1 UNITED STATES PATENT AND TRADEMARK OFFICE

2 _____

3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4 _____

5 MERCK SHARP & DOHME LLC,

6 Petitioner,

7 v.

8 THE JOHNS HOPKINS UNIVERSITY,

9 Patent Owner.

10 _____

11 IPR2024-00622, Patent No. 10,934,356;
IPR2024-00623, Patent No. 11,325,974;
12 IPR2024-00624, Patent No. 11,325,975;
IPR2024-00625, Patent No. 11,339,219;
13 IPR2024-00647, Patent No. 11,649,287.

14 _____

CONFIDENTIAL - ATTORNEYS' EYES ONLY

15

16 REMOTELY CONDUCTED DEPOSITION OF

17 BRIAN J. SEGERS

18 MONDAY, APRIL 21, 2025

19 10:03 A.M. EDT

20 JOB NO.: 580059

21 PAGES: 1 - 101

22 REPORTED BY: KARISA EKENSEAIR, CCR RPR RMR RDR

1 DEPOSITION OF BRIAN J. SEGERS, CONDUCTED VIA
2 ZOOM VIDEOCONFERENCE.
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10 Pursuant to notice, before Karisa J.
11 Ekenseair, Certified Shorthand Reporter in and for
12 the States of Arkansas, Oklahoma, Missouri,
13 Illinois, Tennessee, Georgia, New Mexico,
14 Washington, and California; National Registered
15 Professional Reporter; National Registered Merit
16 Reporter; Notary Public.
17
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22

1 A P P E A R A N C E S
2 ON BEHALF OF THE PETITIONER MERCK SHARP & DOHME
3 (VIA ZOOM):
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11 ON BEHALF OF THE PATENT OWNER, THE JOHNS
12 HOPKINS UNIVERSITY, AND THE WITNESS, JENNIFER
13 NEWBERGER (VIA ZOOM):
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20 ALSO PRESENT:
21 KAREN MOREIRA, ESQUIRE, MERCK
22 JON POTLER, REMOTE TECHNICIAN

1 T A B L E O F C O N T E N T S

2 PAGE

3 STYLE AND NUMBER..... 1

4 APPEARANCES..... 3

5

6 WITNESS: BRIAN J. SEGERS

7 EXAMINATION BY MR. ZEILBERGER..... 6

8 EXAMINATION BY MS. MCCORMICK..... 97

9

10 CERTIFICATE OF REPORTER..... 100

11

12 EXHIBITS

13 (NONE MARKED)

14

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1 P R O C E E D I N G S
2 THE REPORTER: Good morning. My name is
3 Karisa Ekenseair. I am a certified shorthand
4 court reporter. We are on the record.
5 Today's date is April 21st, 2025, and it
6 is 10:03 a.m. Eastern Daylight time.
7 Would counsel please introduce themselves
8 for the record.
9 MR. ZEILBERGER: This is Daniel Zeilberger
10 from the Paul Hastings Law Firm. I'm joined today
11 by my colleague Elizabeth Moore. In-house counsel
12 Karen Moreira may also join later today.
13 MS. McCORMICK: Madelyn McCormick from
14 Fish & Richardson on behalf of Patent Owner.
15 THE REPORTER: Thank you.
16 Will counsel please stipulate that in lieu
17 of formally swearing in the witness, the reporter
18 will instead ask the witness to acknowledge that
19 their testimony will be true under penalties of
20 perjury, that counsel will not object to the
21 admissibility of the transcript based on
22 proceeding in this way and that the witness has

1 verified that they are, in fact, BRIAN J. SEGERS,
2 beginning with the noticing attorney, please.
3 MR. ZEILBERGER: That's fine.
4 MS. McCORMICK: Agreed.
5 BRIAN J. SEGERS
6 of lawful age, being first duly sworn, deposes and
7 says in reply to the questions propounded as
8 follows:
9 EXAMINATION
10 BY MR. ZEILBERGER:
11 Q Good morning. It's good seeing you again.
12 A Good morning.
13 Q Please state your full name for the
14 record.
15 A Sure. It's Brian Jeffrey Segers.
16 Q And would you please state your residence
17 address?
18 A It's 5213 Cascades Drive, College Station,
19 Texas.
20 Q How are you feeling today?
21 A I'm feeling well. Thanks.
22 Q And do you understand that you're

1 testifying today under oath?
2 A I do.
3 Q Is there any reason you can't testify
4 truthfully today?
5 A There is -- there is not.
6 Q Do you have any documents in the room with
7 you, whether a hard copy or loaded onto a
8 computer?
9 A I have hard copies of each of my
10 declarations and then I've got each of those in
11 a -- just a plain folder with the number of the
12 patent handwritten on them, on the folder.
13 Q And when you say each of the declarations,
14 just to be sure we're on the same page, would you
15 mind clarifying which ones you're referring to?
16 A Sure. So the '393, the '975, the '974,
17 the '287, the '219, and the '356.
18 Q Got it. And so you have, if I counted up
19 correctly, six declarations?
20 A That's right.
21 Q And the same six declarations are loaded
22 on your computer folder?

A I don't have those easily accessible. I brought the paper copies.

Q Got it. Do your paper copies have any markings on them?

A No. No, they do not.

Q Any tabs?

A No.

Q Any Post-it notes?

A No, they don't.

Q Is there anybody in the room with you today?

A There is not.

Q And I think that you said you're located in Texas today. Is that just in one of your offices?

A Yes. Yes.

Q Great.

A So I'm in the conference room of our -- our office here.

Q Okay. What did you do to prepare for today's deposition?

A I think I had discussion with some staff

1 who helped me out Thursday, pretty brief
2 discussion just to kind of review the various
3 declarations. I looked over all my declarations.
4 I looked over my deposition. I looked at the
5 Sheridan report and his declaration and I had some
6 discussions, brief discussion Wednesday, Thursday
7 with counsel.
8 Q When you say you had discussions with
9 staff, who are you referring to?
10 A Only one, Seb Peinado.
11 Q Is he an employee of yours or he works at
12 the same firm as you?
13 A He works with Coherent and he managed
14 basically the project for me.
15 Q Got it. And what did you speak to him
16 about?
17 A I think mostly just to refresh my memory
18 about the differences between some of the
19 declarations. We've got six different ones, they
20 all have kind of slight differences. But most of
21 my conversations with him was about what those
22 differences are.

1 Q Did he work on any of your six
2 declarations?
3 A He assisted in preparing those.
4 Q And what was his role in preparing the
5 declarations?
6 A He was the project manager so he -- he
7 carried out various analyses at my direction and
8 assisted in preparing some of the footnotes and
9 some of the -- some of the -- revising some of
10 paragraphs under my direction.
11 Q But at the end of the day, the statements
12 that are contained in the declarations are your
13 own; is that fair?
14 A Yes.
15 Q You said you looked over your deposition.
16 Are you referring to your deposition that you had
17 for the '393 patent?
18 A That's correct.
19 Q And when you say you looked over the
20 Sheridan report and deposition, which report are
21 you referring to?
22 A I believe that would be his declaration

1 for the '393 as well as his deposition for that
2 declaration.
3 Q And you said you had brief discussions
4 with counsel on Wednesday and Thursday.
5 Who did you speak to?
6 A Maddie McCormick.
7 Q Besides the one individual from your staff
8 that you referred to and Ms. McCormick, is there
9 anyone else you spoke to to prepare for today's
10 deposition?
11 A No.
12 Q Is there anyone else that you spoke to
13 relating to this case in preparing any of the five
14 declarations for which you're here today?
15 A Well, that would include Dr. Goldberg and
16 I believe that conversation is cited within the
17 declarations.
18 Q Okay. And you understand -- I know you
19 refer to the '393 patent. You understand you're
20 here today to be deposed with respect to your
21 declaration submitted for five of the patents, the
22 '219 patent, the '287 patent, the '356 patent, the

1 '974 patent, and the '975 patent?
2 A Yes.
3 Q And if I refer to your declarations, for
4 example, by patent number, so for example the '219
5 patent declaration, will you understand what I'm
6 talking about today?
7 A Yes, I will.
8 Q Do you recall being deposed in connection
9 with the '393 patent declaration on December 17th,
10 2024?
11 A I -- I do recall it and the date sounds
12 correct.
13 Q Since December 17th, 2024, when you were
14 deposed for the '393 patent declaration, other
15 than your work on the five proceedings you're here
16 for today, have you done any other work for JHU?
17 A Nothing outside the -- the additional five
18 declarations we're -- we're discussing today.
19 Q And what about the Fish & Richardson law
20 firm?
21 A I don't think so. I -- nothing
22 significant, no.

Q Since your deposition for the '393 patent proceeding, have you had any conversations with any JHU scientist?

A No, I have not.

Q Any of the named inventors?

A No.

Q You mentioned a few moments ago that you did have a conversation with Dr. Goldberg. Was that after your deposition for the '393 patent?

A I believe so. I did have to check the dates about when those are cited in my declarations.

Q And what would you do to check those dates in your declarations?

A I believe there would be a footnote which would describe when the -- or it would be within the text that would describe when the conversation took place, but it was prior to filing these declarations.

Q Could you show me what footnote you're referring to?

A I'll have to look at one of them, if you

1 don't mind.
2 Q That's fine.
3 A So I don't see a note with the date,
4 although the -- at least in the '356, the
5 conversation is reflected in paragraph 7 as well
6 as paragraphs 35 and 36. And that conversation
7 would have happened sometime before filing each of
8 these declarations.
9 Q But you don't recall whether that happened
10 before or after you were deposed for the '393
11 patent?
12 A My recollection is it was after. I don't
13 think I had begun work on the other declarations
14 at that time.
15 Q How many times after being deposed for the
16 '393 patent did you speak to Dr. Goldberg?
17 A My -- I recall a single time where I
18 discussed each of the additional patents.
19 Q And when you say a single time when you
20 discussed each, was that a single conversation
21 where all five patents were discussed or -- or one
22 discussion for each of the five?

A One discussion covering all five of the patents.

Q How long was that conversation with Dr. Goldberg?

A I believe it would be something around half an hour.

Q What did you discuss with Dr. Goldberg?

A So a couple of things, just information about each of the patents, what they covered as well as some of the nexus issues that are reflected in his -- his declarations, which I've also reviewed.

