UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 20-00278
Plaintiff,	)	
	)	
vs.	)	
	)	
KEITH BERMAN,	)	Washington, D.C.
	)	March 20, 2024
Defendant.	)	11:30 a.m.
	)	
* * * * * * * * * * * * * * * * * *	)	

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE TREVOR N. McFADDEN
UNITED STATES DISTRICT JUDGE

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THE COURTROOM DEPUTY: Your Honor, this is Criminal Case 20-278, the United States of America versus Keith Berman.

Counsel, please come forward to identify yourselves for the record, starting with the Government.

MR. REILLY: Good morning, your Honor. Matthew Reilly and Christopher Fenton for the United States. We're joined at counsel table by our paralegals, Rachel Boyer and Grace Souder.

Thank you, your Honor.

THE COURT: Good morning, folks.

MR. COLLINS: Good morning, your Honor. Kevin Collins from Covington on behalf of Mr. Berman, who's now present.

I'm joined by a number of colleagues from Covington: Jonah Panikar, José Giron, José Ramos, Lori Taubman, Michelle Peterson from the Federal Defender's Office and Nick Xenakis. And on the bench behind is Brendan Howell.

THE COURT: Good morning.

And good morning, Mr. Berman.

My apologies to everyone for the late start. I know Mr. Berman had -- we didn't get his medications this morning.

And I'm sure that's been frustrating for you, sir,

and I know for everyone else. I apologize for that delay.

Mr. Collins, while I've got you up here, you are expecting to present two witnesses; is that correct?

MR. COLLINS: We are, your Honor. We have a witness on loss amount and a witness on sort of the background, the technology and sort of the product development. We have Professor Williams, who was going to testify during trial. There was some discussion about whether this technology was theoretically feasible and possible.

And -- but I don't know. I understand the Court has obviously a busy docket. So we defer to how the Court wants to proceed. But one thought we had as we were sitting here is that the Court take the two experts, the Government's and ours, on loss amount and, if there's time, then have Professor Williams testify or potentially reschedule him to appear remotely.

He apparently has a bit of a conflict that starts very soon. He has a project for NASA where he has to be available at his facility. But he can make time to appear remotely. So I just -- I'm giving you sort of all of the arguments.

THE COURT: Yes. Thanks.

I guess I was a little surprised to see your notice about him. I understood this was going to be about

loss amounts. I'm very interested to hear that back-and-forth.

I mean, what he's describing there really doesn't seem related to loss amount. And I don't think you're disagreeing with that --

MR. COLLINS: I agree. I don't disagree.

THE COURT: -- you know, perhaps more about your client's culpability or something like that. I mean, I feel like there's pretty narrow room for you to be playing on that.

MR. COLLINS: Fair enough.

I mean, we think it would go to a couple factors under 3553(a): number one, the nature and circumstances of the offense. I mean, this was actual, real development. I mean, Mr. Berman and DECN hired real experts, you know. They were pursuing an FDA application. So this wasn't as if this was just sort of totally made up. There was a theoretical basis for this technology. And in fact, Mr. Berman just got out in front of his skis in the press releases. That's kind of what this case is about.

But the Government has refused to acknowledge that this technology was technically feasible to detect a virus. We -- there was a lot of colloquy with the Court and the Government at the pretrial conference in November, and we stipulated. And the Government sort of waffled back and

forth. We never got to it.

That's why -- they've injected this issue into the case. So we brought Professor Williams here to say: Actually, this was real technology, you know. They might not agree with that. But the point is, we're not saying it worked; but theoretically, it was possible to get a test that would detect the virus.

THE COURT: Okay. Let's see where we are after loss amounts and then chat on that. I'm not thrilled about doing a trial after --

MR. COLLINS: Fair enough. But my -- from our perspective, there was going to be testimony from Dr. Williams at trial. So if it was relevant at trial, which, from our perspective, certainly it would be relevant background under 3553(a).

THE COURT: Okay.

MR. COLLINS: That's our position, your Honor. I understand where you're coming from.

A number of my colleagues will be handling some of the exams. I'll act like the Nationals manager and just sort of call them out as the issues arise.

THE COURT: That's fine, as long as I'm hearing from one person per thing. I'm not excited about --

MR. COLLINS: We're not tag-teaming.

THE COURT: Great.

So, Mr. Reilly, you have a professor? Should we get started with your witness? Anything before we get started?

MR. REILLY: Your Honor, the only thing is we had anticipated Professor Mitts to testify, listen to the testimony of Mr. Reilly and offer brief rebuttal testimony. And that's the way we had prepared and structured this, and that's what we noticed to the defense. If the Court would be okay with that, that would be our preference.

THE COURT: I have no problem with, I mean, all three gentlemen being present for any of this that they wish.

MR. COLLINS: I think they're entitled to be present.

THE COURT: Yes. Great. Thank you, sir.

MR. REILLY: With that, your Honor, the United States calls Professor Joshua Mitts.

JOSHUA MITTS, Ph.D., GOVERNMENT WITNESS, SWORN.

THE COURT: Good morning, sir.

THE WITNESS: Good morning.

DIRECT EXAMINATION

BY MR. REILLY:

Q. Would you please state and spell your name for the record?

A. Joshua Mitts, M-I-T-T-S.

Q. Professor Mitts, would you briefly run through your academic qualifications for the Court.

A. I have a bachelor's degree from Georgetown University, a J.D. from Yale Law School and a Ph.D. in finance and economics from Columbia University, Columbia Business School.

Q. Professor --

THE COURT: You got a J.D. and you got a Ph.D. I'm shocked.

THE WITNESS: I'm not the only one.

BY MR. REILLY:

Q. Where are you currently employed?

A. Columbia University. Columbia Law School.

Q. What's your role there?

A. I am a professor of law at the law school.

Q. And does -- do you specialize in any particular area of research?

A. My research focuses on trading in the financial markets.

Q. Does your research focus on economic theory and quantitative measures of valuation?

A. Yes.

Q. Are there any other areas of specialty in your research?

A. Sure. I write on the nature of information transmission in the financial markets, how informed trading makes its way into stock prices. I write on insider trading, market

manipulation and other topics in that space.

Q. Is it common for an economist to teach at a law school, Professor Mitts?

A. It is. Many have J.D.s and Ph.D.s, as I do. But I do have a colleague who does not have a J.D. That's been an increasing trend in recent years.

Q. Has your work been published in financial economic publications?

A. Yes. I have published in the *Journal of Finance*, which is a leading peer-reviewed journal in financial economics, and I have also published in peer-reviewed law and economics journals, the *Journal of Law and Economics*, the *Journal of Legal Studies*, published interdisciplinary work that is fundamentally economic in methodology.

Q. Have you served previously as an expert in federal court securities cases?

A. Yes.

Q. And have you ever been deemed an expert by a federal court in connection with any of those representations?

A. Yes.

Q. Would you briefly summarize the judicial findings?

A. Sure. I was qualified as an expert in the *Set Capital v. Credit Suisse* case in the Southern District of Florida of New York. There was a *Daubert* motion to disqualify me that the Court denied and found that my testimony was reliable.

My testimony in the Bayer Securities Litigation matter in the Northern District of California was also accepted by the Court. There wasn't a *Daubert* motion, but the Court essentially adopted my report.

Q. Do you have a consulting expert business, Professor Mitts?

A. I do.

Q. Would you briefly describe what kind of services that business offers?

A. I have a consulting LLC that provides both consulting expert services. So generally, let's say, prior to testimony or in a case where counsel are contemplating bringing a case, I'll be engaged as an expert. But I also testify through that consulting LLC.

MR. REILLY: And, Ms. Boyer, if you'd please bring up Government's Exhibit 00.

BY MR. REILLY:

Q. Professor Mitts, is this a current copy of your CV?

A. Yes, it is.

MR. REILLY: Your Honor, I would offer to admit Government's Exhibit 00 into evidence.

MS. TAUBMAN: No objection.

THE COURT: Without objection, 00 is in.

(Whereupon, Government's Exhibit No. 00 was entered into evidence.)

MR. REILLY: Your Honor, I would move to certify Professor Mitts as an expert in financial economics.

MS. TAUBMAN: No objection.

THE COURT: Without objection, Professor Mitts will be recognized as an expert in the area of financial economics.

BY MR. REILLY:

Q. Professor Mitts, were you engaged by the Department of Justice in this matter?

A. I was.

Q. What were you asked by the Department to do?

A. I was asked to evaluate, one, the losses to investors by applying the modified rescissory method set out in the United States Sentencing Guidelines and, two, to evaluate whether the MRM calculation was a reasonable estimate of the actual loss suffered by investors.

Q. And are you being paid for your work on this matter?

A. I am.

Q. And do you have a contract with the Government where you can bill $600 an hour up to $70,000 for your work in this matter?

A. Yes.

Q. So now that you've explained what you were engaged to do, would you walk the Court through the process you undertook to complete that work.

A. Sure. So first, I needed to collect pricing data to evaluate the change in price, which is part of the MRM formula. So I collected pricing data from the OTC Markets database that basically has the closing price and other data points for each OTC traded stock.

I collected information on the shares outstanding and other data points concerning the company here, Decision Diagnostics. I applied the methodology, which I'm happy to get into the calculations, and that yielded my estimate of a numerical loss. That was the first opinion.

And the second opinion: To evaluate whether it was reasonable, I employed a number of additional analyses to examine whether the price decline reflected in that calculation was the product of other factors, external market forces. And I'm happy to walk through each of those steps.

Q. Starting with the mathematical calculation, what method did you use to calculate the loss under the guidelines?

A. So generally speaking, the guidelines set out a comparison of average prices over particular intervals.

So basically, I needed to collect the prices over the defined intervals that I looked at and then I needed to compute the difference in average prices.

Then I needed to multiply that difference in average price by the number of shares that were outstanding.

And there were actually two different number of shares outstanding that I used for reasons I'm happy to explain.

And I simply multiplied the difference in price by the number of shares outstanding to obtain a measure of the total decline in market value caused by the loss according to the MRM -- caused by the fraud; excuse me -- according to the MRM method.

Q. And this is the methodology found in the application note to Section 2B1.1 of the sentencing guidelines?

A. That's correct.

MR. REILLY: Ms. Boyer, would you put up Government's Demonstrative Exhibit 6-X.

BY MR. REILLY:

Q. Can you see that, Professor Mitts?

A. Yes. Thank you.

Q. Would you walk the Court through kind of the mathematical process you undertook here to come up with your loss amount figure?

A. Sure. So using the closing price data that I described previously, I took the period of the fraud, which is defined as March 3rd, 2020, to December 17th, 2020. I took the average of the closing prices over that period, which is 19.54 cents per share. I then calculated the average price over the 90 days following the fraud or following revelation of the fraud, which was December 18th, 2020, to March 17th,

2021. The average price during that period I calculated to be 2.13 cents per share.

And then I simply took the difference of those two numbers, which yielded 17.41 cents per share.

THE COURT: Professor, did you come up with the period of the fraud or is that something the Government provided for you?

THE WITNESS: The Government provided me with the dates for the period of the fraud. I did evaluate based on the materials that I reviewed that were publicly available, the indictment and so forth, whether that seemed reasonable to me. And it did seem reasonable to me. But I did not select the dates myself.

THE COURT: Understood.

BY MR. REILLY:

Q. And would you just at a high level explain why you thought the date the Government gave you for the period of the fraud was reasonable?

A. Sure. So generally speaking, it didn't seem to me that there really was much question concerning the beginning date.

But the question of when the truth was revealed to the market, you know, I basically started from the question: Well, when was the entirety of the fraud revealed? And it seemed to me reasonable to look at the publication of the

indictment as a date when the totality of the Defendant's activities were revealed to the market.

Q. Looking at the second chart here on the demonstrative exhibit, Professor Mitts, would you walk through the calculations that you ran here to determine the loss amount?

THE COURT: Sorry. I want to go back to that point.

As you're probably aware, there's -- a lot seems to turn on that. Is this something that is within your area of expertise to try to determine the appropriate time period? Or is that something that you're looking at as a lawyer yourself and law professor, but not necessarily -- that's not where your skill lies?

THE WITNESS: Your Honor, I was not asked by the Department to evaluate that question.

I think generally my view would be that that's not a question that can be answered by financial economics.

What I can say is, it would seem to me that the key question would be for any alternative date what information was released versus other activity potentially by the Defendant. And it did not seem obvious to me that there was a date other than this date where the entirety of the information had been released to the market. And I'm familiar generally with, you know, what's in the record concerning the Defendant's overall conduct in statements

that were made even after the trading suspension.

So again, I wasn't asked to choose the date. But it didn't seem, you know, like there was another date that I just -- I felt like, well, we should have used that date. It seemed to me that there was enough ambiguity that I as an economist could feel comfortable with December 18th. But I don't think the question really can be answered as a matter of financial economics.

THE COURT: So I don't think either party is suggesting this. But it occurred to me that looking at how the stocks were trading before the fraud could be at least as instructive as the time afterwards.

Does that resonate with you at all? I mean, obviously, that's not what the guidelines suggest. But why might that -- why is that not an equally good kind of baseline?

THE WITNESS: I think your Honor is making a good point, that if we have an inflationary period, you know, at least there's another period where there wasn't inflation in the price.

So I agree with your Honor that, prior to the initial misstatement, that is a period not characterized by the price inflation and the fraud.

I guess my thought would be that, you know, there could be other information that came out after the fraud was

revealed, and that would be relevant to the company. And I wouldn't necessarily be measuring the impact of that other information, let's say, in late 2020 or early 2021 if I were looking at the prices in 2019, for example, as a direct measure of that counterfactual that we're discussing.

But I do use -- and I'm happy to say more about this -- I do use the period before the fraud in my analysis. I just don't use it in this particular calculation.

THE COURT: Okay.

BY MR. REILLY:

Q. Well, why don't you explain for the Court, since this is where we're -- what's of interest: What did you do with regard to the period prior to the fraud in connection with your analysis?

A. So I used the year preceding the period of the fraud as a period to examine the extent to which Decision Diagnostics thought price is responding to market-wide or industrywide information. So that's generally the approach that one uses in the economics literature, which is to estimate the relationship between this stock price and the market or industry as a whole to see, you know, does this stock tend to be affected by industry-wide or market-wide news?

So I do use the period of the year preceding the fraud to examine that, which ultimately feeds into the reasonableness of this calculation for -- as a measure of

investor loss.

Q. So let's stick with this. You looked at the prior year to determine what?

A. To determine whether -- ultimately whether this mathematical calculation is a reasonable estimate of investor loss, but specifically to examine whether this stock was generally affected by external market forces.

Q. And walk the Court through what kind of analysis you do based on financial economics principles to conduct that analysis.

A. So typically, people use an event study to look at the extent to which other factors might have affected the stock price. That's the standard method in financial economics.

What an event study requires as an initial phase, if you will, is that there's some relationship between this stock price and those external market forces. So those external market forces could be the market as a whole, industry index, for example, other standard asset pricing factors.

When one estimates a regression model, when one looks at the relationship between a stock price and these other factors, you have to identify a statistically significant relationship for these factors to explain changes in the stock price of the company.

And I did not identify such a relationship. So in

effect, this was the first half of an event study. And I concluded that effectively there was no need to proceed beyond that because this stock price was not tracking market or industrywide factors.

Q. That was the regression analysis?

A. That's correct.

Q. That first part of the event study. Right?

A. That's correct.

Q. And what factors did you use to conduct your regression analysis?

A. So I used the standard asset pricing factors from the literature, which is the market as a whole, the so-called Fama-French factors, which look at small firm returns, value firm returns, and I examined whether there was a statistically significant relationship, correlation, in a regression model between the daily changes in the price of Decision Diagnostics and these factors.

Q. And what was your ultimate finding?

A. I found no statistically significant relationship with any of those standard asset pricing factors.

Q. So taking a step back, what does that mean for kind of the reasonableness of using the MRM approach in calculating loss here?

