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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22nd November-Friday 23rd December 2022

Before:

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

BETWEEN:

Appellants

(1) ALLERGAN PLC (“Allergan”)

(2) ADVANZ PHARMA CORP. LIMITED & O’RS (“Advanz”)

**(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED &
O’Rs (“Cinven”) (4)**

(4) AUDEN McKENZIE (PHARMA DIVISION) LIMITED (“Auden/Actavis”)

(5) INTAS PHARMACEUTICALS LIMITED & O’RS (“Intas”) Respondents

AND

COMPETITION AND MARKETS AUTHORITY (“The CMA”)

A P P E A R A N C E S

Mark Brealey KC (On behalf of Advanz)

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

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

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

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

Marie Demetriou KC, Josh Holmes KC, Tristan Jones, Niklaus Grubeck, Michael Armitage,
Professor David Bailey & Daisy Mackersie (On behalf of the Competition Markets Authority)

Tuesday, 22 November 2022

(10.30 am)

Housekeeping

THE PRESIDENT: Good morning. Before we begin, I'll just put on the record the usual warning. This hearing is being live streamed on our website. An official recording is being made and a transcript by my authority being produced, but any other recording, photography or transmission is strictly prohibited and I hope no one does that.

With that, we have got an hour for housekeeping. I have a few points, but I think we had probably better hear from the parties on any housekeeping points first if there are any.

Ms Demetriou?

MS DEMETRIOU: I do not know if I have switched this on. I have, I think, yes. I am not sure how many housekeeping points there are that need to be addressed immediately. There are some points. There are some updates, so, for example, the Tribunal requested that an updated version of the Decision is put on Opus and that has been done. There is -- there are communications between the parties I think in response to your request, sir, that the parties agree a glossary of terms, so that is in train, so the CMA -- there is still some

1 disagreement, because we are keen that the terms are not
2 different to the terms as defined in the Decision, which
3 we think would be very confusing, but hopefully that is
4 something that can be agreed quite rapidly. And so that
5 can be put on Opus.

6 There have been various letters to the Tribunal
7 about witness familiarisation, so you should have
8 received those.

9 THE PRESIDENT: Yes.

10 MS DEMETRIOU: The Tribunal is aware, I know, that Dr Burt
11 is not going to be cross-examined. So that leaves
12 a little bit more flexibility in the timetable.

13 Advanz have agreed that certain names that at the
14 moment are redacted, but which we will be coming to
15 reasonably frequently in cross-examination, can be
16 referred to in open court, so that has been helpful.

17 I think those are really the only points that I have
18 got at the outset. They are really points by way of
19 update.

20 THE PRESIDENT: That is very helpful, Ms Demetriou.

21 Anyone else got anything they want to get off their
22 chest? I see shaking of heads.

23 Just a couple of points from us. First of all, we
24 will take the usual no more than ten minutes
25 transcription break mid-morning and mid-afternoon.

1 I will try and remember, but if everybody else can also
2 try to remember, we will not run on for too long.

3 Secondly, I found it of use in other long cases
4 which is if the parties could produce what I call a day
5 file at the end of each day, which is a hard copy file
6 containing the transcript, any documents handed up that
7 are not in the record and a list of the documents that
8 have been referred to during the course of the day, that
9 would be very helpful. If in addition to the list one
10 could have a copy of the page actually referred to in
11 the order that they are referred to, not the whole
12 document, but the page, that would be very helpful as
13 well, simply so that when we are writing up our findings
14 we can see what was said and what was referred to on any
15 given day. That would be very helpful if it can be
16 done.

17 There is one other point or two other points of
18 slightly more substance, which I think it is appropriate
19 that we just raise now. First of all, I notice that
20 there is a difference in approach between the parties
21 regarding the 20mg agreement in that the appellants are
22 not overtly making very much reference to it and the CMA
23 has commented on that adversely in its submissions.

24 Now, we have no view at the moment as to whether the
25 20mg agreement is or is not material when looking at the

1 factual context in the round. The only point that
2 I would make is that we are not going to presume, simply
3 because it has not been referred to, that it is
4 irrelevant. It may very well be irrelevant, but we are
5 not going to presume that to be the case and if and to
6 the extent the CMA makes points regarding what can be
7 inferred out of the 20mg agreement as regards other
8 aspects of conduct, then that is a point that we
9 consider it open to the CMA to make and we will hear
10 those points for what they are worth.

11 I do not know what they are worth. That is a matter
12 for later on, but I would not want anyone to be under
13 any illusions that we are simply going to ignore,
14 without more, the 20mg agreement simply because it is
15 not the subject of anyone's appeal.

16 Secondly, Mr Sully is obviously going to be in the
17 witness box next. My understanding is that the CMA will
18 be bearing the brunt of the cross-examination. Have
19 I got that right?

20 MS DEMETRIOU: Yes, that is right. I think we are the only
21 party cross-examining factual witnesses.

22 THE PRESIDENT: Right. I had gleaned from the PTR, and if
23 I am wrong then that does not matter, that some of the
24 other parties might have follow-up questions.

25 MR PALMER: We might. "Might" is the word, because it

1 depends entirely on the content of Ms Demetriou's
2 cross-examination.

3 THE PRESIDENT: Indeed. I am glad I got that right. That
4 there is the potentiality for further questions in which
5 case that is absolutely fine. But it does seem to us
6 that, given that it is the CMA defending this Decision,
7 the CMA ought to have the last word in terms of
8 cross-examination. Obviously, I am excluding
9 re-examination, but Ms Demetriou, if Mr Palmer stands
10 and asks some questions, I will give you the opportunity
11 to have the last cross-examination word in any
12 cross-examination, if that assists.

13 MS DEMETRIOU: Sir, thank you very much and of course I know
14 that my learned friends will not do this, but it would
15 not be appropriate through that means effectively to
16 re-open things that have been established in
17 cross-examination through some sort of form of -- whilst
18 avoiding the strictures of re-examination, so it is not
19 a free-for-all. If there are particular points which
20 affect their client, then they can be put and we will
21 have a chance, as you say, to respond, but anything that
22 is properly re-examination should be the subject of
23 re-examination by Mr Brealey I apprehend.

24 THE PRESIDENT: I think that is taken as read. What
25 I wanted to establish was the essential ground rules for

1 cross-examination. I mean, there are cases where one
2 has a particular order of cross-examination in that
3 allies of the witness being cross-examined tend to go
4 first and then the person who has the aggressive
5 questions goes second. That is not the course that has
6 been adopted here and that is why I have made the point
7 that the CMA ought to have the last cross-examination
8 word. We are obviously only going to entertain
9 appropriate cross-examination questions and whoever is
10 calling the witness, Advanz in this case, will obviously
11 have full right of re-examination at the end. So the
12 last word there.

13 The final point that I had was I noticed that
14 Mr Sully in, for example, paragraph 38 of his statement
15 refers to material that is legal advice and so
16 presumptively privileged and whether privilege has been
17 waived. It is obviously a selective waiver in the sense
18 that only part of the advice that was provided has been
19 referred to. I just want to assure myself that there is
20 no hidden point about a partial waiver that ought to be
21 looked at further, the CMA does not have any concerns
22 about that.

23 MS DEMETRIOU: Sir, yes, so some of the advice is redacted
24 and we have not made a point about that. I think that
25 things have moved on, I think in a constructive way in

1 the sense that Mr Brealey's clients have confirmed that
2 insofar as the advice is referred to, so the advice that
3 is referred to in the witness statement at the moment is
4 marked "confidential" in the bundles, but can be
5 referred to in open court. So they are not maintaining
6 confidentiality over it in terms of -- because that will
7 make the hearing easier. But in terms of the
8 substantive point, no, we have not taken any point about
9 partial waiver.

10 THE PRESIDENT: No, I just wanted to get that on the record.
11 I was quite confident that was the position, but if
12 there was a latent row I wanted to make sure it was
13 overt before we had Mr Sully in the witness box, rather
14 than during the course of it. So there are no surprises
15 there, but I thought it appropriate to raise it.

16 MS DEMETRIOU: Thank you, sir.

17 THE PRESIDENT: Those were, for what it is worth, our
18 housekeeping points. Is there anything arising out of
19 that that the parties want to mention? Otherwise, we
20 can presumably proceed straight away to Mr Sully.

21 Mr Brealey, over to you.

22 MR BREALEY: Yes, I call Mr Sully. I notice there is no
23 witness statement there.

24 MR SULLY (affirmed)

25

1 Examination-in-chief by MR BREALEY.

2 THE PRESIDENT: I do not know how you are going to be
3 referred to documents. Is that going to be done by way
4 of physical bundles?

5 MR BREALEY: Oh my goodness.

6 MS DEMETRIOU: Sorry to interrupt. We are both taken aback,
7 because they should come up on the screen, but there is
8 no screen there, so.

9 THE PRESIDENT: That was my immediate thought.

10 MR BREALEY: It is a piece of housekeeping.

11 THE PRESIDENT: We had probably better rise to make sure --
12 Mr Sully, I do not think you should trouble yourself
13 with the mechanical details, but you are obviously going
14 to need to see the documents. We will rise for five or
15 ten minutes to enable the screens to be put in place, so
16 we will do that now.

17 (10.43 am)

18 (A short break)

19 (10.52 am)

20 THE PRESIDENT: I am glad to see you do now have a screen.

21 What I was going to say before you are asked some
22 questions is this: normally if you have a bundle you are
23 able to leaf through the document to see context and
24 understand what the document is. You cannot actually do
25 that on the screen. Please do not feel inhibited in

1 asking counsel to see what it is that you are being
2 presented and if you want to read the document from the
3 beginning, then just shout and it will be done. Do not
4 feel awkward. There is a tendency amongst witnesses to
5 be very British about this and say, I will accept what
6 is shown to me and I will not ask anything else, but we
7 want your evidence and this is not a memory test. You
8 are not expected to understand what every document is in
9 its completeness, so do ask.

10 A. Okay, thank you.

11 THE PRESIDENT: Mr Brealey over to you.

12 MR BREALEY: Thank you very much. So, Mr Sully, I can see
13 your witness statement there. Can you just check that
14 it is yours and can you -- for the document it is
15 {B2/2/29}.

16 A. Yes, it is mine.

17 Q. There is a date, 4 November 2014. Is that your
18 signature?

19 A. It is, yes, my DocuSign signature.

20 Q. And can you confirm that the contents of this witness
21 statement are true to best of your knowledge and belief?

22 A. Yes, I confirm they are true to the best of my knowledge
23 and belief.

24 Q. Thank you very much indeed. And Ms Demetriou, to my
25 right, is going to ask you some questions. Thank you.

1 Cross-examination by MS DEMETRIOU.

2 MS DEMETRIOU: Morning, Mr Sully. You are familiar with the
3 Tribunal's procedure, are you not, because you recently
4 gave evidence on behalf of Advanz in the Liothyronine
5 appeals, that is right, is it not?

6 A. Yes.

7 Q. And you are no longer general counsel for Advanz, is
8 that right?

9 A. Yes, that is right.

10 Q. So when did your employment come to an end?

11 A. My employment came to an end at the end of April or very
12 beginning of May this year and I set up a consultancy.

13 Q. And you say in your statement that you were appointed as
14 general counsel of AMCo on 15 March 2013, that is right,
15 is it not?

16 A. Yes, I had been at Mercury before then since
17 about June 2011, but I was appointed as --

18 Q. Mr Sully, this is going to be uncontentious stuff so
19 really do not feel the need to elaborate, unless you
20 want to, because I am going to take you through it. So
21 if there is something at the end -- otherwise, we might
22 be here for a very long time. So if there is something
23 at the end that you think is missing, do feel free to
24 come back, but these are really uncontentious facts so
25 a yes or no should be sufficient.

1 So by AMCo, you mean Amdiphram Mercury Group, that
2 is right, is it not?

3 A. Yes.

4 Q. And before that you had been legal director of Mercury?

5 A. Yes, yes.

6 Q. And that had been called Goldshield, but it was
7 re-branded as Mercury in March 2012?

8 A. Yes, that is correct.

9 Q. And that was purchased -- so Mercury was purchased by
10 Cinven in August 2012, that is right, is it not?

11 A. Yes, Mercury was purchased by Cinven in August 2012,
12 yes.

13 Q. And then Cinven acquired Amdiphram at the end
14 of October 2012?

15 A. Yes.

16 Q. And prior to 2011, you had worked in private practice,
17 had you not?

18 A. Yes, I had. I had been on secondment for about
19 nine months, but I had been in private practice.

20 Q. And you had practised in, amongst other things,
21 intellectual property law and competition law?

22 A. Yes, that is right.

23 Q. In fact, we see from your CV that you did the
24 post-graduate degree in EU competition law at
25 Kings College, that is right, is it not?

1 A. Yes, that is right.

2 Q. Was Professor Whish still running that course when you
3 did it?

4 A. Yes, he was.

5 Q. So we have something in common, probably with lots of
6 other people in this room, we all know Professor Whish?

7 A. Yes.

8 Q. And you also had experience of pharmaceutical law?

9 A. Yes, so during my time at Jones Day, I was a litigator,
10 dispute resolution, but I had particular experience of
11 pharmaceuticals and, therefore, IP in competition, as
12 well as various other things.

13 Q. You have had a significant amount of experience, I think
14 we can say, in the pharmaceuticals industry, that is
15 right, is it not?

16 A. Yes, that is right.

17 Q. Because of your experience, amongst other things in
18 competition law in practice but also the
19 postgraduate degree you did, you had a good
20 understanding of what type of conduct is
21 anti-competitive?

22 A. I believe so, yes.

23 Q. And you understood, we see from your statement, the
24 importance of commercial companies having competition
25 compliance programmes in place?

1 A. Yes, absolutely, that was one of the things I had done
2 when I came on secondment to Goldshield before it was
3 re-branded, yes. It was very much an important part of
4 my role as I saw it and it was very important for the
5 company and the boards at the various times as they
6 evolved.

7 Q. Thank you. And that would involve, would it not,
8 training the employees in what conduct is and what
9 conduct is not permissible in competition law terms.
10 That is part of your role too?

11 A. Yes, absolutely.

12 Q. And you explain -- just on that a bit more, you explain
13 in your witness statement that following your arrival at
14 Goldshield in 2011 you instigated a rolling annual
15 compliance programme specifically in relation to
16 competition law, that is right, is it not?

17 A. Yes, it is. It included competition law. It was all
18 types of compliance, anti-bribery, competition law, etc
19 but it was not just competition law but it absolutely
20 definitely included competition law.

21 Q. And you say I think that you did that with some help
22 from external advisers?

23 A. That is right, yes.

24 Q. But you were very much involved in producing the
25 compliance documents?

1 A. Well, I was definitely involved. I think I asked
2 Jones Day for a template policy and then effectively
3 tweaked it to make it -- with their help to make it sort
4 of a pharmaceutical appropriate policy, if you like.

5 Q. And you say that when you were there you established
6 yourself as someone that staff could call on to give
7 advice about competition law issues?

8 A. Yes, about all compliance issues, but I saw it very much
9 as part of my role to make sure I was approachable and
10 legal was not sort of off in a box on the side, that
11 I was fully part of the business and that staff could
12 come and speak to me and indeed did. I think that was
13 a very important part of being in-house counsel.

14 Q. And one of the basic -- one of the features of that
15 important role, one of the basic principles that you
16 would have wanted everyone at Goldshield to understand,
17 is that it is not a good idea generally to speak to
18 competitors. That is right, is it not? You have got to
19 be careful.

20 A. That you have got to be careful, yes, yes. Certainly
21 the compliance training included the fact that
22 competitors should not be speaking to each other
23 normally, to be careful around trade conferences and
24 that kind of thing, so, yes.

25 Q. Not just trade conferences, but any other time where

1 competitors --

2 A. I am not saying just trade conferences. Any time you
3 have to be careful around it.

4 Q. And you would have known and you would have explained to
5 people that if you were going to speak to a competitor,
6 then generally it is a good idea to have a lawyer
7 present?

8 A. No, I do not think I did explain that. I think what I
9 did say is generally you should not be speaking to
10 competitors. We were a small company. The legal team
11 was effectively me, a relatively junior lawyer in
12 Mumbai, and then a paralegal and I said -- and generics
13 is a small industry and there were a number of occasions
14 where people would be talking, such as trade
15 conferences, and I said, generally, you have to be
16 extremely careful about this, but if you ever speak to
17 a competitor, you must inform me, I need to be involved
18 in that, and then if there was a particular sensitivity,
19 as I am sure we will come to, in some meetings
20 absolutely I would make sure I was there.

21 Q. And I think you also would have told employees that
22 generally there should be an agenda for discussions like
23 that and a note should be taken. That is right, is it
24 not?

25 A. No, I don't think that is right. I think we were

1 working too fast and too busy to take notes as we go.

2 I think that is more sort of private practice.

3 Obviously, as part of being informed why does there need
4 to be a meeting and who are you seeing, I would want to
5 be involved, but I do not remember the business ever
6 really taking notes of meetings with people in the way
7 that you are suggesting.

8 Q. Including with competitors. So you do not think it is
9 a good idea that if you are meeting a competitor there
10 should be a record of the meeting?

11 A. The compliance practice at the time, given the size of
12 the business, was to keep me fully informed. I want to
13 know what is going on and, ideally, you know, if it is
14 something that I am concerned about, I want to come
15 along too, but certainly at the time we were just moving
16 too fast and we were too under-resourced to be taking
17 the kind of -- there was not some sort of policy that if
18 you meet a competitor there needs to be an agenda in
19 advance and there needs to be minutes of the meeting.
20 That just wasn't the case.

21 Q. You say at paragraph 19 of your statement -- I do not
22 think we need to turn it up. You have got it there in
23 case you want to look at it -- that neither Amdiphram
24 nor Waymade had any internal legal or compliance
25 function. When did you come to realise that?

1 A. I am honestly not sure how long ago it was. I suspect
2 it was in the run-up to Cinven acquiring Amdiphram.
3 After Cinven had acquired Mercury at the end
4 of August 2012 some of us were asked to help Cinven, and
5 in particular its due diligence advisers,
6 Clifford Chance and Deloitte, in performing due
7 diligence on Amdiphram which it was acquiring from the
8 owners of the Waymade group. I suspect I became aware
9 then that there was not a legal team and it certainly
10 became apparent subsequently, when I did the compliance
11 training in June/July 2013, but I am sure I would have
12 become aware of it earlier.

13 Q. Okay.

14 A. I think in autumn 2012, as part of that run up to that
15 acquisition.

16 Q. So you think around autumn 2012, but you can't be sure
17 at the moment, but that is your best recollection?

18 A. Yes.

19 Q. When you did come to realise that that must have been
20 a concern to you, no?

21 A. Not particularly, it was relatively straightforward.
22 I remember someone joining from Zentiva and they did not
23 have an in-house legal team from the UK. So it was a --
24 the Waymade group was, I think, like lots of generic
25 groups that did not have in-house counsel and used

1 external counsel.

2 Q. Let me put it this way: you did not think it was a good
3 idea that they did not have any compliance function.

4 You set about trying to change that for them?

5 A. I do not think I judged what they had done, but
6 certainly as part of creating AMCo it was absolutely
7 clear that all AMCo staff, and that included all of the
8 Amdiphram staff that came in, were going to adhere to
9 our best in class compliance practices and that included
10 all of the annual training I had set up and that was why
11 after the acquisition, after AMCo was created and after
12 the staff of AMCo were chosen, which was in about April
13 or May 2013, I promptly rolled out -- I personally went
14 to Basildon and I trained all of the staff who were part
15 of Amdiphram to make sure they understood all of these
16 things, because they obviously had not been trained in
17 the past and we rolled out all the compliance practices
18 and policies and acknowledgments that I had set up in
19 Mercury Goldshield to them, because the board and
20 I wanted to make sure we were best in class compliance.

21 Q. Mr Sully, you were then presumably involved in creating
22 the AMCo competition law compliance manual in 2013 as
23 part of the process you have just described?

24 A. Yes, so once AMCo was created in March 2013, we updated
25 the Mercury competition policy that I had set up

1 previously to become the AMCo policy. That would have
2 been what I trained the staff on.

3 Q. Let us have a look at that. That is at {H/186.2/1}.

4 That should come up on your screen with a bit of luck
5 {H/186.2/1}.

6 MR BREALEY: I am really sorry to interrupt, Ms Demetriou.

7 There is nothing coming on my screen and I clearly need
8 to have it. I can share yours. Let us wait and see.

9 THE PRESIDENT: It is coming up on our screens. Has anyone
10 else got a problem?

11 MS DEMETRIOU: I think Mr Brealey's screen might be broken,
12 which is not ideal. Is it switched on?

13 MR BREALEY: I wondered whether --

14 MS DEMETRIOU: I just wondered if we should just sort this
15 out, because it is not ideal that Mr Brealey is not --

16 THE PRESIDENT: Yes, I agree. We will rise again.

17 MS DEMETRIOU: He might have it.

18 THE PRESIDENT: Let us see if it can be resolved. (Pause).

19 MR BREALEY: No, no. Sorry, it is completely dead.

20 THE PRESIDENT: You obviously need to see the documents. We
21 will rise to enable this to be dealt with. Mr Sully,
22 I would normally give this warning later on in the
23 morning. But please do not talk to anyone about your
24 evidence. I am sure you would not want to, but do not.
25 I will only say it once, but it applies throughout your

1 evidence. We will rise for as long as necessary.

2 (11.09 am)

3 (A short break)

4 (11.15 am)

5 THE PRESIDENT: Mr Brealey, are you up and running?

6 MR BREALEY: It wasn't my incompetence. It was a lead
7 missing.

8 THE PRESIDENT: We are very glad to hear that.

9 MS DEMETRIOU: Mr Sully, we are looking at the front page of
10 this document that says "Competition Law Compliance
11 Manual". Do you have that on the screen in front of
12 you?

13 A. Yes.

14 Q. And if we can go to page 2, please {H/186.2/2}, you see
15 this was circulated to all employees. Do you see that
16 at the top?

17 A. Yes, I do.

18 Q. And it was done in March 2013. Do you see that at the
19 top as well?

20 A. Yes.

21 Q. And you would have expected all relevant employees
22 carefully to read this and to follow it, would you not?

23 A. Yes.

24 Q. And in fact if we go down to the bottom of the page, you
25 can see that employees have to then complete a mandatory

1 competition law compliance certification. Is that
2 something you helped introduce?

3 A. Yes, it is. So part of the sort of wanting people to
4 take responsibility was they should sign to say: I have
5 been trained, I understand it and I will comply.