Q And did you speak to Dr. Goldberg after signing any of your declarations for these five patents?

A No.

Q Did you speak to Dr. Goldberg following your deposition for the '393 patent about the '393 patent?

A No. I don't think so. We discussed the other five patents.

Q Got it. So the -- the topic of your

1 deposition for the '393 patent or his deposition
2 for the '393 patent didn't come up?
3 A I did not discuss anyone's deposition.
4 Q Did your conversation with Dr. Goldberg
5 impact the opinions you provide for the five
6 declarations you're here for today?
7 A Only as it's reflected within the
8 declarations themselves. The --
9 Q What do you mean by that?
10 A -- portions where I say I'm relying on my
11 understanding from him, that's where it would have
12 impacted the declarations.
13 Q Three of the declarations that we're
14 discussing here today, the '356 patent, '974
15 patent, and '975 patent were signed by you on
16 January 12th, 2025, correct?
17 A That sounds right. I can verify the dates
18 if you'd like but that -- at least for the '356,
19 and that sounds correct to me.
20 Q If you can please confirm that it's
21 correct for all three.
22 A Sure. '974 and '975 is the other two?

1 Q That's right.
2 A Yes. January 12th, '25.
3 Q And your declaration for the '219 patent
4 was signed on January 13th, 2025; is that right?
5 A That is correct.
6 Q And your declaration for the '287 patent,
7 was that signed on January 22nd, 2025? It refers
8 to 2024.
9 A It must be 2025. I don't think I was
10 retained on this matter in January '24.
11 Q Is the January 22nd part of the date in
12 your signature block correct?
13 A Yes, I believe so.
14 Q And your declaration for each of these
15 five patents is Exhibit 2191 in each of their
16 respective proceedings, correct?
17 A Yes. That is the number on these.
18 Q Did you read each of your five
19 declarations carefully before you signed them?
20 A I did.
21 Q Did you understand every statement,
22 opinion, and conclusion included in each of your

1 five declarations before you signed them?
2 A Yes.
3 Q Is there anything contained in your five
4 declarations that you're confused about with
5 respect to the wording?
6 A I -- no, I don't believe so.
7 Q And you're familiar with the content of
8 the documents that you reference in each of your
9 five declarations?
10 A Yes.
11 Q Are there any errors that you know about
12 in any of your five declarations?
13 A There are none that I'm aware of as I sit
14 here right now.
15 Q So you don't have any corrections for any
16 of the five; is that right?
17 A I do not.
18 Q Have you reviewed any of the five patents
19 that are underlying each of your five
20 declarations?
21 A I've looked at them, yes.
22 Q And what was the scope of that review of

1 the patents?
2 A Just to gain a general understanding of
3 those patents.
4 Q So what is your general understanding of
5 those patents?
6 A Well, it would be what's reflected in the
7 report, so. Part of that general understanding
8 would be there are some patents that are
9 CRC-specific. There are others that are tumor
10 agnostic. All of them for MSI-High, so
11 that's -- that is part of my general understanding
12 that I gained information from by reviewing the
13 patents.
14 Q When you say some are CRC-specific and
15 some are tumor agnostic, are you referring to the
16 claims of the patents?
17 A I believe so. I -- that's analyzing
18 claims themselves is outside my scope. I'm not an
19 attorney or -- my scope is as an economist. But
20 that's my understanding, yes, that the -- that
21 information is reflected in the claims.
22 Q So when you say your review kind of helped

1 you determine that some of the patents are
2 CRC-specific and some are tumor agnostic, what did
3 you mean?
4 A That's what I mean. I read the patents.
5 I looked at the claims. I formed a general
6 understanding.
7 Q So despite not being an attorney, you were
8 able to read the claims and gain understanding of
9 them; is that right?
10 A In a general sense. I mean, a document in
11 these declarations where I rely on assistance
12 outside those, for example, from Dr. Goldberg.
13 Q In paragraph 5 of each of your
14 declarations, you state that you understand that a
15 certain use of Keytruda practices the invention
16 claimed in the patent at issue, correct?
17 A Yes.
18 Q And Dr. Goldberg provided you with the
19 basis of that understanding; is that fair to say?
20 A Yes.
21 Q And is it also fair to say that this
22 understanding forms the basis of your

1 understanding of nexus for each of the five
2 declarations?
3 A I'm not sure I follow. You have two
4 "understandings" in there. So can you -- can you
5 clarify, please?
6 Q Sure. So a moment ago you agreed that in
7 paragraph 5 of each of your declarations, you
8 state that you understand that a certain use of
9 Keytruda practices the invention claimed in the
10 respective patent at issue.
11 Do you remember that?
12 A Yes, I do.
13 Q Taking that understanding, that
14 understanding formed the basis of your
15 understanding of nexus for each of the five
16 declarations, correct?
17 A I'm not sure I completely agree with that,
18 yes. In part, yes, that is part of my
19 understanding.
20 Q And what is the part that you disagree
21 with?
22 A Well, I don't disagree with that

1 understanding. I just think there is -- there is
2 more to my understanding of nexus and that's as I
3 discuss in some of the declarations whether or not
4 Keytruda could generally be sold within those
5 indications without the patent and without the
6 label.
7 Q Is there any information Dr. Goldberg
8 provided you that's not reflected in your
9 declarations that you used in your analysis that's
10 contained in these declarations?
11 A I don't believe so.
12 Q Dr. Goldberg -- well, let me take a step
13 back.
14 Did you review Dr. Goldberg's declarations
15 for each of these five proceedings?
16 A I have reviewed them, yes.
17 Q Dr. Goldberg's declarations concerning the
18 five patents that we're discussing today each
19 analyzed nexus with respect to one claim per
20 patent, correct?
21 A I'd have to look at them, but I don't
22 think I disagree with you.

1 Q Do you understand that the different
2 claims of each patents have different claim scope?
3 A Again, that's outside interpreting
4 the -- the scope of each claim is outside my
5 expertise, but I don't know that I have a reason
6 to disagree with that.
7 Q Is it fair to say that you applied a
8 particular scope, one particular scope for each of
9 the respective patents that you analyzed?
10 A I'm not sure that's fair.
11 Q Okay. So there's some patents where you
12 understood that different claims can mean
13 different things?
14 A No. I'm simply saying I haven't done any
15 analysis on my own of the scope of these patents.
16 Q So you don't have any understanding as to
17 the scope of the claims of the '356 patent,
18 correct?
19 A Not outside what's documented in the
20 declarations and my reliance on Dr. Goldberg.
21 Q What is the scope of the claims of the
22 '356 patent that you applied?

1 A I don't know that I have an opinion about
2 what the scope is within my report.
3 Q I am not asking for an opinion. I'm
4 asking for -- let's take a step back.
5 When you prepared your declaration for the
6 '356 patent, did you have an understanding as to
7 the scope of the claims of the '356 patent?
8 A I formed an understanding, again, based in
9 part or -- or in large part even on Dr. Goldberg
10 about the scope of the patents and what I needed
11 to know for my analysis, is which indication of
12 Keytruda that those applied to.
13 Q So what was your understanding, based on
14 Dr. Goldberg or otherwise, of the scope of the
15 claims of the '356 patent?
16 A Again, I wouldn't characterize it as an
17 understanding of the scope. My understanding was
18 that the -- we're discussing the '356. I'd have
19 to look in my declaration and see what indication
20 that I applied that to for Keytruda. But that is
21 how I would characterize what my understanding is,
22 is which indication that applies to.

1 Q I see. So it's fair to say that for each
2 of the patents, you gained an understanding,
3 whether from Dr. Goldberg or otherwise, about what
4 indication is covered by that patent and that was
5 what formed the basis of your subsequent analysis?
6 A Yes. I think that's one way to put it.
7 Q Is there any other way to put it?
8 A Well, the way it's described in my report
9 is how I would put it. But again, that's a fair
10 characterization. So if you want to look at the
11 '356, I would just refer you to what it says in
12 the report.
13 Paragraph 35, again, my understanding from
14 Dr. Goldberg, that the challenged claims allow for
15 the use of Keytruda as a treatment for MSI-High or
16 dMMR cancer in patients who have received a prior
17 therapy, i.e., second-line treatment, and that use
18 of the treatment regardless of tumor type and as
19 second line beyond -- and beyond therapy embodies
20 the challenged claims.
21 That paragraph 35 is how I would describe
22 my understanding.

1 Q And paragraph 35 provides the entirety of
2 your understanding of how the claims map to the
3 use of Keytruda?
4 A Along with paragraph 36, the second
5 sentence as well which says, "I understand from
6 Dr. Goldberg that such a use as a second line and
7 beyond therapy is not possible without practicing
8 the invention claimed in the '356 patent."
9 Q Do you have an understanding that
10 oncologists use and follow the Keytruda labeling
11 to treat their patients?
12 A I believe Dr. Goldberg describes that
13 practice in the nexus section of each of his
14 declarations. If we look at one, I could point
15 out where, but from my recollection, he does -- he
16 does describe that and I've reviewed his reports
17 so that is my understanding.
18 Q Is it your understanding that oncologists
19 treat individual cancer patients?
20 A Can you ask that again? I was thinking
21 about the wording and I got lost.
22 Q Is it your understanding that oncologists

1 treat individual cancer patients?
2 A Individual cancer patients, what do you
3 mean by that qualification?
4 Q As opposed to groups of patients at a
5 given time.
6 A I'm not an oncologist. I'm not a
7 practitioner, but I think that would be my
8 understanding.
9 Q Are you aware that Keytruda is approved
10 for numerous tumor-specific indications that are
11 not dependent on MSI-High status?
12 A Yes.
13 Q Would you agree that patients with
14 MSI-High tumors may have been treated with
15 Keytruda regardless of their MSI-High status?
16 A For some indications where there is an
17 indication without -- without an MSI-High
18 diagnosis.
19 Q And so you're referring to indications
20 where the potential patient population would
21 include people with or without MSI-High cancer,
22 those patients might be treated with Keytruda

1 regardless of their MSI-High status; is that
2 right?
3 MS. McCORMICK: Object to form.
4 A I agree there are some, as I just
5 discussed, but there are also many others where
6 there are not cancer types where's there's not an
7 indication absent an MSI-High, like colorectal
8 cancer. And there's others where's there no
9 indication at all, other than the tumor agnostic.
10 Q What is your understanding as to the -- as
11 to what those indications are where the patient
12 population could include patients both with and
13 without MSI-High cancer?
14 A Well, I'm not sure I follow your question.
15 Are you saying -- are you asking about whether
16 there's an indication for MSI-High for a certain
17 tumor type as well as an indication without
18 MSI-High? Like endometrial cancer, I believe,
19 would fall under that definition for Keytruda but
20 I don't know if you're asking about the
21 indications or if you're just asking are there
22 MSI-High patients within those indications.

