. Do you see that?

6 A. Yes.

7 Q. Broken down into skinny label purchase volumes and
8 skinny label as a proportion of all Hydrocortisone
9 tablets purchases. But in the row underneath, the CMA
10 have broken out the figures for AAH's supply to
11 customers other than Lloyds. Do you see that?

12 A. Yes.

13 Q. So looking at what they were doing once you strip out
14 Lloyds and you see in those percentage figures that in
15 2016 18% of the Hydrocortisone tablet purchases were
16 skinny label. That had gone up in 2017 to 38%. Do you
17 see that?

18 A. Yes.

19 Q. So AAH obviously by that stage were having no difficulty
20 in supplying pharmacies, albeit less so to Lloyds
21 itself, with the skinny product and obviously their
22 supervisory pharmacy officer cannot have taken the view
23 that there were compliance risks with doing that, at
24 least by that time. Do you agree with that proposition?

25 A. Yes, I am not aware that wholesalers have superintendent

1 pharmacies. I think generally I was referring to the
2 chains when I referred to this before. But, yes, it
3 certainly seems that they changed their mind.

4 Q. We see Alliance has broken out also and you see that --
5 to their customers other than Boots. It is even more
6 dramatic at 35% in 2016 and 60% in 2017. Again, a very
7 different picture to what they were telling you in
8 2014/2015 which is saying no, there is no demand, there
9 is no way we are going to touch this, as I understand
10 your evidence, we are just not interested in having
11 this?

12 A. Yes.

13 Q. So a massive change in the market perception of these
14 risks even if that perception differs from your own
15 perception at that earlier time?

16 A. So it seems.

17 Q. So it is fair to say, that this development of the
18 market which I am showing you here happened in a way
19 which you did not predict in 2014/2015?

20 A. True.

21 Q. And the reason why you did not predict that is that as
22 a supplier or potential supplier of skinny
23 Hydrocortisone tablets you could not say in advance
24 which customers would revise their view of compliance
25 risks at any given moment or indeed whether they would

- 1 at all?
- 2 A. No, we could not or indeed the MHRA or anybody else, you
3 know.
- 4 Q. The MHRA said one thing. I will leave that aside. But
5 you have said in your evidence to this tribunal that the
6 reason why the customers told you they were not
7 interested in April/May 2014 and December 2015 is
8 because they perceived compliance risks from --
- 9 A. Yes, that is right.
- 10 Q. And you did not know whether or if they were going to
11 change that view and if they were going to do so, you
12 did not know when?
- 13 A. True.
- 14 Q. That is what I mean about it being unpredictable. What
15 could happen, what we know now certainly in retrospect
16 that could happen in a drop of a hat, as we saw with
17 Day Lewis, a different view, a different approach taken
18 and it can happen at a time which again you cannot
19 predict in advance? You are nodding but for the
20 transcript you agree with that?
- 21 A. Yes, you cannot predict how somebody is going to change
22 their mind.
- 23 Q. No. Last point, can we go to your paragraphs 110/111 of
24 your witness statement. This is going back to
25 explaining why you focused on the full-line wholesalers

1 AAH and Alliance.

2 You explain at 111 -- you do say there that their
3 buying decisions, that is the wholesalers buying
4 decisions "involve superintendent pharmacists who are in
5 turn responsible for patient safety and patient service.
6 In [your] experience they will not be driven by price to
7 stock an inferior product over a superior product,
8 instead they focus on longer term partnerships through
9 which they can ensure they receive good quality products
10 from reputable suppliers who can guarantee surety of
11 supply."

12 That was exactly how you were trying to position
13 AMCo.

14 There are a number of points there. You were saying
15 that these full-line wholesalers focus on quality not
16 just in terms of patient safety, which one would hope
17 that everyone did but also patient service as well as
18 that continuity, that longer term partnership, good
19 quality products, reputable suppliers and the guaranteed
20 surety of supply.

21 So is it your evidence that they value those things
22 and are prepared to pay more to reflect the value to
23 them of those qualities?

24 A. I think that and I would not -- I made some comments
25 about short-line wholesalers earlier and I would not

1 include all short-line wholesalers in that commentary.
2 I think that there is value in dealing with reputable
3 full-line and short-line wholesalers.

4 Q. Yes. So some short-line wholesalers and some pharmacies
5 will focus purely on the bottom line price but I think
6 your point about the larger operators and full-line
7 wholesalers is they take a wider view than just price
8 because they value those other matters and are prepared
9 to pay more if that is what it takes to secure it?

10 A. Yes.

11 MR PALMER: Thank you, those are my questions, thank you
12 very much.

13 THE PRESIDENT: Thank you very much. Is there anyone else
14 before -- Ms Demetriou, do you have anything to ask out
15 of that? No. Good, in that case I think we can proceed
16 to re-examination. Mr Brealey.

17 Re-examination by MR BREALEY

18 MR BREALEY: Basically, two documents. You were taken to
19 a note of a call in 2021 with Day Lewis and for the
20 record, we do not need to go to it, that was {H/1241/1}.
21 Could we go, also please to H/1033/1, probably the
22 {IR-H/1033/1}. If you go to the top of that. That is
23 a Day Lewis response to the CMA. We do not know the
24 question here but:

25 "We refer to the notice referred under the case and

1 reply to the questions in annex 1."