6 Q. Thank you. If we go on to page 12, please {H/186.2/12}.
7 At the top of the page, if we can just zoom in a little
8 to the top of the page, you can see a heading
9 "Communications" and then the very first thing this says
10 is:

11 "Before writing:

12 "Do you need to record this in writing? Anything
13 written can be made public.

14 "Is email appropriate? Assume all email will be
15 read by others. Remember, email can never be deleted
16 completely."

17 What were you getting at here, Mr Sully, because it
18 seems to be telling employees that if they have anything
19 commercially sensitive to say they should not commit it
20 to writing because someone might see it. Is that what
21 you were trying to get across?

22 A. As I said, this came from a template from Jones Day and
23 I have seen a number of policies over the years that are
24 quite similar, because of the way that, under European
25 competition law, in-house counsel do not have privilege.

1 There is generally a thing of speak to find out what's
2 going on, as part of the policy, as I understand it, and
3 I have seen a number of these kinds of templates, and do
4 not just write loads of stuff and send it all over the
5 place before you actually understand what is going on
6 and I'm sure if we go do the bottom it will say:

7 "If you have any concerns, speak to legal and then
8 you can make sure that things are done properly".

9 Q. Mr Sully, when you talk about a template, are you saying
10 that you just really adopted a template without really
11 giving it any thought yourself, is that your evidence?

12 A. No, I do not think I said that. What I said was we took
13 a template from Jones Day and I ensured that it was
14 specific for pharmaceutical, but, as far as I recall,
15 this would have been in their template and I have seen
16 it in a number of other law firm's standard templates
17 for competition policies.

18 Q. So you are not saying here, well, if you are exchanging
19 commercially sensitive information, make sure you don't
20 keep a written record of it?

21 A. No, no, absolutely not.

22 Q. But you understand that is how it might be understood by
23 someone looking at it?

24 A. That is certainly not how I understood it at the time,
25 as I mentioned. I think this is pretty standard in

1 competition policies and is meant to make sure that
2 people are careful about what they write, things can be
3 misunderstood and, as I said, there was definitely
4 a message to them, and I am sure it is in the policy, if
5 you have any concerns about something, come and speak to
6 the legal team.

7 Q. Let us go to page 13 {H/186.2/13} and you see there the
8 heading "Trade Associations - A Special Case" but you
9 see in the second line that what is being said there is
10 that:

11 "Such meetings are between competitors".

12 Yes, you see that there?

13 A. Yes, sorry, the second --

14 Q. The second line under "Trade Associations"?

15 A. Yes:

16 "AMCo must recognise that such meetings are between
17 competitors... "

18 Yes.

19 Q. And then what is listed -- and then you see before the
20 bullet points, do you see:

21 "Essential safeguards for trade associations or
22 other contacts with competitors."

23 Do you see that?

24 A. Yes.

25 Q. And you then list or the document then lists some

1 essential safeguards, yes, including having written
2 agendas and minutes of meetings?

3 A. Yes.

4 Q. And so when you said previously that you were not very
5 concerned about agendas and records, written records, of
6 meetings, by this stage presumably you had realised that
7 was an important thing to do, had you not?

8 A. No, this was the policy that applied from I think 2010,
9 broadly. It got updated regularly onwards and up until
10 the present. It would be interesting to see if the same
11 thing is there now and as I said, given the size of the
12 organisation, the size of the legal team, the policy we
13 approached was: if you are talking to a competitor,
14 involve legal. If you have any concerns about
15 something, involve legal and, obviously, we used to take
16 the legal advice. There certainly was not a mandate to
17 state if you go to a trade association you need to do
18 these points.

19 Q. Mr Sully, I just want to understand that a bit better,
20 because this says "Essential safeguards for ...contacts
21 with competitors". It says they are essential, yes, and
22 you are distributing this to all employees in March 2013
23 and they have to sign a certificate to say they have
24 understood it and the essential points are agendas
25 circulated in advance and minutes recording each meeting

1 and take legal advice on proposed initiatives. Those
2 are some of the essential safeguards.

3 Are you saying that you did not believe those were
4 essential safeguards at the time and that it was alright
5 just to tell you that a meeting was happening or did you
6 believe those were essential safeguards, because that is
7 what you wrote?

8 A. So I am saying that the policy, which was taken from
9 a template -- I can see the words that are there, but
10 the approach we took was to explain to everyone exactly
11 what competition law was, where it applied and that any
12 kind of contact with competitors, including trade
13 associations, is extremely sensitive and you should
14 involve the legal team. They should know about these
15 things and if you have any concerns, you should raise
16 them and, equally, as the legal team, we then took
17 a call on is this something that is a concern that we
18 should attend. Essentially, that was me personally.
19 But given I could not attend trade associations
20 meetings, for example, I attended some of them, but not
21 all of them, there would be calls that I would make as
22 to so long as I know what is going on that is fine.

23 Q. So your evidence is that despite sending this round, as
24 long as you knew that there was a contact with
25 a competitor, it did not matter if there was no agenda

1 or no written record. Is that your evidence?

2 A. So what I am saying is this was the policy. I can see
3 why you are picking up on the fact that it says
4 "essential", but the way it worked at the time was, as
5 I said, we only had a limited number of people in the
6 team. There were only a small number of sales people in
7 the UK and internationally. I had encouraged an open
8 practice where I was fully involved in what was going on
9 and we felt it was appropriate -- or I felt it was
10 appropriate to, so long as I knew what was going on,
11 that that was enough.

12 THE PRESIDENT: Sorry. So sorry to interrupt.

13 Mr Sully, you are quite properly being taken to this
14 document and what it says in black and white. I think
15 your evidence is the black and white wording is somewhat
16 nuanced in terms of how it applied in the organisation.
17 Would that be a fair way of describing it.

18 A. Yes.

19 THE PRESIDENT: So how was that nuance communicated to the
20 other people in the organisation? I mean, they are
21 given this written document. It says "essential
22 safeguards". We see what it says. Your view as to what
23 was appropriate is, as I say, more nuanced. How was the
24 average employee who just gets this document to know
25 that they did not have to have an agenda in advance for

1 each meeting or they did not need minutes recording each
2 meeting.

3 A. So, I gave -- I personally gave the trainings to all the
4 staff in the organisation on the policies, so I would
5 have dealt with questions at the time. There were
6 relatively few trade associations we were members of and
7 very few, very, very few dealings with competitors. So
8 to the extent that someone said, for example, I am going
9 to a BGMA meeting, I know because I attended a number of
10 them to make sure I understood what was going on.
11 I know they did have a constitution and an agenda and
12 minutes, so I would have said that is fine if you are
13 going to a BGMA meeting which is the UK generics
14 industry.

15 I do not think I recall any other trade association
16 meetings that people went to because effectively UK was
17 the biggest part of the business. And then if they had
18 said, look I need to talk to a competitor, then I would
19 have said, so what is it about? Do I need to be
20 involved? Either I am there or I need to come back.
21 But I would have discussed it in those training sessions
22 with them.

23 I can think of an example where in 2012 Teva who was
24 a competitor, another generics company, the MHRA had
25 taken away its manufacturing licence for Levothyroxine,

1 and there were only three players in the market and it
2 was like Actavis, Teva and ourselves. Teva was out
3 because it has lost its licence and so there was
4 a proposal that came from Teva to say, look we have all
5 our customers, can we take supply from you, and I said
6 this came to me from the UK commercial team. This has
7 been the request because they were off the market. So
8 I said, that's fine but I need to know exactly what is
9 going on and in that case I did go to those meetings
10 because Teva was a major competitor. So I guess it
11 would be -- in short my answer is I gave the training
12 sessions myself. I dealt with questions and then I was
13 involved as part of wanting to make sure legal was fully
14 involved in the functioning of the business in
15 discussing appropriate responses to different situations
16 that arose.

17 THE PRESIDENT: Yes, thank you. I am sorry, Ms Demetriou.

18 MS DEMETRIOU: Mr Sully, let us leave trade associations to
19 one side because I am not terribly interested in trade
20 associations. I just want to think about discussions
21 with contacts with competitors.

22 So despite these words which you are asking people
23 to sign up to you are saying, are you, that in the
24 training sessions you told people that they did not
25 actually need to record the meetings in writing or have

1 an agenda as long as they told you the meeting was
2 happening. Was that the advice you were giving in the
3 training sessions?

4 A. So I have to say I read this mostly as referring to
5 trade associations. I certainly did not give advice
6 that if you meet with competitors you don't need to --
7 I cannot remember the exact words you said -- you do not
8 need to do these things. What I did say is you
9 absolutely, if you are going to trade associations legal
10 needs to know and be involved and if you are meeting
11 with competitors which, as I say, was extremely rare
12 then legal needs to know. I did not say you do not need
13 to do these things. I said legal needs to be fully
14 involved.

15 Q. So you did not remove the impression conveyed by this
16 document that it was important to keep a written record?

17 A. Well, I suspect that if someone was there saying, I have
18 to go and meet, for example, Teva --

19 Q. I don't want to go into the Teva example. I am just
20 asking you a factual question. So you did not remove
21 the impression, you did not say, you do not have to keep
22 minutes of a meeting with a competitor?

23 A. Well, I think I did. If someone went to the BGMA
24 meeting and I knew that the BGMA meeting had their own
25 constitution, agenda and minutes, I would say that is

1 fine, so long as I know that you are the person that is
2 now delegated to go to those meetings. If someone said
3 to me I am talking to a competitor and I knew, I am sure
4 they did get the impression that they did not need to do
5 these things.

6 Q. Mr Sully, you say, well, I thought this was more about
7 trade associations. Are you telling the Tribunal that
8 you were not aware that other contacts with competitors
9 were potentially problematic?

10 A. No, I am not saying that.

11 Q. So you were --

12 A. Trade associations and competitors, but, for example,
13 the first bullet point is written association setting
14 out the purpose of the trade association -- written
15 constitution -- that clearly relates to a trade
16 association. So what I am saying is when I look at
17 this, some of the specifics there are clearly just about
18 trade associations, but I am not saying it does not
19 apply also to contacts with competitors, which are, if
20 anything, of more concern. That is why I wanted legal
21 to be fully involved.

22 Q. Now, Pinsent Masons produced a report following their
23 audit, did they not, and that report was dated
24 27 January 2014. Let us look at it. So it is at
25 {IR-H/554/5}. So you can see there the date at the top.

1 A lot of this is redacted. Sorry, we need the IR
2 version not the H version, because that is why it is
3 redacted. So there is an {IR-H/554/1} bundle,
4 thank you. (Pause).

5 EPE OPERATOR: I don't have it.

6 MS DEMETRIOU: There should be a tab that says "inner ring
7 confidential". I wonder if anyone there is just able to
8 assist, because we --

9 THE PRESIDENT: If you go into the hearing bundles tab,
10 there are a two sub-tabs "inner ring confidential".

11 EPE OPERATOR: I only have nonconfidential information.

12 THE PRESIDENT: You only have the nonconfidential. It looks
13 like we can't call up inner ring confidential versions,
14 which we clearly need to do.

15 MS DEMETRIOU: Sir, I do, yes.

16 THE PRESIDENT: How easy is this going to be to rectify?

17 EPE OPERATOR: I can contact my office.

18 MR BREALEY: As I understand it, some laptops are restricted
19 in terms of access. It may be a question of changing
20 laptops.

21 THE PRESIDENT: We will rise again and, hopefully, this can
22 be resolved. So we will give it a maximum of
23 ten minutes. If there is a greater problem, then we
24 will have to debate further.

25 (11.30 am)

1 (A short break)

2 (12.04 pm)

3 MS DEMETRIOU: Thank you, sir.

4 So, Mr Sully, I was taking you to the Pinsent Masons
5 report that they made following their audit and you have
6 got that in front of you. Can we just look at -- it
7 says "Summary of Conclusions". Perhaps we could zoom in
8 to that, thank you.

9 Can you see there that what is said is that:

10 "A recurring theme of this audit is the extent to
11 which employees meet with competitors. Clearly, there
12 are times when it is essential to meet with a competitor
13 and there are scenarios where competitors may also be
14 suppliers. However, as a result of the very strict case
15 law in this area, such meetings or discussions will
16 carry an inherent competition law risk for any employer.
17 One of the key recommendations we have suggested in
18 formalising the process by which employees can meet with
19 competitors such that they are controlled as far as
20 possible."

21 So you read and understood that at the time, that is
22 right, is it not?

23 A. Yes, I did.

24 Q. And presumably the reason that Pinsent Masons said that
25 the extent to which employees meet with competitors was

1 a recurring theme, to use their words, was because they
2 had found that it happened extensively. Do you agree?

3 A. I do not recall whether it was extensive or not. I do
4 not believe it was extensive, but that certainly was one
5 of the however many points we had raised in the
6 competition audit. I think the fact that Amdiphram
7 Waymade did not have a compliance team and they had met
8 with competitors must have come up in some of them,
9 certainly, so it was -- they were drawing it to my
10 attention.

11 Q. And you agreed, did you not, that there was
12 a competition law risk, so meetings or discussions with
13 competitors carry competition law risks, do you agree
14 with that?

15 A. I do.

16 Q. And that the process needed to be formalised. Do you
17 agree with that?

18 A. I do and I think that the formalisation is what I was
19 talking about earlier on, so the -- I have just been
20 thinking about what was the nuance and, effectively,
21 that would have been if I am talking to staff, any
22 junior staff, medium level staff, they need to know that
23 meeting with competitors is extremely dangerous and it
24 effectively should not happen without legal present.

25 I guess the nuance was if it was one of the

1 executive team, who I believed I was working closely
2 with, if they made sure I was fully involved, I think it
3 was the seniority point of if there was an executive
4 team member who had briefed me fully and who had, who
5 I believe understood competition law and understood the
6 risks, that was probably the nuance. I certainly do not
7 want the Tribunal to get the impression that we were
8 meeting willy-nilly. As I say, it happened very, very
9 rarely, but so long as I was involved and the person was
10 on the executive team and senior enough, I think that
11 would have been the -- what you said, sir, about the
12 nuance and that effectively is what I formalised was to
13 make sure, just to be clear, this is not something that
14 should be happening. If it is a junior or mid-level
15 person, it should not be happening at all, meeting with
16 competitors outside of trade associations.

17 Q. Right.

18 A. But, otherwise, I need to be fully involved in certain
19 circumstances. Depending on my assessment of the risk,
20 I would make sure I was there.

21 Q. When you say it happened very rarely, that is not what
22 Pinsent Masons obviously thought, because they said it
23 was a recurring theme the extent to which employees meet
24 with competitors. So they obviously did not think it
25 happened very rarely, did they, Mr Sully?

1 A. No, I think there is a difference here between what
2 Amdiphram had been doing prior to the acquisition and
3 what was going on going forwards, so that was the whole
4 point of the audit. We trained the staff so they
5 understood it. We said meetings with competitors and
6 a number of other things that were going on is not
7 acceptable, including for example unwritten agreements,
8 and going forwards this is what we did. So I think the
9 recurring theme is us looking backwards at the points
10 that I had been concerned about that had come up in the
11 compliance trainings and had therefore taken to them.

12 Q. Hang on, Mr Sully, the dates here are during the period
13 July 2013 to January 2014 "we worked with AMCo to
14 review a number of competition law risks". So that is
15 the post AMCo, if I can put it that way, period, is it
16 not?

17 A. So the review went on from July -- so I had the
18 training -- the compliance training sessions for
19 Amdiphram in, I think, it was June or July 2013. I was
20 concerned about a number of points. I raised them with
21 Pinsents. That review carried on until the final report
22 in January, but it was all relating to those risks that
23 had come up in the Amdiphram compliance training
24 session.

25 Q. Hang on a second. So Amdiphram had -- they had -- AMCo

1 had been formed, had it not, before July 2013?

2 A. AMCo was formed in March 2013.

3 Q. Right, and so when it says "during the period July 2013
4 to January 2014" that is a post-AMCo period. So AMCo
5 was formed formally back in March, wasn't it, of 2013?
6 So it is not looking at the history with Amdiphram. It
7 is looking at AMCo. They were assessing AMCo, weren't
8 they, Pinsent Masons?

9 A. Absolutely not. It was -- during that period, Pinsents
10 and I had worked closely together to look at the points
11 I had raised with them in July, which came out of those
12 compliance training sessions in June/July and they were
13 all points about the business of Amdiphram, what it had
14 been doing: for example, this Hydrocortisone unwritten
15 agreement.

16 Q. So they were saying that a recurring theme had been that
17 employees were meeting each other, were meeting
18 competitors, that this was happening to a large extent.
19 That is why they called it a recurring theme and you
20 were saying that was Amdiphram rather than Mercury, are
21 you?

22 A. Yes, because the audit was retrospective. It was
23 looking back at this business we had bought and we
24 wanted to make sure that it came up to our compliance
25 standards.

1 Q. All right. If we then look at the top -- if we can
2 scroll to the top of the document of that page, the top
3 of that page. Sorry, the top of page 1, can we go back
4 to page 1 in the same document. So you can see from
5 this email that you sent this to the AMCo -- I am
6 looking at the email addresses at the top -- the AMCo
7 management team, do you see that, from you to AMCo
8 management?

9 A. Yes.

10 Q. And that is on 11 July, that is the American dates, is
11 it not, so it is not 7 November. I think this is
12 11 July 2014 and this is the email thread you exhibited
13 to your statement, but if you look at the first
14 paragraph then I think what we can see from the first
15 paragraph is that this was you circulating a further
16 copy, is it not? I'll come on to that in a moment.

17 But looking at the third paragraph, you specifically
18 there refer to the informal arrangements with Auden. Do
19 you see that. So your note that section 8 --

20 A. Sorry, can you just tell me which --

21 Q. So the paragraph that says "You will note" section 8
22 deals with ..."

23 Have you got that?

24 A. Yes, yes.

25 Q. "With the informal cross-supply agreements that legacy

1 Amdiphram had with Auden McKenzie. As recommended by
2 Pinsents, we have ended these informal relationships
3 (contracts were put in place and then the arrangements
4 were terminated): Pinsents have been fully involved in
5 the new Hydrocortisone supply agreement with Auden,
6 which arises out of the orphan drug status."

7 And then at paragraph 4 you specifically say, so
8 that is the next paragraph, the one immediately
9 following that one of the key recommendations, at the
10 start of the report, is that AMCo puts in place
11 a process whereby any discussions with competitors are
12 monitored. In that paragraph you specifically again
13 refer to the discussions with Auden about
14 Hydrocortisone, that is right, is it not?

15 A. Yes, I can see it says that.

16 Q. So it is right to say, is it not, that you were
17 concerned about the informal nature of the discussions
18 that had already taken place between Amdiphram and Auden
19 over Hydrocortisone?

20 A. So I was concerned about the informal arrangements that
21 had taken place between Amdiphram and Auden regarding
22 Hydrocortisone and indeed Carbimazole. When those arose
23 in the compliance sessions in June 2013, that was the
24 point that we covered with Pinsents and we followed the
25 recommendations and documented it. When they produced

1 their final report in January 2014, I circulated that.

2 Q. I am going to come to that?

3 A. Sorry.

4 Q. I am going to come to it.

5 A. Sorry, but I circulated it again after the Auden second
6 agreement had been signed at the end of June to remind
7 everyone again this was a report we did and this is the
8 situation that has arisen. This Auden situation was
9 extremely complex and extremely unusual and so
10 I circulated it again, which is why I say, a further
11 report, a further copy and said because of this we
12 are -- this is the point. This is what has happened.
13 We have involved Pinsents in the second agreement that
14 has now been signed. You need to remember all of this
15 and you need to remember that meetings with competitors
16 must involve legal.

17 Q. Mr Sully, I know that you have a lot to get off your
18 chest, but really please just bear with me. I am going
19 to ask you short questions to which there should be
20 short answers and if we get to the end of a series of
21 questions and you feel there is still something you need
22 to get off your chest, then you can elaborate, but
23 really we are going to be here for several days if we go
24 at this pace.

25 I thought of some of these points already and I am

1 going to come to them. If you can just bear with me and
2 answer the question I am putting to you, I would be
3 very, very grateful. We will get on much more
4 efficiently.

5 THE PRESIDENT: Ms Demetriou, are you going to be eliciting
6 the witness's understanding about the informal
7 cross-supply agreements that are mentioned in this
8 paragraph?

9 MS DEMETRIOU: So one of the agreements is the
10 Hydrocortisone agreement, which obviously, yes, I am
11 going to go to. The other one, the other drug,
12 Carbimazole, is not relevant, so I am not going to be
13 dealing with that.

14 But obviously the informal supply agreement, one of
15 them, is Hydrocortisone.

16 If we go to {IR-H/354/1} so this isn't a thread that
17 you have exhibited, but just to establish what happened.
18 It attaches the same document, does it not? We can see
19 that at the top, "Pinsent's Competition Audit Report"
20 and this was circulated by you on 1 February 2014 to the
21 AMCo management team, yes?

22 A. Yes, this is what --

23 Q. I was getting to it. How many people would have been
24 included in an email to the AMCo management team
25 approximately?

1 A. I would say the AMCo management team would be 10 to 12,
2 10 to 14 maybe.

3 Q. So this is you, I think you have explained already,
4 circulating the report in February 2014 when you first
5 received it, yes?

6 A. Yes.

7 Q. And if we look at what you say?

8 A. The final report, just to be clear. I think I had
9 circulated the draft before.

10 Q. The final report, thank you. If you look at the
11 paragraph -- if you look at your email and do you see
12 the second main paragraph, you are saying there:

13 "Please can each of you read the report and let me
14 know if you have any questions. It reviews a number of
15 sensitive issues to our business, such as de-branding
16 and own label supply agreements. It is also a useful
17 summary of what we will need to be aware of and how easy
18 it can be to hold meetings or have discussions which can
19 create presumptions of guilt, so we all need to
20 understand it fully."

21 Yes, and there you are talking about discussions
22 with competitors, are you not?

23 A. Yes, I suspect I am. I don't know for certain, but
24 I suspect I am.

25 Q. If we go to your witness statement, which I think you

1 have in front of you, but for everyone else it is at
2 bundle {B2/2/25}. So I am going to paragraphs 94-95 of
3 your witness statement. So you say in these paragraphs
4 that you introduced firewalls following the conclusion
5 of the second written agreement, yes?

6 A. Yes.

7 Q. So that was in July 2014, was it not?

8 A. That was.

9 Q. And the firewalls meant, did they not, that all
10 communication with Auden had to be through the legal and
11 supply chain teams only, so that there was no commercial
12 or business development team interaction with Auden,
13 that is right, is it not?

14 A. Yes, we were concerned to ensure that the pricing, now
15 that the supply agreement had been signed, that the
16 pricing -- that there was no inference that our
17 commercial team were discussing pricing with Auden,
18 which obviously would have been inappropriate, so it
19 went through the legal supply chain.