1 Q Well, a moment ago you agreed with me that
2 there were indications where the patient
3 population would include patients with both
4 MSI-High and non MSI-High cancer.
5 Do you remember that?
6 A Yes.
7 Q What are those indications?
8 A I don't know as I sit here right now that
9 I have a full list of which cancer types are
10 subject or have populations with MSI-High.
11 Probably non small-cell lung cancer might be one
12 of those, but -- but there were other indications
13 that were approved before the MSI-High agnostic
14 tumors.
15 Q Looking at your '356 declaration for a
16 moment, and if you could turn -- you might already
17 be there, to paragraph 35.
18 A 35?
19 Q Yes.
20 A Okay.
21 Q And you indicate in paragraph 35 that you
22 understand from Dr. Goldberg that the challenged

1 claims allow for the use of Keytruda as a
2 treatment for MSI-High or dMMR cancers in patients
3 who have received a prior therapy, i.e.,
4 second-line treatment.
5 Do you see that?
6 A Yes. That -- I believe you're reading
7 that correctly.
8 Q In your opinion, if a patient is treated
9 with Keytruda because it is an approved treatment
10 for their specific tumor type, and that tumor
11 happens to be MSI-High but wasn't tested for
12 MSI-High, would you assume that that use of
13 Keytruda practices the '356 patent for the
14 purposes of your analysis?
15 MS. McCORMICK: Object to form.
16 A If I'm following you correctly, I don't
17 think that my analysis includes those patients.
18 Q What did you do to exclude those patients
19 from your analysis?
20 A So couple things. I looked at Merck's own
21 statements about how much of Keytruda was sold for
22 MSI-High. I also looked at -- I'm going to have

1 to refer to one of my other declarations here if
2 you don't mind but --
3 Q That's fine, but please let me know what
4 you're referring to.
5 A I believe I'm referring to the '219.
6 For example, with the '219 declaration, I
7 also looked at Keytruda's -- Keytruda's patient
8 counts of CRC as well as all non-approved cases.
9 So those would be tumor types where they didn't
10 have a non MSI-High indication.
11 And then I looked at another subset that
12 just included CRC plus ovarian and pancreatic.
13 And I think those would all be indications where
14 there's not a separate indication for that cancer
15 type.
16 Q So for the patents that in your
17 understanding are directed to tumor agnostic uses,
18 your analysis excluded instances where the
19 indication could potentially cover MSI-High but
20 also non MSI-High; is that fair?
21 A Yes. So for that Appendix 5 we were just
22 looking at, it wouldn't cover things like non

1 small-cell lung cancer and it wouldn't cover
2 things like endometrial cancer where there's both
3 MSI-High indication and a non MSI-High
4 indication -- or sorry, and an indication without
5 the MSI-High qualifier.
6 Q Are you aware if there are any tumor
7 types -- I'll strike that.
8 You would agree that if a patient isn't
9 actually tested for MSI-High, any sales associated
10 with that patient shouldn't be included for any of
11 the five patents that you're testifying about,
12 correct?
13 A I guess I would say I'm including sales
14 which would follow from physicians following the
15 label for these indications that are covered by
16 the patent.
17 Q Right. But there's parts of the label
18 that don't require testing for MSI-High, correct?
19 A I'm talk -- when I say follow the label, I
20 said following the label for the indications that
21 are covered by the patents here. So that would be
22 the MSI-High tumor agnostic one and for others,

1 the CRC MSI-High.
2 Q Do you have any understanding as to
3 whether use of Keytruda would embody -- would only
4 embody any of the challenged claims where a
5 particular result is obtained?
6 A I'm not sure I follow your question.
7 Q The analysis that you applied assumes that
8 every time a patient's satisfying one of the two
9 indications you mentioned, either the MSI-High
10 tumor agnostic indication or the CRC MSI-High
11 indication, that as long as a patient fits within
12 one of those two indications, you can count them
13 as a sale, correct?
14 A Yes. I believe so, as long as they were
15 treated under those indications.
16 Q But even if a particular patient didn't
17 respond to Keytruda as compared to a patient
18 that's non MSI-High, under the analysis you
19 applied, you would still count that person as a
20 sale, correct?
21 A I'm not sure I understand your question or
22 necessarily agree with it. What do you mean by

1 "didn't respond"?
2 Q Do you have an understanding as to whether
3 MSI-High cancer patients treated with Keytruda
4 always experience an improved outcome as compared
5 to non MSI-High cancer patients?
6 A I don't have an opinion on that.
7 Q Are you aware that Keytruda is approved to
8 treat esophageal cancer regardless of MSI-High
9 status?
10 A That may be one of the indications they
11 have without an MSI-High, but I -- I'll take your
12 word for it. Without looking at the label, I
13 can't say for sure.
14 Q Is that an issue that you considered in
15 preparing your declarations?
16 A Yes.
17 Q Where is that consideration reflected in
18 your declarations?
19 A So again, if we go back to the '219
20 declaration and look at that Appendix 5 there.
21 Q And where in Appendix 5 does it refer to
22 esophageal cancer?

1 A So well, the point is that it doesn't
2 refer to esophageal cancer. So if you look in the
3 note below Appendix 5, there is a number of
4 cancers listed there which I believe are cancer
5 types where there's not a Keytruda indication
6 without the MSI-High qualifier. And esophageal is
7 one of those. So I haven't included that in my
8 analysis of Keytruda sales.
9 Q So when you say in that note, you're
10 referring to in Appendix 5 of the '219 patent that
11 if a cancer type is listed as an approved
12 indication, all prescriptions of reporting groups
13 under that cancer type are not considered a
14 non-approved indication in this chart, what do you
15 mean?
16 A So specifically for Appendix 5, what that
17 means is the -- the light blue line at the top of
18 the chart includes Keytruda sales for various
19 indications. Those indications are the ones that
20 are listed in that note. And it specifically does
21 not include indications where Keytruda has a
22 separate approval, like non small-cell lung cancer

1 or endometrial cancer or esophageal cancer.
2 Q What do you mean by separate approval?
3 A Well, what I mean is that there's an
4 approval without MSI-High as part of the approval.
5 So for example all the approvals that they had
6 prior to -- prior to the '219 patent and the
7 others, not prior to the patent but prior to the
8 approval.
9 Q The light blue line in Appendix 5 of the
10 '219 declaration includes patients that are
11 outside the scope of these patents, correct?
12 A I don't know that I agree with that.
13 Q So in your view, the light blue line which
14 is the highest line in Appendix 5, the '219
15 patent, solely includes patients that are within
16 the scope of these patents; is that right?
17 A I think that's a reasonable assumption. I
18 don't know that I would say that every single one
19 of these patients are, but a great many of them
20 because there's not an alternative indication
21 would likely be treated under an MSI-High tumor
22 agnostic indication, because there is no -- there

1 is no other approval for those cancer types for
2 Keytruda. But I --
3 Q Why did --
4 A I've not seen that every single one of
5 them necessarily would be. But I think there's
6 also some, like endometrial cancer, where I
7 haven't included but they might be treated under
8 the MSI-High indication for endometrial cancer.
9 But I couldn't tell whether they're treated under
10 that indication or just the endometrial cancer
11 indication, so I didn't include those. So I think
12 there are some that I've left off this chart and
13 there may be, you know, some but not the majority
14 that are treated for other reasons.
15 Q For these non-approved indications that
16 you're talking about, what did you do to ascertain
17 whether doctors test for MSI-High status prior to
18 treatment with Keytruda?
19 A What I looked at is what's reflected in
20 the note here and that's whether or not there are
21 separate indications for these outside of a
22 MSI-High tumor agnostic indication.

1 Q You don't have any evidence to show that
2 any of the patients associated with the
3 non-approved indications were tested for MSI-High
4 prior to treatment with Keytruda, correct?
5 A I don't think that I have testing data
6 from physicians that would show that.
7 Q You don't have any evidence whatsoever,
8 testing data or otherwise, to show that patients
9 associated with these non-approved indications
10 would be tested for MSI-High status prior to
11 treatment with Keytruda, correct?
12 A I don't think I agree with that, no. I
13 believe I do have evidence and the evidence is
14 there are not separate indications on the label
15 for these cancers. I understand from Dr. Goldberg
16 that physicians treating cancer patients generally
17 follow the labels and so a label that would be
18 available to them is the MSI-High indication.
19 Q Are you familiar with off-label uses, Mr.
20 Segers?
21 A I know -- I know what you mean by
22 off-label use, yes.

1 Q Did you perform any analysis to determine
2 whether doctors prescribe Keytruda as an off-label
3 use for any of the non-approved indications you
4 list in Appendix 5?
5 A Again, I reviewed Dr. Goldberg's
6 declarations where he discusses prescribing
7 according to the label. I believe that was part
8 of my discussions with him as well, both for the
9 prior one with the '393, and the newer patents.
10 And it's my understanding that, generally,
11 off-label use is not very common.
12 Q Is it fair to say that based on what you
13 learned from Dr. Goldberg, you applied an
14 assumption that you could disregard any off-label
15 uses for these non-approved indications you list
16 in Appendix 5?
17 A Well, combined with the fact that I'm
18 unaware of any data that would show there's
19 significant off-label use for Keytruda.
20 Q What did you do to investigate whether
21 there's any data that shows significant off-label
22 use for Keytruda?

1 A Well, I haven't seen -- again, I've looked
2 at Dr. Goldberg's declaration where he talks about
3 the manner in which he and other physicians would
4 prescribe. I've had my conversation with him. I
5 think I probably generally investigated it some
6 and didn't find anything. And I'm unaware of
7 anything else in the record that would suggest
8 it's a significant portion.
9 Q Is it your understanding that MSI-High is
10 the only tumor agnostic indication for Keytruda?
11 A I don't know. I would, like I said, have
12 to review the label.
13 Q Well, is it fair to say that your analysis
14 in your declarations assumes that MSI-High is the
15 only tumor agnostic indication for Keytruda?
16 A It was certainly the first one. And
17 Merck, I think, in their earning call afterwards
18 hailed it as a landmark for that very reason. And
19 it was the only one for at least a period of time.
20 I don't know about more recently, but yes, for a
21 long period of time it was.
22 Q Well, I guess I'm confused, Mr. Segers.