A. Because there was no statistically significant relationship between the price of Decision Diagnostics and

the market factors that I examined, I concluded that the MRM was an appropriate method to measure the actual loss suffered by victims, because very intuitively, if there's no relationship between this company's stock and the market as a whole, then we can conclude that the price decline was not caused by the market.

Q. And turning back to the first question that we jumped off of from here, when looking at one of the dates proposed by the defense, what sort of firm-specific activity would you think would need to be examined in order to select one of those dates?

A. Sure. So I mean, I think the key question really as I was answering your Honor's question earlier is: What's the nature of the information that is being brought into the market by the firm or by individuals associated with the firm?

So I might be looking at what sort of disclosures are being made, for example, and those -- that would be firm-specific information that could affect the price of the stock.

Q. All right. And turning back to the loss amount calculation and the multiplication part of the math, would you walk us through briefly your finding here and why there are two different amounts of outstanding shares that you contemplated.

A. Sure. So when I reviewed the -- both the data and the disclosures, Decision Diagnostics was selling additional shares during the period of the fraud. When companies do this, they're issuing more shares. So the number of outstanding shares is increasing.

And so what we have here are two points in time. So at the beginning of the period of the fraud, there were 160 million shares outstanding. At the end of the period of the fraud, there were 349 million shares outstanding.

Q. Are these both reasonable numbers to use in calculating the loss amount here?

A. In my opinion, yes. They are both reasonable.

Q. Do you think one was a better measure than the other of the true loss amount?

A. I do. I think that -- I think the latter is -- 349 million shares is more reasonable than the 160 million shares number.

The reason is because the company was selling shares during the period of the fraud. So there were investors who were buying newly issued shares at inflated prices during the period of the fraud. So those investors' losses would not be captured by the 160 million shares number.

Q. So in any event, what are the two loss amount numbers that you found could be used under the MRM?

A. The 27.8 million number is with the 160 million share figure at the beginning of the period of the fraud. And the 60.8 million number is the -- uses the 349 million share figure.

Q. In your opinion, are either of these figures an acceptable measurement of the loss amount caused by Defendant Keith Berman in this case?

A. Yes.

Q. So then we turn to the second part of the analysis that you previewed earlier; and you were asked to then determine if these were reasonable estimates of the actual loss attributable to the change in value of Decision Diagnostics' stock?

A. That's correct.

Q. Okay. And we've talked a bit about how you worked on determining if it was reasonable. But can you walk us through the totality of what steps you took to evaluate if this was a reasonable measure.

A. Sure. So first, I took the daily changes in the price of Decision Diagnostics during the year preceding the fraud. And I estimated a regression model, where I regressed those daily changes in the price on --

THE COURT: Sorry. Dr. Mitts, going back to the outstanding shares -- forgive my ignorance on this -- does this mean that there's 350 million shares and all of these

have been bought by individuals? Or does this mean that there's -- you know, there's shares available, but some of them have not been purchased?

THE WITNESS: Your Honor, from the disclosures and the data that I reviewed, it appeared to me that all of those shares had been purchased. They were not all purchased by individuals.

Just to respond to that point, many of these were purchased by institutions, for example, who had lent the company money. They might have converted their debt obligations, let's say, to shares, so they might have been cashed out effectively in shares. But that was issued in a sense for value. So in a way, it's economically the same.

THE COURT: But the "outstanding shares" term means shares that have been purchased by an entity or person?

THE WITNESS: That's correct. Generally, the term "shares," "authorized shares," will refer to the number of shares that the board of directors and the shareholders have authorized to be issued.

But "outstanding" is really here being used to represent issued and outstanding. And that number is increasing because these newly issued shares, some of which are being either paid for, as I said, through debt obligations or cash, are being issued by the company; and so

those shares are not held by the company on its own books, but they're held by these purchasers. So that increases the number of outstanding shares, shares that are outstanding and held by investors.

THE COURT: And so I'd imagine these shares are being sold over this period of -- what is it? About six months or so? Maybe more like nine months. And the price is probably fluctuating some.

Are you trying to figure out kind of where each share is along there? Or is this kind of an extrapolation or an approximation?

THE WITNESS: Your Honor is correct that I am not calculating at each point in time what the purchase price was relative to the average figure here in the MRM.

So the number at the end of the period, meaning the 349 million shares, you can say, well, you know, it was less than that at some point during that period. And that's correct. And that's why I use two numbers. I think, you know, either one would be reasonable because, you know, they both reflect the magnitude of the market value loss.

But I think, you know, neither one perfectly captures the market cap at each point in time, market capitalization.

THE COURT: Okay.

BY MR. REILLY:

Q. We talked about the regression that you ran, and that was the testimony provided a few moments ago. Right?
A. Yes.
Q. Did you look at peer-reviewed literature to assess the reasonableness of these figures?
A. I did look at peer-reviewed literature to assess the reasonableness of the regression results. Yes.
Q. And what did it say about companies like Decision Diagnostics and how to think about whether this is a reasonable measure of loss?
A. So the literature consistently shows that OTC penny stocks like Decision Diagnostics are generally characterized by idiosyncratic information specific to that firm. So if the concern is, well, maybe this price decline reflects, let's say, the market or industrywide factors, the literature shows that generally these OTC penny stocks are not following market or industrywide factors as a group.
MR. REILLY: Would you please put up Government's Exhibit 6-A2.
BY MR. REILLY:
Q. And, Professor Mitts, is this a chart plotting the stock price of Decision Diagnostics in 2019 and 2020 against the stock price of the NASDAQ biotechnology index?
A. Yes, it is.
Q. And was this chart generated using data from Bloomberg?

A. Yes.
Q. Was it originally prepared by FINRA's CPAG group?
A. That's my understanding. Yes.
Q. Do you adopt this chart as your own for purposes of today's proceeding?
A. Yes.
MR. REILLY: With that, your Honor, I would move to admit Government's Exhibit 6-A2 into evidence.
MS. TAUBMAN: No objection.
THE COURT: Without objection, 6-A2 is in.
(Whereupon, Government's Exhibit No. 6-A2 was entered into evidence.)
BY MR. REILLY:
Q. Professor Mitts, as the final step in your reasonableness analysis, did you look at whether Decision Diagnostics' stock price was uncorrelated with industry-specific events?
A. Yes, I did. And that's --
Q. What does that mean? That's very technical terminology.
A. Sure.
Q. Maybe if you could walk back what that's really looking at.
A. Sure. So previously, I discussed the standard asset pricing factors, like the market as a whole, small firms, value firms and so forth.

But because the sentencing guidelines also refer to industry-specific factors, I examined whether the price of Decision Diagnostics was systematically correlated with biotechnology firms. And I measured price changes in biotechnology firms using the NASDAQ biotech index, which is a standard index consisting of NASDAQ-traded biotechnology firms.

Q. Why do you use that particular index?

A. So there's a couple points there. One is that you want to make sure you're using a basket of stocks, because any individual comparator stock will have its own set of idiosyncratic information.

So if you're trying to evaluate, well, was this price change in Decision Diagnostics correlated with biotech industry information, you have to have an index that nets out the changes in individual stocks so that only the industry news or industry price effects remain. So we definitely need an index of biotechnology firms.

In an ideal world, I would have used an over-the-counter biotech index because Decision Diagnostics is an over-the-counter traded stock. But there is no such index that I'm aware of that satisfies the criteria, meaning, for example, the index needs to reflect companies that are traded frequently enough so that the price measurements are meaningful. And I'm not aware of any such

OTC index.

The closest index that I could find was NBI, because there are many small NASDAQ-listed companies that are similar to Decision Diagnostics in many respects.

Q. Once you got the relevant data for the NBI, did you conduct another regression analysis?

A. I did.

Q. And what did that regression analysis look for?

A. So I looked for a systematic correlation as measured by regression analysis between Decision Diagnostics' stock price and the NASDAQ biotech index. And I did not find a statistically significant relationship.

Q. So what does that tell you about the correlation between Decision Diagnostics and industry-specific events?

A. So the absence of a consistent statistically significant relationship between Decision Diagnostics and the NASDAQ biotech index -- the absence of such a correlation indicates that Decision Diagnostics' stock price was not responding to industry-specific news concerning the biotech industry.

Q. So taking everything we've talked about today, the regression analysis, the peer-reviewed literature, what is your opinion as to the reasonableness of using the loss figures that you talked us through in Government's Exhibit 6-X for the relevant loss amount here?

A. It is my opinion that the MRM calculation is a

reasonable estimate of the actual loss suffered by investors.

MR. REILLY: No further questions at this time, your Honor.

THE COURT: Thank you.

Defense?

CROSS-EXAMINATION

BY MS. TAUBMAN:

Q. Good morning, Dr. Mitts.

THE COURT: Remind me of your name, ma'am.

MS. TAUBMAN: I am Lori Taubman on behalf of Mr. Berman.

THE COURT: Thank you.

BY MS. TAUBMAN:

Q. You mentioned previously that you have testified in federal court. Have you ever offered testimony on behalf of a defendant?

A. I was once engaged to write an expert report on behalf of a defendant in a securities class action. My expert report was submitted under oath, but the case settled before I was deposed. So that's one case I can think of.

I also testified in Alberta in a merger case, a merger litigation dispute. I can't recall if the party I was engaged for was technically the defendant. They might have been.

Q. Okay. Have you ever testified against the Government?
A. No.
Q. Your appearance today is not the only engagement you have had with the DOJ's criminal division's fraud section. Is that right?
A. That's correct.
Q. Okay. Since 2021, you have been paid over $350,000 by the criminal division's fraud section for consulting work. Is that right?
A. I would have to check my figures. That sounds approximately correct.
Q. And that number does not include work that you've performed in connection with today's hearing. Correct?
A. That's correct. I haven't submitted any invoices for this matter yet.
Q. It's fair to say that you've read and done a lot of research about securities markets. Is that right?
A. Yes.
Q. Okay. But I saw from your CV, which was entered earlier as an exhibit, that your only professional experience outside of being a law professor was working at a law firm for one year. Is that accurate?
A. I think I might define "professional experience" differently. But if you're referring to full-time employment outside of the academy, I'd say that's correct.

Q. So you've never worked in a financial firm?
A. I have not.
Q. You talked about the OTC literature a fair bit.
Have you ever purchased a penny stock?
A. I don't believe so, no.
Q. We talked a little bit about the shares outstanding and that number. Did you review the stock ledger of DECN?
A. I did not.
Q. And the additional shares that we spoke about earlier, did you verify whether they were newly issued shares or shares that were the result of conversions of preferenced older shares?
A. Well, generally speaking, if preferred shares or convertible notes or other derivative securities are converted to common stock, the common stock is newly issued. So I don't understand that to be an either/or distinction. It just goes to where the newly issued shares came from in the sense of: What was their consideration? Was an investor paying cash for them? Or were they exchanging or converting or trading their existing preferred convertible note or other derivative obligation like a warrant for those newly issued common shares? In all of those cases, the shares that are newly issued, the common shares, are newly issued in all of those cases.
Q. Okay. But in this particular case, did you look into

that in the documents that you consulted?
A. From the disclosures by the company that I reviewed, it was apparent to me that, as I answered the Court's question earlier, these were newly issued common shares.
Q. Okay. I want to ask you a few questions about the NASDAQ biotechnology index that you were discussing earlier.
So stocks could be traded either on an exchange, like NASDAQ, or over the counter. Is that right?
A. That's correct.
Q. And then to be in the NASDAQ index, the stock must be listed on NASDAQ. Is that accurate?
A. Generally, I think that's correct. I'd have to check exactly what the index inclusion rules are. But that sounds generally correct.
Q. And I think you mentioned earlier that the companies that trade exclusively over the counter would not be included in the NASDAQ index. Did I get that right?
A. That's correct.
Q. Okay. In your expert disclosure, you cited an article called Asset Pricing in the Dark: The Cross-Section of OTC Stocks.
Do you remember that article?
A. Yes.
Q. Okay. And then, as the authors of the article explained in the article's summary, over-the-counter or OTC stocks are

far less liquid, disclose less information and exhibit lower institutional holdings than do listed stocks.

Is that consistent with your recollection of that article?

A. Yes.

Q. So there's meaningful differences between OTC stocks and stocks that are listed on exchanges like NASDAQ. Is that right?

A. There's certainly differences when one looks at the entire population. NASDAQ has some of the largest publicly traded companies.

In the biotech space in particular, biotech companies on NASDAQ by and large tend to be very small, either small caps or micro caps. There are biotechs on NASDAQ which are comparable to OTC stocks like Decision Diagnostics.

I don't have the exact numbers in front of me as to the average market cap of each; but from my experience, you know, companies go off and on NASDAQ, particularly biotech companies. And so, you know, there's a general similarity in the nature of those companies in that group.

Q. So to kind of follow up about that group, the NASDAQ biotechnology index is constructed from the prices of more than 200 securities. Is that right?

A. That's consistent with my recollection.

Q. And they include both biotechnology companies and pharmaceutical companies. Is that right?
A. I'd have to go back and check the index inclusion criteria. But that sounds correct to me.
Q. It would include companies like 23andMe?
A. I don't know off the top of my head which companies --
Q. So you --
A. -- are in --
Q. -- don't know --

THE COURT REPORTER: I'm sorry. I didn't get the answer.

THE WITNESS: I don't know off the top of my head which companies are -- I don't have the entire list of 200 companies in front of me.

BY MS. TAUBMAN:
Q. And you showed us a chart earlier. It was the Government's Exhibit 6-A2.

MS. TAUBMAN: I don't have an electronic version, but I have a paper copy.

MR. REILLY: We can pull it up.

MS. TAUBMAN: That would be great. Thank you.

BY MS. TAUBMAN:
Q. So according to this chart, it looks like the DECN closing price was never more than 45 cents in 2020. Is that accurate?

A. I'm sorry. Could you repeat the question?
Q. Yeah. I'm looking at the chart and looking at the trend in the DECN closing price. And it appears that it's never higher than 45 cents. It kind of -- is that right?
A. That is consistent with the data on the chart. Yes.
Q. Okay. And -- but the price per stocks traded on NASDAQ tends to be higher than that. Is that accurate?
A. Not as a general statement. There are NASDAQ issuers who trade below one dollar. They're in danger of being delisted off of NASDAQ if they remain below one dollar. So there are certainly fewer what we would call penny stocks on NASDAQ.
Q. And to be in the NASDAQ biotechnology index, the security must have a minimum market capitalization of $200 million. Is that accurate?
A. I don't recall the index inclusion criteria. That wouldn't surprise me.
Q. And over the period that we are discussing for your estimation, DECN's market capitalization, would it have approached $200 million?
A. I'd have to look carefully at the numbers. But I don't think it would be far from that figure if you took, let's say, just round numbers, 50 cents times, you know, 300 million shares, for example, you would get 150 million shares -- excuse me -- $150 million.

So I don't -- you know, I don't know exactly what the number would be. But I don't think it would be an order of magnitude less than 200 million.

Q. But it would be below the minimum of 200 million?

A. Again, it might be. But I can't say with certainty because, as I was explaining earlier, there were more than 300 million shares issued. I can say probably it would have been below. But I would have to check to be sure.

Q. And I believe, as your opinion that you shared earlier, that you believe that DECN's stock price is not impacted by industry-specific events. Is that accurate?

A. I didn't identify any evidence to indicate that Decision Diagnostics' stock price was affected by industry-specific events.

Q. And you reached that conclusion because you found that the DECN stock price was not correlated with this NASDAQ index we were discussing?

A. Well, the NASDAQ biotech index is not a comparator because of the similarity between NBI -- between that index and Decision Diagnostics.

The reason why one would compare a stock like Decision Diagnostics to the NASDAQ biotech index is because an index of heavily traded biotech stocks will reflect industry-wide news. So if the price of NBI goes up, that would occur, among other reasons, if there was positive

biotech industry news; and, vice versa, if the price of NBI went down, that would occur, among other reasons, if there was negative biotech industry news.

So the way that the peer-reviewed literature in financial economics uses indices -- and in fact, many times the indices that are used to compare stock prices are very different from the companies who are being compared, not because one is comparing between two similar companies, but because the external market forces of interest are measured through the changes in the price of the index.