20 Q. When you say "obviously inappropriate", that is because
21 Auden was a competitor as well as a supplier, yes?

22 A. On the downstream sale of the product to customers, yes,
23 it was -- we were effectively acting as -- we had
24 a supply agreement from Auden and they were supplying
25 into the market and we were supplying to the market. We

1 wanted to make absolutely sure there was a Chinese wall
2 so there could be no suggestion that commercial to
3 commercial were discussing pricing, and that was also --
4 I will stop there.

5 Q. And of course AMCo had a marketing authorisation for its
6 own product, did it not, and it had been seeking to
7 bring its own product on to the market, yes?

8 A. Yes, AMCo -- so part of the acquisition of Amdiphram had
9 included the Waymade MA which came across.

10 Q. Had it come on to the market, it would have been at that
11 stage directly competing with the Auden, yes, in the
12 supply of Hydrocortisone?

13 A. Not exactly. That is what we initially thought and
14 hoped, because the plan --

15 Q. No, it is a much more simple question, Mr Sully.
16 Imagine they have come on to the market, so had they
17 come on to the market, AMCo, with its Hydrocortisone
18 supply, it would have been, you would accept, would you
19 not, that it would be competing with Auden for the sale
20 of Hydrocortisone?

21 A. That is what we had hoped when that MA was included in
22 the acquisition and then the orphan drug issue arose
23 and --

24 Q. Mr Sully, I am so sorry to interrupt.

25 THE PRESIDENT: Mr Sully, you are being asked a hypothetical

1 question.

2 MS DEMETRIOU: I am asking you a very simple hypothetical
3 question. I am saying had AMCo come on to the market
4 with its own product at that stage, it would have been
5 competing directly with Auden, would it not?

6 A. I'm sorry. If there had been no orphan drug issue, yes,
7 but the orphan drug issue had arisen then.

8 Q. I am going to come on to the orphan drug issue.

9 A. But it is directly relevant to my evidence.

10 Q. I am trying to ask you a really simple question. You
11 are trying to read too much into it. I am simply saying
12 if AMCo had a supply of Hydrocortisone, which was
13 selling on the market, and we know Auden did too, they
14 would be competing on the market, would they not? It is
15 as simple as that.

16 A. I'm sorry, that was what we initially hoped, but because
17 of the orphan drug issue it turned out not to be the
18 case.

19 THE PRESIDENT: Mr Sully, we are well able to differentiate
20 between events that did happen and hypothetical
21 questions which enable us to understand the context.
22 You are being asked, without reference to the orphan
23 drugs, if -- which was not the case -- it would have
24 been possible to bring out a distinct supply of
25 Hydrocortisone, leaving on one side the orphan matters.

1 A. Okay, sorry, I misunderstood.

2 THE PRESIDENT: The answer to that question I think is yes.

3 A. Yes, absolutely.

4 THE PRESIDENT: It is not what happened.

5 A. I'm sorry. I misunderstood the question.

6 THE PRESIDENT: That is the question that is being put to

7 you.

8 MS DEMETRIOU: So whilst AMCo were trying to come on the

9 market, they were a potential competitor, were they not,

10 to Auden?

11 A. Yes, a potential competitor.

12 Q. Right, and you understood, did you not, that that was

13 the type of situation that your own compliance

14 documents, so discussions with competitors and potential

15 competitors, that was the kind of situation that your

16 own compliance document and Pinsent Masons in their

17 competition audit said you have got to be very careful

18 about, yes, and that is why you introduced the

19 firewalls, yes?

20 A. Yes, to discussions with competitors or potential

21 competitors, you have got to be very careful about.

22 That wasn't why -- it was a slightly different point

23 about why I introduced the firewall. That was about

24 pricing, but yes to the question.

25 Q. So you did not introduce the firewall in part at least

1 to address this question about being careful about
2 discussions with competitors and potential competitors?

3 A. Sorry, I see what you mean. It was to avoid, yes,
4 discussions with downstream sale between Auden, because
5 they were ...

6 Q. And we know, because we have just seen, that
7 Pinsent Masons had specifically identified the informal
8 discussions between Auden and AMCo about Hydrocortisone
9 as being problematic. We have just seen that, haven't
10 we, in their report?

11 A. Yes, and that was a concern I had taken to them
12 in June/July 2013 too.

13 Q. Where you say at paragraph 94 of your witness
14 statement -- so you say that there should be no further
15 dealings between the commercial team and Auden, and you
16 say there that the commercial team, including
17 John Beighton -- the commercial team would also have
18 included Brian McEwan, before he left, would it not,
19 that is right? Was he on the commercial?

20 A. Yes, probably. Brian had a slightly curious role,
21 because he came across as a sort of managing director of
22 Amdiphram and he was involved in helping to put in place
23 a lot of written agreements (inaudible) so actually he
24 did quite a lot of supply and operation stuff, but
25 I certainly would have thought of him risk

1 perspective-wise as someone who has a commercial part to
2 his role.

3 Q. Are you saying -- just so I can understand what you are
4 saying. So he came over from Amdiphram?

5 A. From Waymade I think.

6 Q. From Waymade. He came over from Waymade to Amdiphram
7 and he had, I think you say somewhere else in your
8 witness statement, he had a managing director role?

9 A. That's right.

10 Q. In relation to Amdiphram?

11 A. That's right.

12 Q. And I think what you are saying and what you have just
13 said is that he straddled both sides of the business, so
14 he had a supply role, but he also had a role on the
15 commercial side. Is that correct?

16 A. Yes, that is a good way of describing it. He straddled
17 a number of sides of the business.

18 Q. Thank you. In terms of his role, in terms of
19 Mr McEwan's role -- let us just explore this a little
20 bit since we are on it. In terms of Mr McEwan's role on
21 the supply side, he was responsible at least for
22 a while, was he not, for overseeing the development of
23 AMCo's 10mg problem with Aesica, that is right, is it
24 not?

25 A. So he was responsible for documenting the supply

1 arrangement. The AMCo development went from Malcolm
2 Milham of Amdiphram, the development project to bring
3 the new Aesica product to market, to Paul Frankland,
4 supported in both cases by Wayne Middleton who was the
5 supply chain person. Malcolm Milham and Paul Franklin
6 were technical sort of technical people who were
7 involved in that, so --

8 Q. Was he overseeing them? Did he have a role overseeing?

9 A. I think eventually as managing director of Amdiphram, he
10 was everything in Amdiphram in this integration period.

11 Q. Including the project with Aesica?

12 A. Everything included.

13 Q. He was also, was he not, responsible -- because when he
14 came over from Waymade, he continued to be responsible
15 for the relationship with Auden, didn't he, in relation
16 to the supply of 10mg Hydrocortisone after the
17 acquisition?

18 A. Yes, he did, yes. He was the person that came across
19 and said -- he was the person who seemed to have
20 a relationship with Auden McKenzie, so, yes, he did.

21 Q. If we go to {H/303/3}. So you can see there is an email
22 from Guy Clark on 2 January. Do you see that?

23 A. Yes.

24 Q. Do you see that you are in copy. So it is an email to
25 Mr Beighton with you in copy. Mr Clarke was AMCo's

1 chief strategy officer, that is right, is it not?

2 A. That is right.

3 Q. And what you see here is if you go to the very bottom:

4 "By the way is Brian still the right guy to be
5 leading this for us?"

6 So Mr Clarke is there querying whether Mr McEwan is
7 the right man to be leading and what he is talking about
8 there is leading on the relationship with Auden, that is
9 right, is it not?

10 A. That's right.

11 Q. The context of this, and we are looking at the date of
12 2 January 2014 is that Mr McEwan -- he was still leading
13 negotiations with Auden at that stage. That is why
14 Mr Clark is saying is he the right man to be doing this?

15 A. He certainly had been. The context for it was that as
16 managing director of Amdiphram up until December it had
17 been an Amdiphram project and then in December 2013, as
18 part of moving to the new offices, everything was
19 re-distributed and it went to the AMCo new project team,
20 which was run by Guy Clark and he became much more
21 involved and in our minds at the time Guy, John and I
22 and others on the executive team were thinking that
23 Brian's role, it was time for him to start working him
24 out, because he had come across in this integration
25 role.

1 So this is during the sort of period where Guy is
2 becoming more involved. Brian is going effectively to
3 start handing over things to him. The integration has
4 sort of formally happened, so his role is winding down
5 and then he left in April.

6 Q. So at this stage -- so up until this point, Mr McEwan
7 was the one really leading on those negotiations with
8 Auden and what you are saying is then at this stage he
9 started -- his role started to reduce, is that right?

10 A. Yes, absolutely. Up until this stage, he had been
11 leading the negotiations with Auden. In December a lot
12 of other senior AMCo people had become involved.

13 Q. Then if we go to {H/300/1}, please, we see here an email
14 from Mr Clark to Mr McEwan, that is on the same day, and
15 so do you see this, it says:

16 "According to the data on IMS, only 22% of
17 prescriptions are specifically identified as Adrenal,
18 with a long list of others. That gives us a bit more
19 strength to say to Amit that we do not mind having
20 limited labeling. Pharmacists will use it anyway,
21 regardless of labelling. Therefore, we should still be
22 arguing using 100% of the market as our negotiating
23 position for supply volumes!"

24 And then there is a smiley emoticon. Do you see
25 that?

1 A. I see.

2 Q. I am going to come back to the thing about the 22% and
3 the orphan drug designation, so let's not worry about
4 that now. But what we can see here is that it is
5 Mr McEwan who is negotiating with Mr Amit Patel at Auden
6 for increased supply volumes at this stage. That is
7 correct, is it not?

8 A. Increased supply volumes and also to document the
9 unwritten agreement. That was actually his main role.
10 When it was identified as a risk in the summer, we put
11 a pause, and said let's check with Pinsent Masons. They
12 agreed with us we needed to document this to make sure
13 it is clear and he was the one who negotiated that and,
14 as you say, he is still negotiating it now.

15 Q. Are you able to help the Tribunal with what Mr Clark
16 meant at the end of that email when he said that
17 Mr McEwan should use 100% of the market as AMCo's
18 negotiating position?

19 A. So this is a period -- so I did not write the email, but
20 if I think back to what is happening at the time and
21 what I suspect he was saying, it was that Brian is
22 trying to negotiate supply agreements, because we had
23 needed to document the unwritten agreements. We also
24 wanted to make sure that we carried on getting supply
25 from Auden until our Aesica product could be launched

1 and we wanted to make sure we got as much volume as we
2 could and so in the negotiating position Guy is saying
3 to Brian, we should be arguing for -- use this data,
4 which has just come from Pradip, which we think is
5 helpful to try and negotiate as much volume as you can.

6 Q. So what he is saying just so that I understand it, so
7 that we all understand it, so the -- he is saying, when
8 he refers to 100% of the market, he is saying, is he,
9 that that means that AMCo can contest 100% of the market
10 with its own product?

11 A. He is saying that as a negotiating position to try and
12 get -- I think we were asking for 7,000 packs not 6,000
13 a month -- we should be saying, look, Pradip has found
14 this data. It seems to be helpful. Use that to argue
15 that we should be getting more volumes, because our
16 product could supply 100% of the market. That is what
17 he is saying.

18 Q. Right. So, essentially, he is using -- what he is
19 saying there is he is using your own product and the
20 fact that you can contest 100% of the market as leverage
21 in the negotiations to get more volume? That is
22 correct, is it not?

23 A. In a negotiating position he is not saying our product
24 can do 100% of the market. He is saying here is some
25 helpful data to get more volumes. You should -- in the

1 negotiation, you should argue that our product will be
2 able to get 100% of the market.

3 Q. I think that is clear. Thank you very much. Let us
4 move on to the next point. Actually, before we leave
5 it, you were not yourself involved in the negotiations
6 were you, so the negotiations were happening, we have
7 established, by Mr McEwan. He was speaking to Mr Patel,
8 but you were not involved in all of those decision
9 discussions, were you?

10 A. I wasn't on the calls but I was very closely involved in
11 this whole issue ever since it first arose to my
12 attention in July 2013. So I was working -- effectively
13 everything that Brian did, he was checking in with me
14 and I was involved in a lot of the emails. I wasn't on
15 this email chain. I wasn't on the calls for Amit and
16 I don't think I ever met Amit Patel of Auden.

17 Q. Did you say you did meet him or you did not meet him?

18 A. I do not think I ever did.

19 Q. You did not ever meet him. You were never at any
20 meetings in the negotiations and you weren't on any
21 calls?

22 A. Up until -- in June 2014, I was on calls with him and
23 his lawyer, but I was very closely involved in this
24 whole thing, because I recognised it was a very
25 sensitive area.

1 Q. And you were aware, were you not, that Mr McEwan was
2 having discussions not only in January,
3 early January 2014, but during the course of 2013, with
4 Amit Patel at Auden, were you not?

5 A. So I was aware that in September 2013, after we got the
6 first draft with the Pinsents report and they agreed
7 with us that we should document this relationship with
8 Auden, we -- I was aware that Brian then went back to
9 Auden and said we are going to need to document this
10 and, also, we're really unhappy with this rebate point,
11 which was in there which we had also identified as
12 a thing we did not like at all and that throughout the
13 autumn, from September onwards, Brian was working,
14 negotiating with Auden, reporting back to me. I was
15 very involved in an acquisition in Sweden, but,
16 effectively, we were working side by side to document
17 this agreement in line with our belief that was
18 confirmed by the Pinsent's report.

19 Q. Would this be a fair way of summarising it that
20 Mr McEwan during the autumn of 2013 was negotiating with
21 Mr Patel, yes?

22 A. He was negotiating to document the supply arrangement.

23 Q. And to acquire further volumes going forwards?

24 A. As part of that, we always wanted more volumes, if
25 possible.

1 Q. Yes. And you were not at their meetings or on their
2 calls, correct?

3 A. Correct, I was most -- a lot of time I was in Sweden
4 doing the acquisition there.

5 Q. I did not catch --

6 A. A lot of time I was in Sweden doing an acquisition. We
7 acquired a company called Abcur at the beginning of
8 December, which became our Nordic hub so I was very
9 caught up in this period.

10 Q. But you were checking in with what was going on,
11 checking in with Mr McEwan?

12 A. So I produced -- my team produced a draft of the supply
13 agreement. I gave them to him and told him this is the
14 draft. You need to go and negotiate it. It is based on
15 a Pinsent's template we had used before in the Teva
16 situation and he was checking back with me and saying
17 this is what Auden have said, here are their comments on
18 the draft that went backwards and forwards.

19 Q. Let us go to bundle {H/215/1}. So if we can scroll down
20 a little bit so there is an email from you, I think, on
21 12 July to Mr McEwan. You say:

22 "Brian, can we also discuss where you are with this.
23 Shout if you need any assistance in drafting, and
24 I would like to review prior to signing please."

25 So you want to discuss at this stage, this

1 is July 2013, where Mr McEwan is up to, so this is
2 before the autumn. So there have obviously been
3 negotiations going on before that stage too, yes?

4 A. Can I just scroll down, please, just to see or is that
5 the bottom email.

6 Q. I think that is the bottom. We can probably scroll up.
7 That might help.

8 A. That would be helpful just to see. Okay, thank you very
9 much. That is very helpful.

10 So this is -- so this looks to me --

11 Q. I am just asking you a question about timing at the
12 moment. Just now we established that in the autumn of
13 2013 there were negotiations between Mr McEwan and
14 Mr Patel and I think what this shows us is that the
15 negotiations started earlier than that, right, because
16 you are asking in July 2013 where things are up to?

17 A. I am not sure that is the way it was. I think what
18 happened was when this issue came to my mind, as
19 a result of the compliance issues, I was thinking,
20 right, I need to basically check this with Pinsents
21 before we do anything. There were a large number of
22 informal unwritten agreements we had inherited as
23 a result of buying Amdiphram and from April onwards,
24 with Brian's help, we had been documenting them, because
25 he had a lot of relationships with the partners of

1 Amdiphram.

2 So I had said, hold on, there's something funny
3 going on here. I have heard about this Hydrocortisone
4 and Carbimazole and written agreements. Checked in with
5 him and said: where are you? I want to make sure I am
6 fully involved in this. When he said "probably better
7 for us if we propose a draft", I suspect nothing has
8 happened and that he has come back to me said we should
9 be proposing the first thing and I said, yes, please,
10 let us do that. Then, as I say, we actually wanted then
11 to pause it until Pinsents had advised before we
12 documented something to check that we were not missing
13 some risk.

14 Q. So Mr McEwan was the person charged with getting this
15 agreement down in writing, yes, with your assistance?

16 A. Initially it was him and then it was with my assistance,
17 once I had discovered -- once I effectively became
18 involved, yes.

19 Q. And he was having various meetings and calls with
20 Mr Patel, which you were not at, and he was not sending
21 you, was he, any written reports or minutes of those
22 meetings? That is right, is it not?

23 A. I do not know if he had any meetings or calls with Auden
24 at all until I know that they started -- I know that
25 they happened in September. When they started, I am

1 afraid I just don't know.

2 Q. Let us think about the autumn period then. Let us not
3 get bogged down in timing, but we agree that there were
4 discussions and calls going on in the autumn between
5 Mr McEwan and Mr Patel and we have established you were
6 not at any of those. You were not attending those calls
7 and what I am trying to establish now is whether or not
8 you were sent any minutes of the calls or the meetings
9 by Mr McEwan?

10 A. So I was sent updates of when -- of the meetings.
11 I don't think I was sent minutes of them. So I recall,
12 for example, in October 2013 I got an update saying he
13 had spoken with Auden and they had agreed to change the
14 rebate thing, which was our most -- the key concerning
15 point at the start and then I think later at some point
16 he said here is the draft back from Auden with all their
17 comments and that they are in principle agreed to
18 putting in place an agreement, but then they had this
19 really irritating, but it was a quid pro quo on the
20 acquisition that they wanted us to look at buying.

21 Q. Let us look at --

22 THE PRESIDENT: Just pausing there. It may not matter, but
23 looking at the top of the email, the time is 19.26.46
24 plus 100. It may not matter, but we do not quite
25 understand the timing reference compared to the 14.12

1 below. I do not know if that can be explained.

2 Is the time -- 11.42 is not quite matching with
3 the -- so we have got 2.12, Mr Sully's writing and then
4 sending it later that evening; is that right, at 11.42
5 in the evening?

6 A. I do not know if this helps and this is pure
7 speculation, but by the time the investigation started
8 we had been acquired -- AMCo had been acquired by
9 Concordia, which was based in North America, and I know
10 that some of the dates are in that American flipped
11 format, so -- potentially these were printed at a time
12 when the IT system was linked to North America, but
13 I don't know if that's right or not.

14 THE PRESIDENT: It may not matter, thank you. And just
15 a further question, not to do with email times, when it
16 refers to filling out a form, what was he talking about?

17 A. As part of putting in place contracts, AMCo had -- the
18 contract creation policy basically was someone in any
19 team that wanted a contract should fill in a form, a two
20 page form, looking at the main points of the contract
21 and should send it to the legal team and that was
22 the sort of process to follow through.

23 THE PRESIDENT: Yes, I see.

24 MS DEMETRIOU: Sorry, sir.

25 THE PRESIDENT: The form that the witness has just described

1 is that something we have in the record?

2 MS DEMETRIOU: No.

3 THE PRESIDENT: Okay.

4 MS DEMETRIOU: No.

5 Mr Sully, can we go to -- we are going to go to
6 {H/247/1}, please. The operator will bring that up.
7 You can see that is an email from Jane Hill to
8 Brian McEwan and you are in copy, yes? And it is dated
9 17 October 2013?

10 A. Yes, yes.

11 Q. And so she is saying there:

12 "Where are we up to with the agreements with
13 Auden McKenzie?

14 "I believe we may be getting our own stock from
15 Aesica in February 14 so would then terminate the
16 agreement with Auden."

17 Now, Ms Hill was commercial director, was she, or
18 was she general manager?

19 A. No, Ms Hill was UK commercial director of AMCo, ex
20 Mercury, but of AMCo.

21 Q. So she is again -- so here is someone asking Mr McEwan
22 where he is up to with the agreements with Auden and
23 that is because everyone knew he was negotiating
24 directly with Amit Patel, yes?

25 A. Yes, Jane would have known -- Jane was on the executive

1 team, as was Brian at the time. Jane would have known
2 that we were putting in place agreements with Auden and
3 that Brian was the one negotiating and she copied me,
4 because she knew I was involved.

5 Q. And she would have known also that you weren't just
6 documenting what had happened up till now, but you were
7 trying to negotiate further volumes going forwards, yes?

8 A. I suspect so, she certainly would have wanted more
9 volumes going forwards. It was a business she was
10 responsible for.

11 Q. I think we have established already that you knew that
12 that was part of the negotiation, yes?

13 A. Yes, we certainly pushed for more volumes.

14 Q. Then if we go to {H/252/1} this is an email from
15 Mr McEwan to Mr Amit Patel of Auden McKenzie
16 in November 2013 and we can see that no one is copied
17 in. You are not copied in and nobody is copied in on
18 the AMCo side and he says:

19 "Further to our discussions, please now find
20 attached draft supply agreements ..."

21 Yes?

22 A. He does.

23 Q. So, again, this confirms that the two of them have been
24 having discussions, but you were not shown any minutes
25 of those discussions or any notes of the meetings?

1 A. I was not shown any minutes or notes of the meetings.
2 I had drafted these supply agreements. I do not know
3 which draft that was and Brian had been telling me what
4 was coming out of the meetings, but he was not sending
5 me minutes of these meetings.

6 Q. Did he tell you what was coming out of the meetings in
7 terms of the negotiations for more volumes as well?

8 A. I am not sure when the request for more volumes came.
9 It may have come in these drafts. So I do not know
10 when -- exactly when -- I cannot remember exactly when
11 the request for more volumes came in. I know that
12 certainly by January it had come, because there was then
13 an issue. Auden reacted when we pushed for 7,000 packs.

14 Q. Let us go to {H/292/1}. There is an email exchange here
15 between Mr McEwan and Mr Patel and you can see there in
16 the middle on the 18 December Mr Patel says:

17 "Dear Brian,

18 Find attached.

19 We need to discuss Hydro volumes."

20 Do you see that? And then --

21 A. Yes, I can see it.

22 Q. And then on 19th you see at the top of the page, again
23 an email from Mr Patel to Mr McEwan:

24 "Can you alter the volume on the hydro agreement as
25 discussed."