1 Because if there are other tumor agnostic
2 indications for Keytruda, then what you told me
3 about Appendix 5 your '219 declaration wouldn't be
4 accurate, correct?
5 A You'd have to tell me which ones you're
6 talking about.
7 Q Well, you told me that you assume that all
8 of the non-approved indications in Appendix 5, the
9 '219 patent would necessarily go to the MSI-High
10 indication because you're assuming that patients
11 are -- rather, physicians are following the
12 Keytruda labeling.
13 A Right. At least for a significant portion
14 of that graph where I am very confident it was
15 the -- the only tumor agnostic indication.
16 Q Which portion of the graph are you
17 confident about?
18 A I think I'm reasonably confident at least
19 up through 2020. Now, if you have another
20 indication you'd like to ask me about, I'm not
21 sure which one you're -- it would help if you
22 identify the other indication you're talking

about.

Q I just want to understand what -- what analysis you performed, Mr. Segers, in looking at Appendix 5. The '219 declaration, it goes through November of 2023, correct?

A That's right.

Q And it's your opinion that through November of 2023, all of the non-approved indications would have been associated with the MSI-High indication, correct?

A I think at least through 2020. And you know what I would say about that is I am confident that it's [redacted] And the 5 percent comes from Merck's own statements about how much is done under MSI-High.

And so what you see is a consistent pattern where those indications are [redacted]

So if there are some others that appear

1 later on after 2020, I think it would have to be
2 incremental to what's already in the tumor
3 agnostic indication, if there were another tumor
4 agnostic indication.
5 But I just -- I don't have any evidence of
6 that as I sit here today and I don't think it
7 would change my -- my opinion in any meaningful
8 way.
9 Q You don't have any evidence of what as you
10 sit here today?
11 A That there's some other tumor agnostic
12 indication that's not incremental to the MSI-High
13 tumor agnostic indication.
14 Q And Mr. Segers, I just want to understand
15 whether you have an understanding about any other
16 tumor agnostic indication. If you don't know of
17 any others, that's fine.
18 Do you know of any others or no?
19 A I don't know that I do know of any others.
20 You're asking me is it possible there is one. If
21 you have a specific one in mind, I'd be happy to
22 look at it and discuss it with you.

1 Q For purposes of the analysis you provided
2 in your declarations, your understanding was that
3 the MSI-High indication is the only tumor agnostic
4 indication, correct?
5 A It certainly was when it was -- the
6 approval was granted. Merck hailed it as such. I
7 think any other approval that was tumor agnostic
8 they sought after, that would have just had to be
9 incremental to this. And I don't see any changes
10 in the trends in that Exhibit 5 that would suggest
11 there's -- there's some new indication that I need
12 to be concerned about.
13 Q Mr. Segers, when you signed your
14 declarations for each of these five patents, did
15 you have an understanding as to whether there were
16 any tumor agnostic indications besides the
17 MSI-High indication?
18 A I'm not aware of one as I sit here today.
19 I've reviewed the label, if that -- if you want to
20 point me to an indication that's on the label,
21 like I said, I'll look at it. But as I -- you
22 know, we'd have to look at a specific indication.

1 Q Were you aware of any when you signed your
2 declaration, Mr. Segers?
3 A I was aware of the indications. I've
4 looked at the label. That's what I'll say.
5 Q And you have an ability to ascertain which
6 indications in the label are tumor agnostic; is
7 that right?
8 A Again, if there's one you want to look at
9 and we can look at the language for it. But as I
10 sit here today without looking at the label, it's
11 hard to say.
12 Q It's hard to say whether you're cable of
13 ascertaining whether a particular indication is
14 tumor agnostic?
15 A I might be. I'd have to look at what
16 the -- again, which indication you want to look at
17 and what the language says and I can tell you
18 whether I understand it or not.
19 Q Let's take a look at Exhibit 1134 if you
20 can.
21 MR. ZEILBERGER: Please have that shared
22 with Mr. Segers. And if we could go to page 6,

1 rather the pages bridging here pages 6 and 7.
2 Q Do you have an understanding, Mr. Segers,
3 as to whether tumor mutational burden-high cancer
4 is a tumor agnostic indication?
5 A I don't see a cancer listed there.
6 Q So is your understanding tumor mutational
7 burned-high cancer is a tumor agnostic indication?
8 A That's the way I -- I would interpret
9 this.
10 Q When was the tumor mutational burden-high
11 cancer approved?
12 A I don't know the exact date. As I said,
13 I'm pretty sure the MSI-High was the only one
14 through 2020.
15 Q Looking back to Appendix 5 of your
16 declaration for the '219 patent, what percentage
17 of the non-approved indications that you provide
18 are associated with the tumor mutational
19 burden-high indication?
20 A Well, I'm not aware of any evidence in the
21 case or that I've seen from anyone that it's a
22 very high percentage.

1 Q Have you seen any evidence showing one way
2 or the other what that percentage is?
3 A Well, yes. There would be none before it
4 was approved, so the entire section of the graph
5 up until whatever that approval date is
6 would -- my assumption is it would not include any
7 of those. And beyond that, I don't see any
8 significant change in the -- in the trend, that
9 light blue line, that would suggest there's a
10 bunch of extra ones that are showing up.
11 And furthermore, I just -- I don't know
12 what all is involved in doing the testing for this
13 tumor mutational burden-high cancer. And I'm not
14 aware of any evidence that suggests there are many
15 more additional patients being treated under that
16 indication than there were -- that would
17 significantly add to the ones that were already
18 treated under the MSI-High.
19 And I'll just add, I haven't seen any
20 public statements from Merck suggesting that it's
21 tumor mutational burden-high indication is
22 significant.

1 Q So you would agree that there wasn't any
2 sort of inflection point in 2020, associated with
3 the CRC plus non-approved indication line?
4 A I don't believe I discuss any inflection
5 point for 2020. That's not part of my analysis.
6 Q And you would agree that there isn't one,
7 correct?
8 A For the CRC plus non-approved indicators
9 line? I don't see one as I sit here right now.
10 Again, even if there were a small one, I don't
11 think it would meaningfully change any of my
12 opinions. I haven't done that analysis, so I
13 don't know that I agree one way or the other.
14 Q You're aware that Keytruda is Merck's
15 drug, correct?
16 A Yes.
17 Q Are you aware that Merck has a number of
18 patents covering Keytruda?
19 A I am.
20 Q The analysis in your declarations does not
21 take into account Merck's patents to Keytruda,
22 correct?

1 A The analysis in my declarations is largely
2 focused on the -- the two indications that the
3 patents apply to -- or I'm sorry, that the JHU
4 patents apply to. And so in that sense, by
5 excluding others that those patents don't apply
6 to, I would say I have taken into account Merck's
7 other patents. In other words, I haven't
8 attributed the success of these JHU patents to
9 Keytruda as a whole.
10 Q Do you have an understanding as to whether
11 those two indications you referred to would be
12 covered by Merck patents in addition to the JHU
13 patents?
14 A That's outside my scope but my assumption
15 is that they do, that they are covered.
16 Q Did you look up any of Merck's patents at
17 any point?
18 A I looked at them. I believe they're
19 referenced in my report. We may -- I believe we
20 discussed the patents in my prior deposition. I
21 don't recall whether we looked at any of them.
22 Q Could you tell me which portion of the

1 declaration you're referring to when you say that,
2 included in your report?
3 A If you'll let me look, I can see where
4 they're mentioned.
5 So I'm not sure they are listed in the
6 declaration but I have seen them. I've looked at
7 the lists of the -- the handful of the Merck
8 patents that -- that cover Keytruda.
9 Q Your declarations don't include an
10 analysis about how others -- how third parties may
11 have been prevented from developing a method of
12 treatment using pembrolizumab in view of Merck's
13 patents, correct?
14 A I don't agree with that. In fact, I
15 discussed Merck itself as one of the relevant
16 third parties when I say that they had incentive
17 to conduct the same research.
18 So Merck would be one of the others that
19 could have done the same research that JHU did and
20 there certainly was nothing preventing them from
21 doing that research.
22 Q Setting aside your analysis about Merck,

1 you -- your declarations don't include an analysis
2 about how third parties, meaning not Merck or JHU,
3 may have been prevented from developing a method
4 of treatment using pembrolizumab in view of
5 Merck's patents, correct?
6 A I don't think my declaration discusses
7 what you said specifically, but we did discuss
8 this in my prior deposition. And I guess I'd
9 refer you to that answer there, but also just
10 restating that Merck's patents were not a
11 significant hurdle for JHU. There are certainly
12 other research institutions out there that I would
13 assume would conduct the same research with the
14 same access to Keytruda that JHU was able to
15 obtain.
16 Q And when you say Merck's patents weren't a
17 significant hurdle for JHU, what do you mean?
18 A What I mean was JHU was able to conduct
19 the research using Keytruda, and Merck's patents
20 did not prohibit them from doing that. So they
21 obtained license or rights to use it and I think
22 others could have similarly obtained the same

1 rights.
2 Q Do you have an understanding as to how JHU
3 obtained the license or rights that you're
4 referring to?
5 A I may have seen those agreements. I'm
6 generally aware that they exist.
7 Q What do you mean by "those agreements"?
8 A Well, I think there is some sort of
9 agreement between JHU and Merck that was entered
10 into prior to the clinical trials.
11 Q Did you speak to Dr. Goldberg about
12 Merck's patents?
13 A I don't believe I did.
14 Q Do you have an understanding as to whether
15 anyone besides Merck can sell pembrolizumab?
16 A No. I'm not aware of any other marketing
17 agreements. That's not to say there aren't any or
18 commercialization agreements. There may be, I'm
19 just not aware of any.
20 Q But you are aware that absent any sort of
21 agreement with Merck, Merck's IP rights would
22 preclude anyone else from selling pembrolizumab,

1 correct?
2 A Yes.
3 MR. ZEILBERGER: Okay. Why don't we take
4 a break.
5 MS. McCORMICK: Sounds good to me.
6 (Whereupon a break was had.)
7 BY MR. ZEILBERGER:
8 Q Mr. Segers, have you reviewed any contract
9 between JHU and Merck establishing the terms of
10 their collaboration?
11 A I don't recall whether I've reviewed them
12 or I'm just aware of their existence.
13 Q Do you recall asking to review any such
14 contract?
15 A I may have. I don't recall whether I did
16 or didn't.
17 Q Circling back to our discussion about the
18 tumor mutational burden-high cancer indication for
19 Keytruda, what is your understanding as to whether
20 the patient population for that indication and the
21 patient population for the MSI-High indication
22 overlap?