2 This is where Day Lewis in 2017 are saying what they
3 purchased and what their practice was. They purchased
4 both full and skinny. We have seen what Mr Palmer has
5 just said about the volumes. And then there are six
6 bullet points. And if you look at bullet points 5 and
7 6:

8 "Skinny label Hydrocortisone tablets were only
9 dispensed to patients under the age of 18 years for
10 [paediatric] use only."

11 6: The product is not licensed for adult use. Our
12 patient medical record system in each pharmacy states
13 a warning note that its use is restricted for
14 [paediatric] use only.

15 Does that, point 6 in particular, is that consistent
16 with your perception of how good pharmacy practice
17 should be?

18 A. Yes, and is.

19 Q. If it is limited to paediatric use is this the 2% of the
20 market you were referring to?

21 A. Yes, I believe so, though there were different elements,
22 paediatric use is certainly a very small portion of the
23 market.

24 Q. If we go now to another document, that you were taken
25 to. That is {IR-H/837/1}. I am interested in the first

1 three lines:

2 "Another generic is now on the market. There is
3 a product from Resolution Pharma which has adult
4 indications (although apparently worded differently on
5 the SPC to the Auden product)."

6 So we know, we have just seen Resolution Pharma is
7 a skinny supplier. Could you assist the tribunal why
8 the sender of this is saying that basically it is
9 a product from Resolution generic skinny which has adult
10 indications? Can you assist the tribunal as to what the
11 implications of that would be?

12 A. Well, if the adult indications are for adrenal
13 insufficiency, it will give this product access to all
14 prescriptions I assume, but also that somehow the MHRA
15 have granted this licence or this indication to
16 a product that was approved after the orphan status was.

17 Q. Or it is not consistent with their licence?

18 A. Yes, or they're labelling it incorrectly.

19 Q. If they are labelling it incorrectly, would the pharmacy
20 believe that he or she is dispensing off-label?

21 A. If it is labelled incorrectly, the pharmacist will trust
22 what it says on the label.

23 Q. Correct.

24 I have no further questions, thank you.

25 THE PRESIDENT: Thank you very much, Mr Brealey.

1 Mr Beighton, thank you very much. We have gone on
2 longer than we should have done. I am very grateful for
3 your forbearance. Thank you very much. You are
4 released.

5 A. Thank you.

6 (The witness withdrew)

7 THE PRESIDENT: I have got some housekeeping matters but
8 you -- no. Two things. First of all, I think I should
9 probably let people know what you already know but we
10 ought to get it on the record. I am giving a lecture
11 which is sponsored by one set of barristers' chambers
12 who are represented here today and also sponsored by
13 a solicitors' firms that is instructing Mr O'Donoghue.
14 I am not extending an invitation for you to come for
15 that reason but I think you ought to know (a) it is
16 being sponsored by those two organisations and (b) it is
17 quite likely that I will be seeing some of you there
18 this evening and obviously we will not talk about the
19 case, but those who are not intending to come, and
20 I would not blame you, then you will know what is going
21 on.

22 That was the first minor point. The other point is
23 Dr Pattrick. Have you been able to speak, Mr Brealey,
24 with Ms Demetriou?

25 MR BREALEY: I have. She is not being called so there will

1 be no cross-examination. It has slightly put
2 Kelly Lifton in a position so she has now left. She is
3 coming back tomorrow because she was supposed to be at
4 work tomorrow because she was warned two days ago. She
5 was supposed to give evidence today. So I think we are
6 going to -- I am going to call Mr Middleton first.
7 I think he will be over by lunchtime and then
8 Kelly Lifton will start maybe before lunch or after and
9 hopefully I do not know whether we will go on until
10 Friday but --

11 THE PRESIDENT: Tomorrow is Friday.

12 MR BREALEY: Tomorrow is Friday. Then we will finish by
13 Friday.

14 THE PRESIDENT: Yes, we are a little bit behind because
15 Ms Lifton and Mr Middleton were to start and probably
16 finish today but we are not in any --

17 MR BREALEY: I think we are on track.

18 THE PRESIDENT: If you want an earlier start again.

19 MS DEMETRIOU: I do not think that is necessary and Advanz's
20 team, we are grateful to them, they have been very
21 cooperative in terms of -- and so has Ms Lifton in terms
22 of coming back tomorrow. So we will cross-examine
23 Mr Middleton first. I am not expecting to be very long
24 with him and so if Ms Lifton is available when I am
25 finished, then I think we will have plenty of time

1 tomorrow. We may finish around lunchtime with a fair
2 wind.

3 THE PRESIDENT: Very good. That is excellent news. It is
4 just I would not want the witnesses of fact to drift
5 into next week because that would be --

6 MS DEMETRIOU: There is no prospect.

7 THE PRESIDENT: There is no prospect of that. Thank you all
8 very much. Mr Palmer.

9 MR PALMER: May I just indicate that I hope it is no
10 discourtesy to the tribunal if the Intas team does not
11 attend tomorrow. We have no interest in tomorrow's
12 witnesses who do not affect us at all and so if you
13 excuse us.

14 THE PRESIDENT: Yes, of course, Mr Palmer. I am not going
15 to issue a standing requirement for people to attend.
16 I am sure that you have, all of you, many other things
17 to do in terms of deployment not only in this case but
18 perhaps in other matters so no discourtesy is taken.
19 You are of course released.

20 Thank you all very much. We will resume at 10.30
21 tomorrow

22 (5.00 pm)

23 (The hearing adjourned until Friday, 25 November at
24 10.30 am)

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