1 Yes? And so they obviously had discussed volumes on
2 18 or 19 December, had they not?

3 A. It looks like it from the email.

4 Q. And there was no record of that informal discussion that
5 was sent to you?

6 A. So Brian updated me as the negotiations went on, on what
7 was happening, but --

8 Q. I am asking whether he sent you a note of the meeting,
9 his notes of the meeting or any minutes of the meeting?

10 A. He updated me on what was discussed.

11 Q. On the upshot?

12 A. On the upshot of what was going on, yes.

13 Q. So you were aware -- let us just try and step back and
14 look at what was happening. So you were aware at the
15 time that there were informal discussions going on
16 between Mr McEwan and Amit Patel, yes?

17 A. Informal? I mean there were discussions going on to
18 document the informal arrangement.

19 Q. No, what I mean is the discussions themselves were not
20 formalised. They were picking up the phone to each
21 other, they were meeting, there were no minutes of the
22 meetings. So going back to the competition compliance
23 and Pinsent Masons's advice, there were informal
24 contacts that were going on?

25 A. So there were discussions going on. There were -- I do

1 not know if there were any meetings at all, not that I'm
2 aware of, but that Brian was negotiating. That was the
3 way the business effectively ran. It was quite a lean
4 business. There weren't a huge number of people and
5 there were discussions. He was in charge of putting
6 this supply agreement in place and he was reporting back
7 to me. I discussed it carefully with him. I was
8 involved in the drafts. I thought I was all over it.
9 There weren't minutes if that is the question.

10 Q. Or notes? The CMA certainly did not find any notes of
11 those meetings. You do not recall being sent notes of
12 the meetings?

13 A. The business tended to operate on an email with an
14 update was the notes of the meeting. We were a small
15 generics business. We did not have -- that was not --
16 we kept on trying to go really every single meeting
17 should have a formal agenda before and minutes
18 afterwards, but we were just operating at a pace that
19 emails saying this is what the latest is, that was the
20 way we were working as a business.

21 Q. You did not at any stage say to Mr McEwan it is not
22 a very good idea for you to be speaking by yourself with
23 no one else present with Mr Patel? You did not say that
24 to him at the time?

25 A. I did not, because he was working closely with me.

1 I had the pen on the drafts from our side. He was
2 updating me on everything that happened.

3 Q. As far as you know?

4 A. As far as I know.

5 Q. And you did not ask to be present at the discussions?

6 A. I did not. As I said, at this time I was in Sweden
7 a lot of the autumn in 2013, because I was leading the
8 acquisition of Abcur.

9 Q. Did you suggest that any other member of the legal team
10 should be present since you were away in Sweden?

11 A. I did not. As I said, we had a small legal team and
12 I also -- this was, you know, a very sensitive issue for
13 me this Auden agreement. The fact that there had been
14 these two unwritten agreements and so I was -- I wanted
15 to control it sort of carefully myself to make sure
16 I understood what was going on. It was flagged as
17 a compliance risk. That is exactly why it went to
18 Pinsents. My team was quite junior, so I would not have
19 said someone else should be on the call instead.

20 Q. So it was flagged as a compliance risk, you accept that,
21 but you did not at this stage do anything about it?

22 A. No, I did. It was on one of the things I was looking
23 at. I just could not be on the call because I was
24 elsewhere doing the acquisition, but he was reporting
25 back to me.

1 Q. And you did not ask him to take notes of the meetings
2 and send those notes to you. You were relying on his
3 word for it, were you?

4 A. So he was sending me emails, which had the summary of
5 what was happening. I think that is the same thing
6 as --

7 Q. Is it the same thing, Mr Sully, because what we are
8 concerned about here are informal contacts between
9 competitors which raise compliance risks and you
10 understand, do you not, that informal contacts between
11 competitors are dangerous from a competition law
12 perspective. So are you really telling the Tribunal
13 that you think it is all right for those to go ahead
14 without any lawyer, not to be documented and that it is
15 okay just to have an email update to the general counsel
16 afterwards? You think that is all right in compliance
17 terms, do you? It is not what Pinsent Masons were
18 saying?

19 A. So we had flagged it as an important issue when we
20 discovered it. We had involved Pinsents and Pinsents
21 and I and Brian were working closely together. I was
22 working with Brian and I was working with Pinsents.
23 Brian's emails I was sending on to Pinsents on some
24 occasions where they were a material update or an
25 explanation of the situation, because he was

1 representing Amdiphram and when something happened, as
2 far as I was aware -- I knew he understood competition
3 law. He was on the executive team. We understood it
4 was a compliance risk. He was updating me of the
5 discussion by email. That was the way the business
6 operated. And I had the pen on the draft and I was
7 checking carefully with Pinsents and that is why the
8 Pinsents report took a while to come through actually,
9 because it kept on evolving as the situation with Auden
10 changed.

11 Q. When you introduced the firewalls in July 2014, at that
12 stage, you certainly did not think it was enough in
13 competition law compliance terms for discussions to take
14 place informally and then a report back by email, did
15 you? That is why you introduced the firewalls to make
16 sure they did not happen at all?

17 A. That was a slightly different point, as I mentioned
18 earlier, because that was about, we are now going to be
19 supplying into the market. They are also supplying in
20 the market. We need to make sure, firstly, make sure
21 the price we sold at was actually not negotiated ever.
22 It was linked to the drug tariff because that is what
23 Pinsent Masons had advised in 2012 in relation to the
24 Teva agreement. That you should not have any commercial
25 people there because you are both selling into the

1 market the same product even it was from the same
2 supply. So we copied that and we said there should be
3 firewalls to make sure that there can be no possible
4 inference that there is some sort of price fixing
5 between us on the sale of the Auden full product into
6 the market.

7 Q. Mr Sully, you have already accepted, so going back
8 before one of our breaks, you have already accepted that
9 when you introduced the firewalls that was in part for
10 the reason that you have just explained but in part
11 because AMCo is a potential competitor because it was
12 bringing its own product on to the market. You have
13 accepted that already.

14 That was true back at this stage too, was it not,
15 but you did not introduce any firewalls then, did you?

16 A. So the answer is I did not introduce any firewalls then.
17 I think I saw this as we have an informal agreement. We
18 need to put in place a supply arrangement. I do not
19 believe that Brian ever raised price into the market
20 with Auden. It was all about we need to document this
21 supply arrangement. And he had the relationship and
22 I was working closely with him. I do not -- I am not
23 aware of anybody else. I think I would have been
24 concerned if other people had started getting involved
25 in talking to Auden but it was him and I was working

1 closely with him and I was working closely with
2 Pinsents.

3 Q. Mr Sully, we have already seen the email where Mr Clark
4 is explaining that Mr McEwan was leveraging your own
5 product in the negotiations to get more volumes, yes?
6 We have established that that is what he was doing. You
7 explained the email. So you knew that these discussions
8 were going on and yet you did not at the time
9 appreciate, did you, that they were inappropriate and
10 they should have been documented. I think that is
11 right, is it not?

12 A. So I knew the discussions were going on. I knew we were
13 pushing for more volumes in the agreement and obviously,
14 as you do in the commercial world, you leverage anything
15 you can to get a better deal. I do not think it was
16 inappropriate. In the circumstances of the company at
17 the time the number of people we had, the way we were
18 working, everything was put on email. That was
19 effectively the form of recording things. I completely
20 accept that the compliance policy, the wording of it
21 says there should be an agenda and minutes, but as
22 I say, these were very senior staff, the most senior and
23 I was fully involved and I was getting updates. But
24 I took the decision at the time that was appropriate in
25 the situation I was in, so I do not -- so that is what

1 I did at the time.

2 Q. When you say everything was on email, it was not, was
3 it, because there were discussions going on which were
4 not recorded on email?

5 A. Can you point me to those discussions?

6 Q. There were discussions going on of which there is no
7 record. I have pointed you to lots of discussions
8 having taken place, references to discussions taking
9 place through the autumn. You say yourself that through
10 the autumn of 2013 Mr McEwan was talking to Mr Patel but
11 there are no notes of those discussions?

12 A. Well, there are certainly some emails where he said
13 I have spoken to Amit and I have updated -- we have
14 agreed that the rebate thing is going to change and then
15 there was another email in November where he is saying,
16 here are the drafts, we sent them. I do not know if
17 there were any other meetings taking place, I do not
18 think there were.

19 Q. What we do not have is any other record of the
20 negotiations about -- the negotiations to secure greater
21 volumes. We do not know what was said, do we?

22 A. No, we have the emails saying this is what has come out
23 of the call with Auden.

24 Q. All right. You know, do you not, that the agreement
25 that we are interested in in this case was reached

1 in October 12, yes, the supply agreement. That is when
2 the supply of 10mg Hydrocortisone tablets from Auden to
3 AMCo started, yes?

4 A. So I now know, I did not know at the time, but I now
5 know that Waymade, as I understand it, agreed with Auden
6 for a supply of Hydrocortisone -- of their full
7 indication Hydrocortisone in October 2012.

8 Q. I misspoke but it started a few months prior to that but
9 it was in October that the price went down to £1 per
10 pack. You are aware of that?

11 A. I am not aware if it started earlier and I do not know
12 when the price went to £1 a pack. I do know that
13 from October it was £1 a pack on Hydrocortisone and £2
14 to £3 a pack on Carbimazole. I found that out but I do
15 not know before then whether there was any agreement.
16 I do not know if there was any supply before October or
17 if the price was different.

18 Q. Let us look at what you say then -- let us go now to
19 paragraph 23-24 of your witness statement which are at
20 {B2/2/8}. If we can go back to the top of the page. Is
21 that the top of the page? I cannot see. So we need the
22 beginning of paragraph 23. Thank you. It is on page 7.
23 So if you just read through paragraphs 23 and 24 to
24 yourself. {B2/2/7}. (Pause)

25 A. Yes.

1 Q. So what you are saying at 23 is that the CMA was wrong
2 to find that AMCo had an unwritten agreement with Auden
3 not to enter the market independently in return for
4 substantial payments, yes?

5 And then at 24 you are saying that AMCo had two
6 written agreements with Auden which were prepared with
7 the assistance of Pinsent Masons and cleared from
8 a competition law perspective.

9 Now you are not suggesting there, are you, Mr Sully,
10 that AMCo and Auden only had those two written
11 agreements, are you, because that is the impression the
12 reader might get from reading these paragraphs. You
13 accept that there was also an unwritten agreement in
14 place between Auden and AMCo prior to the signing of
15 what you call the first written agreement?

16 A. So the first written agreement when it was put in place
17 was specifically backdated to 1 January 2013 which is
18 when the Hold Separate period ended and Cinven took
19 control of Amdiphram. So that is what I am referring
20 to. From 1 January 2013 the first agreement was put in
21 place, it was put in place retrospectively and it was
22 put in place to cover that period, and as far as I am
23 aware that written agreement and then the second written
24 agreement are the only agreements that we had with
25 Auden McKenzie. I do not entirely understand what the

1 CMA is saying but in terms of --

2 Q. I was asking you, Mr Sully. Let me just take it in
3 stages. So you are saying -- you have just said that
4 the first written agreement was put in place
5 retrospectively. So I am just trying to establish
6 a point which I think is non-contentious. That for the
7 period from October 2012 until the time that the first
8 written agreement was signed, during that time there was
9 not a written agreement in place but there was
10 nonetheless a supply agreement in place, yes? It was
11 unwritten?

12 A. So yes, but with different parties, so ...

13 Q. I am not asking about parties. I am asking about supply
14 from Auden.

15 A. So Auden supplied Waymade on an unwritten agreement
16 in October 2012 and then I do not know exactly what
17 happened but I know from January 2013 onwards there was
18 this unwritten agreement that we looked to document
19 where Auden was supplying initially Waymade and then
20 subsequently Amdiphram as part of the AMCo group after
21 the MA came across to us, and then we put in place the
22 first written agreement in February 2014 to cover that
23 entire period so that the terms of it were clear.

24 THE PRESIDENT: So what you are saying is that you put in
25 place a retrospective agreement?

1 A. Yes.

2 THE PRESIDENT: To regularise something that was going on
3 which you did not like. Is that the reason it was
4 retrospective?

5 A. So effectively unwritten agreements. AMCo had a policy,
6 Mercury had a policy which became the AMCo policy we
7 should not have any unwritten agreements so that had
8 immediately raised a concern and we documented
9 throughout 2013 in the integration phase a lot of
10 Amdiphram unwritten agreements that we had come across.
11 Many of them very normal but just unwritten, so they all
12 got documented and it was retrospective.

13 So, yes, we put that in place and the reason for
14 that, just if it helps, is when you get audited by the
15 MHRA they will say this product, where is the supply
16 agreement for it and where is this, and you need to be
17 able to say, this is the agreement, this is the terms,
18 this is who is responsible for releasing it.

19 So yes, we put in place that agreement in
20 in February 2014. We tried to put it in place earlier
21 but it took a long time with Auden to document what we
22 understood to have been happening in that period from
23 1 January 2013.

24 THE PRESIDENT: I mean, all I am trying to get clear is that
25 fine, you can have a retrospective agreement but that

1 does not alter the fact that during the period of
2 retrospectivity something is going on which is at that
3 time not documented.

4 A. That is correct.

5 THE PRESIDENT: So there was during this retrospective
6 period an agreement.

7 A. That was unwritten, yes.

8 THE PRESIDENT: That was unwritten and it existed at the
9 time. It is not --

10 A. Absolutely.

11 THE PRESIDENT: It is not something you can write out of
12 existence by simply saying: the written agreement when
13 it comes into place is retrospective?

14 A. No, absolutely. I hope that is what I explained, the
15 concern we had about his unwritten agreements and why we
16 documented them.

17 MS DEMETRIOU: You know, do you not, that that unwritten
18 agreement, so the supply at the outset, when it was
19 first agreed by Waymade, you know that it was Mr McEwan
20 that negotiated that with Auden, do you not?

21 A. I do not know exactly who negotiated it. Since these
22 proceedings -- the investigation has started, I have
23 seen emails that it looks to me from what the emails say
24 that Vijay Patel who ran Waymade and then moved to the
25 Waymade/Amdiphram group and Brian were involved with it

1 and various other people in the supply chain but I do
2 not know exactly who negotiated it. As I say, the
3 documents speak for themselves. I can only interpret
4 them.

5 THE PRESIDENT: Just it may be this is going to be brought
6 out in which case, Ms Demetriou, shut me up, but your
7 concern about the anterior oral agreements or informal
8 agreements, was it simply that they were informal or did
9 you have concerns that went beyond their informality?

10 A. So initially they were on the list of many unwritten
11 agreements we were going to document. When I gave the
12 compliance training to the Amdiphram staff
13 in June/July 2013, I think it was early July or
14 late June, in those sessions somebody raised with me,
15 well, I think we have got the market sharing section of
16 the competition policy and I was explaining what you
17 should and should not do and someone said, are you aware
18 there are unwritten agreements with Auden where we
19 supply them with Hydrocortisone and they supply us with
20 Carbimazole? I said, well no, I am not, and that was
21 what raised the concern and that is what I took to
22 Pinsents and you can see in the Pinsents report the two
23 are linked in that section on the risk I had flagged.

24 They then -- so internally I have said, we should
25 document these but let us just check is there something

1 bigger going on here that we are not aware of? So
2 Pinsents then said, there is a risk of resale price
3 maintenance but no one was negotiating the price.
4 I made sure of that. So we went ahead and removed the
5 rebate in September 2013 because that was a risk --
6 another thing we did not like with this arrangement and
7 then documented the agreement retrospectively so that we
8 had the document and we regularised it, knew exactly
9 what the position was.

10 MS DEMETRIOU: And just to pull up on something you have
11 just said, when you were concerned about market sharing
12 and you knew that would be a competition problem, was
13 that something that you asked Pinsent Masons to advise
14 on?

15 A. It was part of the concern, so it was something that --
16 I honestly do not know. I explained the position to
17 Pinsent Masons. I cannot recall ten years ago. But
18 I said, this is something I have got concerns about. It
19 looks like there are these two unwritten agreements.
20 One product is going one way and one product is going
21 the other way, and that is clear in the Pinsents report.

22 Because what had happened was Amdiphram had an MA
23 for Carbimazole and due to a legacy arrangement with
24 NRIM, which is a different company, it had been
25 supplying NRIM with Carbimazole at £2 a pack I think or

1 £2 or £3 a pack because NRIM had said we have got an MA
2 but we have problems bringing this to market. Then
3 Auden McKenzie at about the same time as Cinven acquired
4 Amdiphram, Auden McKenzie acquired NRIM and then we
5 found out that in the same breath, hold on, you have got
6 Waymade, which is a sister company to Amdiphram, has got
7 this 20mg, it has now developed a 10mg MA for
8 Hydrocortisone and it has managed to arrange an informal
9 supply of -- for £1 a pack -- of Hydrocortisone.

10 Now, we were told this is because they are acting as
11 CMOs that neither company can bring their product to
12 market but you can understand I immediately thought this
13 needs to be checked carefully to make sure this is okay.

14 Q. Mr Sully, let us get back to my line of questions if we
15 can. So if we look at paragraph 27 of your witness
16 statement which is on page 8. It is one o'clock.

17 I have seen the time. Shall I just stop there. I think
18 if I start on this it is going to take me a few minutes.

19 THE PRESIDENT: No, that is fine. We have lost a certain
20 amount of time this morning. I am anxious that we do
21 not put your cross-examination under pressure.

22 Mr Sully, would you have a problem if we rose now
23 but started at quarter to to clawback 15 minutes.

24 A. Absolutely fine.

25 THE PRESIDENT: I do not want you to get tired. You are the

1 most important person in the room and it is very
2 important that you get your evidence clear.

3 A. That is a rare position to be in but, no, that is
4 absolutely fine, thank you.

5 THE PRESIDENT: In that case we will resume at quarter to.
6 Thank you.

7 (1.03 pm)

8 (Luncheon Adjournment)

9 (1.45 pm)

10 THE PRESIDENT: Ms Demetriou, before you begin, it always
11 annoyed me intensely when judges did this to me, so do
12 please feel free to show your annoyance, but are you
13 going to formally put the CMA's case theory to the
14 witness about the side agreement?

15 MS DEMETRIOU: Sorry, about the?

16 THE PRESIDENT: Well, we spent this morning going through
17 the compliance rules.

18 MS DEMETRIOU: Yes, I am getting on to all of that, so --

19 THE PRESIDENT: No, what I mean is, there are, as it seems
20 to me, three theories. One is that the written
21 agreement was the written agreement and there was
22 nothing more. The first alternative is that Mr McEwan
23 used the latitude given to him by the failure to monitor
24 his conversations to agree something which was not in
25 the written agreement and the second alternative is that

1 actually that was done, but with the witness's
2 compliance and I would like the denials of that formally
3 on the record at some point.

4 Now you probably will be coming to it, but I just
5 wanted to be assured that you are.

6 MS DEMETRIOU: Sir, yes, thank you. Exactly how I put it
7 will depend on where we get to, but I understand.
8 Thank you for raising it.

9 THE PRESIDENT: I am sorry for raising it. I am sure
10 that --

11 MR BREALEY: It is an important point -- sorry -- that
12 actually what the agreement is should be put to the
13 witnesses, so Mr Sully and Mr Beighton, because it will
14 be apparent that there is some confusion as to what
15 actually is the agreement that is alleged to infringe
16 the competition rules. We know it is in an agreement
17 not to enter, but in the light of the CMA's written
18 observations there is still a degree of confusion as to
19 what their case is on the agreement. I think -- I do
20 not think, I submit that their case has to be put
21 squarely to both witnesses.

22 THE PRESIDENT: Ms Demetriou, you have heard what Mr Brealey
23 has said. I am sure you will do that.

24 MS DEMETRIOU: Sir, of course, I totally understand the
25 points that you have put to me and I will cover those

1 points off. I was intending to.

2 Mr Brealey has certain submissions he is making
3 about our case being unclear and if he thinks,
4 ultimately, that I have not put our case clearly, he can
5 say that in closing, but I am not going to be guided by
6 what Mr Brealey thinks I should put. I will put what
7 I think I need to put.

8 THE PRESIDENT: Of course, but it does seem to me that even
9 if it involves a short denial from the witness and, to
10 be clear, I am going to expect that from the witness, we
11 know where the battle lines are. What the side
12 agreement was is something which does need to be put, to
13 the extent it is different from the written agreement,
14 so that we know where we stand. So when the witness
15 says, and we all know -- when the witness says, no, it
16 was the written agreement and nothing else, we know what
17 we are tilting at in terms of the battle lines. So I am
18 sorry for interrupting, because --

19 MS DEMETRIOU: No, not at all. That is understood.

20 Mr Sully, I just want -- shall I carry on?

21 THE PRESIDENT: Please do, yes.

22 MS DEMETRIOU: Thank you.

23 Mr Sully, I just want to go back to one point that
24 you made. Let us look at what you said in the
25 transcript. This is transcript page 73, if we could get

1 that up, around line 7. This was something you said in
2 answer to a question put to you by the President and
3 here you said -- have you got that in front of you?

4 "When I gave the compliance training to go to the
5 Amdiphram staff in June/July 2013, I think it was
6 early July or late June, in those sessions undoubtedly
7 someone raised with me, well, I think we have got the
8 market sharing section of the competition policy and
9 I was explaining there are unwritten agreements with
10 Auden where we supply them with Hydrocortisone and they
11 supply us with Carbimazole and that is what raised this
12 concern and I took it to Pinsents."

13 So I just want to be clear about what you are saying
14 there. So when you talk about your concern about market
15 sharing, you say that is in relation to Hydrocortisone
16 and Carbimazole and I think what you are saying there is
17 that you were concerned there might be a market sharing
18 agreement whereby Auden agreed not to enter into the
19 market for Carbimazole and AMCo agreed not to enter into
20 the market for Hydrocortisone. Is that the concern that
21 you are referring to there?

22 A. So not exactly, but sort of. So I was doing the
23 compliance section. I remember someone raised it.

24 So I was doing the compliance section. Somebody
25 raised with me there are these two unwritten agreements,

1 and I do not remember exactly when it was, but I think
2 it may have been in the section of the training session
3 that was on market sharing. I do not know that for
4 certain, but I think it may have been. But my concern
5 was they are unwritten and what is going on where you
6 have got two unwritten agreements that appear to be
7 going in different directions.

8 Q. But I am trying to be a little bit more precise. I am
9 asking you to be a bit more precise, because you
10 mentioned market sharing and you mentioned these two
11 products. I just want to understand what the potential
12 concern was and I think that the only thing that makes
13 sense to me is that the potential concern about market
14 sharing would be that Auden agrees not to enter the
15 market for Carbimazole and AMCo agrees not to enter the
16 market for Hydrocortisone, so they share the market in
17 that sense. Is that what you are referring to?