1 A I don't have an understanding that there
2 is a significant overlap. I haven't seen anything
3 to suggest that there is. My assumption is if
4 Merck sought that additional indication, it was to
5 increase sales and not purely overlap sales that
6 there were already making.
7 Q You understand there's a potential
8 something in between pure overlap and no overlap
9 at all, correct, Mr. Segers?
10 A Sure. There's a lot of things in between,
11 including very little overlap.
12 Q And there could be moderate overlap as
13 well, correct?
14 A I don't know if there could be or not. As
15 I said, I'm not aware of any evidence that there
16 is moderate or any significant overlap.
17 Q If it was the case that a majority of
18 MSI-High patients are also tumor mutational
19 burden-high patients, that would be inconsistent
20 with the assumptions you made in your
21 declarations, correct?
22 A I guess we'd have to define what you mean

1 by a patient. I wouldn't assume that they would
2 be treated under both.
3 Q If a majority of patients that could be
4 treated under the MSI-High indication could also
5 be treated under the tumor mutational burden-high
6 indication, that would be inconsistent with the
7 assumptions that you made in your declarations,
8 correct?
9 A I don't think I would word it like that.
10 I would say if they were likely to be treated
11 under that, under the -- this other indication
12 we're talking about instead of the MSI-High.
13 Q What do you mean by that?
14 A What I mean by that is whether or not that
15 indication is displacing sales that were
16 previously made under MSI-High and I don't see any
17 evidence that that is the case.
18 Q If a majority of patients -- let's take a
19 step back.
20 Do you disagree that a majority of
21 patients that could be treated under the MSI-High
22 indication can also be treated under the tumor

1 mutational burden-high indication?
2 A Are you asking me if I disagree? I'm
3 sorry, I got lost in your question.
4 Q Do you disagree that a majority of
5 patients that can be treated under the MSI-High
6 indication can also be treated under the tumor
7 mutational burden-high indication?
8 A As I said, I haven't seen any evidence to
9 indicate that that's the case. I haven't seen
10 evidence to indicate that doctors are widely using
11 this other indication or that they're widely using
12 that test. I just haven't seen any evidence to
13 suggest that those are the same populations.
14 Q Well, I think you said earlier that you
15 haven't seen any evidence suggesting explicitly
16 that doctors are using the MSI-High indication,
17 but rather you made an assumption that patients
18 with a non-approved tumor type must be flowing
19 into the MSI-High indication.
20 Did I misunderstand your testimony, Mr.
21 Segers?
22 A I think in part you did. Merck itself has

1 made statements about the MSI-High indication and
2 their sales that are made under that indication
3 which would imply use. And so, certainly, a big
4 chunk of that line is made up of Merck's, the
5 5 percent that Merck itself says that they've sold
6 under that indication.
7 Q But you're testifying in Appendix 5 that
8 inconsistent with what you represent, Merck has
9 said about 5 percent, there's actually
10 [redacted] associated with MSI-High,
11 correct?
12 A Again, I don't completely agree with that
13 characterization. When you look at my declaration
14 and you look at Appendix 5, what that appendix is
15 there for, I don't actually use that -- that top
16 line on Appendix 5 to estimate the number of sales
17 made under the indications we're talking about.
18 What I do use is Merck's own statements of
19 5 percent.
20 Now, what Appendix 5 does is it --
21 it's -- it's a check on Merck's own statements to
22 see how reasonable that is. And the information

1 in the Appendix 5 tells me that 5 percent is [redacted]
2 [redacted]
3 Q Let's turn to paragraph 28 of your '356
4 declaration.
5 A Sorry, I'm not there yet. Okay. I am
6 there.
7 Q You state in this paragraph of your '356
8 declaration that you estimated MSI-High or dMMR
9 cancer sales after Q1/2019 by projecting a linear
10 forecast based on the linear trends of Keytruda
11 for treatment of all MSI-High for dMMR cancers
12 from Q2/2018 to Q1/2019, correct?
13 A Yes.
14 Q What is the basis for your assumption that
15 sales growth would be linear?
16 A I think I would say my assumption is that
17 a linear forecast of sales growth is a
18 conservative way to do it.
19 Q What is the basis for your assumption that
20 a linear forecast of sales growth is the
21 conservative way to do it?
22 A So one, we know, in fact, Keytruda was

1 [redacted]
2 [redacted]
3 [redacted] And that Appendix 5 from the '219
4 declaration also forms part of the basis for this
5 assumption that that's a conservative way to do
6 it. Very -- there may well be other patients
7 beyond what Merck is reporting in the 5 percent
8 that were treated under the MSI-High indication.
9 Q You also say in paragraph 28 that this
10 forecast estimates what Keytruda's sales for non
11 first-line treatment MSI-High or dMMR cancers
12 would have been from Q2/2019 through the end of
13 2023 if Keytruda was not approved for first-line
14 treatment of MSI-High or dMMR CRC.
15 Do you see that?
16 A I do.
17 Q What is the relevance of these
18 hypothetical sales in your commercial success
19 analysis?
20 A Well, the reason it's done this way is
21 because this particular patent did not have -- my
22 understanding from Dr. Goldberg is the first-line

1 indication would not apply to this particular
2 patent. And so that's why I've looked at what the
3 sales would have been in absence of that
4 first-line approval, because [redacted]
5 [redacted]
6 [redacted]
7 [redacted]
8 [redacted]
9 Q What was the basis for your decision to
10 create this hypothetical world where Keytruda was
11 not approved for first-line treatment of MSI-High
12 or dMMR CRC?
13 A Again, that this particular patent did not
14 apply to the first-line approval. That's the
15 basis for it. But I would say that my analysis as
16 a whole, I've collect -- I've also collectively
17 looked at all of these patents, so there's another
18 declaration that doesn't make this assumption, but
19 this one because this particular patent, my
20 understanding is, does not include the first-line
21 approval. That's why I've done it this way here.
22 Q At the end of paragraph 28, you state that

1 through the end of 2023, Keytruda's sales for non
2 first-line treatment of MSI-High or dMMR cancer
3 indications have totaled to an estimated
4 [redacted]
5 A That's right.
6 Q And if you could turn to paragraph 28 of
7 your '219 declaration.
8 A Yes.
9 Q In the last sentence of paragraph 28 of
10 the '219 declaration, you state that through the
11 end of 2023, Keytruda's sales for treatment of
12 MSI-H or dMMR cancer indications have totaled to
13 an estimated [redacted]
14 Do you see that?
15 A I do.
16 Q Based on the difference between those two
17 numbers, is it your understanding that Keytruda's
18 sales for first-line treatment of MSI-High dMMR
19 cancer indications for that period were around
20 [redacted]
21 A No, not necessarily.
22 Q Why not?

1 A One, I don't have data that would tell me
2 which patients are being treated first line or
3 second line. Merck may have that data, but it's
4 not been provided to me. What I do know is those
5 may overlap to some extent and patients who
6 otherwise wouldn't have been treated under first
7 line might still have been treated under second
8 line after they tried, you know, another required
9 treatment.
10 Q You're going to have to explain that to
11 me, Mr. Segers. In the '219 declaration, you do
12 state that through the end of 2023, Keytruda's
13 sales for treatment of MSI-High or dMMR cancer
14 indications have totaled to an estimated
15 [redacted], correct?
16 A That's right.
17 Q And that includes first-line treatment?
18 A Right. So what I would say is there's an
19 incremental [redacted]. But that doesn't
20 necessarily mean only that [redacted] is only
21 first line. I guess the [redacted] is only
22 first-line treatment, but that doesn't mean it's

1 all of the first-line patients.
2 Q You're saying that some of the
3 [redacted] referenced in paragraph 28 of your
4 declaration would include first-line treatment?
5 A Yes. That's why what paragraph 28 in the
6 '356, that's why it says -- it makes the
7 assumption that, well, if the first-line approval
8 had never been granted what would the second-line
9 approval have done on its own. That's a measure
10 of that.
11 Q I see. So when you say "have totaled,"
12 what you really mean is "would have totaled" in
13 this hypothetical world you've created?
14 A That's fair.
15 Q Let's turn to the '287 declaration for a
16 moment, paragraph 34.
17 A 34?
18 Q Yes.
19 A Okay. All right.
20 Q In paragraph 34 of the '287 declaration,
21 you state that the total market for drugs
22 specifically targeted to treat MSI-High or dMMR

1 colorectal cancer is defined by the sales of
2 Keytruda, Opdivo, Yervoy, and Jemperli for the
3 indication of MSI-High or dMMR colorectal cancer,
4 correct?
5 A Yes.
6 Q You have previously testified that the
7 total market for drugs specifically targeted to
8 treat MSI-High or dMMR colorectal cancer is
9 defined by the sales of Keytruda, Opdivo, and
10 Yervoy for the indication of MSI-High or dMMR
11 colorectal cancer, correct?
12 A Those were the drugs that were discussed
13 in the prior declaration, the '393 declaration,
14 but I do recall I did discuss Jemperli in my
15 deposition for that patent and that was one reason
16 why I went ahead and added it here.
17 Q Why did you omit Jemperli from the '393
18 declaration but include it here in your '287
19 declaration?
20 A I think Jemperli does -- so when you look
21 at the wording in the '393 declaration, it talks
22 about MSI-High that is approved for CRC. I think