So if there was biotech industry news, one would certainly expect that it would be in the price of NBI. And if that news were also affecting Decision Diagnostics' stock price, one would expect to see therefore a correlation between these two prices, even though NBI may be different from Decision Diagnostics in many ways.

Q. Right. But if the index also includes stocks that may be dissimilar from DECN, like a pharmaceutical company, for example, then it would potentially reflect news from other types of companies than DECN. Is that right?

A. No. I don't think that's a correct description of the financial economics methodology.

There are pharmaceutical indices. The reason one uses an index of a particular type is precisely to address the concern identified by your question.

Any index will consist of companies that are different from each other in lots of ways. But the purpose of the index is to aggregate together companies that are similar along one dimension, in this case biotechnology. So pharmaceutical-specific company news will be averaged out such that the biotech index reflects on average biotech-relevant information.

Q. Let me rephrase a bit.

That index reflects information that's relevant to all the companies that are included in the -- in deriving it. Is that right?

A. I wouldn't characterize it as information that's relevant to all of the companies.

Each company in the index has information that's idiosyncratic to that company. But when you aggregate or average them into an index, what remains from that average is what is a common -- we call it pricing factor to all of the companies in that index.

But the information reflected by that pricing factor is the only information that's coming to all of the companies in that index. So if you have information that affects a few companies in the index, but it's not common to all the companies in the index, it would not be measured by the index because the index would be averaging that idiosyncratic information out.

Q. So if there was some information that was relevant to a subset of companies in the index, though, that information might get averaged out and not be reflected as strongly in the overall index if there are essentially other types of companies in the index?

A. The logic of that statement is correct. But of course it applies both ways. So it applies to information about some of the companies that could be positive on any given day and it applies to information about other companies that could be negative. On average, what's left in the change of the price at NBI is what is consistently correlated or consistently common to all of the companies in that index, meaning it goes the same direction.

For an index that consists of biotech companies -- and that's the inclusion criteria -- the standard approach in the financial economics literature is to use that sort of index as a measure of biotech's industry news.

Q. Did you attempt to identify a peer group of companies for DECN aside from your work with this NASDAQ index?

A. I did not.

Q. Okay. And you had mentioned earlier when you were discussing your calculations a data source called OTC Markets that tracks stocks that are traded over the counter, like DECN?

A. That's correct.

Q. And the OTC Markets website also includes some industry classification information. Is that right?

A. It includes industry classification information that in my experience, because I've researched the OTC Markets platform, it's very inconsistent. There are classification codes that I personally in my work have not found, you know, persuasive or coherent as a means of organizing companies. Some of the industries have maybe less than ten companies in them, which is not a particularly reliable metric of an industry.

Q. Did you make any attempt to replicate the analysis that you performed with a NASDAQ index with that OTC Markets data?

A. I did not. For reasons I've explained earlier, the OTC Markets generally are a problematic source of stock prices for constructing an index because in order for an index value to be a reliable measure of industry-specific news, the index needs to be heavily traded such that changes that are relevant to the industry are, in fact, impounded into the price of the index.

Unfortunately, while the OTC stocks, as I explained earlier, would have been my first choice, I was not satisfied and did not find a group of OTC stocks whose prices were reacting with sufficient frequency that I felt it was a reliable measure of biotech news.

So just to clarify, I did think about this question and look at the stock prices that were available. But I did not identify an index that I thought was a reliable measure of industry-specific news in a way that would be consistent with the financial economics literature and methodology.

Q. Okay. I want to turn back to this chart. The chart shows the trendline for the NASDAQ biotech index that we were just discussing as well. Correct?

A. Yes.

Q. And that trendline looks flatter than the DECN price trendline. Is that right?

A. Yes. And that's consistent with the literature we were discussing previously, that penny stocks tend to have idiosyncratic volatility, meaning there's a lot of idiosyncratic information that is specific to the penny stock, which will cause the price of that penny stock to be responsive to what's going on with that company far more and maybe even to the exclusion of market-wide or industrywide information.

Q. But these two trend lines are plotted essentially using the different axes, so on the left is the DECN closing price and on the right is the NBI closing price. Was there any syncing up of the percentages or other ways of associating these two lines when you put them on there?

A. Yes. The regression analysis that I described earlier of the closing price changes in Decision Diagnostics on the NASDAQ biotech index uses percentage changes, which are scale invariant, meaning they are -- the percentage change essentially bakes in the differences in the scales.

And in fact, it's important to recognize that even in a situation where the stock price moves more in magnitude than the index -- so let's say for every 1 percent increase in the index, the stock might go up 2 percent. That would also be captured by the regression analysis.

So the regression analysis would not require a one-to-one correlation between the industry factor and the stock price. It would also allow and yield potentially a statistically significant coefficient even if the stock were more volatile but were still correlated with the industry factor.

So the absence of any statistically significant correlation means that I can rule that out as well.

Q. We can talk about that. I was just -- sorry. I thought it was a simple question.

On this particular chart, I just see the two lines. One of them is jumping up and down a lot more than the other. Is there any meaningful way to compare those two lines and the volatility just looking at this chart?

A. One wouldn't make that comparison by looking at the

chart. One would use the regression analysis that I was describing.

Q. Okay. And then on the chart, on April 23rd, 2020, the SEC announced that it would suspend trading of DECN stock. Is that right?

A. That's what I recall. Yes.

Q. And the SEC suspension order specifically referenced language in DECN's press releases. Correct?

A. That's consistent with my recollection. Yes.

Q. And the suspension ran from April 24th through May 7th, 2020. Correct?

A. That's consistent with my recollection. Yes.

Q. Would you agree that during that time no one could sell or purchase DECN stock?

A. That's what a trading suspension is. Yes.

Q. Okay. And the suspension is indicated on this chart with the shaded column; is that right?

A. Yes.

Q. Okay. Would you agree that the DECN share price decreased immediately following the SEC suspension? Is that correct?

A. Yes.

Q. So you spoke a bit about your regressions earlier.

You're using those regressions as part of your opinion that there were no significant changes in DECN's

stock price not related to the fraud. Is that accurate?
A. I don't believe that's accurate. I'm using the regression analysis to examine whether external market forces consistently or systematically explain changes in the price of Decision Diagnostics' stock.
Q. And when you say "external market forces," are you referring to changed economic circumstances, changed investor expectations and new industry-specific or firm-specific facts, conditions or events?
A. Yes.
Q. So you are considering firm-specific facts, conditions or events in that statement?
A. Well, I agree that that is -- that firm-specific facts are an external market force.

For purposes of this analysis, I did not evaluate with a regression analysis firm-specific facts. I don't believe it's possible to do that, because any firm-specific facts would be embedded within the stock price of the firm, so you wouldn't have a comparator. So it's not possible to do that with a regression analysis.

Q. Okay.

MS. TAUBMAN: The Court's indulgence.

BY MS. TAUBMAN:
Q. Saying there are newly issued common shares doesn't tell you whether the shares were issued as a result of a

preferred shareholder converting its existing preferred shares into common stock that is issued by the company. Correct?

A. I think I agree with that. Shares can be newly issued for many different reasons.

Q. Did you ever review DECN's public filings?

A. As I mentioned earlier, I did review those filings in the course of preparing my analysis.

Q. Did you ever review any of DECN's quarterly public reports which contain stock and notes tables that would have told you that the new shares of common stocks were actually the result of preferred shareholders converting existing preferred shares into new shares of common stock?

A. As I said before, the fact that shares are issued -- newly issued in exchange for cash or in exchange for preferred shares or in exchange for notes or other obligations of the company doesn't change in my view the conclusion that those are newly issued shares.

Maybe one way to think about it is a preferred shareholder in that example has, you know, a set of shares that are worth a certain amount.

And when they convert, they get a set of common shares that are worth the same amount, so that they're in my view equally injured when the value of those common shares that they received in the conversion is inflated by fraud,

because they now become a common shareholder and so they're exposed to the same loss that other common shareholders are exposed to.

MS. TAUBMAN: I have no further questions, your Honor.

THE COURT: Thank you.

Hold on just a second.

Can you put 6-A2 back up.

So, Dr. Mitts, kind of going back to my idea here about the pre-fraud status quo, it looks to me -- I mean, you indicate the 90 days following the fraud, the stocks were worth about 2 cents a share. Is that right?

THE WITNESS: Yes.

THE COURT: Eyeballing this, it looks to me like there are probably -- they're worth about the same before. Is that right?

THE WITNESS: That's correct, your Honor.

THE COURT: And so I guess in some ways it doesn't really matter.

Well, let me ask you this: Is there a reason that I'm missing why kind of looking at what happened before as a baseline is wrong?

THE WITNESS: No, your Honor. I don't think it's wrong. And in fact, I think as an economic matter, if you think about price inflation as false information that has

been put into the market, if the price, you know, started out at what it was and then you added that false information, well, the difference should exactly measure the impact of that false information.

So I think my reference earlier was just to the fact that I was asked to apply the MRM formula. But I think it would also be a reasonable estimate of the loss to use the price before.

THE COURT: And I mean, again, I think a major question here is: When was the fraud period?

Can you draw any conclusions from an economic matter that the window you've taken looked to -- essentially, it goes back to the status quo ante as opposed to another period earlier in the year, where it would be significantly different?

THE WITNESS: Yes, your Honor. I think that, apart from what's in the record about additional statements that were made during the period that I referred to as the period of the fraud, it would be standard in the financial economics literature to expect that the price after a complete corrective disclosure, after the truth is revealed, would be approximately similar to the price before a material misstatement was made, because they're both measuring in effect the true value of the shares absent the artificial inflation.

THE COURT: Ms. Taubman, any questions based on my questions?

MS. TAUBMAN: No, your Honor.

THE COURT: Any redirect?

MR. REILLY: Subject to recall on rebuttal, no further questions from the Government either.

THE COURT: Thank you, Professor. You may step down.

(Witness excused.)

THE COURT: Anything further from the Government?

MR. REILLY: That's all we had, your Honor. Thank you.

THE COURT: For defense?

MR. COLLINS: Your Honor, if you're ready to proceed, we'll call our witness. I don't know if you wanted to break.

THE COURT: We can continue. Justice never sleeps.

MR. COLLINS: At this point, on behalf of Keith Berman, we're going to call our expert, Jim Reilly. Brandon Howell, my colleague, will be doing his exam.

JAMES REILLY, DEFENSE WITNESS, SWORN.

THE COURT: Good afternoon, sir.

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Good afternoon. Please tell us your name.

A. James Reilly.

Q. Can you spell that?

A. R-E-I-L-L-Y.

Q. Mr. Reilly, can you tell us about your education?

A. Sure. I received a BS in finance from the University of Maryland in 1987.

Q. Can you tell us about your work experience?

A. Sure. I have been a compliance professional throughout my professional career. I started in the late '80s working as a special investigator for an entity that's now known as FINRA, previously known as NASD, regulation. Various compliance positions throughout the years.

The last part of my career, I was managing director and head of global equities compliance at Goldman Sachs.

I was then the chief compliance officer, head of all compliance, at TIAA-CREF.

Then I became the head of compliance/chief compliance officer for TD Ameritrade.

Q. Now, are any of these companies, your prior employment, broker-dealers?

A. They're all broker-dealers.

Q. Can you explain what a broker-dealer is?

A. Sure. Very simply, a firm that's authorized under the federal securities laws to transact, you know, equities, fixed income, different types of trades with customers on exchanges, OTC pink sheets, whatever the different things. So it's basically a specific type of legal entity that deals with customers and their trading in the capital markets.

Q. Have you received any specialized training or licenses in your current field?

A. Yes. Throughout my career, I have obtained a number of licenses in the securities industry.

Q. And can you tell us a little bit more about those licenses?

A. Sure. So they range from the basic general securities license, which is called the Series 7, that trains you in the basics of the rules and regulations and requirements of the industry.

Along the way I also received specialized exams: the New York Stock Exchange chief compliance officer examination; a number of general securities principal licenses that allowed me to supervise others; and the futures and commodities exam, the Series 3.

Q. How do you obtain those licenses?

A. It's standard, you know, study and then taking written tests.

Q. And do you consider yourself an expert in any area or

field?

A. Sure. Throughout my career, I've become expert in the various federal securities laws and state -- self-regulatory body rules and regulations. So most especially the Securities Act of 1933, the Exchange Act of 1934 and FINRA and NFA rules and regulations as well as the Commodity and Exchange Act.

Q. Have you ever testified as an expert before?

A. I have.

Q. Can you explain that?

A. Sure. Since the fall of 2018, I started doing this type of work about half-time.

I've appeared in 36 FINRA arbitrations, which is the main part of the work that I do. I've appeared in federal court once in the Middle District of Tennessee and I've got a number of pending state and federal court matters coming up.

Q. You just mentioned -- can you explain what your current position is?

A. Sure. I'm the managing partner of PNA Consulting, LLC, my own sole-member LLC.

Q. Can you explain what your current role and your duties are?

A. Sure. In this part of my work, I do some consulting for financial services firms and clients, law firms. I also do

a lot of expert witness appearances, as we just discussed.

Q. You said you started in 2018?

A. In the fall of 2018. Correct.

Q. Have you ever worked specifically with assessing when and whether fraud has been disclosed to the market?

A. Yes, I have.

Q. Can you explain that?

A. Sure. In a couple of arbitrations that I was involved with, that was one of the key elements of at least two cases.

Q. Have you ever calculated the amount of potential loss arising from fraud?

A. Yes. I do damages calculations in almost all my cases.

MR. HOWELL: Your Honor, we offer Mr. Reilly as an expert relating to -- in the field of financial services, complex litigation matters.

MR. FENTON: No objection.

THE COURT: Without objection, Mr. Reilly will be recognized as an expert in the field of financial services and complex litigation matters.

MR. HOWELL: Thank you.

BY MR. HOWELL:

Q. So in preparation for your testimony today, did you review certain information?

A. I did.

Q. What information did you review?
A. The variety of information provided by counsel from discovery between the Government and counsel for the Defendant. That included information such as -- one of the things that stuck out for me is the Blue Sheet information from July 9, 2020. You know, the press releases, different pleadings. I mean, it's standard for an expert to look at a wide variety of information in forming his opinions.
Q. Let's talk about penny stocks.

Are you familiar with over-the-counter securities?
A. I am.
Q. Can you explain what over-the-counter securities are?
A. Sure. So there's a segment of the market, over-the-counter market, where they are -- the securities that trade there are not listed on a major exchange like the NASDAQ or the New York Stock Exchange, typically because they don't meet the listing requirements of those exchanges based on whether it's market capitalization or average daily trading volume, et cetera.

And so there's a segment of the market, typically low-value, low-market capitalization securities, that trade on the OTC markets.
Q. How does someone actually trade over-the-counter securities?
A. Sure. If you wanted to buy shares in a company like

DECN, you would have to go to your broker-dealer. And in this day and age, typically you will enter an order electronically saying, Buy 100 shares of XYZ. That order will be transmitted to -- the OTC market is a little bit different than exchanges. It's all -- it's a dealer-to-dealer market. So there's market makers that make markets in the securities as opposed to an exchange, where you can send your orders to have them executed there.

And so your broker will then transmit it to a market maker for execution.

Q. Is there, like, a trading system that's generally used for microcap or lower-cap stocks?

A. Well, to trade DECN specifically, you'd have to use the OTC link system of otcmarkets.com. That is technically what is known as an alternative trading system. It allows different brokers to trade with each other electronically.

Q. So this is OTC Markets Group?

A. Correct.

Q. Based on the information you reviewed, was DECN stock traded on this OTC Markets Group platform?

A. It was.

Q. What are penny stocks?

A. Penny stocks are defined under the Exchange Act of '34 as -- they have basically -- there's a number of different tests, $5 million in market capitalization, a number of

other factors.

I think people use that term more broadly as a low-priced -- you know, some people call it microcap securities; some people call them penny stocks. They are all basically these stocks -- about 10,000 to 12,000 companies on any -- in any given year that are trading through OTC Markets.