18 A. So, no, I am referring to when I think this issue arose
19 in the training session.

20 Q. I do not want you to tell me when it arose. I want you
21 to tell me --

22 A. That was the reference to where I raised it in the
23 transcript. I remember not liking the sound of this and
24 wanting to check it carefully, which I did, including
25 with Pinsents, but I -- like it was not immediately, oh,

1 there is a market sharing arrangement going on. It
2 was -- it was the fact that it was reciprocal and they
3 are unwritten and I think it came up in the context of
4 you are not allowed to market share etc.

5 Q. What you mean by market sharing is that, is it not? So,
6 one, Auden keeping the market for one product and AMCo
7 keeping it for the other and sharing the market in that
8 way?

9 A. What I mean by market sharing is there a section in one
10 of the pages of the compliance policy and the
11 presentation I would have given would have been price
12 fixing and this is an example of anti-competitive
13 behaviour. There was a slide on you cannot share the
14 market geographically etc. So that is sort of market
15 sharing and I think this led to the point being raised
16 with me.

17 Q. Yes, so I understand that there will have been a section
18 in the manual about market sharing and we all know that
19 is in competition law terms, but you have referred
20 specifically to two products. So I am just trying to
21 ask you to try and understand how did market sharing
22 arise in your mind or potentially arise? What was the
23 concern in your mind relating to market sharing and
24 those two products? Is it one that I have just
25 outlined?

1 A. Sorry, the concern -- the agreements were raised with me
2 in the context of some training and I believe it was on
3 that slide about market sharing. But the concern I had
4 was, hold on, why are there unwritten agreements and are
5 they reciprocal? I need to look into this further.

6 Q. Sorry, sir. You go ahead.

7 THE PRESIDENT: So this morning you were asked that when
8 Amdiphram and Waymade came into your purview, you were
9 aware that there was no internal compliance in either
10 organisation.

11 A. Of Waymade and Amdiphram, yes.

12 THE PRESIDENT: Yes. And your evidence was that you ensured
13 that such compliance was put in place.

14 A. Yes.

15 THE PRESIDENT: Prospectively, as it were.

16 A. Yes.

17 THE PRESIDENT: But looking back, if you have got an
18 organisation which, through no fault of your own, has
19 got no internal compliance, did you do anything to
20 ascertain whether in the past there were practices that
21 needed to be sorted out? In other words, did you look
22 actively for conduct that was in competition terms
23 questionable so that you could stamp it out? In other
24 words, as well as setting things on a proper basis going
25 forward, you backwards look and see what needs to be

1 rooted out.

2 A. Absolutely. This was what this compliance audit was all
3 about. I gave the training and people said we do this,
4 we do that, this happens, you know, are you aware of
5 that? And I said, hold on, we have to sort this out,
6 because this is not best in class compliance. So that
7 is exactly what I took to Pinsents and I also, as well
8 as taking it to Pinsents, dug in myself and said so what
9 is actually going on here?

10 THE PRESIDENT: Okay, so going back to the imposition of
11 written contracts, clearly having an undocumented
12 practice, even if it is competition law compliant, is
13 a bad thing and you want to document it. So you can
14 take it that I understand that that needed to be
15 corrected.

16 The question I think counsel is getting at and the
17 question I am asking now is: was that the only concern
18 that you had or was there, over and above the
19 undocumented nature of the practice, a concern in
20 competition law terms about what was going on?

21 A. There was a bigger concern, which was that there could
22 be all number of issues with this kind of arrangement.
23 So is there price agreement? Are they mirroring each
24 other's pricing? Is there some sort of market sharing?
25 Is there exchange of competitive information? I think

1 that is what I was saying. There was a number of
2 concerns and so I raised it with Pinsents and dug into
3 it myself to find out so what actually is going on here.
4 So does that answer your question?

5 THE PRESIDENT: Yes, nearly there. So you asked the
6 questions, but what did you find by way of outcome? Did
7 you find when you had asked these questions that there
8 was conduct which was, in competition law terms,
9 questionable which needed stamping out or was it simply
10 that everything was fine apart from the undocumented
11 nature of the arrangements?

12 A. So this took place over a few -- probably a couple of
13 months with Pinsents. So I had a concern about them.
14 I said to the supply chain team -- so the people working
15 on this project, I found out who they were, it was
16 Wayne Middleton and Paul Franklin, and I said so what is
17 going on with this Hydrocortisone product and they
18 explained they had got the MA the year before, but there
19 were a whole bunch of technical issues around the assay.
20 They had involved a specialist and they were looking to
21 manufacture with Aesica that autumn, which was when the
22 order was in. They explained they had put in place the
23 order. I -- so I thought, okay, fine. So that is
24 a problem. There has been a historical problem. We
25 think we have resolved it. It is coming to market.

1 I said so what actually is the arrangement between Auden
2 and Aesica and they explained that Auden was the interim
3 supply pending sorting out all these issues with Aesica.

4 I also said so what is going on on the other side
5 with this Carbimazole agreement and I found that,
6 originally, there had been NRIM situation I described
7 earlier. So Amdiphram had supplied NRIM, because they
8 had got an MA. That had an issue of being £2 or £3
9 a pack. Then from January that had been changed when
10 Cinven took over supply and that was now at drug tariff
11 less margin. I think it was the wholesale margin, about
12 15%.

13 I also spoke to Brian McEwan and said what is going
14 on with these things? So he explained, no, the
15 Carbimazole point is separate. These two things aren't
16 linked. This isn't a kind of tit-for-tat. The NRIM has
17 got an MA, could not get a supply, we wanted to maintain
18 our manufacturing volumes. We, as in Amdiphram 2012 ,
19 wanted to maintain our manufacturing volumes, so they
20 had sold Carbimazole to NRIM. NRIM had then been bought
21 by Auden. Then we had obviously, once Cinven took
22 control of it, the price had gone up to a normal price
23 into the market to wholesale. So I thought, okay, that
24 seems okay, but fine, let us just test this.

25 Then on the other side, as I say, it was clear we

1 had no product from Aesica. There had been all these
2 issues and there was manufacturing orders in place to
3 come to market and people were clear internally this is
4 an interim supply from Auden until Aesica come online.

5 So I said, okay, actually, I do not think there is
6 anything to stamp out, but, as I say, I want Pinsents to
7 be absolutely sure I am not missing something.

8 THE PRESIDENT: Okay, so I think in a sentence your answer
9 to my question is that having looked at the matter,
10 there was nothing in the practices to be concerned about
11 apart from their undocumented nature, having looked into
12 it.

13 A. Yes, but I wanted to make sure I hadn't got it wrong,
14 hence --

15 THE PRESIDENT: No.

16 A. Yes, I investigated.

17 THE PRESIDENT: I appreciate you are not acting on your own,
18 but in terms of where we are at.

19 A. Yes.

20 THE PRESIDENT: Having involved Pinsents and having looked
21 at it yourself, the only problem was the undocumented
22 nature of the practices.

23 A. And I think Pinsents raised resale price maintenance as
24 well as a concern in order to make sure there were no
25 discussions going on on the downstream sell side as to

1 if, for example, we need to make sure that Amdiphram is
2 not aligning its selling out price during this interim
3 period with Auden McKenzie, which, again, did not appear
4 to be the case.

5 MS DEMETRIOU: Thank you, sir.

6 THE PRESIDENT: Thank you.

7 MS DEMETRIOU: Now you know now, Mr Sully, do you not, that
8 the CMA also found that Mr McEwan on behalf of Waymade
9 negotiated with Amit Patel at Auden another agreement in
10 respect of 20mg Hydrocortisone. You know that now, do
11 you not?

12 A. I understand that is the CMA's case. I obviously do not
13 know if he did or did not.

14 Q. And you know that the CMA's case is that that 20mg
15 agreement is anti-competitive?

16 A. Yes, I know the CMA's case.

17 Q. And you know the CMA's case is that that is because
18 Auden agreed to transfer value to Waymade in exchange
19 for Waymade agreeing not to enter the market with its
20 own product, yes?

21 A. I understand that is the CMA's case, yes.

22 Q. And you know that there is no appeal against that
23 finding in this Tribunal?

24 A. Yes, I am aware of that.

25 Q. So can we go to {H/70/1}. We can see that the top of

1 the chain, at the top, that the chain, this email chain
2 ends with Brian Wyatt of Waymade forwarding an email to
3 Mr McEwan of Waymade, yes? And if you we go down the
4 chain, let us go to page 3 {H/70/3}. So this is
5 Brian Wyatt's email to Alan Barnard at Auden and what
6 you can see here -- I will just give you a minute to
7 read that email. Have you seen this email before?

8 A. I do not think so, no.

9 Q. Just have a look at it. (Pause).

10 A. I am sorry. Who is it to? To Alan Barnard, yes.

11 Q. So this is Brian Wyatt from Waymade to Alan Barnard at
12 Auden and what you can see here is that there was an
13 arrangement between Auden and Waymade, whereby Auden
14 would supply 800 packs to Waymade at the special price,
15 it is called the special price, which was £4.50 a pack
16 and Waymade would immediately sell them back to Auden at
17 £34.50 per pack, which was then the market price.

18 Now, do you know now that in fact those packs never
19 left the Auden warehouse? Do you know that now?

20 A. I do not know anything about this. This is the first
21 time I think I have seen the document. I obviously was
22 not involved at the time.

23 Q. No, but you said that you know that the CMA's case in
24 relation to the 20mg agreement is that it is
25 anti-competitive. So I am just asking about the detail

1 of that case. Do you know now that in fact those packs
2 never left the Auden warehouse? Is that something you
3 are aware of now?

4 A. No, I do not know that now. I know the CMA's case is
5 that the 20mg agreement was anti-competitive. I have
6 not particularly looked into it, because it did not
7 relate to Advanz, so I do not know.

8 Q. So the answer is, no, is it, you don't know that now,
9 you weren't aware of that in preparing for this Tribunal
10 hearing?

11 A. I wasn't aware of this email.

12 Q. No, not of the email, but of the fact. Mr Sully, please
13 try and listen to the question and just answer it in
14 a yes or no way if you can, because we are really
15 running out of time. So I am asking you whether or not
16 you know now, whether you knew in preparing for this
17 Tribunal, that the CMA's case in relation to the 20mg
18 agreement is that it found that these packs never left
19 the Auden warehouse? Do you know that or not?

20 A. I was not aware of that.

21 Q. Right.

22 A. You are telling me that now.

23 Q. So Auden was simply handing over this money to Waymade.
24 So you weren't aware of that either?

25 A. No, I am not aware of the details of the 20mg agreement.

1 Q. So you are not aware now even, are you, that we can see
2 a reference in this email to 200 packs, a further 200
3 packs. Were you aware that the 20mg agreement also
4 provided for Auden to supply Waymade with 200 packs
5 a month at the same special low price?

6 A. No, I wasn't aware.

7 Q. And that those were sold by Waymade at the market price,
8 which was then £34.50?

9 A. I wasn't aware of any of this.

10 Q. But you would agree, would you, that this looks like
11 a highly profitable arrangement for Waymade?

12 A. I do not know if I can agree that. I do not know the
13 details.

14 Q. It is not very difficult, is it, to be honest, Mr Sully?
15 It is a value transfer of lots of money to Waymade. The
16 packs never even leave Auden's warehouse so they are
17 getting money for nothing. I think we can agree, can we
18 not, that that looks profitable for Waymade?

19 A. Sorry, I do not know what the special price is. I am
20 looking at this for the first time.

21 Q. I am telling you the special price is £4.50 for the pack
22 and the market price is £34.50. Just as a matter of
23 logic, it is a highly profitable arrangement for
24 Waymade, is it not?

25 A. I do not know what this agreement is. I -- it looks

1 like the price is different, if they are what you say
2 they are, but I honestly do not know.

3 THE PRESIDENT: Ms Demetriou, let us close off, if we can,
4 this question of what evidence this witness can give
5 about the 20mg agreement.

6 MS DEMETRIOU: Yes, I was going to do that, sir. I was
7 going to do that in a couple of questions.

8 THE PRESIDENT: Okay, I will ...

9 MS DEMETRIOU: I think we can cut this short, because
10 I think we have established that you were not
11 involved -- you did not know about this at the time,
12 because you do not know about it now, right?

13 A. Correct.

14 THE PRESIDENT: Just to be absolutely clear. Mr Sully, you
15 know what the CMA has found in the Decision, the 20 and
16 there must have been some inklings of what the CMA was
17 probing during the course of the investigation.

18 A. Yes.

19 THE PRESIDENT: But absent the CMA's involvement in the
20 investigation and the decision, the 20mg agreement is
21 something you know nothing about and can give no
22 evidence on to this Tribunal.

23 A. So the only thing I know about the 20mg agreement, so
24 I know Waymade had the 20mg. It kept it when Cinven
25 acquired Amdiphram and then when we looked at trying to

1 buy the 20mg in 2014 from Waymade, because we thought it
2 might resolve the orphan drug issue, because it was
3 a full indication product, we discovered that actually
4 Waymade was getting supply from Auden and we discovered
5 that Waymade hadn't managed with Aesica to get
6 compliance supply from Aesica.

7 So I was aware that there was a relationship between
8 Waymade and Auden, but I did not know it was
9 anti-competitive and I understand now from the Decision
10 that the CMA has said it is anti-competitive and
11 I understand that Waymade hasn't appealed that.
12 I haven't read the details. The Decision is 1200 pages.
13 I have not read the details of exactly what this 20mg
14 agreement was, because I did not think it was relevant
15 to me and my evidence.

16 MS DEMETRIOU: So can we look just to clarify -- can we go
17 to your witness statement at paragraphs 27-28 {B2/2/8}.
18 You say there at 27 that you learned from Brian McEwan
19 and some of the Amdiphram supply chain team that Waymade
20 had been working with the Aesica for a number of years
21 to try to develop a supply of 20mg Hydrocortisone.

22 And then at 28 you say that you learned about the
23 10mg supply agreement between Waymade and Auden, yes?

24 A. Yes.

25 Q. And so Mr McEwan when you were having these discussions

1 with him, he told you, did he, about the -- he told you
2 about the supply agreement for 10mg Hydrocortisone, did
3 he?

4 A. He told me about -- well, I already knew about the
5 supply agreement for the 10mg, because it had come up in
6 the compliance sessions.

7 Q. And I think you learned about it in part from Mr McEwan,
8 do you see at the beginning of paragraph 27. You are
9 obviously talking to him.

10 A. So what I learnt from Mr McEwan as part of digging into
11 this whole issue was he said, right, the background to
12 all of this is Waymade have a 20mg MA and it developed
13 a line extension of it at the same time as lining up
14 Aesica and so Aesica is the CMO for the developer, for
15 the line extension and then he explained the development
16 issues that were going on for the 10mg.

17 I was not aware there were any issues, any
18 manufacturing or development issues for the 20. That
19 came as a surprise when we found out that Waymade was
20 actually sourcing from Auden, not from Aesica, for its
21 20mg, and then also I understood from this discussion
22 that the 20mg Waymade MA was a full indication, but the
23 10mg MA was actually this skinny label, as I explain in
24 my statement.

25 Q. Mr Sully, when you were talking to Mr -- when you were

1 digging around, as you say, and you were talking to
2 Mr McEwan about the 10mg supply agreement, he must have
3 mentioned that they also had a supply agreement for
4 20mg, didn't he?

5 A. A supply agreement with who, with Auden?

6 Q. Yes.

7 A. No, he did not mention that. It came as a surprise when
8 we went to look at buying the 20mgs to try and overcome
9 the orphan drug issue.

10 Q. Did he tell you -- when you were digging around and
11 discussing the 10mg supply agreement, he would have told
12 you what the price was at which they had been buying the
13 product, the 10mg product from Auden, yes? You knew
14 that £1s a pack?

15 A. Yes, I believe he did explain that, yes, that the Auden
16 supply was £1 a pack and he said -- he also explained
17 what the anticipated Aesica price was.

18 Q. Okay. So let us look at the Aesica issue since you have
19 mentioned it. So if we go to paragraph 68, which is
20 {B2/2/18}. You say -- you say at paragraph 68 that you
21 were not involved in the technical details of the Aesica
22 product, but that you kept hearing about a lot of
23 frustration with ongoing problems, yes?

24 A. Yes.

25 Q. And so I think we can take it from that, cannot we, that

1 you weren't closely involved in the development of the
2 Aesica product?

3 A. Yes, I am a lawyer not a technical person. As part of
4 the digging around, I checked what was going on with
5 this Aesica product.

6 Q. So you might have known about the general progress, but
7 you weren't involved in the day-to-day engagement with
8 Aesica, that is fair?

9 A. Absolutely.

10 Q. And you were not involved in decisions about that
11 development, I think it follows, so, for example,
12 whether new batches should be ordered or how they should
13 be packed, that wasn't for you, because, as you say, you
14 are a lawyer?

15 A. Agreed. I knew that batches had been ordered. That was
16 one of my questions but --

17 Q. You weren't involved in decisions about whether to order
18 them. That was not for you. That was for Mr McEwan and
19 then subsequently Mr Clark and Mr Belk. That is right,
20 is it not?

21 A. No, actually it was Malcolm Milham and Wayne Middleton,
22 because they were the Amdiphram supply chain, under
23 Mr McEwan as Amdiphram managing director and then it
24 moved across from them to in December 2013 to the AMCo
25 new product team, which was Rahul Dhorajiwala and Gen

1 Parent. They would have placed the orders and had the
2 relationship with Aesica.

3 Q. So we have got later on, not today, but later this week,
4 we have got Mr Middleton coming to give evidence in
5 relation to the Aesica product. Would it make more
6 sense for me to ask him any technical questions rather
7 than you? I think we have established that the
8 technical part of the project was not really for you,
9 was it?

10 A. So I was not making the technical decisions. I was
11 aware of the stability and assay issues and I have
12 described them in my witness statement. I was aware of
13 what orders were in place so it is entirely up to
14 counsel as to whether she would like to ask me
15 questions. I am very happy to answer them.

16 Q. So where you say -- let us look at paragraph 60
17 {B2/2/16}. You say there that it appeared that Aesica
18 had completely overcome the assay issues in the
19 manufacture and you then say:

20 "Although this turned out to be inaccurate, since
21 Aesica continued to have problems as explained
22 below ..."

23 Yes?

24 A. Yes.

25 Q. But you are not in a position to assist the Tribunal

1 with the detail of the assay issue, are you? Are you
2 able to explain when the problem was first identified,
3 precisely what steps were taken to resolve it and when
4 those steps were taken? Is that something you remember?

5 A. So I am very happy to help the Tribunal on what I was
6 told at the time about what the issues were, when they
7 arose and when they happened and because I was tracking
8 this, obviously because this was all a major agreement
9 that I was heavily involved in, I was aware of updates.
10 I cannot tell you the precise details of what was
11 discussed between Aesica and AMCo, but I can certainly
12 give you a good overview of it.

13 Q. That is very helpful. Let me try some questions, then.
14 It is not your evidence, I do not think, that the Aesica
15 product was not saleable, because it was affected by
16 assay issues after spring 2014. That is not your
17 evidence, is it? In other words --

18 A. What was the date you gave, please?

19 Q. So in other words, you accept, do you not, that the
20 assay issues were solved by spring 2014?

21 A. No, actually I wrote that they weren't. We thought they
22 were, because we thought -- so if I may --
23 in December 2013, these batches were made that I had
24 asked about when I was digging around -- sorry,
25 in October 2013 the batches were made. I was aware that

1 they were then brought to the new product team.

2 In December 2013 then there was a major issue because
3 they failed stability.

4 THE PRESIDENT: They failed what?

5 A. Stability testing, because they were outside of the
6 assay. So what we hoped would be this interim supply
7 from Auden pending the Aesica launch in early 2014,
8 suddenly we had a product that had failed completely all
9 of the stability testing.

10 So in December 2013 a lot of senior AMCo staff,
11 global heads of quality, global head of regulatory,
12 Guy Clark, John Beighton, everyone was going, Christ, we
13 have got a real problem here. This is one of our big
14 product launches for 2013/14 and it has completely
15 failed. So there was a huge effort in December and
16 January and then in February it looked like we had found
17 a way to get over this. There was a change of the
18 analytical methods, so we thought we had resolved it.

19 However, I am aware that product which finally came
20 through later when it was sold into the market then
21 in December 2017 the reason we moved away from Aesica
22 was we found out that actually it was still failing
23 stability testing within its 18-month shelf-life.

24 MS DEMETRIOU: Hang on, a minute, Mr Sully. I am not
25 interested at the moment in 2017 nor am I interested in

1 a survey over what happened over a number of years.

2 I just want to ask specific questions over a specific
3 periods of time.

4 You say in your statement at paragraph 60 that you
5 say that this turned out to be inaccurate, the
6 overcoming the assay issues, because Aesica continued to
7 have problems. So are you saying that the assay issues
8 were still live in 2014 after the spring, because we
9 have seen everywhere else in the documents that they had
10 been resolved at that stage. I am not interested at the
11 moment in 2017. I am interested in what was in the mind
12 of the business in 2014?

13 A. So as I believe I said, we thought in February 14 that
14 the -- we had resolved the assay issues and that thought
15 continued for some time.

16 Q. It continued for some time, thank you. Okay. And
17 certainly up until -- it continued -- that thought
18 continued that it had been resolved at least until the
19 summer of 2014, yes? We can agree that much?

20 A. Yes.

21 Q. Now, let us see -- let us look at what you say at
22 paragraph 63 of your statement which is on page 17
23 {B2/2/17}. So you say there that after discussion the
24 board instructed you to press a -- the board agreed that
25 AMCo should bring the supply arrangements with Auden to

1 a close on 31 March 2014 and that despite the orphan
2 designation issue we would see what happened when we
3 launched our own product.

4 I think what you are saying is that it looks -- here
5 it looks from this like at the end of May things were
6 still looking good with Aesica, right, because the plan
7 at the end of May was to launch your own product, that
8 is correct, is it not?

9 A. No, I think the date of this is 29 January meeting. So
10 this is a meeting towards the end of January 2014.

11 Q. Sorry, Mr Sully. Maybe I am not being clear. I do not
12 want to go into January. I am looking at a date on the
13 face of paragraph 63, which says 31 March 2014 and at
14 that point there had been a board decision, had there
15 not, to press ahead with sale of the Aesica product, to
16 commercialise the Aesica product?

17 A. I am sorry, I must have misunderstood you, because
18 I thought you said in May.

19 Q. Do not worry. Just answer my question.

20 A. So at this board meeting, which was on 29 January, there
21 was the decision to bring the agreements to a close at
22 the end of March, 31 March 2014, and to press ahead with
23 launching the Aesica product, which I believe at that
24 time we thought would be ready around April/May time.