1 Jemperli has a tissue agnostic MSI-High that may
2 be -- could potentially be used to treat CRC, so
3 that's why I added it here.
4 Q So are you saying that Jemperli is not a
5 significant player for MSI-High CRC but rather for
6 non CRC MSI-High cancers?
7 A I don't think I said that. I agree that
8 under its label, Jemperli could be used for any
9 tissue MSI-High. So I think by including all of
10 Jemperli sales, it would be an overstatement. So
11 it's conservative to include Jemperli as a whole
12 which is what I've done when you look at the
13 appendices for the '287 graph -- or this '287
14 declaration.
15 Q So what's the difference between the '393
16 patent and the '287 patent that led you to omit
17 Jemperli from the '393 declaration that you
18 prepared but include it in the '287 declaration
19 that you prepared?
20 A Well, I added it here to the '287 for the
21 reasons I just discussed, because I am aware they
22 have a MSI-High tumor agnostic indication along

1 with an endometrial cancer indication. And I
2 added it here because I discussed it in my prior
3 deposition, but also to be conservative.
4 Q Is there any difference between the '393
5 patent and the '287 patent that would justify
6 including Jemperli for one and not the other?
7 A I'm not opining on differences in the two
8 patents. I guess what I would talk about is the
9 differences in my declaration and I think I just
10 explained why I made the update. I suppose that
11 would apply to the -- could apply to the '393 as
12 well, but I updated it for the '287 for the
13 reasons I just said.
14 Q I think you told me why you included it in
15 the '287. You didn't quite say why you omitted it
16 from the '393.
17 A Well, I omitted it because it did not have
18 a CRC-specific indication. And I was -- for the
19 '393, I was specifically looking at treatments
20 within the '393. And it's -- it's unclear what
21 portion of Jemperli sales would be included or
22 would be sold for CRC patients. That's why it

1 wasn't omitted initially. I've now made a
2 decision on the '287 to be more conservative, in
3 part because I did discuss it in my deposition for
4 the '393. But I've included it in the '287
5 analysis.
6 Q Can you turn to Appendix 9 of your '287
7 declaration?
8 A Yes. I'm there.
9 Q Jemperli's market share for MSI-High dMMR
10 colorectal cancer increased from 2 percent in 2022
11 to 13 percent in 2023, correct?
12 A I guess I characterize that as at most,
13 because as I just explained I made some, what I
14 would characterize as conservative assumptions, by
15 including all of Jemperli's sales here in this
16 share. So it may be that some of that is, in
17 fact, not CRC but I put them all in here anyway.
18 But in terms of what is represented on the graph,
19 yes, it goes from 2 percent to 13 percent.
20 Q And in looking at Appendix 8 of the '356
21 patent, Jemperli's market share for second-line
22 MSI-High dMMR cancer increased from 2 percent in

1 2022 to 12 percent in 2023, correct?
2 A That's right.
3 Q Both of those market share increases are
4 equal to or greater than a six-fold increase from
5 2022/2023, correct?
6 A Approximately. I'm not sure on the
7 rounding, yeah. Depending on rounding, 2 to
8 12 percent could be less than six-fold. But
9 generally agree.
10 Q In both Appendix 8 of the '356 patent and
11 Appendix 9 for the '287 patent, Keytruda's market
12 share [redacted] from 2022 to 2023, correct?
13 A Yes. As represented on these charts which
14 as I mentioned already are very conservative
15 estimates of what Jemperli's sales are, meaning
16 that, if anything, Jemperli's overestimated on
17 these charts.
18 Q What's your basis for saying that
19 Jemperli's overestimated in your Appendix 8 for
20 the '356 patent?
21 A Because I've included -- I believe if you
22 look in the declaration, I've included all of

1 Jemperli's sales and Jemperli has two indications
2 that I'm aware of, one of which is not an MSI-High
3 indication. It's an endometrial cancer
4 indication. But I'm not aware of any statements
5 or data from GSK, I suppose, that would tell us
6 how to break those out so I've included all of
7 their sales.
8 Q Where do you state in your declarations
9 that you were overinclusive in the numbers you
10 provide for Jemperli?
11 A Give me a second. I'll look through it.
12 So if you look on Appendix 7 of the '356
13 declaration under the Notes and Sources, it's
14 citing the GSK annual reports which is
15 Exhibit 2288 through 2290. That's the source of
16 my revenue data for Jemperli.
17 And if you look on those exhibits, I
18 believe it is not broken out between indications.
19 And as I said, Jemperli has multiple indications,
20 one of which is the MSI-High tumor agnostic for
21 second-line treatment.
22 Q And so just to be sure, you took the total

1 sales for Jemperli from Exhibits 2288 through 2290
2 and applied those for the numbers you have for
3 years 2021, 2022, and 2023?
4 A That's correct.
5 Q Have you seen any information about what
6 proportion of Jemperli's sales are associated with
7 MSI-High versus endometrial cancer?
8 A I don't think I'm aware of any statements.
9 Q Are you aware of any reason to think that
10 the MSI-High indication isn't significantly more
11 common than the endometrial cancer indication?
12 A I think I'm unaware of GSK touting one
13 over the other, but I don't have any information
14 one way or the other.
15 Q Do you have an understanding as to
16 whether -- well, let me take a step back.
17 When was Jemperli approved for MSI-High
18 cancer?
19 A I'm not sure the exact approval date,
20 sometimes 2021 or later.
21 Q Jemperli's jump in sales in 2023 coincided
22 with its approval for MSI-High, correct?

A I don't know whether that is the case one way or the other.

Q Did you check when Jemperli was approved for MSI-High?

A I think I've looked at it, but I don't recall as I sit here right now.

Q That's not something that's cited in your declarations, correct?

A Again, I'd have to look through it to see. But as I sit here, I don't recall whether it is or isn't.

Q Are you familiar with something called NCCN guidelines?

A I'm not sure.

Q You're not sure whether you're familiar with it?

A Well, can you repeat what you said? I don't believe I am, but...

Q Well, let me ask you directly.

What are NCCN guidelines?

A Okay. I'm not sure that I have an opinion on that or understanding of that.

1 Q Did you review any industry materials
2 about treatment options that are recommended for
3 patients having MSI-High or dMMR cancers?
4 A I would say I've reviewed the industry
5 material that's cited in my declarations but I've
6 also reviewed Dr. Goldberg's declarations. So to
7 the extent his covered any of that, I would have
8 looked at it as well.
9 Q Did you review Dr. Goldberg's discussion
10 of the NCCN guidelines?
11 A If it's in his report I would have looked
12 at it, yes, in his declaration.
13 Q The NCCN guidelines include
14 recommendations for the treatment of MSI-High
15 cancers besides Opdivo, Yervoy, Keytruda, and
16 Jemperli, correct?
17 A I'm not sure.
18 Q If it is the case that the NCCN guidelines
19 include recommendations for the treatment of
20 MSI-High cancers besides Opdivo, Yervoy, Keytruda,
21 and Jemperli, would that change your analysis?
22 A I don't believe so. Economically, you

1 would want to look at who the closest competitors
2 are and who Merck and these other companies view
3 as their competitors for these indications on the
4 label.
5 Q You didn't check the sales of any products
6 besides Opdivo, Yervoy, Keytruda, and Jemperli,
7 correct?
8 A Well, no, because I didn't include any
9 others in my relevant competitive products that
10 are immunotherapies that treat within these
11 indications, that are approved within these
12 indications.
13 Q In you could turn to paragraph 30 of your
14 '356 declaration, please.
15 A Okay.
16 Q You state in paragraph 30 of your '356
17 declaration that MSI-High dMMR cancer indications
18 accounted for no more than and likely less than
19 5 percent of Opdivo and Yervoy U.S. sales in 2018
20 and 2019?
21 A That's right.
22 Q You rely on the transcript that you cite

in Footnote 33 for that statement, correct?
A That's right.
Q And specifically Footnote 33 cites transcripts from Q2 and Q3 of 2018 and Q1 of 2019, correct?
A That's correct.
MR. ZEILBERGER: And if we can share with Mr. Segers Exhibit 2213.
Q This is the Q2/2018 earnings call transcript from BMS; is that right?
A Yes.
Q And if we can turn to page 10 toward the bottom of this exhibit.
REMOTE TECHNICIAN: Sorry, what was the page number again?
MR. ZEILBERGER: PDF page 11, numbered page 10. Scroll down, please. There you go.
Q There is a statement in Exhibit 2213 where sales of Opdivo and Yervoy were broken down by indication, correct?
A Broken down in part. I agree with your characterization.

1 Q This is what you're relying on, correct?
2 A Yes. Yeah. I was just pointing out it
3 was not a full breakout.
4 Q And the reason you say that is the "all
5 others" in quotation marks that are associated
6 with 5 percent, correct?
7 A Well, presumably less than 5 percent
8 because seems like they mentioned things that had
9 at least 5 percent each and then lumped everything
10 else together.
11 Q The assertion about "a little bit of all
12 others" in the bottom 5 and parts is what you rely
13 on to conclude that 5 percent would be the upper
14 bound for Opdivo and Yervoy; is that right?
15 A Yes.
16 Q And why did you choose 5 rather than 10?
17 A Well, I think that 10 is talking about the
18 number of parts. The 5 percent, if you notice
19 when they -- they talk about the percentages for
20 each of these indications, it's 35 percent
21 melanoma and lung, and then 20 for renal, 5 for
22 head and neck, and that leaves about 5 percent

1 left. And then there's "all others" in the bottom
2 5 or 10 percent. I think that's referring to
3 indication.
4 If you look at Opdivo, I think they have
5 10 or 12 indications. Yervoy is less. I think it
6 has something along the line of 6 indications, and
7 that may be why they say 5 or 10.
8 But what I'm characterizing is within this
9 remaining 5 percent of their sales, part of that
10 is MSI-High or CRC, depending on which 10 we're
11 talking about.
12 Q Let's now turn to Exhibit 2214. This is
13 the Q3/2018 earnings call from BMS, correct?
14 A Yes.
15 Q And if we turn to page 12 of this exhibit,
16 second-to-last paragraph, there we go.
17 Do you see where sales of Opdivo and
18 Yervoy are, again, broken down by indication?
19 A Again, in part. And I think as I note in
20 my footnote, it's less specific than the -- than
21 the prior earnings call. So there's less
22 specificity mentioned about which indication has

1 how much.
2 Q The indications that are specified in the
3 Q3/2018 earnings call transcript add up to
4 85 percent, correct?
5 A Yes, for those three that are specifically
6 listed: Lung, renal, and melanoma.
7 Q And the indications that are not listed
8 would count for the remaining 15 percent, correct?
9 A Right. But at least one of those is head
10 and neck, which was listed before.
11 Q For Q3/2018, there's no information about
12 what percentage head and neck would be, correct?
13 A Right. What I'm saying is, in the prior
14 earnings call that I relied on there was
15 information about head and neck. And it, by
16 itself, was 5 percent so it's quite a bit larger
17 in that earnings call than all the other
18 indications. It's roughly the same size as all
19 the other ones combined.
20 Q So are you saying that you assumed head
21 and neck would stay at 5 percent in Q3/2018?
22 A No. What I'm saying is they've been less

1 specific. There's not information on that anymore
2 in this earnings call.
3 Q In Q3/2018, without more information,
4 sales associated with MSI-High could be anywhere
5 from 0 to 15 percent correct, for Opdivo and
6 Yervoy?
7 A I don't think it's very likely that it
8 would be anywhere near 15 percent. As I said
9 before, I think 5 is a very conservative estimate
10 of what it was just in that prior quarterly
11 earnings call.
12 And again, as I note in my footnote, what
13 you see here is less specificity. So in this
14 earnings call, they don't mention anything below
15 20 percent. So nothing below 20 percent was
16 noteworthy to mention on its own; whereas, in the
17 prior earnings call, it actually went all the way
18 down to 5 percent. What I'm saying is within the
19 bottom 5 percent, MSI-High didn't make the cut.
20 So I think it's very unlikely that it
21 would be a significant portion of the remainder of
22 these percentages.