THE COURT: So that's basically synonymous? OTC and --

THE WITNESS: Yeah. In my experience, if you hear someone say microcap or penny stock or pink sheet stock -- that's another term that's kind of a legacy term. They literally used to be -- the quotes were published on pink paper. Those are all kind of used interchangeably in the industry. They have specific meaning, like penny stocks is defined in the '34 act. But people use them more interchangeably.

THE COURT: Okay.

BY MR. HOWELL:

Q. Can you describe how someone trades in over-the-counter securities? Is the trading of penny stocks the same? Is that how penny stocks are traded, the same way?

A. Yes. You're going to a broker-dealer. Say I want to, you know, buy or sell whatever shares you're interested in. They will then transmit that order through the OTC Markets

link for execution.

Q. So broker-dealers are very involved in the trading of penny stocks?

A. Yes. Absolutely.

Q. Can you describe the nature of the risks that are involved with investing in penny stocks?

A. Sure. Well, it is -- I mean, penny stocks, you know, they have much lower information content than an exchange-traded stock like an Apple or Google. They have much lower liquidity typically. Some don't trade at all on certain days.

There's a lot of -- there's -- it's very difficult to access reliable quotations at times for what the best price you can get to buy or sell the security. So there's a number of risk factors involved with trading in this segment of the market.

Q. So are penny stocks riskier?

A. Yeah. Riskier than -- as an equity security sub-asset class, they are much more risky and speculative than, you know, let's talk about a mid-cap or even a small-cap or a mid-cap or large-capitalization -- and when I say "cap," I mean capitalization, how much the shares are worth.

Q. So you mentioned speculation. The penny stock market, based on your experience, is there a fair amount of speculation, speculative trading?

A. Absolutely. While I was at TD Ameritrade, we did -- TD Ameritrade had -- its business model is self-directed investors who are making their own choices to do whatever kind of trading they want. Right? So they can decide to buy 100 shares of Apple or they can decide to buy a thousand shares of DECN. They basically -- we would facilitate any kind of transactions that they wanted to do. They'd make their own decisions. We helped facilitate those.

And so going through that process, they have to then enter the orders in. And there's -- we'll talk in a second about the different steps that they have to go through in this segment of the market.

Q. Based on your experience, could you tell us what was happening in the market in April 2020, the stock market?

A. Well, I would go back to March, quite honestly, with the onset of the worldwide pandemic known as COVID-19 -- right? -- that had a distinct effect on the markets. We saw things like the massive decrease in value of travel-related stocks, airlines. And then you saw a lot of investors and speculators trying to find buying opportunities to make money in an otherwise-falling market.

MR. HOWELL: Your Honor, we'd like to present an exhibit. I think there's a bench binder that has exhibits. We aren't going to display them, but just have him refer to the binder.

THE COURT: Okay.

THE WITNESS: Doing it old-school.

MR. HOWELL: May I approach, your Honor?

(Tenders document to the Court.)

THE COURT: Is this for me?

MR. REILLY: We have them if you want to put them on the screen for everyone.

THE COURT: That might be easier, actually, if we can do that.

MR. HOWELL: That's fine.

THE COURT: If you want to provide one, that's good. But typically we try to do it electronically.

MR. HOWELL: It will be Defense Exhibit 005, DX 005.

THE COURTROOM DEPUTY: Is it coming up on the screen?

MR. HOWELL: I think the Government is going to put it up.

THE WITNESS: There we go.

BY MR. HOWELL:

Q. Have you seen this document before, Mr. Reilly?

A. I have.

Q. Can you explain what it is?

A. Sure. It's a printout of a website of a gentleman who does trading advice for people who subscribe to his blog and

his newsletter, if memory serves.

Q. Based on your testimony, the speculation that was taking place, is this a fair example of the penny stock kind of trading patterns and speculation that was taking place in the early 2020 timeframe?

A. Yeah.

MR. FENTON: Objection to form.

THE COURT: Overruled.

THE WITNESS: So yes. It was, you know, an example of traders, speculators, looking for buying opportunities in the market around that time. You see this kind of stuff all over the internet all the time. Everyone's got different trading strategies, different ideas, how to express those. Some people will focus on penny stocks because they think they can get bigger bang for their buck there. Other people focus on different segments of the market.

MR. HOWELL: Your Honor, we'd move to admit DX 005 into evidence.

MR. FENTON: No objection.

THE COURT: Without objection, 5 is in.

(Whereupon, Defendant's Exhibit No. 5 was entered into evidence.)

BY MR. HOWELL:

Q. Let's talk about SEC trading suspensions.

A. Sure.
Q. Does the SEC have the ability to suspend trading of a company's stock?
A. Absolutely.
Q. What are the reasons that the SEC would suspend or could suspend trading?
A. In my professional experience, they've -- they're doing a preliminary investigation. They have what they think is a credible problem with an issuer. It could be many different things. They may not be current in their filings to the Commission; they may find potential indicia of fraud. And they use those -- they review those factors and decide to issue trading suspensions from time to time.
Q. Does the SEC publicize its suspension of trading?
A. Absolutely.
Q. How does the SEC make the public aware that they're suspending --
A. On sec.gov --
Q. -- a trading?
A. They will publish on sec.gov. They will also release as a press release the order and the companion details when they have a trading suspension. That is picked up by all the different exchanges and broker-dealers on Wall Street so that they can take note of that.
Q. So the OTC Markets Group, they would -- this

information -- pick it up --

A. Yeah. They have a feed where they would subscribe to that kind of -- that kind of news from the SEC so that they could initiate the suspension on their platform.

MR. HOWELL: I'd like to pull up DX 001.

BY MR. HOWELL:

Q. Can you tell me what this document is?

A. Sure. It is the trade suspension of DECN dated April 23rd, 2020, by the U.S. Securities and Exchange Commission.

Q. Have you seen this document before?

A. I have.

Q. Did you rely on this document in your analysis?

A. I did.

Q. Is this a fair and accurate copy of the SEC release that you've reviewed?

A. It is.

MR. HOWELL: Your Honor, we'd move to admit DX 001 into evidence.

MR. FENTON: No objection.

THE COURT: Without objection, 1 is in.

(Whereupon, Defendant's Exhibit No. 001 was entered into evidence.)

THE COURT: Can we pull up DX 002.

BY MR. HOWELL:

Q. Can you tell me what this document is?

A. This is the more detailed order of the suspension in trading in Decision Diagnostics. So this was attached to the first document we just reviewed also dated April 23rd, 2020.

Q. Have you seen this document before?

A. I have.

Q. Did you rely on this document?

A. I did.

Q. Is it a fair and accurate copy of the suspension order that you reviewed?

A. It is.

MR. HOWELL: Judge, we'd move to admit DX 002 into evidence.

MR. FENTON: No objection.

THE COURT: Without objection, 2 is in.

(Whereupon, Defendant's Exhibit No. 002 was entered into evidence.)

MR. HOWELL: Turn to DX 012. Sorry. That's not the right one.

Your indulgence, your Honor.

We have a different 012 in our binder.

THE WITNESS: It is now on my screen, Mr. Howell.

BY MR. HOWELL:

Q. Thank you.

Can you tell me what this document is?

A. It is a copy of an investor alert issued by the SEC on April 10th, 2020.
Q. Is there another date that you see on the document?
A. It was -- it looks like it was subsequently updated on May 6th, 2020.
Q. Have you seen this document before?
A. I have.
Q. What is the title of the document or of the investor alert?
A. It talks about -- it says, Frauds Targeting Main Street Investors: Investor Alert. And this one is specifically focused on potential frauds related to COVID-19.
Q. Is DECN listed?
A. Yes. I believe on Page 2, there are a number of securities that are listed. DECN appears about halfway down the page, roughly.
Q. Thank you.
MR. HOWELL: Your Honor, we'd move to admit DX 012 into evidence.
MR. FENTON: No objection.
THE COURT: Without objection, 12 is in.
(Whereupon, Defendant's Exhibit No. 012 was entered into evidence.)
BY MR. HOWELL:
Q. I want to talk about protocols after trading

suspensions.

A. Uh-huh.

Q. So what -- are there protocols in place that alert traders to the fact that, you know, trading with company stock has been suspended?

A. Yes. Like -- as I said earlier, OTC Markets is the listing market for these types of -- for DECN; I'll keep it specific -- are getting the feeds from the SEC of trading suspensions so that they can initiate the suspension, prevent trading on their platform in the stock while the suspension is in effect.

And then when the suspension is lifted, OTC Markets has another set of protocols where they will append two warnings to -- it changes the characteristic of DECN in the market. They put -- they append a warning that's caveat emptor, whose icon is a skull and crossbones. Pretty straightforward.

And there's another thing that says Expert Market, which means that they will no longer publish live quotations of that security. So you can ask your broker to trade it, but they're the ones who have to go find out the quotations for you.

THE COURT: And so I'm not an investor. Could I just go online now and buy penny stocks?

THE WITNESS: You could. You would have to go

through some processes. I think those processes are important for this case.

THE COURT: And so is that -- the skull and crossbones, would that be visible to the average purchaser?

THE WITNESS: If you go to otcmarkets.com and pull up -- which is, again, the primary listing venue for these securities -- if you pull up DECN, you could see the caveat emptor warning with the skull and crossbones.

If you go to TD Ameritrade or Charles Schwab or Fidelity -- pick your favorite online broker-dealer -- what you will see there is something a little bit different, which is if it's -- the processes and procedures at online broker-dealers are to generally allow electronic trading, like you just enter the order and it goes. But for all OTC market securities, firms have long had policies and procedures from a risk perspective to either flash up, This is a caveat emptor stock. It's speculative. You could lose all your money. Do you want to enter this trade?

Or in the case of once it actually does go into a trading suspension, you have to actually call in the order instead of just being able to enter it electronically. And the call center registered representative will read you a script that says: This is a speculative security. You could lose all your money. It's recently been suspended by the SEC. Are you sure you want to enter this trade?

THE COURT: And so just one way or the other, basically anybody who's going to try to buy this stock would be alerted to this?

THE WITNESS: Through these channels that I'm talking about, yes. Absolutely.

So I find it difficult to see how you could avoid knowing that there was danger ahead, which is the whole purpose of the caveat emptor warning.

THE COURT: And does that -- how long does that stay in place?

THE WITNESS: It is -- that remains on DECN's stock to this day. So it can be taken down if it's proven by the company that it was not warranted in some way. But in general, they stay there forever.

THE COURT: Okay. Thank you.

You may proceed.

BY MR. HOWELL:

Q. Did you collaborate on demonstratives to kind of help illustrate --

A. I did. I even tried to enter a trade in a caveat emptor stock on the Schwab platform.

MR. HOWELL: Your Honor, with the Court's permission, we have some slides that help demonstrate exactly what you were just questioning Mr. Reilly on with the skull and crossbones, if you would allow us to put those

up.

THE COURT: Okay.

BY MR. HOWELL:

Q. So this is -- is this the skull and crossbones that you were -- just referenced to?

A. It is. So if you pull up DECN's page on otcmarkets.com, you will see these warnings. Again, these go into place as soon as the stock is suspended.

Q. Even though our slide says July 20, that's -- you're not saying that's --

A. Yeah. Well, that's --

THE COURT REPORTER: I'm sorry. For the record, I didn't get a complete question.

BY MR. HOWELL:

Q. I said, even though the slide says July 20th, 2020, just because it says -- the slide says July 20, 2020, does not mean that's the first day that he...

A. Well, I like to use primary documents wherever I can. Using the internet archive known as the Wayback Machine, this is the oldest evidence I could find that it was there.

I know from my industry experience that as soon as the stock was suspended, OTC Markets, one, stopped trading, as you saw from the gap in one of the charts we reviewed earlier.

And, two, these warnings would be appended to the

stock from the resumption of trading forward. And again, this says July 20. It's the oldest fact-based document that I could find. If you look today online, you would see the same warnings.

MR. HOWELL: Can we pull up DX 010.

BY MR. HOWELL:

Q. So is this the document you were talking about where it had the July 20th -- this is the Wayback Machine --

A. Correct.

Q. -- that you found?

A. Correct.

Q. Do you recognize this document?

A. I do.

Q. And can you tell us -- I don't know if you'll -- if you can on the screen. But can you read the date that is on the document?

A. You can see -- it's all the way on the top. You can see the URL shows it was retrieved on July -- this is an archive that was done on July 20th, 2020.

Q. Thank you.

MR. HOWELL: Your Honor, we'd move to admit DX 010 into evidence.

MR. FENTON: No objection.

THE COURT: Without objection, 10 is in.

(Whereupon, Defendant's Exhibit No. 010 was

entered into evidence.)

MR. HOWELL: Can we turn to DX 042.

BY MR. HOWELL:

Q. What is this document?

A. This is the report I prepared in this case.

Q. When did you prepare this report?

A. I believe last March. Early March.

MR. HOWELL: Could you just kind of scroll through it so he can see the report briefly?

BY MR. HOWELL:

Q. Let me know if you've had a chance to review it, Mr. Reilly.

A. What's that?

Q. Let me know when you've had a chance to review the document.

A. Sure. This is one of the ones that's easier to do in a physical copy.

Yep. It's March 11, 2024, to clarify the record. That's the date of the report.

Q. This is the report you filed?

A. It is.

Q. Do you think differently about this report today?

A. No.

MR. HOWELL: Your Honor, we'd move to admit DX 042 into evidence.

MR. FENTON: No objection.

THE COURT: Without objection, 042 is in.

(Whereupon, Defendant's Exhibit No. 042 was entered into evidence.)

MR. HOWELL: Can we turn to DX -- the same exhibit, 042, Page 1, Paragraph 5.

BY MR. HOWELL:

Q. You referenced a Blue Sheet. What is a Blue Sheet?

A. So the regulators have subpoena power to require all broker-dealers to submit trading records to them. So -- and those are collectively known as Blue Sheet reports. They contain the information of -- for every broker-dealer in the United States that held this particular one, that held -- or customers held shares in DECN as of July 9th, 2020. So you can see the breakdown of which customers held it, which firms.

And I did a little bit of an analysis off of this data once I received it from counsel.

Q. Did you review the Blue Sheet?

A. I did.

Q. What was the date?

A. July 9, 2020, as I said earlier.

MR. HOWELL: Can we ask Mr. Panikar to pull that up.

BY MR. HOWELL:

Q. What did you observe on this Blue Sheet?

A. I summarized it in my report, which is -- this is a section -- or part of this demonstrative it draws from.

But not surprisingly to me, that over 86 percent, almost 87 percent of the shares on that date were held at the four largest online broker-dealers in the United States. Once again, TD Ameritrade was kind of the top of that pile. When I was chief compliance officer, we were typically 25 to 30 percent of trading in OTC pink sheet securities.

Q. And based on your experience, is this of any significance?

A. Yeah. It's very much along the lines of what I was talking about before, where the process for anyone who wants to trade in DECN, they're going to primarily do it through an online broker-dealer. Right?

And this is evidence of that. Those online broker-dealers have very specific risk-based processes because of the speculative and dangerous nature of trading in OTC securities that they will put up those warnings that I discussed.

Either -- if you're buying one that's not caveat emptor, you're going to get a warning screen that says: This is a speculative security. You may lose all your money. Are you sure you want to enter this order? You have

to click "yes" again before entering the order.

Or if it's caveat emptor, an expert market, as DECN was coming out of its trading suspension, if you want to enter a trade in the security, you have to call us. And we will -- and then -- I designed a process at TD Ameritrade where those reps had a script to read that said: It's recently been suspended. There's serious questions about the security. Are you sure you want to invest in this?

Q. You mentioned you at TD Ameritrade -- you helped design --

A. Yes. As the chief compliance officer of a firm that's doing the largest portion of OTC security trading in the United States, it was prudent for us to design policies, processes and procedures to make sure that customers that were -- wanted to do this kind of speculative trading were at least adequately warned about the speculative and dangerous nature of what they were about to enter into. We allow it, because it's their money, their choices.