25 Q. That was all I was asking. If we go to paragraph 82 of

1 your statement on page 21 {B2/2/ 21}, you say there
2 that:

3 "By late May 2014, Aesica were still having multiple
4 issues ..."

5 Yes?

6 A. Yes.

7 Q. They weren't the assay issues, were they? We have
8 established that. As far as you were aware at the time,
9 those aren't the assay issues, because those have been
10 resolved?

11 A. So, yes, we believed the assay issues have been
12 resolved.

13 Q. So what were the issues is my question? Was it the
14 packing machine issue?

15 A. So there were a number of issues. At the end of January
16 we determined --

17 Q. I am not asking about the end of January. I am so
18 sorry. I am just asking a very simple question, which
19 is: at this date, which is late May, what were the
20 issues?

21 A. Yes, so.

22 Q. But if we go back to the end of January, I am not going
23 to have time to finish. I really just want you to focus
24 on the time there.

25 THE PRESIDENT: Do not worry about time.

1 A. In February 2014, Aesica are saying we have a problem
2 because we cannot pack these things. We do not have
3 a packing machine, tableting machine. So AMCo had
4 agreed to pay for the tableting machine. So that was
5 one issue, because that machine when it was delivered
6 then there was some problem. It had to go back to the
7 manufacturer. It went backwards and forwards. I think
8 it did not come in until July or June. That was one
9 issue and then as a result of that there was various
10 other blister issues. I think there was an API issue.
11 So I know there were a number of issues and, as I say in
12 82, at the end of May Aesica had hoped they would be
13 ready to give us products so we could launch in April
14 or May. Now they were still having multiple issues and
15 now projecting a July delivery date at the earliest.

16 MS DEMETRIOU: Right, so we are looking at the end of May.

17 You are saying there were still multiple issues.

18 Let us look at {H/552/1}. So this is an email from
19 you, if I go down the page a bit, from you to

20 Mr Dhorajiwala, yes?

21 A. Yes.

22 Q. And it is July 10 and you are saying:

23 "Rahul.

24 "Well done for getting these ready for launch.

25 "It is a real shame that this Orphan Drug status

1 issue has meant that we have to hold off launching this
2 (though hopefully we can find a way to sort out the OD
3 issue). In the meantime, is there a way of launching
4 this by making some international sales?"

5 So what you are saying there is that the Aesica
6 product was ready for launch in July 2014, yes?

7 A. No, I know it was not ready for launch. Perhaps if we
8 could scroll down, please. I think Rahul was giving
9 some more positive news about when it would be ready,
10 which I believe at this time was the end of July and
11 I was saying well done for getting this ready for --
12 I said obviously ready for launch, but what I meant was
13 ready for imminent launch in terms of when it arrives
14 within what at the time appeared to be a number of weeks
15 and it is really a shame that we can't launch that
16 because of the orphan drug status issue.

17 Q. Let us look at what he says in the email below:

18 "Just to keep you in the loop regarding the batches
19 of Hydrocortisone tablets from Aesica, I know we have
20 signed the agreement with Auden so this is really just
21 in case you have any thoughts on where else we could
22 sell this stock or do we just want to hold it as ...
23 planned."

24 A. Could we go to the email under. I know for certain --

25 Q. "All issues with the blister feeder are now resolved.

1 Packing is ongoing and it is due to be completed today
2 or tomorrow."

3 A. That means they are not ready for launch. They need to
4 be packed. They will come at some point in the next
5 four weeks.

6 Q. Okay, so I think the disagreement between us is very,
7 very small, Mr Sully. So you are aware, aren't you,
8 that Aesica did in fact deliver the product to AMCo in
9 early August 2014? You know that, do you not?

10 A. I know that Aesica -- I understood it was
11 mid August 2014.

12 Q. So when you are talking in your statement about multiple
13 problems in May 2014, those problems -- we are really
14 talking about problems over a very limited period,
15 aren't we, because in fact the product was ready
16 in August 2014, the beginning of August. I just want to
17 get a sense of how serious these problems are and the
18 answer is they are not very serious?

19 A. The issue -- they were a serious issue, because we were
20 hoping to launch one of our biggest development
21 projects, one of our biggest new product launches, which
22 is a big thing for a pharma company, and we thought we
23 could launch in April and then the date slipped and
24 slipped and slipped to the middle of August.

25 THE PRESIDENT: Just so that I have the narrative in mind,

1 when in paragraph 82 of your statement you say Aesica
2 was still having multiple issues in late May 2014, those
3 issues were to do with the blistering?

4 A. And this machine and I think there was an API issue. So
5 I think there were a number of issues.

6 THE PRESIDENT: So blistering machine and blistering. API,
7 what is that?

8 A. It is the active pharmaceutical ingredient.

9 THE PRESIDENT: What was the nature of the problem there?

10 A. So I do not know. What has been reported up to us,
11 those -- particularly John and I and Karl who were
12 managing this, from Rahul was we had a number of issues
13 with Aesica. They have got problems with the machine.
14 They have got problems with the API. It is not ready
15 like I said it would be.

16 THE PRESIDENT: In May 2014?

17 A. In May 2014.

18 THE PRESIDENT: But those problems were all resolved, so far
19 as you and the company knew, by August 2014.

20 A. Yes, when we received the product in the middle
21 of August 2014, I understood it was as finally we got
22 product, yes. It was saleable.

23 MS DEMETRIOU: And in fact, if we just go back to {H/552/1},
24 we can see all the people copied in to the email. So
25 they are very senior people, including Mr Beighton, that

1 would have known what was going on and what you are
2 saying is well done for getting ready for launch and
3 then when we scroll down, we saw the reason it was not
4 launched was because you had entered into the agreement
5 with Auden, yes?

6 Let us scroll down again to remind ourselves of that
7 email.

8 A. Yes, so we entered into the second agreement with Auden,
9 because there was no customer demand, as I explain in my
10 witness statement.

11 Q. Please, we are going to get into customer demand and
12 orphan designation later, so you do not need to get that
13 off your chest now, Mr Sully. I am trying to establish,
14 you have said there were multiple problems. We have
15 established that the problems were resolved when it was
16 delivered in August, but actually I am saying they were
17 resolved earlier by 10 July, because you are sending an
18 email saying "well done for getting these ready for
19 launch". In fact, the reason we see they weren't
20 launched, if we scroll down -- in fact, go back again.
21 It was my mistake -- is the next email from
22 Mr Dhorajiwala that we have signed the agreement with
23 Auden and so that's why it is not being launched.

24 So the question I am putting to you is that the
25 multiple problems that you are talking about in

1 late May, they had actually all been resolved by
2 10 July, hadn't they, otherwise you would not be sending
3 this email?

4 A. Yes, I believe we had. We had a number of issues
5 in May. We thought in July they had been resolved and
6 the product would be ready for launch when it was
7 delivered, which was within a month.

8 Q. Thank you, Mr Sully. I want to now turn to the look at
9 the first written agreement. Just by way of background,
10 I think you have now explained that one of the key
11 things to come out of the Pinsent Masons review was that
12 the unwritten agreement with Auden should be documented.
13 So you decided not only to document the relationship
14 going forwards, but also to document the agreement
15 retrospectively, yes?

16 A. Yes.

17 Q. You explained that already?

18 A. Yes.

19 Q. And we have already seen that Mr McEwan was the person
20 responsible for leading those negotiations, not only to
21 document the relationship, but also to try to increase
22 the volumes, yes?

23 A. Yes.

24 Q. And if we turn to {H/252/1}, we see there -- I think we
25 have seen this before, but we can see that the draft

1 supply agreements being attached and if we look at those
2 supply agreements, so the draft that was attached to
3 this letter, so if we go to {H/253/1} so that is
4 a draft, yes, and that is what Mr McEwan was sending to
5 Mr Patel at that stage. We saw the cover email a minute
6 ago.

7 If we go to page 20 of this draft {H/253/20}, we can
8 see there the quantities that are being negotiated over
9 and so the increase that Mr McEwan had been trying to
10 achieve was from 6,000 packs a month to 18,000 packs
11 a month, yes?

12 A. It looks like it, yes. I do not remember the details,
13 but that looks like it, yes.

14 Q. You do not remember that detail. So you were not
15 discussing the ins and outs of the volume negotiation
16 with Mr McEwan?

17 A. Sorry, I do not now recall what the number was, but
18 I know we were pushing for as much as we could get.

19 Q. If we look at page 5, {H/253/5}, we can see here at
20 the -- do you see "duration" at the bottom, so:

21 "This agreement shall commence on the effective date
22 and unless terminated earlier, shall remain in course
23 for the term."

24 And then the term means, if you go up, three year
25 period from the effective date, yes?

1 A. Yes.

2 Q. So what you were trying to negotiate was a forward
3 looking three-year agreement at increased volumes,
4 rather what Mr McEwan was trying to negotiate; yes or
5 no?

6 A. So -- well, retrospective and forward looking, yes.

7 Q. I am concentrating on the forward looking bit at the
8 moment, because we can see that what you had in mind was
9 a three-year agreement, yes, at this stage?

10 A. Yes, and three-year agreements are very standard for
11 pharmaceuticals.

12 Q. Right. So you explain at paragraph 51 of your statement
13 that AMCo's request to increase volumes was rejected
14 outright by Mr Patel at Auden, yes, and you say at
15 paragraph 51 that that might have been a negotiating
16 tactic by Amit Patel to encourage AMCo to buy Auden.
17 I am just saying what you say in your statement. Do you
18 want to remind yourself of it?

19 A. Yes, the reason I pause is that the negotiating tactics,
20 as I suspected, was that Amit Patel of Auden wanted to
21 get in front of Cinven and AmCo to be bought. So
22 I understand you to be saying the volumes are linked to
23 the negotiating tactic, but actually what I meant was we
24 tried to negotiate the volumes up, but he disagreed and
25 when he said I want you to look at buying Auden, that

1 was what I thought effectively his big game was.

2 I think he wanted to copy what Vijay Patel of Waymade
3 had done a year earlier and actually I suspect that his
4 real focus was trying to sell Auden to Cinven.

5 It was a big thing in the pharma industry at the
6 time that private equity was coming in and buying
7 generics companies, so I suspected he was trying to get
8 on the bandwagon.

9 Q. Mr Sully, although you were not involved in the detail
10 of the commercial negotiation, you understood, didn't
11 you, that Auden was supplying AMCo at a large discount
12 to the market price, around 97%, yes?

13 A. Yes, it was supplying at a CMO price, which is --

14 Q. We will come on to CMO, but it was supplying at a large
15 discount to the market price, yes?

16 A. It was £1 and the market price was significantly higher,
17 yes.

18 Q. So when Auden was supplying packs to AMCo instead of to
19 a wholesaler, which it would have supplied at the market
20 price, it was foregoing big margins? It was foregoing
21 a lot of profit?

22 A. Yes, that must have been the case.

23 Q. And that is an obvious reason, is it not, why Auden
24 might not have wanted to increase the volumes from 6,000
25 packs to 18,000 packs, yes? It would have been a loss

1 of a lot of money for it?

2 A. It is.

3 Q. Are you agreeing?

4 A. Yes.

5 Q. If we go to paragraph 64 of your statement, {B2/2/17},

6 so you say there that on 25 February Auden and AMCo

7 finally signed a written agreement which you have called

8 the first written agreement, yes?

9 A. Yes.

10 Q. And you explain it is retroactive to January 2013 and it

11 expired on 31 March 2014, so just over a month later,

12 yes?

13 A. Yes.

14 Q. For context, the position in February 2014 was that AMCo

15 was concerned it would not reach a forward-looking

16 agreement for supply for Auden, yes? The three year

17 forward-looking agreement at that stage it did not look

18 very hopeful, did it?

19 A. As I say, in January there had been a decision this guy

20 has just been too difficult, he is making all these

21 threats. We just want to move away from him, which is

22 what the board agreed.

23 Q. Then what happened -- so then what happened is you then

24 see that Aesica product going up to the board for board

25 approval, yes, in February?

1 A. The --

2 Q. Let us look at {H/368/1}.

3 A. Because I think the Auden AMCo first agreement went to
4 the board on 29 January 2014.

5 Q. So here we have got {H/368/1}. What I have been saying
6 to you is that you have agreed that at that stage the
7 idea of getting forward-looking supply agreement with
8 Auden did not look too rosy and so what we see at the
9 same time in February, or around the same time or
10 shortly thereafter, are -- if we scroll down to page 3,
11 {H/368/3} -- we see here for board approval
12 Hydrocortisone tablet, do you see that? Development
13 partner, Aesica; manufacturer, Aesica; launch date,
14 April 2014, yes?

15 A. This isn't an agreement. This is asking the board for
16 approval of a product, yes.

17 Q. And they are approving the project, because it doesn't
18 look very likely that there is going to be an ongoing
19 supply arrangement with Auden, yes?

20 A. No, that is not right. So they are approving the
21 project, because we always wanted to launch our own
22 product and that was clear from right back in the summer
23 of 2013 when I dug into this. We used as a template for
24 the first agreement a template that Pinsents had created
25 with us, the Teva one from 2012, and it is entirely

1 normal in pharmaceuticals to have a long-term agreement,
2 because you don't know what is going to go on.

3 But that agreement specifically said AMCo, it was
4 Amdiphram actually, is perfectly entitled to carry on
5 developing and supply and launch its products with no
6 notice. So in our minds this was exactly what we had
7 agreed to do.

8 Q. Mr Sully, can I interrupt you, because we are going to
9 come to the terms of the agreements.

10 A. I am sorry, because you are asking me to agree.

11 Q. I am going to come to the terms of the agreement. What
12 I am doing is asking you short questions. I was hoping
13 they would be short. If when we get to the end of
14 a series of questions, there is something else you want
15 to get off your chest that you think I have not covered,
16 because I have thought quite hard about what I want to
17 cover, and you are skipping ahead and you are doing it
18 a way which is causing a lot of delay and I am worried
19 about the timetable so if you could just try and answer
20 the question.

21 THE PRESIDENT: Put the question, again, Ms Demetriou, and
22 listen very carefully to the premise.

23 MS DEMETRIOU: The question I asked you is that, first of
24 all, you have agreed that in January and early 2014 it
25 did not look likely that you were going to get a forward

1 looking three-year supply agreement with Auden. We have
2 agreed that, yes.

3 A. Sorry, I specifically said in January we got thoroughly
4 fed up with this guy. We had wanted to put in place
5 a three-year agreement with an immediate termination
6 right in the event we wanted to launch and we had that
7 in the draft which you went to, but skipped over.

8 Q. I am going to come back to the draft, Mr Sully.

9 A. Sorry. Please let me just finish. So the reason we
10 decided to move in January was not because we could not
11 get a three-year agreement. It was because we were fed
12 up with this guy and we wanted to say forget it. We
13 think we have resolved all the problems, the stability
14 and assay problems, with the Aesica product. It looks
15 like it's ready in April, so great, fine, we can move
16 away from this idiot and we can -- let us put in
17 place an agreement that just documents it for compliance
18 purposes for the MHRA and for all the other reasons so
19 we have a written agreement not an unwritten agreement,
20 end it at the end of March and then we can launch our
21 product, the Aesica product, in April. January was the
22 time it was projected to be ready.

23 Q. But, Mr Sully, is it your evidence then that your
24 decision to get board approval for the Aesica product
25 had absolutely nothing to do with the order and supply

1 agreement? Is that your evidence?

2 A. Yes, the decision, the board --

3 Q. Just a minute. I do not want you to repeat yourself.

4 It is yes or no. Is your evidence that the decision to
5 get board approval for the Aesica product had nothing to
6 do with the order and supply contract? Is that your
7 evidence?

8 A. Sorry. Could you please say the question again.

9 Q. Yes, is it your evidence that the decision to get board
10 approval in February 2014 for the Aesica product had
11 nothing to do with the order and supply agreement? It
12 is completely independent?

13 A. Yes, sorry, sorry. It is the board approved -- if you
14 think you have resolved the issues with Aesica, go with
15 Aesica. That is what I am saying.

16 Q. So it has nothing to do with the fact that your
17 negotiations with Auden were not going well, nothing at
18 all to do with that at all?

19 A. No.

20 Q. Can you explain this: why does this say:

21 "Rationale. Back-up product to ensure continuity of
22 supply in case our existing distribution agreement with
23 Auden McKenzie for Hydrocortisone is not renewed."

24 It had everything to do with whether or not it was
25 going to be renewed?

1 A. No, I am sorry. It did not. I did not write this
2 document, but it is perfectly clear the plan was always
3 to use Auden as an interim supply until we could launch
4 the Aesica product and it says here, "more beneficial to
5 the IP owner". Because the business, 93% of its
6 products were our own IP and we wanted to be in that
7 position. So I do not know why this was written. There
8 are all kinds of reasons.

9 Q. So you are saying this is wrong. This thing that went
10 to the board, this statement, is wrong, is that your
11 evidence to the Tribunal today?

12 A. Yes, it must be. I was there at the time and I recall
13 at all times Aesica -- sorry, Auden -- was an interim
14 supplier until we could bring Aesica online and that was
15 exactly what was agreed at the board meeting, because we
16 said we will finish -- we're fed up with this guy. We
17 will finish these agreements at the end of March and we
18 will launch our Aesica product, which at the time we had
19 hoped would deliver in --

20 Q. Mr Sully, if other people in the company were saying it
21 is important to launch the Aesica product because we are
22 not confident that we are going to get continued supply
23 from Auden, that wasn't something they told you at the
24 time?

25 A. So, no, I am aware there was a lot of confusion in the

1 business at the time. So perhaps the person writing
2 this was one of the people that were confused. But
3 I have clarified that back in December -- December 2013.
4 I think I cover it in my witness statement. Because it
5 was a real mess in December. You had this project -- so
6 a number of things came together in December. You
7 had --

8 THE PRESIDENT: 2013?

9 A. December 2013.

10 THE PRESIDENT: Right.

11 A. The Aesica project switched from the Amdiphram team to
12 this new product team at AMCo. We had hoped to have
13 saleable product, which we would then launch
14 in February/March 2014 and then suddenly it failed
15 stability. We had to get all the senior people
16 involved. Discovered the shelf-life issue. There was
17 a real pandemonium over it. Then in addition this
18 orphan drug issue had popped up because the MHRA
19 in November 2013 had said no, you cannot have a full
20 indication so everyone is running around
21 in December 2013. We got Pinsents advice and then the
22 other thing is Auden then said, well, I do not want to
23 put in place a supply agreement to document the
24 unwritten agreement unless you look at buying Auden.

25 Q. Mr --

1 A. So all these things came together and that was the
2 confusion, which I tried to clarify in December.

3 Q. So your evidence on this is that you disagree with this
4 statement that it was a backup product to ensure
5 continuity of supply in case our existing distribution
6 agreement is not renewed? You disagree with that?

7 A. I disagree with that. I was there at the time. That
8 was not the company's plan, as far as I am aware.

9 THE PRESIDENT: When you say you were there at the time,
10 Mr Sully, this is a document that you would have seen?

11 A. So I did not go to PPRM meetings. I may well have been
12 sent it, but I do not recall whether I was or not, but
13 I know for certain, because I was there at the time and
14 I was very closely involved in this whole Auden
15 relationship, that the plan was to make sure we use
16 Auden as an interim stopgap until we can launch our
17 Aesica product.

18 MS DEMETRIOU: Right.

19 THE PRESIDENT: So this document, just so that I understand
20 it, it is putting forward a series of proposals for
21 board approval. I mean, let us go to page 1 {H/368/1}.

22 A. Yes.

23 THE PRESIDENT: So actually the reason you are doing
24 something is quite important for approval.

25 A. Yes.

1 THE PRESIDENT: And if one then goes to page 3, back to the
2 rationale {H/368/3}, what you are saying is that the
3 first sentence under "rationale" has got things
4 precisely the wrong way round.

5 A. So I am saying that does not mean that we need to renew
6 our agreement with Auden and if we can't, this is the
7 way forwards. So there was a big project at AMCo on
8 dual sourcing. It was a major thing at the time and
9 that's what backup products are, they are dual sourced
10 products. We wanted to make sure we could carry on
11 selling to our customers, but I do not know why this
12 person wrote "in case our existing distribution
13 agreement with Auden is not renewed" because that was
14 not our position as far as I was aware.

15 THE PRESIDENT: That is really what I am getting at,
16 Mr Sully. I am quite naturally putting myself in the
17 position of a reader of this document who doesn't know
18 very much else. Now, the impression that one gets from
19 reading the rationale is that the product being produced
20 via Aesica is the back-up and the primary source is
21 Auden McKenzie. That is what I get from this.

22 A. I understand.

23 THE PRESIDENT: And what you are telling me is that that is
24 completely the wrong way round. That what one was
25 primarily aiming for was actually the Aesica product.

1 A. That is what I am telling you. My understanding
2 throughout this whole period, from the summer of 2013
3 onwards, was the Aesica product was the one we wanted to
4 bring to market and launch and the Auden one was an
5 interim position until then, but there was confusion in
6 the business.

7 THE PRESIDENT: I am sure we will come to that. I am just
8 wanting to understand what your evidence is regarding
9 this paragraph and it is that it is the wrong way round.

10 A. Yes, sir.

11 THE PRESIDENT: Thank you.

12 MS DEMETRIOU: Thank you, sir.

13 I am going to move on to look at the first written
14 agreement and if we go to that, we see that that is at
15 {H/172/1}. On the first page we see at the top in
16 inverted commas, "'Own Label' Product Supply Agreement"
17 and you can see that "own label" is in inverted commas
18 and it is right, is it not, that own label product
19 supply agreements are agreements to supply a customer in
20 the customer's own livery, yes, the customer's own
21 label? That is what is meant by "own label" as the
22 words would suggest.

23 A. That's correct.

24 Q. But Auden was not supplying AMCo with 10mg tablets in
25 AMCo livery, was it?

1 A. This was a template from the Teva deal. Teva had not
2 either and because we only regarded Auden as an interim
3 supply, we never went through with the regulatory
4 applications that would be necessary to put it into an
5 Amdiphram label, because that is what would be
6 necessary.

7 Q. It is another template problem, is it? So "own label"
8 comes from another agreement, but it doesn't accurately
9 describe the arrangement in place here?

10 A. I think in the industry own label means that -- there is
11 own label for a short period of time, which is just sold
12 through in the --

13 Q. Mr Sully, in what way --

14 A. So we --

15 Q. -- was this ever an own label agreement if it was never
16 produced in AMCo's own label? It was always in Auden's
17 livery.

18 A. It is exactly the same as the Teva situation where they
19 asked for our product to sell through and we supplied it
20 and they chose not to bother with the regulatory
21 application and we did not either here. Because in both
22 situations it was an interim supply until manufacturing
23 issues were resolved.