1 Q Do you know why melanoma decreased from
2 35 percent in Q2/2018 to 30 percent in Q3/2018?
3 A No, not as I sit here right now. There
4 could be several factors including competition
5 from other products.
6 Q That 5 percent decrease from melanoma
7 would have had to go to other indications of
8 Opdivo and Yervoy, correct?
9 A Yes. Because we're talking about shares
10 calculated as all -- all sales of Opdivo and
11 Yervoy. But yeah, other indications including
12 head and neck.
13 Q And also including MSI-High, correct?
14 A It could. But as I said, I don't see any
15 reason to believe MSI-High would have increased
16 significantly.
17 Q Let's turn to Exhibit 2215. This is the
18 Q1/2019 earnings call transcript, correct?
19 A Yes. For BMS.
20 Q Let's go to page 10 at the bottom, merging
21 into page 11.
22 Do you see where the earnings call

1 transcript, once again, lists the percentage
2 breakdown by indication?
3 A I do.
4 Q And the lung cancer indication has
5 decreased from 35 percent to 25 percent, correct?
6 A Right. Yes, from Q2/2018. As I sit here,
7 I don't recall what it was in the one we just
8 looked at for Q3/2018. But I think -- yes, I
9 think I agree with you.
10 Q And the melanoma cancer indication is
11 still at 30 percent like it was in Q3/2018 down
12 from 35 percent in Q2/2018, correct?
13 A Yes.
14 Q And here, the transcript indicates
15 expressly that all other indications are about
16 20 percent, correct?
17 A Yes. And there would be 9 or 10 other
18 indications included in that.
19 Q Including MSI-High, correct?
20 A Yes.
21 Q So theoretically, applying what I think
22 you called the conservative assumption, MSI-High

1 could make up up to 20 percent of the Opdivo and
2 Yervoy sales in Q1/2019, correct?
3 A Again, I think that's highly unlikely.
4 And the reason I use the Q2/2018 earnings call is
5 because there was much more specificity. In these
6 last two that we've looked at, they don't go
7 anywhere below 20 percent when they break out the
8 indications. In that one, they went all the way
9 down to 5 percent.
10 And as I said about that one, you've got
11 MSI-High lumped in with eight or nine other
12 indications that all of them combined combine for
13 5 percent. And so it's -- it's very likely that
14 5 percent in Q2/2018 is very conservative. And I
15 just don't see anything to lead me to believe that
16 MSI-High on its own could somehow lead to nearly
17 20 percent and not be discussed by Bristol Myers
18 Squibb individually here.
19 Q The percentage for sales of Opdivo and
20 Yervoy associated with lung cancer and melanoma
21 cancer collectively decreased from 70 percent in
22 Q2/2018 to 55 percent in Q1/2019, correct?

1 A I'm sorry, could you say the numbers you
2 just calculated again? They decreased from what
3 to what?
4 Q From 70 percent in Q2/2018 to 55 percent
5 in Q1/2019?
6 A Yes.
7 Q That 15 percent portion of Opdivo and
8 Yervoy sales would have gone to the other
9 indications that Opdivo and Yervoy are approved
10 for, correct?
11 A Sure. But I believe, again, there's 9 or
12 10 other indications so you're talking about 1 or
13 2 percent each if it were spread evenly.
14 Q And it's your opinion that sales of Opdivo
15 and Yervoy are spread evenly throughout the other
16 indications?
17 A No. I just think it's reasonable that if
18 those diverted sales you're talking about -- and
19 diverted is the wrong word.
20 If those sales that are making up that
21 15 percent are all going to a single indication or
22 just even two indications, that that would be

1 noteworthy enough to mention here, but they
2 didn't. So again, I've relied on the earnings
3 call that had the most specificity for the
4 conclusion that just, you know, three quarters
5 earlier, MSI-High was well below or very likely
6 very much -- very conservatively below 5 percent.
7 And I just don't see anything in these statements
8 to suggest that that number has really moved in
9 any meaningful way.
10 Q Do you know whether the percentage of
11 Opdivo and Yervoy sales associated with lung
12 cancer and melanoma cancer decreased relative to
13 total Opdivo and Yervoy sales because sales for
14 those two indications decreased or because sales
15 associated with other indications increased?
16 MS. McCORMICK: Object to form.
17 A Maybe. Give me a moment to look at my
18 reports. I can give you a more complete answer.
19 When you're discussing this, we're talking
20 about in the 2018/2019 period. So I see --
21 Q Right.
22 A If I look at Appendix 7 of my '356 report,

1 I do see a decline in Opdivo sales between 2018
2 and 2019. That very well could be driven by a
3 decline in lung and melanoma sales.
4 But obviously, I don't have complete
5 enough data to make that determination, but it
6 could be that it's a decline in sales in those
7 indications. I just note that Opdivo sales do
8 seem to be declining during that same period.
9 Q Where in Appendix 7 of your '356
10 declaration do you provide total Opdivo and Yervoy
11 sales?
12 A So there's a -- assuming we are looking at
13 the same thing, there are four lines on this line
14 graph of Appendix 7, and the line for Opdivo goes
15 down slightly from 2018 to 2019. And this is a
16 chart of U.S. sales -- well, so it's -- this is
17 U.S. sales for MSI-High cancer, which I've used
18 the 5 percent we're discussing. So if 5 percent
19 of their sales went down and the same 5 percent is
20 used in 2018 and 2019, that means their total
21 sales went down as well.
22 Q Where do you see sales going down in your

1 chart when comparing 2018 and 2019 of Opdivo and
2 Yervoy?
3 A Which -- I'm sorry, which declaration are
4 you looking at?
5 Q I'm -- you referred me to Appendix 6 of
6 your '356 declaration. That's what I'm looking
7 at.
8 A Right. So I'm also looking at another
9 copy of it on Appendix 7 of '974, and it's the
10 same graph.
11 So for 2018, it's hard to know the exact
12 numbers but if you look at the dot on the light
13 blue line, it appears to be the same or slightly
14 lower in 2019 than it was in 2018.
15 Q I see. But if that dot was actually
16 higher, then you would agree sales in 2019 are
17 actually higher for Opdivo than sales for Opdivo
18 in 2018?
19 A Sure. I mean, I guess a reasonable way to
20 look at this is both Opdivo and Yervoy seem to be
21 about the same in their total sales year over
22 year. You could figure it out exactly if you

1 looked at the Bristol Myers Squibb 10-K that I'm
2 citing. You can just compare one number to the
3 next and see what those sales look like and that
4 would tell you overall if their sales are
5 increasing or decreasing.
6 I guess what I'm saying is they're not
7 moving by that much, according to this graph. So
8 it's not clear whether that -- the mix of Opdivo
9 and Yervoy sales is changing because one
10 particular indication has declined or because
11 others are gaining relative to -- I mean, what's
12 happening is others are gaining relative to it.
13 The reason for that may vary.
14 Q You're saying it's not clear whether the
15 portion of sales of Opdivo and Yervoy associated
16 with lung and melanoma cancer is declining because
17 total sales for lung and melanoma are declining,
18 or because other indications are increasing?
19 A Right. The mix. It's a change in the mix
20 as you've mentioned and there could be multiple
21 reasons for that.
22 Q How is it possible, Mr. Segers, for the

1 total sales of Opdivo and Yervoy to be relatively
2 flat between 2018 and 2019 and for the percentage
3 of sales associated with lung and melanoma cancer
4 to decrease between those two years and for the
5 other indications not to increase?
6 A I don't think I said they didn't increase.
7 We talked about how collectively the other 10 or
8 11 indications did increase a modest amount.
9 Q I think you said you agree the percentage
10 increased. I think you disputed, and correct me
11 if I'm wrong, I think it was the case that you
12 disputed whether the total sales associated with
13 the other indications would increase.
14 Do you now agree that they did increase
15 from 2018 to 2019?
16 A As a proportion of their overall sales,
17 those other 10 or 11 indications did increase. I
18 agree with that.
19 Q Setting aside as a proportion of total
20 sales, just focusing in on the sales associated
21 with the indications that are not lung and
22 melanoma cancer, those total sales necessarily

1 increased from 2018 to 2019, correct?
2 A I don't think you can set aside those. If
3 you say that lung and melanoma cancer did not
4 decrease or they stayed the same or even went
5 up -- well, yeah, if you say that they stayed the
6 same, then it would follow that the other
7 indications increased in order for the mix to
8 change.
9 So if lung and melanoma stayed the same as
10 they were from 2018 to 2019 but the mix changed so
11 it's such that lung and melanoma counted for a
12 lower share of Opdivo and Yervoy, then that would
13 imply that the other 10 or 11 indications
14 increased in sales.
15 Q Let's break that down. I think you said
16 earlier that total sales for Opdivo and Yervoy in
17 2018 to 2019 were roughly flat; is that right?
18 A That's from eyeballing the chart. Like I
19 said, we could look at the actual 10-Ks and figure
20 it out, whether there was an increase or a
21 decrease. But visually on that chart, they look
22 fairly flat.