But we wanted to make sure -- assure ourselves that they at least were armed with information sufficient to put them on notice that these were speculative and dangerous investments that they could lose all their money in.

MR. HOWELL: Mr. Panikar, if you'd turn to the next slide.

BY MR. HOWELL:

Q. Does this illustrate what you were just talking about as far as the controls that are in place?

A. Yes. I picked an OTC market stock that is currently trading that's expert market and caveat emptor and tried to enter an order from my personal account. As you can see, I was not willing to waste any money on it. But it pops up, the message that I expected to see. But I wanted to have evidence of it for the Court.

Q. Thank you.

Were you asked to render an opinion as to loss amount in this case?

A. I was.

Q. Are you familiar with the United States Sentencing Guidelines suggestion as to a formula to calculate that loss?

A. I reviewed the note, yes.

Q. Can you explain the method?

A. Sure. It basically calls on an average price of the security in the fraud period compared with an average price of a 90-day period after the fraud is disclosed.

MR. HOWELL: We have a demonstrative that will help his further testimony as he discusses the dates.

BY MR. HOWELL:

Q. What did you consider to be the period of fraud?

A. So from my perspective, you know -- well, counsel had said, you know -- we talked about the fraud period ending July 10th.

I have a very distinct view about this case, to be clear. It's clear that the first press release was from March 3rd, 2020, at the beginning of the onset of the COVID pandemic. It's also very clear that April 23rd was the SEC trading suspension.

And from that point forward, from May 8th forward, when trading resumed, you know, as I said, the caveat emptor warning was appended to the stock.

So in my professional opinion, it would be, you know, impossible for an investor to miss those warnings when entering into transactions from that point forward.

So I did my calculations based off of those key dates.

Q. Did you reach an opinion regarding a date that the fraud relating to the DECN press releases was disclosed to the market?

A. Yeah. So absolutely. So the SEC suspension of trading order is very explicit. They say there's a potential for fraud with a security, and we're suspending it as a consequence.

Q. What was the date of the SEC --

A. Oh, that was April 23rd, 2020.

Q. Okay.
A. If I might add, SEC trading suspensions are not common events. In 2020, there were 176 trading suspensions issued by the SEC. In 2023, there were only two, if my records are correct.

So they are notable events in the market.

Q. Once again, kind of going back to when you were the chief compliance officer, what was your understanding in that role of why the SEC would suspend trading of a company?
A. Again, they have a very strong and important role to protect market integrity. Right? I very much respect the mission of -- basically, customer protection and market integrity are their two main goals and regulatory purposes.

So whenever they detect potential fraud on the market, aberrant trading that could be problematic for investors, they have an absolute duty to suspend trading. And they did so in this case.
Q. In addition to April 23rd, 2020, could there be other events and dates that indicate that the fraud was disclosed to the market?
A. Sure. Again, I feel very strongly that the SEC trading suspension was the date in my mind in terms of when issues with DECN were disclosed to the market.

But there was another release on May 20th by the SEC, the Perkins affidavit, as it's called here in the -- in

this demonstrative. That was from my perspective another very clear date.

MR. HOWELL: Can we pull up DX 004.

BY MR. HOWELL:

Q. Is this the Perkins declaration you just mentioned?

A. It is.

Q. Have you seen this document before?

A. I have.

Q. And is this a fair and accurate copy of the document?

A. It is.

MR. HOWELL: Your Honor, we'd move to admit DX 004 into evidence.

MR. FENTON: No objection.

THE COURT: Without objection, 4 is in.

(Whereupon, Defendant's Exhibit No. 004 was entered into evidence.)

THE COURT: Did you say that you think the fraud ended on April 23rd?

THE WITNESS: I think it was disclosed to the market, the potential for fraud and -- with the trading suspension on April 23rd.

It's clear from my review of the record that press releases continued for some time after that. But again, the importance in my world of dealing with traders who are trading in these things is that caveat emptor designation

very clearly being there and how that causes broker-dealers to change their policies and procedures and processes in terms of affirmatively warning anyone from that period afterwards that there was an issue with this security.

THE COURT: But yet you agree that wasn't the completion of the fraud, that it continued for months afterwards. Right?

THE WITNESS: I saw press releases that went all into July of 2020. So, you know, I wasn't here for that part of it. But in terms of just as -- looking at it, I could easily see how the Court would extend the period to that.

I look at it more from a practical industry perspective of, when did I think any potential investor would be warned adequately about the dangers of the security? And that's very clearly the April 23rd period and forward.

THE COURT: So I guess I'm wondering how you explain what happened since then.

THE WITNESS: Oh, the continued trading?

THE COURT: Yes.

THE WITNESS: Well, investors and speculators are irrational, would be my shorthand for you. You know, I'm sure you follow the press well enough to have seen the GameStop meme stock craze.

THE COURT: I have a case involving that.

THE WITNESS: Excellent. I've had several myself.

The trading in cryptocurrencies. You could pick a lot of trading where people seem to do irrational things.

And again, my lived experience in that period of time is that people were looking for potential opportunities to profit off of the onset of the COVID pandemic. And traders don't necessarily all do, you know, the deep and thoughtful kind of analysis that Professor Mitts might do. My experience with traders and speculators in this section of the market is they might look at a stock chart and nothing else and make a decision.

THE COURT: You may continue, Mr. Howell.

BY MR. HOWELL:

Q. I want to clarify a piece of your testimony you just talked about.

You said in addition to May 20th, 2020, July 20th, 2020, could also have been another date the fraud was disclosed to the market. Am I correct?

A. Correct.

Q. Can you explain that date?

A. That was the date when -- that was the date when we -- there was absolutely -- with the Wayback Machine, we discovered that there was absolutely without a doubt -- the caveat emptor was appended to the stock.

But again, that -- I know from my professional experience and how OTC Markets worked and how broker-dealers worked that that would have been there from the resumption of trading on May 8th going forward. I like hard evidence and fact-based documents. So that's the oldest one I could find in that regard.

MR. HOWELL: If we could put the demonstrative back up so we have all the dates in front of us.

Thank you.

BY MR. HOWELL:

Q. So using the disclosure date of April 23rd, 2020, and using the model that's in the sentencing guidelines, did you determine a loss amount?

A. I did the calculations. But they came out with actually a gain as opposed to a loss.

Q. How did you come up with your calculated amount?

A. Sure. I mean, the note is very straightforward. It's the average price of the period before -- so again, I used the April 23rd date. So March 3rd, 2020, the first press release date, to April 23rd, the SEC's trading suspension. And then I did the 90 days of trading from the resumption of trading onwards.

Q. Same thing --

THE COURT: Sorry. This demonstrative says the fraud period ends July 10th. Right?

THE WITNESS: Yes.

THE COURT: So I guess I'm confused about -- I mean, you're the expert. When do you think the fraud period ends?

THE WITNESS: Well, July 10 is my understanding of the record, is the last press release. Right?

So in terms of again -- I look at this from a -- when was the potential for fraud disclosed to the market very clearly? And that's the April 23rd date.

THE COURT: And you're --

THE WITNESS: So they're a little bit at odds with each other. I understand that. And that's why you're here.

THE COURT: You may proceed.

BY MR. HOWELL:

Q. You mentioned May 20th, 2020, as being another date of disclosure. If the fraud was disclosed on May 20th, 2020, does that change your opinion of the loss amount?

A. It changes the math a little bit, but it still winds up being -- when you do the math required by the note, it winds up being -- also not being a loss. The average price in the subsequent 90-day period is higher than the initial period.

Q. If the fraud was disclosed on July 20th, 2020, does that change your analysis with the loss amount?

A. Again, it changes the math a little bit. But it doesn't change the fact that the subsequent period was higher. And

therefore, under the -- how the note is calculated that demands its calculation, it would not be a loss.

MR. HOWELL: Could I have your Court's indulgence?

THE COURT: Yes.

MR. HOWELL: Thank you, your Honor.

BY MR. HOWELL:

Q. I have a couple more questions.

This is going to deal with outstanding shares, conversions, preferred stock conversions.

A. Uh-huh.

Q. So saying there are newly issued common shares doesn't tell you whether the shares were issued as a result of a preferred shareholder converting its existing preferred shares into common stock that is issued by the company. Is that correct?

A. You're going to have to restate that question. Sorry.

Q. Let's break it down.

So just saying that there are newly issued common stock shares, it doesn't tell you whether the shares were issued as a result of preferred shareholders converting existing preferred shares into common stock that was then issued by the company. Is that correct?

A. Yeah. If you're looking at outstanding shares at a period of time, you don't know whether they were initially issued in an initial public offering or converted in a

subsequent conversion from a preferred stock. You just know how many shares are outstanding at any point in time what you're looking at.

Q. Did you -- you talked about the information you reviewed. Did you review DECN's public filings?

A. I did.

Q. Did you ever review any of DECN's quarterly public reports which contain stock and notes tables that would have told you that the new shares of common stock were actually the result of preferred shareholders converting existing preferred shares into new shares of common stock?

A. Quarterly reports and annual reports typically will recap those kind of conversions. Yes.

One other -- based on your Honor's question, on Page 2 of my report, I did calculate the average price for the fraud period as April -- excuse me -- March 3rd, 2020, to July 10th, 2020, when doing my calculations. And then the subsequent periods were as we discussed earlier.

MR. HOWELL: I think it's in DX 042, if we could have that, please.

THE WITNESS: Page 2.

That table there. So the average price for the period of the fraud period, April 3rd, 2020, to July 10th, 2020, was 17 cents a share.

And then for the 90-day calculations, I used the

three different dates that we discussed: post-trading suspension from May 8th, post-Perkins affidavit from May 20th, and post -- the evidence I could give you for caveat emptor from July 20th. So you have all those numbers there available to you.

MR. HOWELL: Your indulgence.

BY MR. HOWELL:

Q. Regarding the loss amounts, can you just state your conclusions again?

A. Sure. That, you know, the note says: Take the two periods. Calculate the difference and multiply by outstanding shares.

As you can see from my report, I did not multiply by outstanding shares to show a theoretical profit because -- but in all cases we could -- I could have done so.

Q. So what is your conclusion as to any loss for the disclosure of April 23rd, 2020?

A. You're going to have to repeat that.

Q. Will you state your conclusion regarding your -- the opinion of if there was a loss amount if the fraud was disclosed to the market on April 23rd, 2020?

A. There was no loss to the market.

Q. Can you state your opinion if the loss amount -- or the fraud was disclosed to the market May 20th, 2020?

A. As you can see from the math, there is no loss using those dates.

The same answer for July 20th, 2020.

MR. HOWELL: I have no further questions, your Honor.

THE COURT: Thanks.

Why don't we take a quick lunch break. I think we'll recess until 2:00, but we've got a short status conference. I think we'll interrupt this and do that and then resume this and we'll push back the sentencing. And so if you can plan to be back by about 2:05 or so.

Thank you.

(Thereupon, a luncheon recess was taken, after which the following proceedings were had:)

THE COURTROOM DEPUTY: Your Honor, we're back on the record in Criminal Case 20-278, the United States of America versus Keith Berman.

THE COURT: We'll have cross-examination.

Mr. Reilly, I'll remind you you're still under oath.

THE WITNESS: Yes, sir.

THE COURT: Mr. Fenton.

MR. FENTON: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. FENTON:

Q. Good afternoon, Mr. Reilly.

A. Good afternoon.

Q. You agree the fraud period in this case occurred from March 3rd, 2020, to July 10, 2020. Correct?

A. I do.

Q. Okay. Now, you applied the modified rescissory method. Is that right?

A. Correct.

Q. It's the same method that Professor Mitts applied?

A. That's correct.

Q. The major disagreement between you two is about the date on -- the date on which the truth was revealed to the market. Right? About the Defendant's fraud?

A. I would call it adequate disclosure to the market as opposed to truth. But yes.

Q. Okay. But it's the date that the truth was revealed. Right?

A. The date that the potential for fraud was disclosed to the market. Yes.

Q. Now, "the market" is another way of saying the shareholders?

A. No, it's not. It's -- any potential investor would be able to see that.

Q. And, Mr. Reilly, the market includes shareholders?

A. It does.
Q. Okay. And shareholders are the victims of the crime to which the Defendant pleaded guilty here. Right?
A. Not necessarily.
Q. Mr. Reilly, you understand the Defendant pleaded guilty to securities fraud. Correct?
A. I do.
Q. And the shareholders who were defrauded by the Defendant are the victims of that crime. Right?
A. If they lost money.
Q. Okay.
A. There would be investors in this case who made money.
Q. Mr. Reilly, you understand that loss is not an element of the crime of securities fraud. Correct?
A. I'm sorry. In my area of practice, I just try to be specific about these kind of matters.
Q. Right. I'm being specific about this particular matter.
A. Okay.
Q. Securities fraud, Section 10b: Loss is not an element of that crime. Right?
A. Correct.
Q. Okay. So the shareholders are the victims of the crime to which the Defendant pleaded guilty in this case. Right?
A. Correct.
Q. Okay. So the question is: When did the victims learn

the truth about the Defendant's fraud? Right?

A. I don't know that -- that would vary by individual.

Q. Sir, the question you're trying to answer is: When did the victims learn the truth about the Defendant's fraud? Right?

A. Well --

MR. HOWELL: Objection, your Honor.

THE COURT: On what basis?

MR. HOWELL: Speculation.

THE COURT: Overruled.

BY MR. FENTON:

Q. It's a yes-or-no question, Mr. Reilly.

A. From my professional experience, it is not a yes-or-no question. The reason being is that you don't know when any particular holder of the security is going to be looking at the news or -- and what import they take from what the different type of disclosures that are made.

So you keep on using the word "truth." I have to use a more -- from my perspective, when was issues with the security adequately disclosed to the market?

I don't know -- it's impossible to know without interviewing each individual holder of the security when they knew the truth.

Q. Is it your testimony that it's impossible to know when the truth was revealed to the market?

A. Yes. I mean, that -- it's just -- you know, the idea that when the final -- when the indictment was -- for Mr. Berman was done later in the year, that's a date.

But the SEC trading suspension is a very significant disclosure to the market and when you're trading in a security that's traded on the OTC Markets.

Q. Let's talk about that date.

So the first date that you put forward -- you put forward three dates -- right? -- when you believe the truth was revealed?

A. When adequate disclosure was made to the market. I cannot use your word "truth."

Q. Not adequate disclosure by the Defendant, though. Right?

A. I haven't seen anything about -- in terms of the Defendant. But clearly, the SEC initiated its trading suspension on April 23rd.

Q. Okay. So that's the day that the SEC suspended trading of DECN stock. Right?

A. Correct.

Q. And the SEC suspended trading based on questions regarding the accuracy and the adequacy of information in the marketplace?

A. Correct.

Q. The questions were specifically about certain DECN press

releases issued in March and April 2020?
A. That sounds correct. Yes.
Q. Now, on March 7, 2020, the Defendant filed a petition to terminate the trading suspension. Correct?
A. I don't remember that.
Q. Earlier, you testified that you reviewed the SEC's website with respect to -- for information relating to the DECN trading suspension. Is that correct?
A. That's correct.
Q. And so if they had filed a petition to terminate that trading suspension, presumably you would have seen that. Right?
A. Yeah. I do recall seeing a petition. First of all, I know it wasn't granted. And I don't recall the date, to be more precise.
Q. It's a yes-or-no question. Yes, they filed a petition to terminate the trading suspension?
A. Yes.
MR. FENTON: Ms. Boyer, can you please pull up Government's Exhibit 3-O.
BY MR. FENTON:
Q. Is this the petition the Defendant filed?
A. It appears that it could be. Could you scroll through the entire 15 pages just so I can refresh myself?
Q. Yes.

A. You can go pretty quick. You can keep going. I think -- I'm looking for the date at the end, quite honestly. Probably on the last page. Filed November 22nd, 2021.

MR. REILLY: Ms. Boyer, can you go back two pages to the date of the filing?