24 Q. So it wasn't actually an own label supply, you accept
25 that?

1 A. No, that's not what I am saying. In the industry, that
2 is what it would be understood to be. An own label
3 supply is where you have taken someone else's product,
4 rather than it being your own IP.

5 Q. On own label supply, I thought you just accepted, was an
6 agreement to supply a customer in the customer's own
7 livery, as the words would suggest?

8 A. Often, but not always is what I am saying.

9 Q. So you can have an own label supply that doesn't use
10 your own label?

11 A. Yes, you can, as we did with Teva and as we did with
12 this and I think when we supplied Boots, for example,
13 they prefer their products to be in the OLS own label.

14 Q. That is their own label. The OLS label is Boots' own
15 label, is it not?

16 A. But often when the supply starts, it is -- they just
17 sell through your product, because they obviously want
18 supply to start.

19 Q. So this was never an own label supply agreement?

20 A. Sorry. What I am saying is that own label encompasses
21 more in the general terms of the industry than only that
22 specific situation. It is an agreement where you are
23 taking someone's product, often, I agree with you, it
24 will be converted into an own label, but in certain
25 circumstances -- internally, we describe this as an own

1 label agreement, because that is what it was understood
2 to be.

3 Q. Can I just understand. So an own label supply agreement
4 doesn't necessarily have to provide for the product to
5 be in the recipient's own label. That is what you are
6 saying. It describes any supply agreement in the
7 industry. Is that your evidence?

8 A. If you look at the agreement, there is a section on the
9 application to change it across. That makes it really
10 clear that there will be a supply before that label is
11 changed across and we were using that as the period of
12 time, because this was an interim supply agreement.

13 Q. So we can agree this, can we: that this never actually
14 became an own label supply agreement, because those
15 regulatory approvals were never obtained?

16 A. We never sold in our own label. We always sold --

17 Q. Was it your idea -- I think you are saying that this
18 heading was brought over from a template. Was it your
19 idea to put "own label" in inverted commas?

20 A. I think it's almost a mirror image of the Teva
21 agreement. In fact, I think the first drafts of it
22 actually have the Teva -- the products we sold to Teva
23 in the schedules, so literally it was a copy and paste.

24 Q. Still on the first page, we see that the effective date
25 says 1 January 2013. You have already explained that

1 the agreement was retroactive, so it was covering
2 a period where the supply had already taken place, yes?

3 A. Yes.

4 Q. And it didn't go right back to the beginning of the
5 agreement, did it? It did not even go back all the way
6 to October 2012. It started on 1 January 2013, because
7 you say that is the date when Cinven took full control
8 of the Amdiphram business, yes?

9 A. Correct, it was before the 1 January 2013 it was nothing
10 to do with us in our eyes, so we started it from then.

11 Q. Then if we go to page 2 {H/172/2}, we look in the third
12 recital, recital C, at the bottom of the page. Perhaps
13 we can bring that up a little. Thank you. So if you
14 read that:

15 "The parties wish to document their agreement
16 whereby Auden (by itself or utilising a contract
17 manufacturer) has been supplying the product to
18 Amdiphram in the Auden trade dress."

19 So that explains that it is the Auden trade dress,
20 the point we have just been discussing?

21 A. Yes, that is why it is termed an own label supply
22 agreement, because it has a whole process for that. It
23 is wrong, as I think you are pointing out, that it has
24 actually been supplying the Auden trade dress, because
25 that hadn't ever occurred.

1 Q. Then moving on:

2 "Since Amdiphram wished to engage Auden to
3 manufacture and supply the product on the terms of this
4 agreement and Auden wished to manufacture and supply the
5 product to Amdiphram on the terms of this agreement."

6 So just two points. You say in your evidence, and
7 we do not need to turn it up, but you have mentioned
8 this already so I know that you recall it, that this
9 shows that Auden was performing a role akin to a CMO.
10 That is how you put it in your evidence, yes?

11 A. Yes.

12 Q. A CMO -- explain to the Tribunal briefly what the
13 letters "CMO" stand for?

14 A. So it means contract manufacturing organisation.

15 Q. So to be clear, Auden was not actually manufacturing the
16 product itself, was it?

17 A. I think Auden was virtually like us, I believe, and they
18 were having someone manufacture. I do not know for
19 certain, but I think that's right. I am pretty sure.

20 Q. They had Tiofarma as their CMO. Does that ring a bell?

21 A. Yes, that rings a big bell. I think that was right.

22 Q. And Auden would have purchased the product from
23 Tiofarma?

24 A. Yes.

25 Q. And when you say that Auden was performing a role akin

1 to a CMO, are you just saying -- so we know that Auden
2 was not the CMO, because it had its own CMO -- are you
3 just saying that Auden was the source of the product,
4 which otherwise AMCo would have had to have sourced from
5 an actual CMO; is that the point you are making?

6 A. Yes, that is the way it is understood in the industry.

7 Q. We then have a definition section, but if we go down to
8 page 4, {H/172/4} paragraph 1.9 confirms the effective
9 date and then 1.12 -- I am just skipping down just so
10 that you can see what is there -- is the Auden trade
11 dress point and then if we go on to page 5, {H/172/5},
12 we see at 1.24, that price means the price which is set
13 out in schedule A, yes, and schedule A says £1 a pack,
14 yes?

15 A. Yes, because by this time the rebate had all been ended.

16 Q. Then at 1.25, the product is the 10mg tablets as listed
17 in schedule A and then we have the term at 1.28 which
18 is:

19 "15 months from the effective date and unless
20 terminated earlier, then this shall remain in force for
21 the term."

22 15 months from the effective date takes us to the
23 end of March 2014, yes?

24 A. Yes.

25 Q. And although it says "subject to earlier termination",

1 that is obviously redundant in the real world, because
2 it only had a month to go?

3 A. Yes, I think that was a hangover in the template.

4 Q. Yes. And then if we go to -- we stay on this important
5 page for a minute. So we can see the duration clause,
6 which we have just been considering and then we have
7 clause 3, appointment and exclusivity.

8 And if we go over the page to 3.2, we see there that
9 AMCo is not precluded from applying for an MA or
10 manufacturing or supplying its own product, yes?

11 A. That's right, yes.

12 Q. But AMCo already had an MA, did not it?

13 A. Amdiphram had -- part of the AMCo group had an MA, yes.

14 Q. And so that is just a hangover, is it, from the
15 template?

16 A. It is a hangover from the template, but it was
17 critically important to us that we were able to
18 manufacture and supply, effectively launch the product,
19 immediately if we wanted to.

20 Q. So that the hangover from the template is only the bit
21 relating to the MA which you already had, is it?

22 A. Effectively the template is the old agreement, so it was
23 brought over, but --

24 Q. The Teva agreement, the old Teva agreement?

25 A. The old Teva agreement.

1 Q. Right.

2 A. But we did not delete the words "applying for an MA"
3 simply because Amdiphram already had an MA.

4 Q. Right. And you knew of course that AMCo had not in fact
5 supplied its own version of the product during the
6 period covered by the retroactive contract, yes?

7 A. Sorry, no, I did not.

8 Q. You knew for the period from 1 October 2013 up
9 to February 2014, when this was signed, so the
10 retroactive period, you knew that AMCo had not in fact
11 actually supplied its own product to the market?

12 A. The Aesica product, yes, I did know that, yes. AMCo had
13 not been able to -- Amdiphram had not been able to
14 supply the Aesica product for the issues I have
15 described.

16 Q. So this clause allowing AMCo to do it is pretty
17 redundant, is it not, because the agreement is going to
18 come to an end in a month anyway?

19 A. No, actually this clause was really important to us. It
20 was the whole basis of the agreement, just like it had
21 been in the Teva one. This was an own label supply on
22 an interim basis and there is nothing you can do to
23 prevent, in this case us, from carrying on with our
24 development, let us put it, which could include applying
25 for an MA, manufacturing and launching the product in

1 the market.

2 Q. Mr Sully, you say it is very important, but this is a
3 retrospective agreement, so why is it important to say
4 that? Because you know that it has not been launched in
5 that period, so why do you need this clause at all?

6 A. So this clause had been in it from the very start of the
7 drafting and the negotiations and, effectively, as
8 I said, in late January 2014, we got thoroughly fed up
9 with Auden and we just said we want to sign this
10 agreement, change the date to the end of March and
11 effectively be done with you so we can go across to
12 Aesica and so we did not then go through and do
13 a complete update. We simply said so long as the date
14 is the end of March, we are happy. This is the basis on
15 which we are prepared to sign this.

16 Q. I see. Thank you. So we then go on to, if we go to --
17 if we look at clause 4.2. Sorry. Do not worry about
18 clause 4.

19 If we go on to page 7 and look at clause 5
20 {H/172/7}. So this records the obligation on Amdiphram
21 to market and sell the product and to meet the volumes
22 in the schedule. Yes? But of course by this stage the
23 agreement was signed so it had been done already, yes?

24 A. Yes.

25 Q. And in fact, we know that Amdiphram and AMCo had wanted

1 more volumes to sell. We have seen that already, but
2 that hadn't been achieved by then -- yes?

3 A. Correct, yes.

4 Q. And then if we look at page 8, clause 6 {H/172/8}. So
5 there we have a forecasting order process and, in fact,
6 there had not been any rolling forecast provided over
7 the period covered by the contract, had there been,
8 because what had actually happened was that Auden had
9 simply supplied 6,000 packs a month, yes?

10 A. I wasn't involved in rolling forecasts, so I just do not
11 know.

12 Q. You do not know --

13 A. I know that the volumes were different each month and we
14 understood them to be -- when we put it into documents,
15 it looked like 6,000 packs a month was what they were
16 delivering, but I was not close to the details. I do
17 not know whether the rolling forecast was or was not.
18 That would have been a supply chain and then the NPI
19 group.

20 Q. And then if we go to page 10, clause 7, price and
21 payment. Now, the actual price we know is in schedule A
22 and this talks about the process of invoice and payment
23 and it provides for Auden to issue invoices on delivery
24 of the product, yes?

25 A. Yes, I can see that in 7.3.

1 Q. And then if we go on to schedule A at page 21, you can
2 see that the product is 10mg Hydrocortisone and you can
3 see that the estimated order quantity is 6,000 packs
4 a month. I think you are not able to help us with this
5 yourself, but in fact what happened was that 6,000 packs
6 a month were the volumes that were delivered for the
7 duration of this agreement. Then we see the --

8 A. I understand that was an average, because I think it
9 actually changed month to month but that was the
10 estimated order.

11 Q. All right. I will come back to that with someone else
12 perhaps. Now, the price per unit is £1 per pack?

13 A. Yes.

14 Q. And so applying the invoicing provisions, this would
15 imply that Auden invoiced AMCo £1 a pack for each pack.
16 So if it is 6,000 packs, that would be £6,000, but
17 actually that is not what happened, is it, because until
18 around September 2013 Auden had actually invoiced at £38
19 and given AMCo a rebate of £37 per pack. That is what
20 you are talking about when you say "the rebate issue"?

21 A. That is what I understand had happened and we did not
22 like that so we said -- we changed that in September and
23 then agreements which started being drafted in September
24 reflected the price, the correct price.

25 Q. Right. The agreement started in January 2013, so for

1 the period --

2 A. I am so sorry. The drafts that were created of the
3 agreement.

4 Q. So what you are saying is that even though you knew that
5 this rebate invoicing had been happening so payments --
6 so in fact what had happened was that AMCo had been
7 invoicing £38 and giving AMCo a rebate of £37 per pack.
8 You knew that had been happening from the period up
9 to September 2013, but because you did not like it, you
10 did not reflect it in the written terms of the
11 agreement, correct?

12 A. I do not think that was the motivation for not
13 reflecting it there. We thought the agreement we have
14 corrected it in September. It is now £1 a pack and that
15 is what we put in the drafts. I do not think -- I do
16 not recall anyone suggesting we should not put that in
17 the agreement retrospectively to document what happened.
18 We just said it is a pound a pack.

19 Q. It shows, does it not, that what you are not doing here
20 is reflecting accurately what actually happened in terms
21 of the supply arrangements, because that's something
22 that happened that's not recorded here?

23 A. I agree it is not recorded there. The effective price,
24 even during the rebate period, was £1 per pack. So this
25 just says the price per unit pack is £1s a pack, but

1 I accept completely what counsel says. We did not say,
2 for the avoidance of doubt, in the period from January
3 to September there was this rebate which we stopped.

4 Q. And when you were looking at this rebate issue and the
5 £38 and the £37, you would have known that the £38
6 reflected the market price, yes, or approximately
7 reflected the market price?

8 A. I believe that we always -- I think it was slightly
9 below the market price, because I seem to recall, and
10 I think it is in the Pinsent's report, that we were
11 selling at 38 and that Auden was selling, we believed,
12 at more than that. So I do not know. It was our market
13 price 38, but I do not know --

14 Q. But theirs may have been a little higher?

15 A. Our position was we wanted to be undercutting whatever
16 we think they're selling at.

17 Q. So let us assume the market price was about £38, £39 or
18 £40 for them, yes?

19 A. Yes.

20 Q. Then you must have understood that this deal was not on
21 its face a very good deal for Auden, because it could
22 sell the product at that market price to other
23 customers, yes, but it was selling it to you for £1 per
24 pack? You understood that, didn't you?

25 A. Yes, this was Auden choosing to act in a CMO capacity

1 and supply at a CMO price. Our price from Aesica was
2 about £1 a pack. I think it was slightly less than that
3 quoted. But, yes, we absolutely understood Auden had
4 chosen to act in a CMO capacity and not to sell to us at
5 the full market price it was selling at.

6 Q. And you understood that it was losing a lot of money.
7 So that was all money margin that it would have
8 achieved, yes, because it provided -- it made all the
9 sales in the market at that stage?

10 A. Yes, it must have been giving up --

11 Q. And we have already established that when you say it was
12 acting in a CMO capacity, it wasn't actually a CMO, was
13 it?

14 A. That is how the generics industry refers to someone who
15 does that, so, yes, it was not actually a CMO, I agree
16 with you, but that is the way the industry talks about
17 someone. Whether you actually make it yourself or you
18 get it through your contract manufacturer, you are
19 acting in a CMO capacity in order to maintain your
20 manufacturing volumes, because generally CMOs quote
21 pricings on the basis of what volumes do you want. So
22 if you take a hit on your volumes, you may suffer
23 a price increase. So people refer to that as supplying
24 on a CMO basis.

25 Q. Mr Sully, let me get this right. So Auden was supplying

1 the whole market before the supply agreement, so there
2 was no one else supplying the market. Auden was
3 supplying the market, yes?

4 A. Agreed.

5 Q. It was supplying its customers, wholesale, at around £38
6 to £40 a pack at that stage?

7 A. That is what we understood. I do not know for certain,
8 but, yes.

9 Q. It was providing AMCo with £6,000 a pack on average
10 at £1 a pack, yes?

11 A. Yes.

12 Q. So it was losing a lot of money on that deal, yes?

13 A. Yes.

14 Q. AMCo was gaining a lot of money on that deal, yes?

15 A. Yes, AMCo was able to get to the market where it would
16 not otherwise have been. That was why it was an interim
17 supply.

18 Q. It was a lucrative deal for AMCo?

19 A. AMCo was making money and got to market sooner and
20 established a foothold.

21 Q. Did you ever stop to think and ask yourself, well, why
22 is Mr Amit Patel foregoing all of these profits and
23 transferring them to AMCo? Did you ever stop to think
24 about that?

25 A. Firstly, I never thought about it as they are agreeing

1 to forego profits. I thought they want to maintain
2 their manufacturing volumes and have supplied it as
3 a CMO.

4 Q. Can I just pause you there, because you have said that
5 about manufacturing volumes. Can I just try and
6 understand what you mean. What do you mean by they want
7 to maintain their manufacturing volumes?

8 A. So the way that the industry works is if you go to a CMO
9 and say I would like to order this product from you, can
10 you develop it, they will say it is going to take time
11 and money to develop it. What volumes do you want and
12 they will quote according to the volumes. So the
13 industry refers to that as acting in a CMO capacity.

14 Q. How did this help Auden maintain its manufacturing
15 volumes? That is what I am getting at.

16 A. Well, because they had agreed to -- they were choosing
17 to say we're happy to supply you this volume of products
18 at the CMO price.

19 Q. Mr Sully, I am sorry. It makes no sense what you are
20 saying. So you have already accepted that they were
21 supplying the whole market, yes?

22 A. Yes.

23 Q. So they did not need to maintain their manufacturing
24 volumes. They had the whole market anyway. So how did
25 this agreement help them maintain their manufacturing

1 volumes? Can you explain that to the Tribunal, please.

2 A. So, yes, I think -- perhaps I was wrong that they
3 were -- that's what I thought. But they had -- we
4 thought they had agreed a price with their contract
5 manufacturer or -- and if they ordered this amount of
6 volume and they had agreed to supply that -- this is
7 what we had inherited from Waymade -- at £1 a pack,
8 which was similar to the Aesica price.

9 Q. I haven't understood your explanation. I think there
10 were two things that you said there and this is
11 important. I want to try and separate them out.

12 So you said, first of all, that this was inherited
13 from Waymade at £1 a pack, yes?

14 A. Yes.

15 Q. So we can agree that.

16 A. Yes.

17 Q. And are you saying, well, I did not give much thought to
18 why it was £1. It was just inherited. I took it
19 forward. I never thought about it. Is that your
20 evidence, because I do not think it is? You are saying
21 something else. You are giving a substantive
22 explanation. You are saying it enabled Auden to
23 maintain their volumes and I am afraid that makes no
24 sense to me and I am hoping you can explain your
25 position to the Tribunal.

1 A. So I -- we had inherited it. When I asked what is the
2 basis of this arrangement, I was told Vijay and Brian
3 have arranged a supply agreement for an interim supply
4 with Aesica and they have agreed to act in a CMO
5 capacity so I was trying to explain what I understood
6 that to mean. Acting in a CMO capacity means
7 maintaining your volumes.

8 I take counsel's point. I did not particularly look
9 at this at the time in terms of why are they supplying
10 at £1 a pack rather than more. The fact was we
11 inherited the agreement. They were supplying at that
12 price. We knew there had been a reciprocal agreement on
13 Carbimazole, which was initially a similar low price.
14 We had changed that up to the price because we said,
15 well, why are we going to give value to Auden? I do not
16 know why Auden did not do the same when we did
17 in January 2013.

18 What I did say in my witness statement is we
19 suspected that part of this was wanting to be close,
20 because they wanted Cinven or AMCo to look at buying
21 Auden, but I do not know. I do not know what was in
22 their minds. The fact is they were supplying us. We
23 could not supply our own product so we took it.

24 Q. Can we accept now then that your explanation about
25 maintaining volumes, can we say that is a load of

1 nonsense and put to one side, because it just doesn't
2 stack up, does it? You are jumbling lots of thoughts
3 together. I just want to look at the maintaining
4 volumes. Can we accept that is nonsense?

5 A. It is what I was told at the time by Brian.

6 Q. But looking at it now --

7 A. I think that probably is right.

8 THE PRESIDENT: What, that it was nonsense?

9 A. Looking at it now -- that is what the industry term is
10 so I took it at that.

11 THE PRESIDENT: Let us avoid industry terms. Let us try and
12 understand what your understanding was and maybe infer
13 what the understanding of the other side was.

14 When you say "maintain volumes", what I understand
15 by that is that Auden had some interest in requiring the
16 production of 6,000 more units a month from somebody.

17 A. Yes.

18 THE PRESIDENT: Is that what you are saying?

19 A. Yes, they got a price for a volume. I do not know what
20 the volume was.

21 THE PRESIDENT: So what they are doing is they are creating
22 demand for 6,000 more units that someone -- since it is
23 not them -- will have to produce.

24 A. Well, they are saying we think someone is -- yes, we do
25 not want to downscale our volume, because that may lead

1 to a price -- an increase in price and therefore --

2 THE PRESIDENT: So an increase in price in the unit of --

3 A. Cost of goods from the manufacturer, yes.

4 THE PRESIDENT: So let us say, hypothetically speaking, you

5 have got a contract for production of 30,000 units per

6 month and you're worried that you are only going to be

7 able to sell 24,000.

8 A. Yes.

9 THE PRESIDENT: So your understanding of the purpose of this

10 agreement was to maintain the volumes produced.

11 A. So the way it was explained to me, and reflecting on it

12 now I can see I am not sure it does make sense, but it

13 was explained to me, yes, they had wanted to keep this

14 acting as a CMO. That is what was explained to me. It

15 happens in the industry where people want to keep

16 control and, therefore, they had said we will supply you

17 at the CMO price.

18 THE PRESIDENT: Why would you not, if you're Auden, simply

19 maintain the volumes at a hypothetical 30,000 and

20 warehouse the 6000 that you could not sell?

21 A. I do not know what -- Auden could have done a number of

22 things. The fact is the way I dealt with it was looking

23 at this and going, we've inherited this agreement. We

24 cannot bring our product to market, because it is not

25 ready yet. If, for whatever reason, Waymade has managed

1 to negotiate a pound a pack, we are not going to tell
2 Auden to charge us more. They were prepared to supply
3 it. There could have been a number of reasons. As
4 I say, I think in the Pinsent's report one of the points
5 I discussed with Pinsents was why that might have been.
6 But, ultimately, we did not have our own supply. It was
7 great that they were giving us a supply to allow us to
8 get a foothold in the market before our Aesica product
9 came to market.

10 THE PRESIDENT: The consequence of this -- I am just trying
11 to follow this through. The consequence is that you pay
12 6,000 a month or an average, again, maybe more in one
13 month less in another, but let us say £6,000 a month,
14 and you then sell that product for --

15 A. For significantly more.

16 THE PRESIDENT: How much more?

17 A. I think, as counsel has said, it was £38 a pack.

18 THE PRESIDENT: So you made a profit of £37 a pack.

19 A. Yes, on those 6,000.

20 THE PRESIDENT: So did it ever occur to you to ask why Auden
21 were not selling the packs at, say, £5 or £10 a pack?

22 A. To us?

23 THE PRESIDENT: To you.

24 A. No, it did not. I mean, I knew it was something we had
25 inherited. I knew that there was -- I suppose,

1 I assumed there had been a quid pro quo between Waymade
2 and Amdiphram, but I did not know. But the fact is we
3 supplied Carbimazole to Auden at wholesale price
4 from January 2013 and they decided to carry on supplying
5 it at £1 a pack and so long as we did not have our own
6 product and we were still working flat out to get our
7 own product to market, I did not see an issue with that
8 and Pinsents did not flag that as an issue to me either.