1 Q And in addition from the earnings call
2 transcripts, the sales -- the proportion of total
3 sales of Opdivo and Yervoy attributable to
4 melanoma and lung cancer decreased from 2018 to
5 2019 from 70 percent to 55 percent, correct?
6 A Yes.
7 Q For those two things to be possible, it's
8 necessarily the case that sales associated with
9 indications other than melanoma and lung cancer
10 would have increased from 2018 --
11 A Yes. All of them combined. So within
12 that set of all of them combined, some of them, I
13 guess, could have increase and -- but yes, all of
14 them combined would have increased.
15 Q Why do you say some of them, I guess,
16 could have increased? What's your hesitation?
17 A It doesn't have to be all of them. It
18 could be some of them. That's all I'm pointing
19 out is collectively they increased.
20 Q If some of them decreased -- let me start
21 over.
22 If some of the indications other than

1 melanoma and lung cancer decreased from 2018 to
2 2019, that would mean the remaining indications
3 would have had to increase even more to maintain a
4 roughly flat level of sales from 2018 to 2019,
5 correct?
6 A If some of which indications would have
7 decreased?
8 Q Just --
9 A In your question here, we already -- we're
10 presuming already that total sales are flat. The
11 mix is changed where lung and melanoma has
12 decreased and then you're saying if others have
13 also decreased?
14 Q You just told me one question ago, Mr.
15 Segers, that it's possible in this mix some of the
16 other indications would have decreased while
17 others would have increased.
18 Do you remember that?
19 A Yes. And I also remember earlier stating
20 that I -- I believe if all of this increase in
21 Other was attributable to just one or two of these
22 indications, that Bristol Myers Squibb would have

1 mentioned that as something significant. But
2 they're not mentioning what's going on in these
3 other 10 or 11 indications, just merely that they
4 all account for the residual.
5 Q So you think it's likely that all of the
6 indications other than lung and melanoma cancer
7 would have increased by roughly the same from 2018
8 to 2019?
9 A No. I'm saying that's one assumption you
10 could make. What I've said throughout is I think
11 it's better to use the prior earnings call that
12 has more specificity where they mention drugs that
13 had all the way down to at least 5 percent of the
14 mix. And then they said that MSI-High and CR --
15 and the MSI-High CRC would be included within the
16 rest of that remaining 5 percent.
17 Q Relying on that other earnings call, which
18 I think you're referring to the Q2/2018 call,
19 would require ignoring the decline in sales
20 associated with melanoma and lung cancer into
21 2019, correct?
22 A I don't think so. I don't agree that I

1 have to ignore it to come to the conclusion that
2 5 percent is still a reasonable estimate based on
3 what I know from the -- from the more specific
4 Q2/2018 earnings call.
5 MR. ZEILBERGER: Why don't we take a
6 break.
7 (Whereupon a break was had.)
8 BY MR. ZEILBERGER:
9 Q Mr. Segers, during any of today's breaks,
10 did you speak with anybody?
11 A Yes, I did.
12 Q Did you speak about your deposition today?
13 A No. Well, only that I was having one.
14 Q Who did you speak with?
15 A Some of my colleagues in the office.
16 Talked briefly with Ms. McCormick to just check in
17 on me, making sure I'm doing all right here.
18 Q Can you turn to your '356 declaration,
19 paragraph 29?
20 A Yes.
21 Q In paragraph 29, you compare the sales of
22 Keytruda for treatment of MSI-High for dMMR

1 cancers with other pharmaceutical products sold by
2 Merck.
3 A We're looking at paragraph 29?
4 Q Of the '356 declaration.
5 A I'm sorry, I'm on paragraph 30. Yes,
6 that's right.
7 Q In making the comparison that you do in
8 paragraph 29, you rely on data from 2018, correct?
9 A That's right.
10 Q Why did you limit your analysis to the
11 year 2018?
12 A It may be that was the one 10-K that broke
13 out all of their -- all of Merck's products, but
14 it may also be that that's the snapshot I looked
15 at.
16 Q Do you agree that a comparison for other
17 years, if different than 2018, would potentially
18 be relevant to your analysis?
19 A Could be. I'd have to look at it. I
20 haven't looked at it yet.
21 Q Do you remember whether you tried to find
22 this information?

1 A No. I think I looked at 2018 either
2 because I -- as I just told you, that was the one
3 of their annual reports that broke out -- broke it
4 out by product like that, or I looked at the year
5 right after the indication was approved.
6 I think the other reason I mentioned here
7 in the text is because that's the year that lines
8 up with Merck's statements about the 5 percent
9 revenue being attributable to MSI-High as well.
10 Q In Appendix 6 of your '356 declaration,
11 you list Merck's pharmaceutical products ranked by
12 U.S. sales in 2018, correct?
13 A Yes.
14 Q Are all of the drugs listed in Appendix 6
15 directed towards the treatment of cancer?
16 A No.
17 Q Do you have an understanding of what
18 Januvia is used to treat?
19 A Not sure. I know some of these are
20 vaccines. I have looked at some of the other ones
21 but I don't recall as I sit here right now if I
22 looked at Januvia or not.

1 Q What is the relevance of drug sales
2 outside the market for cancer treatment in your
3 analysis of commercial success here?
4 A Well, the relevance is whether the
5 invention has created a profitable enterprise for
6 either the inventors or the ones that are making
7 use of the invention. So in other words, has it
8 added value to -- to Merck as a whole; has it been
9 profitable.
10 Q Do you have an opinion as to whether each
11 of the drugs you list in Appendix 6 is a
12 commercially successful product?
13 A No. I haven't done that analysis.
14 Q When you said that you spoke to some of
15 your colleagues in the office during the breaks
16 today, who are you referring to?
17 A Only one, guy's name is Rob Maness.
18 Q Was he involved in the preparation of your
19 declarations or --
20 A No.
21 Q -- in preparing for testifying today?
22 A No, he was not.

1 Q The numbers that you list in Appendix 6
2 are sales figures, correct?
3 A Yes.
4 Q What is your understanding as to where
5 Keytruda MSI-High/dMMR would fall when looking at
6 net revenue?
7 A I don't know. I think you would -- I
8 think we discussed some of the items I requested
9 from Merck in my other deposition. One of those
10 is a profit and loss specific to Keytruda. A P&L
11 statement would show things like net revenue,
12 revenue net of discounts and rebates and
13 everything else. But I don't have that
14 information, so I -- I can't answer that question
15 given the information that Merck has provided.
16 Q When you say that you requested that
17 information from Merck, what do you mean?
18 A Well, I think we discussed this in the
19 prior deposition but I requested information
20 through -- through counsel. So would have come
21 through Fish for -- and one of the items
22 specifically that I wanted to see was a profit and

1 loss statement for Keytruda, or an income
2 statement would be another word for the same
3 thing.
4 MR. ZEILBERGER: Thank you very much for
5 your time today, Mr. Segers. We have no further
6 questions.
7 THE WITNESS: Okay. Thank you.
8 MS. McCORMICK: I just have a couple
9 questions.
10 EXAMINATION
11 BY MS. McCORMICK:
12 Q Mr. Segers, do you recall earlier today
13 you were talking with counsel about indications on
14 Keytruda's FDA-approved label?
15 A Yes.
16 MR. ZEILBERGER: Objection, leading.
17 Q Do you understand that all indications on
18 a label are FDA approved?
19 MR. ZEILBERGER: Objection, leading.
20 A That is my understanding, yes.
21 Q And counsel asked you about so-called
22 non-approved indications.

1 Do you remember that?
2 MR. ZEILBERGER: Objection, leading.
3 A I don't recall specifically, no.
4 Q If you were talking about non-approved
5 indications, do you have an understanding of what
6 that means?
7 MR. ZEILBERGER: Objection, leading.
8 A I don't have an understanding that it
9 would be on the label if it's not approved.
10 Q So in the context of Appendix 6 from your
11 '219 declaration. And let me stop there.
12 , do you remember talking about that
13 earlier today?
14 MR. ZEILBERGER: Objection, leading.
15 A Give me a moment to look at it.
16 Q I said Appendix 6. I meant Appendix 5 of
17 the '219.
18 A Appendix 5, yes. Yes. I remember
19 discussing Appendix 5 of '219.
20 Q And you have labeled here on Appendix 5
21 the light blue line, CRC plus all non-approved
22 indications?

A Yes.

Q Can you just explain what you mean by that?

A Sure. Yeah. What I mean is that those are -- those are cancer types where Merck or Keytruda does not have a -- a separately individual approved indication. So in other words, these are things that are potentially or likely could be covered under an MSI-High tumor agnostic indication where there's not a separate indication that's approved for these cancer types. I wasn't meaning to suggest that there are non-approved indications on the -- on the label.

Q Perfect. Thank you.

MS. McCORMICK: I have no further questions.

MR. ZEILBERGER: Okay. I think we're done.

(Whereupon the proceedings were concluded at 1:23 p.m. EST)

1 CERTIFICATE OF SHORTHAND REPORTER
2 I, Karisa Ekenseair, Certified Reporter and
3 Notary Public within and for the State of Arkansas
4 do hereby certify: That BRIAN J. SEGERS,
5 the witness whose deposition is hereinbefore set
6 forth, was duly sworn by me before the
7 commencement of such deposition and that such
8 deposition was taken before me and is a true
9 record of the testimony given by such witness.
10 I further certify that the adverse party,
11 PATENT OWNER, was represented by counsel at
12 the deposition.
13 I further certify that the deposition of
14 BRIAN J. SEGERS occurred virtually on
15 April 21, 2025, commencing at 10:03 a.m. to
16 1:23 p.m.
17 I further certify that I am not related
18 to any of the parties to this action by blood
19 or marriage, I am not employed by or an attorney
20 to any of the parties to this action, and that I
21 am in no way interested, financially or otherwise,
22 in the outcome of this matter.

1 IN WITNESS WHEREOF, I have hereunto set my hand
2 and affixed my seal this 22nd day of April 2025.
3 My commission expires: 6-18-2028
4
5
6 Karisa Ekenseair, CCR RPR RMR RDR LS #802
7 Notary Public in and for
8 Pulaski County, Arkansas
9 Commission No. 12704567
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