THE WITNESS: Okay. Filed and certified. That -- okay. What I'm looking for is when this was released to the public, if you can find that easily.

BY MR. FENTON:

Q. So it says here, Certificate of Service: I hereby certify that a true and correct copy of the foregoing was filed on May 7, 2020, by electronic delivery at apfilings@sec.gov.

A. Uh-huh.

THE COURT REPORTER: Is that yes?

THE WITNESS: Yes.

BY MR. FENTON:

Q. So this is the date on which the Defendant filed a petition to terminate the trading suspension. Correct?

A. It is. I don't know if that's when it was publicly available, however.

Q. My question is: This is the date on which it was filed, sir?

A. Well --

Q. The answer is...?
A. Yes.
MR. FENTON: Let's go to --
MR. HOWELL: Objection, your Honor. Relevance.
THE COURT: Overruled.
MR. FENTON: Let's go to, Ms. Boyer, Page 12, please.
BY MR. FENTON:
Q. This is Petitioner Keith M. Berman's sworn statement. Is that right?
A. That's what it says. Yes.
Q. It says: I, Keith M. Berman, chief executive officer of Decision Diagnostics Corp., being duly sworn, state that I have read the foregoing petition for termination of suspension of trading in the securities of Decision Diagnostics Corp. and have personal knowledge of the facts contained therein and that such facts are true and correct to the best of my knowledge.
Is that an accurate reading?
A. It is.
Q. And the Defendant, Mr. Berman, signed it here. Correct?
A. It appears he signed it on May 6th, 2020.
Q. It's the Defendant's sworn statement?
A. Correct.
Q. This is a publicly available document, right, on the SEC

website?
A. Eventually. I don't think this was publicly available on May --
Q. Sir, it's a yes-or-no question.
A. It was --
Q. Was this a publicly available document?
A. I don't believe this was publicly available on May 6th, 2020, based on --
Q. My question, sir, is: Was this a publicly available document?
A. The earliest I saw in my review of the record was that it was not available until 2021, when the entire file was published.
Q. Mr. Reilly, you reviewed the SEC's website for documents relating to the DECN trading suspension. Correct?
A. Correct.
Q. As a member of the public, did you find this document?
A. When it was contained in a filing that was published in 2021, yes.
Q. And you also reviewed otcmarkets.com. Correct?
A. Correct.
Q. And are you aware that the Defendant published this on OTC Markets in May 2020?
A. I did not see any record of that.
Q. But you looked at the website?

A. I did.
Q. Okay. Let's look at the specific -- some of the specific paragraphs. Let's look at Page 9, Paragraph 31.
It says here: The suspension order is not necessary and not in the public interest because, A, DECN has not acted in a fraudulent, deceitful or manipulative manner.
Do you see that, sir?
A. I do.
Q. That is the Defendant denying that he engaged in fraud. Correct?
A. It's what it says, yes.
Q. B: As previously stated, each DECN press release was based upon facts that were true at the time the statements were made.
That's an accurate reading. Right?
A. Correct.
Q. Okay. And so the Defendant again is denying that the press releases that he issued were false or misleading. Correct?
A. Correct.
Q. And in this document, the Defendant specifically addresses each and every press release from March 2020. Right?
A. I will take that assertion from you.

Q. Well, let's take a look. There's no need to take it from me.

MR. HOWELL: Objection, your Honor. Beyond the scope of direct.

THE COURT: Overruled.

MR. HOWELL: And I'd renew my relevance objection.

THE COURT: Understood. I'm overruling.

You may continue, Mr. Fenton.

MR. FENTON: Can we go to Paragraph 16, please.

BY MR. FENTON:

Q. It says here on March 3rd, 2020, DECN issued a press release, a March 3rd press release, prominently quoting Mr. Berman stating, quote, "I want to straight up -- I want to say straight up we have developed a coronavirus screening method, not a cure or a vaccine for this virus.

"This press release did not contain any false or misleading statements or omit to state any facts necessary in order to make the statements made not misleading."

Is that an accurate reading?

A. It is.

Q. This is another example of where the Defendant is denying that he engaged in any sort of fraud. Correct?

A. Correct.

Q. And it's another example of where he said he in fact developed a COVID-19 blood test. Right?

A. I don't see a blood test in here, but it's a test.
Q. Right.
MR. FENTON: Let's look at Paragraph 17, please.
BY MR. FENTON:
Q. It says here: On March 4, 2020, DECN issued a press release. In this press release, Mr. Berman stated: I cannot say often enough we are developing a coronavirus screening method. This press release did not contain any false or misleading statements or omit to state any facts necessary in order to make the statements made not misleading.
Is that right?
A. That's an accurate reading. Yes.
Q. This is another denial, right, of any wrongdoing on Mr. Berman's part?
A. Correct.
Q. Paragraph 18 here talks about the March 11, 2020, press release. Right?
A. It does.
Q. There's another denial of any wrongdoing. Correct?
A. There is.
Q. Paragraph 19 talks about the March 16, 2020, press release; is that right?
A. It does.
Q. It says this press release -- there's another denial

here: This press did not contain any false or misleading statements. Correct?

A. It does.

Q. The same with Paragraph 20?

THE COURT: I get it, Mr. Fenton.

BY MR. FENTON:

Q. So there are eight such instances here, right? All of the press releases in March 2020?

A. Correct.

Q. That gave rise to the trading suspension?

A. From what I've read in the SEC order, yes.

Q. And Mr. Berman went and publicly said there are no false or misleading statements in any of those press releases.

A. I don't know that this was a public document. This is a document filed with the SEC in trying to get the trading suspension reversed.

Q. Right. And posted by Mr. Berman on otcmarkets.com, which you reviewed, sir. Correct?

A. I didn't see evidence of those postings.

Q. Let's move on to the second date that you chose, May 20th, 2020.

A. Uh-huh.

Q. That's the date when the SEC filed a brief showing the information on which the trading suspension was based. Right?

A. Correct.
Q. That was prepared by SEC staff member Carl Perkins. Is that right?
A. I believe it's Carlton Perkins. Yes.
Q. I think it's Carlisle.
A. Carlisle. Sorry. I know there was --
Q. I think they call him Carl.
A. Thank you.
Q. Now, in response to the Defendant's petition -- this was filed in response to the Defendant's petition to terminate the trading suspension. Right?
A. I'm not certain about that.
Q. Well, let's look at Defense Exhibit 2 --
A. Cool.
Q. -- or Defense Exhibit 3. I'm sorry. This is an order requesting additional written submissions. Correct?
A. It is. That's what it says.
Q. And it says at the bottom here: On May 7th, 2020, DECN filed a petition to terminate the trading suspension?
A. I see that.
Q. Let's turn to the next page.

The SEC ordered a briefing schedule. Right?

A. Correct.
Q. And Mr. Berman chose to publicly dispute the nature of the allegations underlying the trading suspension. Correct?

A. I don't recall that, but I accept the assertion.
Q. Well, it's right here. He filed a petition on May 7th and he's appealing the trading suspension, is he not?
A. Oh, he absolutely did appeal the trading suspension. Yes.
Q. Right. Okay.

So the May 20th, 2020, submission is in response to Mr. Berman's appeal, right, of the trading suspension?
A. It's part of the SEC process for that. Yes.
Q. Right. Okay.

So let's look at -- and the Defendant had an opportunity to respond to that May 20, 2020, filing. Correct?
A. As did others. Yes.
Q. And, in fact, he did. Right?
A. (No response.)
Q. I'm going to --

THE COURT REPORTER: I'm sorry. I didn't get a response.

THE WITNESS: "And he did."

THE COURT REPORTER: I mean the answer.

THE WITNESS: Oh, "yes." Sorry.

BY MR. FENTON:
Q. I'm going to show you what's been marked Government's Exhibit 100, please. This is the Petitioner's opening brief

in support of the petition to terminate the trading suspension. Correct?

A. That's what it states. Yes.

Q. Let's turn to Page 6.

MR. FENTON: We have hard copies of this exhibit that we can hand out or that I can put on the ELMO.

THE COURT: Okay.

MR. COLLINS: Judge, I just want to make a standing objection to this line of questioning. It's irrelevant and beyond the scope. It's frankly a waste of time.

THE COURT: I don't see that. I thought the main question here is: What is the appropriate time of the -- when was the fraud exposed? And I think this does go directly to that.

So I'm overruling the objection.

BY MR. FENTON:

Q. Can you see the date here, Mr. Reilly?

A. I can. Do you have a physical copy? This is -- I'd like to flip through it.

Q. (Tenders document to the witness.)

A. Thank you.

Q. My question, Mr. Reilly, was: What is the date of this filing?

A. The date this was filed? It appears to be June 17th,

2020.

Q. And that's after the May 20th, 2020, submission by the SEC?

A. Correct.

Q. In fact, this is in response to the May 20, 2020, submission. Correct?

A. Correct.

Q. Let's turn to Page 2. Do you see here at the bottom it says: Factors upholding a trading suspension are not present? Is that accurate?

A. It is.

Q. And at the bottom it says: From the time DECN publicly announced that its existing glucose technology used by diabetics had the potential to be utilized to test for the COVID-19 virus, the date of the trading suspension, the company issued no less than 12 detailed releases concerning its proposed COVID-19 GenViro! test kits and the emergency use applications being sought from the Food and Drug Administration.

No corrective disclosures were required or made after the trading suspension, and there has been no showing of any demonstrable falsity.

Do you see that, sir?

A. I do.

Q. This is not an admission that the Defendant in fact lied

about inventing a COVID-19 test. Correct?
A. Correct.
Q. This is in fact another denial?
A. Correct.
Q. There's an affidavit attached here from Mr. Berman as well. Correct?
A. I believe I saw that in here.
Q. It's the affidavit of Keith M. Berman in support of the petition to terminate the trading suspension.
Do you see that, sir?
A. I do.
Q. Let's look at Paragraph 2 of Mr. Berman's sworn affidavit.
Can you just read aloud for the Court what Mr. Berman writes here?
THE COURT: I don't need you to read it.
BY MR. FENTON:
Q. Mr. Reilly, this is another denial, right, of the allegation that Mr. Berman did anything wrong. Right?
A. Yes.
Q. Okay. And in fact, here, he blames the SEC for engaging in a twisted and misleading investigation, right, and colluding with cybercriminals. Right?
A. I see those words. Yes.
Q. Let's move on.

Now, you're aware that the Defendant pleaded guilty to obstructing the SEC's investigation of his fraudulent scheme. Correct?

A. I'm actually not cognizant of his plea agreement. I haven't reviewed that.

Q. Right. So my question was: Are you aware that the Defendant pleaded guilty to obstructing the SEC's investigation into his fraudulent scheme?

A. No.

Q. Is that a fact that you would want to know when opining on whether or not the truth was revealed to the market and when?

A. No. As I stated very clearly, I hope, in my testimony, the appending of the caveat emptor designation when trading resumed on May 8th, 2020, constitutes adequate disclosure to the market in my professional opinion.

Q. Right. And my question is this: If the Government was trying to investigate whether or not Mr. Berman had committed a crime, would you want to know whether or not he obstructed the investigation of that crime?

A. When choosing to invest in or not invest in DECN, that would probably, like, be not particularly material to me.

Q. It wouldn't be material to you?

A. If a trading suspension, which is not a typical step that the SEC takes, in a penny stock is issued and the

caveat emptor warning is appended to that stock for all the world to see, I view that as adequate disclosure that this is a dangerous instrument to be involved in.

Q. Right. Mr. Reilly, my question is: Is that relevant to you, that he continued to engage in fraud?

A. For my purposes, no.

Q. It doesn't matter to you that after July 2020 the Defendant --

MR. HOWELL: Objection. Asked and answered.

BY MR. FENTON:

Q. -- the Defendant continued to engage in fraud?

THE COURT: Sustained.

BY MR. FENTON:

Q. Are you aware that Mr. Berman convinced some of his victims to in fact disbelieve the SEC?

A. I am not.

Q. And that he convinced some of his victims to in fact attack the SEC?

A. I am not.

Q. I'd like to show you Government's Exhibit 102. This is the Defendant's statement in support of the guilty plea.

Do you see that, sir?

A. I do.

MR. FENTON: And let's go to Page 2. Move on to Page 3, please. I'm sorry, Ms. Boyer. Move on to Page 4.

BY MR. FENTON:

Q. It says here: Between May and June 2020, Mr. Berman, using an alias, sent private messages to an investor on the website Investors Hangout to influence the investor to draft an independent shareholder letter accusing the SEC of misconduct for its actions against DECN and Mr. Berman.

Is that -- that fact is relevant to your analysis. Right?

A. It's an individual. Again, I look at this as -- we're talking about fraud on the market.

Q. Right.

A. Right? So disclosure to the market is relevant.

Could there be individuals that are being coerced or otherwise influenced? Of course there could be.

But my mandate is to look at what were the policies, processes and procedures after a trade suspension in an OTC stock, and do those constitute adequate notice to the market? Because remember, the sentencing guideline requires you to calculate the price against all outstanding shares.

You could certainly calculate the individual damages for this person included in your sentencing. The Court could include that. But that's not dispositive of the market as a whole.

Q. Mr. Reilly, would it matter if the Defendant convinced

dozens of victims to disbelieve the SEC and attack them?
A. How many investors? How many shares did they hold? You could calculate those specifically.
Q. Dozens of investors.
A. Okay. The Government --
Q. Would that be relevant?
A. -- could have easily calculated those specific damages and included them in any charging documents it so chose, that specific information.

I could calculate the damage to the market if the SEC gave me access to all the Blue Sheets for all the days in the period involved to a great degree of specificity.
Q. So, Mr. Reilly, is your answer no?
A. My answer was my answer.
Q. Mr. Reilly, is it relevant to your analysis if the Defendant convinced dozens of victims to disbelieve the SEC?
A. No.
Q. It's not relevant?
A. No.
Q. Is it relevant if the Defendant publicly posted a shareholder letter attacking the SEC?
A. No.

MR. HOWELL: Objection. Asked and answered.

THE COURT: I'm actually not sure that that was. Overruled.

THE WITNESS: Could you restate -- repeat the question? Sorry.

BY MR. FENTON:

Q. Sure.

Would it be relevant to your analysis that the Defendant publicly published the SEC shareholder letter, the fake SEC shareholder letter, that he describes here?

A. That he published it? No. I don't know how many people relied on that. Again, I'm doing a market-wide analysis here against the processes that I know as a professional exist for entering transactions in this type of security with this kind of warning attached to it.

Q. What if it was published in otcmarkets.com?

A. It doesn't change my answer.

Q. Okay. Let's look at Government's Exhibit 3-M. Are you familiar with this document, sir?

A. I don't remember seeing -- not particularly. I may have seen it. But...

Q. So no?

A. No. I don't recall it. I may have seen it in my review.

Q. At the bottom it says: Decision Diagnostics Corp., shareholder letter, dated June 2nd, 2020.

Do you see that?

A. I do.

Q. This is a letter to Jay Clayton, the SEC chairman.

Do you see that?

A. I do.

Q. And do you see it says at the top: We represent a number of concerned shareholders of Decision Diagnostics Corp. and are writing today in response to the following items. And it lists three different things. Right?

A. I see that. Yes.

Q. The April 23rd, 2020, trading suspension. Right?

A. Correct.

Q. The actions associated with the potential theft of company property and its use against Decision Diagnostics in early 2020, and then the administrative proceeding filed before the Commission on the trading suspension dated May 20, 2020.

A. I see all that. Yes.

Q. This directly relates to the two events that you claim provided adequate notice. Right?

A. Well, again, they list the -- two of the -- those events. Yes.

Q. Well, both of them.

A. Yes.

Q. There's three. So this addresses two of the three?

A. Correct.

Q. Okay. And let's look at what they say in the

shareholder letter about this: In the section below, we outline what we believe to be numerous inconsistencies between the two documents filed by the SEC that was dated April 23rd and May 20, 2020, as well as many other issues with the investigators' purported findings and how they used these findings to institute enforcement actions against the company.

A. I see that.

Q. Right?

These are denials, right, that the SEC got it right?

A. It questions them. Yes.

Q. This is an attack on the SEC. Right?

A. If you want to characterize it that way, sure.

Q. Well, I'm asking you.

A. It's questioning their actions. Absolutely.

Q. Okay. And this is the letter to which Mr. Berman pleaded guilty for using to obstruct the SEC investigation. Right?

A. I would have to accept that assertion. I don't know what -- on what basis he pled to that charge.

Q. But you didn't even know that when you did your analysis?

A. Again, as a practitioner, when the caveat emptor designation is appended to a stock that's been suspended by

the SEC, I view that as adequate -- more than adequate notice to the market that anyone who chooses to trade in that security does so at great danger.

Q. I understand, sir.

But what I'm asking you, sir, is: When you did your analysis, you didn't know that Mr. Berman had pleaded guilty to obstructing the SEC investigation?

A. I knew he had taken a plea deal.

Q. But you didn't know that he had pled guilty to obstructing the SEC investigation?

A. Well, he wasn't particularly effective in obstructing it, was he? But yes.

Q. Sir, it's a yes-or-no question. Did you know this?

A. I see this. I may have read this in my review. Again, not relevant for my analysis.

Q. And you didn't read the shareholder letter even though it was on OTC Markets. Right?

A. I read this shareholder letter at some point in my review.

Q. And you didn't read the petition appealing the trading suspension?

A. Excuse me. Could you repeat that?

Q. You did not read the petition appealing the trading suspension?

A. I skimmed through it when I was doing my review.

Q. And you didn't read the opening brief challenging the trade suspension?
A. I reviewed that. Yes, I did. Again, as a practitioner, those points are not relevant to how the potential for fraud and danger and risk are disclosed to the market. That is as I described in my previous testimony.
Q. And that's because it all comes down to the skull and bones, the caveat emptor. Right? The skull and bones symbol? That's it for you?
A. I would say that a reasonable investor, faced with the kind of warnings you'd get at TD Ameritrade or Schwab or Fidelity or E*TRADE, when you are given the absolute inability to trade online which you're typically used to, and have to call in and then you're read a script saying: This has been suspended by the SEC; there's a lot of potential risk in trading this security; do you still want to enter this trade? That is an adequate notice.
Q. So let's talk about the caveat emptor symbol.

So the third day that you choose -- that you claim when the truth was revealed or there was this adequate disclosure was July 20th, 2020. Right?
A. That was the earliest day I could find in terms of absolutely closest to the trading suspension when it was captured by the internet or kind of -- that does not mean in my professional experience -- that was -- that that was when

it was disclosed. I know it was disclosed on May 8th. But I wanted evidentiary proof.

Q. And so, Mr. Reilly, my question is: The third date that you claim that the truth was revealed was July 20th, 2020. Yes?

A. That's the third disclosure date that I chose. Yes.

Q. That's based on the Wayback Machine?

A. Correct.

Q. That's the earliest date when you found that OTC Markets had applied the caveat emptor and skull and bones?

A. That I could prove it empirically, yes.

Q. And that does not mean that July 20 is the actual date, right, that --

A. Correct.

Q. -- they put that up?

A. Correct.

Q. That's just the first date that you found it?

A. Correct.

Q. Let's look at -- I believe it was Defense Exhibit 10. Let's look at that caveat emptor symbol.

So at the bottom here, it says: The caveat emptor designation may be assigned when OTC Markets becomes aware of one or more of the following. Right?

A. Uh-huh.

THE COURT REPORTER: Is that yes?

THE WITNESS: Yes.

BY MR. FENTON:

Q. And there's a list that follows. Correct?

A. There is -- it follows under the next page.

Q. Let's look on to the next page. So there's one bullet. There's four more here. The third bullet is suspension/halt. It says: A regulatory authority or an exchange has halted or suspended trading for public interest concerns, i.e. not a news or earnings halt. Correct?

A. Correct.

Q. Okay. So if the SEC institutes a trading suspension, this automatically gets put up under OTC Markets for that particular stock, the stock that got suspend?

A. Correct.

Q. And if that were the case, this information would already be known to the market by then. Right? Because it would have been -- the SEC would have put out notice. They put out their notice on April 23rd. Right? So the market knows about the trading suspension on April 23rd?

A. Correct.

Q. This information is merely confirmatory. It's just saying the same thing that the SEC has already said?

A. In essence, yes.

Q. Nothing in this document says that the caveat emptor symbol was applied to DECN for any other reason than the

fact of the trading suspension. Correct?
A. Correct.
Q. Okay. For example, it does not say that the CEO of DECN was lying to his investors?
A. It doesn't have any particular detail like that. No.
Q. It just is a generic description?
A. Generic in terms of buyer beware and a skull and crossbones, which was picked by OTC Markets to emphasize the "danger ahead" nature of trading in securities like that. Yes.
Q. But this same symbol is used regardless of what stock it's applied to?
A. Well, every symbol -- everyone -- every stock that trades on OTC Markets that's appended with caveat emptor is viewed as speculative. You could lose all your money. Because, remember, there's a second part to this process: How is it applied at a broker-dealer?
Q. But my question is: This caveat emptor symbol and explanation is the same for every stock to which it is applied?
A. That is correct.
Q. It's generic?
A. It is the same for all the stocks, Yes.
Q. It's the same for all?
A. That have caveat emptor. Correct.

Q. Let's look at Page 2 -- I'm sorry. Let's look at the bottom here, the caveat emptor symbol.

So OTC Markets --

THE COURT: Mr. Fenton, you've been going for about 40 minutes. I'll give you five more minutes.

MR. FENTON: Thank you, your Honor.

BY MR. FENTON:

Q. OTC Markets does not say that the investor should not buy DECN stock. Right?

A. OTC Markets doesn't make any recommendations one way or the other on any stock that's listed on its markets.

Q. And it doesn't say that DECN stock is a fraud. Right?

A. It doesn't say anything particularly like that. No.

Q. Now, all it says here is that investors are encouraged to use caution and due diligence in their investment decisions. Right?

A. Correct.

Q. One of the things that an investor could do if they were exercising caution and due diligence in their investment decisions would be to look at what the CEO of the company says about the company and says about the stock. Correct?

A. That is one of the things they could do. Yes.

MR. FENTON: Thank you. No further questions.

THE COURT: Any redirect?

MR. COLLINS: Your Honor, could we have the

Court's indulgence for just 30 seconds?

THE COURT: Yes.

(Discussion had off the record amongst counsel.)

MR. COLLINS: Thank you, your Honor.

MR. HOWELL: No redirect, your Honor.

THE COURT: Thank you, Mr. Reilly. You may step down. You're free to go.

(Witness excused.)

THE COURT: Putting aside the other witness issue, anything further on loss?

MR. COLLINS: No further testimony. I don't know if the Court was inclined to hear any kind of summation based on the testimony today or if the Court would accept further briefing on this.

THE COURT: We'll figure that out later. Thanks.

Did you want to re-call Dr. Mitts?

MR. REILLY: Just briefly, your Honor.

THE COURT: Okay.

MR. REILLY: Thank you, your Honor.

The Government re-calls Professor Joshua Mitts.

THE COURT: Professor, I'll remind you you're still under oath.

THE WITNESS: Thank you.

Mr. Reilly.

MR. REILLY: Thank you, your Honor.

(JOSHUA MITTS, GOVERNMENT WITNESS, PREVIOUSLY SWORN.)

REDIRECT EXAMINATION

BY MR. REILLY:

Q. Professor Mitts, did you hear Mr. Reilly's testimony on caveat emptor?

A. I did, yes.

Q. Are you yourself familiar with that concept?

A. Yes.

Q. Are you familiar with the warnings that are attached when a caveat emptor label is put on an OTC stock?

A. Yes.

Q. And does that label necessarily put investors on notice that officers of a company are engaged in fraud?

A. No.

Q. Does the caveat emptor disclosure let the market know if the executive of that company is engaged in obstruction in an SEC investigation?

A. No, it does not.

Q. Professor Mitts, you're familiar that the application note discussing the MRM requires not just the mathematical analysis, but then an assessment as to whether the resulting loss number is reasonable. Right?

A. That's correct.

Q. And one of the factors the application note suggests that should be looked at when assessing reasonableness is

firm-specific facts, conditions and events. Right?
A. That's correct.
Q. What do firm-specific facts, conditions and events mean to you?
MR. XENAKIS: Objection, your Honor. Beyond the witness's legal expertise as -- certified as an expert previously.
THE COURT: Sustained.
BY MR. REILLY:
Q. Professor Mitts, in conducting your own analysis, did you look at firm-specific facts, conditions and events?
A. Generally, yes.
Q. Is that an important step in determining the reasonableness of a loss number?
A. Yes.
Q. Why?
A. Because to assess whether it's plausible that a particular date revealed the truth of the fraud to the market, one would need to look at the totality of the firm-specific information that was being released on that date or during that time, because otherwise one could mistakenly conclude that the inflation had dissipated from the price when in fact there was some other firm-specific activity that maintained that inflation on a given date.
Q. In your view, is it possible to assess the

reasonableness of loss amount without a close analysis of firm-specific events?

A. No. One needs to consider the totality of the evidence and what happened to determine whether or not the loss amount was reasonable.

Q. And would the appeal of a trading suspension or obstruction of an SEC investigation constitute the types of events that could cause continued price inflation?

A. Yes. Certainly. As long as there was some disclosure to the market in some way, those events certainly could maintain a preexisting price inflation.

Q. And to be clear, what does preexisting price inflation mean?

A. Whatever inflationary impact of a prior misstatement is still in the stock price, those additional actions could give the market reason to not, let's say, in this case sell the stock, thereby causing the inflation to dissipate.

Q. In conducting the reasonableness analysis called for in the application note, would the reliable principles in financial economics require some sort of systematic or regression-type tool to support a finding of reasonableness?

A. Yes. It's generally the case that in order to assess whether a particular measure is a reasonable estimate of loss that one would at least within the basic parameters of the peer-reviewed literature assess questions like whether

there's market-specific or industry-specific or other factors that a regression analysis would pick up.

Q. Did you hear any of -- any analysis of that type conducted by Mr. Reilly in explaining his assessment of the loss amount?

A. No, I did not.

Q. What does the financial literature say about the value to the market of statements by a corporate insider as compared to those by third parties or outsiders?

A. There's actually a substantial literature on this, because the fact -- it's not even an assumption. It's an understanding that corporate insiders have assymetric information about their firms. They know things the rest of the market doesn't. When a corporate insider speaks, the market takes that very, very seriously. The assumption is that third parties might be getting it wrong, but the insider knows what's really going on.

So the assymetric information disparity between the insider and the rest of the market is a basis for the market as a whole to ascribe extra importance to what insiders are saying. And there's a very large literature on this point.

Q. And how does that topic apply to the potential to perpetuate price inflation?

A. Well, I think what that literature implies is that even

relatively oblique or indirect or subtle comments by corporate insiders can give investors -- and here, I'm referring to the market as a whole -- a reason not to disbelieve the misstatements, meaning not to sell the stock, not to update their beliefs.

It's as if the market looks and says: Well, you know, look. It looks like maybe these third-party accusations are wrong. And so the market's ascribing extra weight to those insider statements.

MR. REILLY: No further questions, your Honor.

THE COURT: Mr. Xenakis.

MR. XENAKIS: Thank you, your Honor.

RECROSS-EXAMINATION

BY MR. XENAKIS:

Q. Professor Mitts, as part of your legal expertise, you're familiar with litigation with the SEC. Correct?

A. I'm not sure I understand what you mean by "litigation with the SEC."

Q. Well, you're familiar with litigation, for example, the litigation that's been discussed today about a stop trade order with the SEC?

A. I'm generally familiar with trading suspensions and attempts to convince the SEC to reverse or overturn a trading suspension.

Q. And the attempts to persuade the SEC to overturn a

trading suspension is a legal right that people have. Correct?

A. I'm not entirely sure what you mean by a "legal right." I believe generally the SEC has provided for that as a matter of their own procedure. But I can't recall the exact framework from a procedural standpoint that applies to those sorts of appeals.

Q. Okay. I believe you testified on direct that you -- I'm sorry -- on cross-examination that you've testified for the Government before. Right?

A. I have advised the Department of Justice, but I have not testified for the Department of Justice before.

Q. And have you advised the Department of Justice on issues like -- that have come up today, like the sentencing guidelines?

A. I don't believe this level of specificity. We certainly have discussed the general issues that were discussed today. The level of specificity today in preparation for this hearing and the analysis that I was asked to conduct was certainly at a higher level of specificity than our prior discussion.

Q. In preparing for that ability to speak with specificity, you reviewed the guidelines closely. Right?

A. I reviewed the note that I discussed in my testimony and the associated reasonableness analysis.

Q. And when you talk about the note, that's the note for Guideline 2B1.1. Right?
A. That sounds roughly correct. I'd have to consult my notes as to the exact provision. But --
Q. In your review of the guideline, do you remember where it said the word "truth"?
A. I can't recall the exact words. What I remember is that the language is in substance examining the date when the fraud was revealed to the market or the fact that the misstatement was false. I don't remember the exact words that were used, but that was my understanding of the formula.
Q. And is it possible you don't recall because the guideline doesn't actually use the word "truth"?
A. That's possible. As I said, the question as I saw it was whether the dates at issue in fact captured the revelation of the fraud or the dissipation of the price inflation, meaning the market realized that the prior misstatements were false and therefore the inflationary effect of those misstatements came out of the price.

MR. XENAKIS: The Court's indulgence.

Nothing further, your Honor.

THE COURT: Thank you, Professor Mitts. You may step down.

(Witness excused.)

THE COURT: Mr. Collins, I'll give you 20 minutes if you want to have Dr. Williams speak now. I'm happy to hear him speak at sentencing. I have reviewed his disclosure and I'm happy to review something else he says. I don't think I want to do another hearing, though.

MR. COLLINS: I understand, your Honor. Can you give me one minute to consult with my team?

THE COURT: Sure.

(Discussion had off the record amongst counsel.)

MR. COLLINS: Your Honor, could I suggest Plan B?

THE COURT: Which was that he comes up?

MR. COLLINS: No, no. That to the extent that we would rely on Professor Williams or Dr. Williams, we might submit something in support of sentencing.

But if the Court has some time, we would like -- the Court's heard a lot of information. In our view, we think a summation of some sort for ten minutes would be, we think, beneficial. If it's beneficial -- if the Court's willing, we'd like to have ten minutes to try to --

THE COURT: Of course. Yes.

MR. COLLINS: So we'd like to do it orally today or we could do it in briefing. Whatever the Court prefers.

THE COURT: I don't want briefing.

I'll hear from the Government.

MR. REILLY: Thank you, your Honor.

The corrective disclosure for the fraud that Mr. Berman engaged in cannot be the trading suspension or the other summer events that the Defendant points to for a number of reasons. I'll go through them briefly.

First, as the Defendant has pled guilty to obstruction of the SEC investigation, an obstruction that targeted shareholders of the company, the victims of his crime, who believed his false press releases and invested in this company, the obstruction plays a critical role in the continued inflation of Decision Diagnostics' stock price even after the SEC's trading suspension.

As the Court knows and as we've seen today, the Defendant's efforts to continue to besmirch the SEC, their investigation and to outright call the nature of the investigation into question distorted the market and prevented the market from realizing that in fact the conduct the Defendant had engaged in was fraud.

As the Court is aware, there were three letters submitted to the SEC over the course of that summer: June 2nd, July 28th and August 11th. This was persistent. And those letters were not only sent to the SEC's investigators and the highest levels of the SEC, but they were shared with investors. They were signed by 56 investors.

And these promoted to the victims of the fraud, circulated in that community, that this fraud was not in

fact a fraud.

And the result of that is the price of this company's stock remained inflated during the summer until the indictment revealed the truth, including that the Defendant was on the message boards under a false identity refuting what the SEC suggested in its trading suspension, pushing back.

THE COURT: Well, I guess why -- I, of course, have the greatest respect for the Justice Department. But kind of the average market participant, why would they see an indictment, treat an indictment, differently than the SEC making a very similar claim with these little skull and crossbones?

MR. REILLY: Well, first, the SEC of course doesn't attach that. That's the OTC Markets. We've heard about kind of the limitations of what the OTC caveat emptor provides.

But the SEC trading suspension is a temporary measure, of course. It's not --

THE COURT: But it's also a pretty extraordinary one. Right? Do you disagree with the claim that it happens only a couple times year?

MR. REILLY: Well, in most years, but not in 2020. In 2020, I had the benefit of being at the Commission at that time, your Honor.

And because of COVID-19, there was an inordinate -- I believe Mr. Reilly even testified to the large number of trading suspensions that came out around COVID-19 products. I believe the uncertainty of the pandemic, the newness of companies, you know, claiming to have COVID-related products, it resulted in an inordinate number of trading suspensions around that time, which I think significantly undermines kind of the rareness, because that year during that particular time the SEC was suspending a number of stocks in order to make sure that these companies weren't getting ahead of themselves on what they were claiming existed.

And what we have here is not only that Decision Diagnostics had this, but then the Defendant rebuts this, we now know perjuriously. Maybe he had a legal right to do it, but he certainly didn't have a legal right -- now that he's pled guilty, we know that the statements he made to the SEC in that document appealing the trading suspension were false, where he denies the press releases --

THE COURT: I get that.

MR. REILLY: Your Honor, then he circulates that on the OTC Market. And that's so that investors in these penny stocks can see.

So the items that he's engaging in to continue the fraud concern circulating a misleading appeal, recruiting

investors and pushing, through obstructive conduct, investors to prepare letters to kind of attack the SEC investigation and then continuing to issue at least one false and misleading press release, all after that point in time.

And we see it in the stock pricing because, once the indictment comes out, the stock price returns to where it was before the Defendant began putting out those press releases about having these products.

The only time that we see the market being on full notice that the EUA process that the Defendant had continued to tell the market that he was far along in was baseless, that the FDA had told Decision Diagnostics that they would need to conduct additional clinical trials in order to get an EUA. They couldn't afford them. They couldn't do them. They didn't have the protocols to do them. And that gets revealed right there.

THE COURT: Is your position in conflict with the indictment and your pretrial claims that the fraud had just existed into that summer?

MR. REILLY: I don't think so, your Honor, because it's really two separate questions. Right? The question is, one, how long is the fraud period? And because of the obstructive conduct and the continued perpetuation of the fraud, we believe the correct measure of the fraud period is

all the way until December.

But even if the fraud ends on July 10th, the question still remains of: When was the full scope of the fraudulent conduct revealed to the market?

And there is no doubt, whether the fraud ends July 10th or the fraud ends when Mr. Berman is indicted, it is not revealed to the market what -- that the Defendant has been using aliases to promote additional false information on the message boards, that the press releases were in fact false, that there's no opportunity to get an EUA.

A variety of additional conduct is put out there as well as for the first time a finding by a body, the grand jury, that there is probable cause that criminal conduct has existed.

And the stock price shows that that is -- had a significant impact on the market, because that is the first time that the stock goes back to and stays at approximately 2 to 5 cents, where it has not been since the Defendant began putting out the false and misleading press releases back in March.

THE COURT: So I'd think an indictment suggests if I could afford to invest in the stock change and I saw someone indicted, that might have even greater effect, like suggesting this whole firm is going to collapse or whatever.

Doesn't that have -- isn't there a danger that

your post-December timeline even overcompensates and really tanked the company's share price beyond just kind of what would have been implicated by the fraud?

MR. REILLY: Well, your Honor, I think what it indicates is that the market was not baking in the risk that we've heard from the defense in the other disclosures as the market appreciating the full extent.

I think the Court's right that these are extreme risks to the viability of DECN. And had the market had the complete scope of information, including that the Defendant was engaging in obstructive conduct, using pseudonyms and aliases to put out additional false information and that, you know, the core premise of the investment value in this company, which had not been previously disclosed in any of the SEC's public filings, that's really what the indictment is getting at.

And I think the comparison shows that if the market had truly appreciated the extent of what the Defendant was doing, the stock price would have reverted to that price over the summer, not until the indictment was revealed.

THE COURT: Thank you.

MR. REILLY: Any other questions?

THE COURT: No.

MR. REILLY: Thank you, your Honor.

MR. GIRON: José Giron of Covington & Burling for Mr. Berman.

Your Honor, may it please the Court.

This Court has heard a lot about what the parties disagree about: the fraud period, the disclosure period. But I'd like to begin by highlighting some of the things the parties do agree about.

For instance, the parties all agree that the guidelines method -- excuse me -- the guidelines recommend measuring loss using MRM, the modified rescissory method.

And, second, the parties agree about how the method works, at least in principle: You compare the price during the fraud to the price post-disclosure, the idea being that the post-disclosure price is what an investor would have paid if they had complete information.

Third, your Honor, the parties -- and importantly -- do not dispute where the burden lies. Quote: "The overall burden of proving loss under the guidelines always remains with the Government." That's *United States versus Bikundi*, 926 F.3d at 798, D.C. Circuit, 2019, a recent case.

I'd like to pivot to some of the things the parties do disagree about, your Honor.

First, the period of the fraud. Well, when did it end? When did it begin?

THE COURT: You agree on when it began. Right?

MR. GIRON: That's right, your Honor. We both agree that -- the parties do agree that it began on March 3rd, 2020, when DECN issued its first fraudulent press release.

Now, I think the Government --

THE COURT: Isn't a warning sent to me, Mr. Giron, that your method can't be right when the result is that there are no real victims, that they end up better under the fraud than they would have been otherwise? Doesn't that just kind of fly in the face of common sense?

MR. GIRON: Not necessarily, your Honor.

There can be many market forces, many confounding causation events, that can lead to a price increase without there being loss.

So just to give you an example, suppose that Mr. Berman on July 10th had invented OpenAI. You know, anybody who's buying in the market would realize, Whoa, this stock is worth a lot of money. I want to buy it, notwithstanding prior fraud.

THE COURT: So have you pointed to anything that would suggest something like OpenAI here?

MR. GIRON: No, your Honor. But it's not our burden to do so; it's the Government's burden to do so.

THE COURT: I get that. I get that.

But nonetheless, they have a pretty convincing kind of bell curve. You know, it's around 2 to 3 cents; fraud; fraud is exposed; back down to 2 to 3 cents. There's kind of a logical appeal to their position.

Yours, not so much.

MR. GIRON: I disagree with that, your Honor.

Before the guidelines were enacted, courts often stressed that the fraud period or the post-disclosure period should be brief.

And there's a reason why they did that. That's because the longer the periods are, whether it's the fraud period or the disclosure period, the likelier it is that there's some other confounding variable that is affecting the stock price and that shouldn't be folded into the loss calculations, because at the end of the day your Honor has to calculate the loss that was, you know, the product of reasonable reliance on the fraudulent statements, not other -- you know, any other confounding variable.

And we submit to you the three or four answers that Professor Mitts gave just do not suffice to accomplish that, you know.

Moreover, your Honor doesn't need to believe us. The Government's consistent position throughout this litigation has been that the fraud period began in March and ended in July.

THE COURT: So, you know, I thought you were right about that. But I'm looking back at the indictment, and it actually does say securities fraud from at least in or around February 2020 through in or around December 2020.

So I'm not sure exactly where you're getting the summer. But it looks to me at least their --

MR. GIRON: Your Honor, let me give you --

THE COURT: -- indictment looks longer.

MR. GIRON: A fine question, your Honor.

Let me give you what the Government thought the indictment said.

In the pretrial conference held on November 13th, 2023, the Government said as follows, quote: "If you look at the indictment, it really is divided into discrete periods of time, with February through July 2020 being the allegedly false and misleading statements and the rest of the time period, basically April through December, related to the obstruction case."

I'd like to address for a moment, your Honor, a few of the cases that undermine and I think completely contravene the Government's position.

The Government at bottom is saying that Mr. Berman's obstruction somehow extended the period of the fraud.

But the case law doesn't back that up. Tellingly,

the Government cannot cite a single solitary case for that proposition, your Honor. Not one.

We can for ours. Take, for example, *United States versus Lundstrom*. That's out of the District of Nebraska, U.S. District Lexus 195507 at *4.

There, a bank doctored financial statements. Okay? At a later point in time, it said: We're going to revise those financial statements. That's all it said.

At a third date, your Honor, the bank continued to issue Form 8-K filings with the SEC, and in those filings said: There's no fraud. The people who were auditing us, they quit for another reason. We haven't destroyed any evidence.

Those are attempts to conceal the fraud.

And the Government there, the fraud section of the Justice Department, the same one that brings this case, argued that, you know, the period of the fraud had ended with that initial disclosure, notwithstanding the later-in-time attempts to conceal the fraud.

Your Honor, that case was upheld on appeal by the Eighth Circuit in *United States versus Lundstrom*, 880 F.3d at 444.

Likewise, here, the Court should rule that the fraudulent period ended when Mr. Berman issued the last fraudulent press release on July 10th, even though he

continued to post about DECN anonymously.

And on the anonymous point, your Honor, a real brief detour: Professor Mitts said that insiders have assymetric access to knowledge, so their word may matter a lot to investors. I totally agree with that.

But that actually undercuts the Government's position, your Honor, because many of Mr. Berman's statements in the obstruction half of the case were posted anonymously, so investors didn't -- couldn't attribute those statements to Mr. Berman.

THE COURT: But they could in the various filings with the SEC. Right?

MR. GIRON: That's correct, your Honor. That's true.

I'd like to pivot now to maybe the second half -- or maybe the second issue that the parties really disagree about, which is the disclosure period. When was the fraud disclosed?

Now, I want to be precise here, your Honor. The sentencing guidelines speak not of truth, but about the period when, quote, "the fraud was disclosed to the market." That's Sentencing Guideline Section 2B1.1, Comment No. 3, Subdivision (F), Subsection (ix).

THE COURT: Okay.

MR. GIRON: Now, "disclose" is not a term that's

defined in the guidelines. Your Honor decided a case, *United States versus Seefried*, 639 Federal --

THE COURT: I'm familiar with it. Go ahead.

MR. GIRON: Excellent. I'm just making a record.

-- that held that undefined phrases take their plain meaning. And as a textualist, I totally agree with that.

Now -- so what does it mean to disclose something to the market? It means, you know, when did a proposition go from being unknown to generally known to the market?

And I think, your Honor, the evidence here is overwhelming that that happened on April 23rd.

As you know, the SEC had questions relating to the, quote, "accuracy and adequacy of information in the marketplace" since at least March 3rd, 2020.

Cases -- courts have held that suspension orders trigger their 90-day -- the post-disclosure period.

So, for instance, *United States versus Peppel*, 2011 U.S. District Lexis 909957, decided in August of 2011 and eventually upheld on -- or reversed on appeal for different reasons said that, quote: "The announcement of the SEC investigation is an efficient and highly relevant proxy by which to measure the price effects of the fraudulent conduct," end quote.

And that's --

THE COURT: Was that a case where there was post-SEC announcement obstruction, though?

MR. GIRON: No, your Honor.

But for propositions -- for a case that is more similar to what your Honor is asking about, I would point your Honor to *United States versus Lundstrom*, where there were -- there was disclosure, there was fraud, disclosure, attempts to conceal. And the outcome there is exactly what we're asking for, which is that, you know, the disclosure happened when it happened.

And, your Honor, *Lundstrom* was actually really instructive for that reason. Many courts have found that disclosure happens when far, far less information is available to the market. And *Lundstrom* is one such case. So in *Lundstrom*, all the bank said to trigger the disclosure --

THE COURT: That was the Eighth Circuit case you mentioned?

MR. GIRON: That's right. That's right, your Honor. Yes.

All the company said was: We're revising our earlier financial statements.

It contained none of the detail found in the suspension order. It contained none of the detail found in the SEC's May 20th filing, detail by the way, your Honor,

that is found in the Government's indictment several months later.

In our briefing -- your Honor, we wanted to highlight how similar the allegations that the SEC made were to the allegations that the Government, you know, makes. And we have a table set up where your Honor and your Honor's clerks can compare the allegations. A lot of times they use very similar language.

Now, underlying the Government's position is that the disclosure needs to be complete and that it needs to be uncontested.

Again, that is -- your Honor, that's not the case. That's not what the case law says.

In *United States versus Tuzman* from the Southern District of New York -- that's 2021 U.S. District Lexis 142715 -- the Southern District of New York held that the fraudulent scheme was disclosed when a company filed a Form 8-K that merely announced, quote, "errors and irregularities in its financial statements from prior years."

Again, that is a real big contrast between the detail contained in the documents that we submit, humbly, disclosed the fraud here.

Your Honor, in *United States versus Ferguson*, the District of Connecticut -- excuse me -- that's 584 Federal Supplement 2nd 447 -- the District of Connecticut ruled that

when a company announced that it had received a subpoena from a state regulator, that was enough to trigger the disclosure.

Your Honor, I'd like to make two more points about why the Government's disclosure argument is fatally flawed.

First, it collides with the fact that the Government must prove that investors reasonably relied on fraud to measure loss.

Loss that is not incurred as a result of reasonable reliance should be omitted from the loss calculations. That's *United States versus Stein*, an Eleventh Circuit case, 846 F.3d 1135, and a recent one at that, because it was issued in 2017.

So, your Honor, just think about what an investor would have had to do on July 21st to buy DECN stock. When he typed DECN, you know, on otcmarkets.com, he would find a skull and crossbones.

He would find that same skull and crossbones on otcmarkets.com once he navigated to DECN's page.

There are bright red warnings about how buyers ought to beware as a result of either fraud or, you know, the suspension orders.

And if they wanted to place -- if after all of that they wanted to place an order, they couldn't do so online. You heard Mr. Reilly testify that they actually had

to call up broker-dealers. By that point, the SEC has suspended trading. It has issued a detailed analysis identifying specific fraudulent statements made on May 20th. And now you have all these blinking-red neon red lights saying, "Don't do this."

We submit to you, your Honor, that an investor buying DECN securities on July 21st was not reasonably relying on Mr. Berman's fraudulent statements.

THE COURT: All right.

MR. GIRON: As a result, their sustained losses can't be folded into the calculations.

Just one last brief point, your Honor. I know we've taken up a lot of your time.

The Government's test is inadministrable. They say it has to be a complete disclosure; it has to be uncontested.

Well, you can always learn more about a particular fraudulent scheme. What was the Defendant eating on the day he issued the press release? We'll never know that. It's never going to be a part of the record.

And so the Government says, Oh, well, the indictment is enough, that, you know, nothing happened before.

That doesn't make a lot of sense.

Your Honor, because the allegations in the

indictment mirrored so closely the allegations made in the SEC, we don't think it adds much, you know, to learn the information contained in that indictment.

And the Government's rule would incentivize it if -- if the rule is, Oh, well, let's just measure it by the time the Government indicts, well, then, the Government has this perverse incentive to maybe indict when -- you know, a lot later, when the price of the security has depreciated. Nothing in the guidelines calls -- or gives the Government that power.

Your Honor, even if you assume that the Government is right about the fraud period and you take any one of the three disclosure dates, the investors in this case under the guidelines method, which the parties both agree ought to be applied here, have sustained no loss.

Thank you, your Honor.

THE COURT: Thank you, Mr. Giron.

I appreciate everyone's --

MR. REILLY: Judge, may we be heard on one very brief point?

THE COURT: No.

MR. REILLY: Thank you, your Honor.

THE COURT: I appreciate everybody's hard work and briefing on this. I appreciate the experts' presence here today.

I think we have a schedule for memoranda in aid of sentencing and a sentencing date. So I'll see you folks then.

Thanks, folks.

MR. REILLY: Thank you, your Honor.

(Proceedings concluded.)

CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings produced to the best of my ability.

Dated this 22nd day of March, 2024.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the District of Columbia
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Washington, D.C. 20001
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