9 THE PRESIDENT: You mentioned a moment ago a quid pro quo
10 between Waymade and Amdiphram. I take it that you are
11 not saying that there was any kind of quid pro quo here
12 for the £1 pack?

13 A. No, and when I say "quid pro quo", I do not mean an
14 anti-competitive quid pro quo. It mean it may be
15 that --

16 THE PRESIDENT: Well, let us stick with this agreement.
17 There was no quid pro quo legitimate --

18 A. Absolutely not. We always intended to launch our own
19 product. If we were able to take supply from Auden
20 until Aesica came online, we were not going to turn it
21 down and Pinsents never suggested we should and
22 I did not see it as anti-competitive to take that
23 product.

24 THE PRESIDENT: I am simply trying to understand the nature
25 of the -- well, I do not want to coin a phrase -- the

1 gift horse that you were being offered. It does seem
2 curious that if Auden cannot sell 6,000 units to
3 maintain their volume, they let you sell 6,000 units at
4 £38, charging you only £1 per product, enabling you to
5 make, effectively at their expense, £37 of profit
6 because you are selling the stuff.

7 A. Yes.

8 THE PRESIDENT: So why are they doing this?

9 A. I do not know why they were doing it. We looked at this
10 carefully. We had a number of game theories, but,
11 ultimately, we did not know. I can tell you what we
12 thought at the time might be the reasons they were doing
13 it.

14 THE PRESIDENT: And that was volume.

15 A. Sorry, no. One reason was volume, but there was, as
16 I say in my statement, we thought this was part of them
17 wanting to get close to AMCo and Cinven to see if they
18 could be bought and then subsequently, when this whole
19 orphan drug thing came up, we thought maybe this is some
20 clever route they've thought if we keep these guys
21 close, we can then actually start to disparage their
22 product to them, effectively sort of rubbish our
23 product, which is what he started to do. So we thought
24 it could have been any one of those reasons, but the
25 honest truth is we did not know. But we looked at it

1 and said, well we can't launch yet. We are in the
2 market. Our customers are asking for the product. If
3 he is prepared to supply a pound a pack, we are not
4 going to say no to him.

5 PROFESSOR HOLMES: Was there ever any suggestion that Auden
6 thought you would be growing the market beyond what they
7 could currently sell in terms of total volume?

8 A. I do not believe so. I mean, we had different routes to
9 market, but I do not believe so.

10 PROFESSOR HOLMES: Thank you.

11 MS DEMETRIOU: Mr Sully, can I just ask, because you have
12 now given a number of potential reasons why Auden might
13 have done this. To be clear, when the President said,
14 well, why did they not sell you the product at £5,
15 actually, the alternative for them was to sell it to
16 their customers at £40, yes? You accept that.

17 A. Whatever they were selling to their customers at.

18 Q. And so one of the reasons I think we have dealt with is
19 volumes and I think you have just about accepted that
20 doesn't make sense, because the market is the market.
21 They could have sold those volumes anyway. So this
22 arrangement doesn't actually help maintain volumes at
23 all. We can agree that, yes? Even though you may not
24 have understood that at the time, you accept that now?

25 A. Yes, just to be clear -- sorry -- it was to maintain the

1 same cost of goods, because they had the volumes.

2 Q. But you accept that doesn't make sense either, because
3 they were producing those volumes in any event, right?

4 A. Yes, I agree.

5 Q. The other reason you gave was you said something about
6 the orphan designation. So you said that:

7 "If we keep these guys close, we can actually start
8 to disparage their product to them, whereas effectively
9 sort of rubbish our product, which is what he started to
10 do."

11 Now, let me just take that in bite-sized chunks. By
12 rubbishing the product, you are talking about
13 Project Guardian, yes?

14 A. No, I did not know about Project Guardian until these
15 proceedings.

16 Q. Let us keep it simple. You are talking about the orphan
17 designation that they were trying to rubbish your
18 product on the basis it only had a reduced indication,
19 yes?

20 A. Yes.

21 Q. Right. And you are saying, are you -- so your
22 explanation now is that it was in their interests to do
23 this very detrimental deal for them, because they could
24 keep you close and thereby rubbish your product. But
25 that doesn't make sense either, does it, Mr Sully

1 because they could have rubbished your product anyway?

2 A. No. So what I am saying is at the time when this all
3 happened in -- I think particularly it came to a head
4 in January 2014, and there was this big effectively
5 rubbishing of our product, we thought, okay, we do not
6 know why they've carried on supplying us at a pound
7 a pack under the legacy arrangements, but maybe that is
8 why so they felt they could -- they had this sort of
9 inside line to really emphasise to us the problem with
10 our product, but we still decided, regardless of that,
11 we are going to draw it to a close and try and launch
12 our product.

13 Q. Mr Sully, I am sorry. It is a load of rubbish this.
14 Why on earth would this give them an inside line to
15 rubbish your product? They could have rubbished it
16 anyway. They did not need to forego all of this profit
17 to rubbish your product. It just doesn't make sense.

18 A. I am afraid at the time that is what we looked at. He
19 was using this to threaten us and to rubbish our product
20 to say it has got this reduced status. It only covers
21 a tiny percentage of the market. We did not even
22 realise that until the MHRA in November 2013 had refused
23 the additional part of our licence. So that is what we
24 thought at the time. But there was one -- we were game
25 planning. I am not saying it is the reason. Honestly we

1 did not know the reason.

2 Q. So you accept that there must have been some quid pro
3 quo, because Mr Amit Patel is not a stupid man, is he?
4 He is not out to sort of run his business into the
5 ground. So there must have been something in it for
6 Auden, yes? You accept that.

7 A. There was no quid pro quo. He obviously had a strategy
8 that he was pursuing that made him decide to do this.
9 Our strategy was clear, which was we do not have product
10 from Aesica. There are a number of issues. He doesn't
11 know that, but we are going to carry on pushing ahead
12 with Aesica and bring our product to market and, in the
13 meantime, if he's stupid enough to keep supplying us at
14 a pound a pack, great. There was absolutely no quid pro
15 quo.

16 Q. You did not tell him there was a problem with the Aesica
17 product, did you?

18 A. Of course not, no.

19 Q. Because you wanted him to think you were going to bring
20 the Aesica product on to the market, yes?

21 A. Which is what we were trying to do, yes.

22 Q. And you were trying to leverage that in the
23 negotiations, yes?

24 A. No, we never mentioned to him -- sorry, no, we were
25 always trying to bring the Aesica product to market.

1 Brian McEwan's job was to go and document the agreement
2 and, if he could, to get more volumes.

3 Q. Looking at it from Mr Patel's perspective, yes, there
4 must have been something in it for him to supply to
5 forego all of this profit and transfer it to AMCo, you
6 accept that?

7 A. So I do not know what Mr Patel was thinking and, as
8 I have said, there was nothing agreed with Mr Patel.

9 Q. Between -- let us stop there. Nothing agreed between
10 you and Mr Patel?

11 A. There was nothing agreed between me and Mr Patel. As
12 far as I was aware, and I was closely involved in this,
13 because of the concern I had about this arrangement,
14 there was no quid pro quo at all. We were always
15 internally and I checked this on a number of occasions.
16 It was passed round the organisation. We continued
17 bringing the Aesica product to market and if we can get
18 interim supply in the meantime, that's great. Our
19 customers wanted the product and we could get it there.

20 Q. When you said to the President in answer to the
21 President's question: "I suppose I assumed there had
22 been a quid pro quo between Waymade and Amdiphram, but
23 I did not know", what did you mean?

24 A. So what I mean by that is there are a number of reasons
25 why Waymade and Auden could have agreed this

1 relationship, this Hydrocortisone and Carbimazole, and,
2 again, we had had a number of thoughts about what that
3 could have been, but we do not know for certain.

4 Sorry, just to be clear. I am not saying that was
5 some anti-competitive agreement. So, for example, we
6 thought at the time, okay, so Waymade is a wholesaler.
7 Maybe they have managed to get this supply from Auden at
8 a cheap price by giving some agreement to buy Auden's
9 other products.

10 Q. So Mr Sully, is this a good summary of your evidence
11 then. That you believed there would have been a quid
12 pro quo that Waymade would have agreed. You did not
13 know what that was, but you are telling the Tribunal it
14 would not have been anti-competitive. Is that a good
15 summary of your evidence?

16 A. We did not -- everything we had looked at had not
17 suggested there was anything anti-competitive. We did
18 not know what Waymade had agreed with Auden. We had
19 a number of game theories of what that could be. What
20 we did know -- and we did not know what was in
21 Amit Patel's head either. What we did know, absolutely
22 clearly was, we do not have product from Aesica and
23 until we can get product from Aesica, let us keep trying
24 to get product from Auden, because our customers want
25 it, and then we switch across as soon as we can get

1 product from Aesica.

2 Q. It would have been obvious to you, would it not, that
3 because AMCo had its own MA and Mr Patel knew that you
4 were trying to get product on the market, that the only
5 reason that he would have agreed to this arrangement was
6 because if he did not, you would enter the market with
7 your own product. That would have been obvious to you
8 at the time?

9 A. No, that absolutely is not the case and we could not
10 enter our product at any time until way later on. So it
11 never occurred to me that he is doing this to keep us
12 off the market, because we knew full well we were not
13 staying off the market. We were pushing ahead as fast
14 as we could. In fact, in many ways he was helping to
15 fund our development of the Aesica product.

16 Q. When you say "way later on", you mean July 2014, a few
17 months later, yes?

18 A. No, sorry. We thought it was going to be -- I think it
19 was the middle of August when the batches came, but then
20 there was a problem with those. So actually the first
21 time we ever had saleable product from Aesica was not
22 until I think December 2015 and I know we haven't talked
23 about the orphan drug issue --

24 Q. We are going to come on to that. Do not worry.

25 A. But the first customer demand was April 2016 and as soon

1 as we had customers saying they wanted it, we sold to
2 them.

3 THE PRESIDENT: Are you finished with this agreement?

4 MS DEMETRIOU: I am finished with the actual agreement, but
5 I am now going to look at the Pinsents advice. Is now
6 a good time for a break?

7 THE PRESIDENT: I have some questions regarding the
8 specifics of the --

9 MS DEMETRIOU: Of course, sir. why don't you ask those?

10 THE PRESIDENT: I did not want to tread on your toes before
11 doing so.

12 Mr Sully, first of all, can you help me about the
13 term of this agreement. If we look at clause 1.28, we
14 see the term means a period of 15 months from the
15 effective date. Do you see that?

16 A. Could that be brought up?

17 THE PRESIDENT: Yes, please bring up {H/172}. You see under
18 1.28, "term". It is a 15-month period from the
19 effective date, but is the March 2014 date an accurate
20 one?

21 A. Yes, so the plan was to bring it to a close, bring the
22 relationship with Auden to a close, at the end
23 of March 2014. Because at this time, which was mid to
24 late January 2014, we thought we had found a way to
25 resolve the issues with Aesica and launch the Aesica

1 product in April 2014.

2 THE PRESIDENT: You see the only reason I ask is if we can
3 go back to the first page of the agreement, we have an
4 effective date of 1 January 2013, which 15 months would
5 take you through to somewhere in the first half of 2014,
6 but if one then goes to the next page, clause 1.1
7 defines the effective date as 24 January 2014, which
8 takes you through to March 2015 as the duration of the
9 agreement.

10 So there is a high degree of inconsistency in the
11 agreement and I wondered if you could help me as to what
12 the actual intention was on this document.

13 A. Yes, so 1.1 is wrong. That must have crept in by double
14 definition, but the intention was to put in place
15 agreements that ended at the end of March 2014 and
16 I know that is recorded in various emails and in the
17 board decision of 29 January 2014.

18 THE PRESIDENT: I am grateful. Just so that we are clear,
19 you always had a marketing authorisation for this
20 particular product -- at the time of this agreement you
21 had a marketing authorisation.

22 A. Yes, so the marketing authorisation came across from
23 Waymade to Amdiphram on 9 May 2013.

24 THE PRESIDENT: Thank you. So if we then move down to
25 clause 1.12, you have been taken to this, that is the

1 Auden trade dress definition. Do you see that?

2 A. Yes.

3 Q. And do you see immediately below that the Amdiphram

4 trade dress?

5 A. Yes.

6 Q. So that would probably be an own product, if I am

7 understanding it correctly. In other words, you would

8 dress product provided by Auden in the Amdiphram trade

9 dress there defined?

10 A. Yes, a pure OLS agreement as opposed to the way that

11 everyone just generally refers to it. A pure OLS is it

12 goes from being the supplier's trade dress to the

13 buyer's trade dress.

14 THE PRESIDENT: So own label would mean in the conventional

15 sense turning the product into something that looked

16 like an Amdiphram product.

17 A. Yes, and I believe there will be a section in the

18 agreement that explains the regulatory application to do

19 that.

20 THE PRESIDENT: So if we then move on to clause 5.1.

21 {H/172/7}, there is then an obligation to use reasonable

22 commercial endeavours to sell in the volumes set out in

23 schedule A.

24 A. Yes.

25 THE PRESIDENT: And then if we can just go back to

1 clause 3.3, {H/172/6}. Perhaps you could read that.

2 (Pause).

3 A. Yes, that is the clause I was referring to that explains
4 the definitions earlier. So that is what an option
5 would be, to switch it from the Auden trade dress to the
6 Amdiphram one.

7 THE PRESIDENT: It is not an option though, that is really
8 my question. If you read the second sentence of 3.3 it
9 says:

10 "If an application is made successfully, [and there
11 was a successful application] the parties shall work
12 together to switch supplies as soon as reasonably
13 practicable to the Amdiphram trade dress."

14 And my question is: why did that not happen?

15 A. I think that wording about "work together as soon as
16 reasonably practical" refers to if an application has
17 been successful. We certainly did not see it as
18 mandatory under this agreement to have to change and
19 because we saw it as an interim supply we never looked
20 at changing it.

21 THE PRESIDENT: So this is another hangover from an
22 agreement that was, as it were, a genuine own label
23 agreement. It is a clause that actually does not have
24 any particular meaning in this context.

25 A. Not exactly, because in the Teva agreement that had not

1 happened either. So the second sentence where it says
2 "initially be" we saw ourselves as being in that initial
3 period. I appreciate because of course when we started
4 this was going to be a three-year agreement but that we
5 could terminate it when we were ready to launch. So we
6 were in this initial period, if you like.

7 I agree that in January when we came to go, no, we
8 are just going to end it at the end of March, we did not
9 go through and sort of update all of the dates. We just
10 said the term is until the end of March from the
11 beginning of January.

12 But certainly the way we have used the agreement
13 before which seemed to have worked well before and was
14 approved by Pinsents was this wording, but in that case
15 we hadn't switched to supply Teva to the trade dress
16 either. So we stayed in the initial period, because
17 they resolved their issues and they switched back to
18 their product.

19 THE PRESIDENT: I appreciate your evidence is that you moved
20 away from a three-year agreement to something which is
21 shorter and you say this agreement was intended to
22 end March 2014.

23 A. Yes.

24 THE PRESIDENT: But had it been a three-year agreement, all
25 other terms would have been unchanged?

1 A. Had it been a three-year agreement --

2 THE PRESIDENT: In other words, if it had not ended

3 in March 2014, as you say it would have done, it would

4 have run for longer.

5 A. Yes, and we -- exactly.

6 THE PRESIDENT: But on the same terms?

7 A. On the terms that are there, yes, and for us in

8 particular that was whatever the clause is about --

9 I think 3.2, just above this, nothing prevents us from

10 developing, manufacturing and launching our product.

11 THE PRESIDENT: I understand. So assuming a three-year

12 agreement on these terms, if my reading of clause 3.3 is

13 correct, there would have had to have been a move from

14 Auden trade dress to Amdiphram trade dress as a matter

15 of course.

16 A. I have to say we did not see it as an obligation. I can

17 see what the words say, but we did not see this as there

18 will have to be a change.

19 THE PRESIDENT: It would have been an obligation on Auden if

20 Amdiphram had wanted it to happen.

21 A. Yes, if Amdiphram had said, we want to move this

22 forward, we have applied to the MHRA for a switch to our

23 livery.

24 MR O'DONOGHUE: Can we read 4.2?

25 THE PRESIDENT: Why don't we read 4.2 together. (Pause).

1 I think what is being suggested is that you did not
2 have an authorisation by virtue of 4.2. Is that your
3 understanding of clause 4.2?

4 A. I am sorry, sir. When you say "an authorisation", sir,
5 this was -- I understand 4.2 to mean if after the
6 agreement starts both sides decide to apply to the MHRA
7 to amend their marketing authorisations into the new
8 trade dress, these things happen. But as I say, we
9 never saw it as an obligation to have to move into the
10 Auden trade dress and, in fact one, of the reasons may
11 have been it would obviously have cost us money and we
12 saw this as an interim supply, so it was not worth
13 doing. But the application relates to amending it to
14 add it -- add the trade dress.

15 THE PRESIDENT: But had it been a three-year agreement as
16 was the original intention, I appreciate not realised in
17 this agreement, presumably it would have been in
18 Amdiphram's interests to move to an Amdiphram trade
19 dress? Would that be fair or not?

20 A. I do not really think so. I mean, we just never saw
21 this as something that was going to last that long.
22 There is no particular added value in having a product
23 in your own trade dress, particularly if you are wanting
24 to bring online your own IP product. So I have to say,
25 at the time we never looked at -- we never thought this

1 was an agreement where we need to do that. Because it
2 is an own label agreement, it was an option in the
3 agreement, but I appreciate the language sounds like it
4 is mandatory, but I am not aware we ever considered
5 moving it into that trade dress.

6 THE PRESIDENT: Thank you very much. Any questions arising
7 out of that, Ms Demetriou?

8 MS DEMETRIOU: No, sir, thank you.

9 THE PRESIDENT: We'll rise for ten minutes.

10 (3.32 pm)

11 (A short break)

12 (3.42 pm)

13 THE PRESIDENT: Ms Demetriou.

14 MS DEMETRIOU: Mr Sully, you explain in your witness
15 statement that in January 2014 Pinsent Masons had
16 assessed the supply arrangement with Auden as part of
17 its competition compliance report, yes?

18 A. Yes.

19 Q. And so I just want to look at what they said in
20 a moment. We'll come to that, but I just want to first
21 of all try and understand the timing. If we can go to
22 {IR-H/214/1}. The chain starts at the very bottom of
23 page 3, so if we can go to that {IR-H/214/3}, and do you
24 see the heading? There is a redacted name that I won't
25 read out from Pinsent Masons, yes, at the very, very

1 bottom of page 3?

2 A. Yes.

3 Q. And then if we go over to page 4, {IR-H/214/4}, that is
4 an email from somebody at Pinsent Masons to you, yes?

5 A. Yes.

6 Q. And it is dated, I think we saw on the previous page,
7 but it is dated 2 June 2013 so this is the person that
8 we saw on the previous page, yes, writing to you on
9 2 June 2013 and she makes some points about training and
10 then before the blank section she says -- do you see at
11 the end, the very last sentence that we see:

12 "I have also made a start on the audit report.

13 I have a couple of follow-up questions ..."

14 Which she has set out below. So we can see from
15 this that the competition audit had started in
16 around June 2013, yes?

17 A. Yes.

18 Q. And we have established that that is something that you
19 commissioned?

20 A. Yes.

21 Q. We then see some text on Hydrocortisone. So before we
22 read it, let us look at your response to Pinsent Masons,
23 at the same document at the top of page 3. So if we go
24 to the top of page 3:

25 "Please see comments below from Brian, who has been

1 the most closely involved in the Amdiphram business in
2 recent years."

3 Yes, and that is Brian McEwan, yes?

4 A. Yes.

5 Q. And he has provided responses to the Pinsents questions
6 and if we scroll back down, we can see what he said,
7 which is on page 5 {IR-H/214/5}. There are these two
8 bullet points and we do not have a copy with colours,
9 but what has happened and I am just going to focus on
10 the first bullet is there is a request from
11 Pinsent Masons, "Can we be provided with a copy of the
12 contract agreement?" and then there is some information
13 that Brian McEwan has provided. So he says:

14 "We get Hydrocortisone tablets from Auden and we
15 have developed Aesica to produce it in a 10mg form.
16 Waymade kept the 20mg tablet which was used to the get
17 the 10mg licence as the 10mg market is larger. Aesica
18 licence granted end of 2012. Aesica essentially
19 a second source. Not convinced that the Aesica can make
20 it consistently so we prefer to keep sourcing from
21 Auden. No supply agreement with Auden. Which we are
22 rectifying and putting one in place. Auden give us
23 a discount and we sell at a small discount to their
24 price. Aesica have an order that they are manufacturing
25 and it all looks good, then we will consider going it

1 alone, but the current concern is not to have Aesica
2 online and also not to get from Auden."

3 Yes, and so we -- so Mr McEwan's view, we can see
4 from that, is that Auden and Aesica are alternative
5 sources, yes? He is not contemplating doing both at the
6 same time?

7 A. I see, no. He is explaining that we are taking supply
8 from Auden until Aesica come online, but we have some
9 serious concerns about Aesica, which we are working on.

10 Q. And so he is saying that Aesica is the back up source,
11 if you like, because of concerns about whether Aesica
12 can make it consistently. So AMCo prefers to source
13 from Auden instead, is that fair?

14 A. I do not think that is quite right. So the second
15 source meant something very specific at AMCo. This is
16 early AMCo days. We have just come back from our
17 management off-site and there was a huge project at AMCo
18 during 2012 to 2016 to dual source the products, because
19 there had been some real criticisms of AMCo's or
20 Mercury's ability to supply the market. So one of the
21 three big strategic projects for AMCo in the AMCo period
22 was to get second sources online and, in many cases,
23 transfer to them or at least have them as back up
24 sources so that you could always supply the customers,
25 because we have been severely criticised by the

1 Department of Health.

2 So when it says "second source" that is referring to
3 Aesica who are essentially, in your AMCo lingo, a second
4 source and he is explaining that the plan is, as you
5 have read out, make sure we keep supply from Auden until
6 we can flip, but our big concern is not to have supply
7 from either.

8 Q. Sorry, your big concern is what?

9 A. Not to have supply from either, as you read out.

10 Q. Let us look at {H/274/1} for a moment. There is an
11 email from you, do you see that, to Brian McEwan with
12 other people in copy dated 10 December 2013 and then you
13 say:

14 "I am just concerned that there is confusion about
15 our strategy here. I think it's pretty simple, which is
16 that we source from Auden for the time being while we
17 work out if we have fully compliant supply from Aesica,
18 and also while we investigate the orphan status of the
19 Auden product and what it would take to get Adrenal on
20 to our licence. But I have seen emails suggesting
21 otherwise ..."

22 So you understood, didn't you, that these were
23 alternative sources, yes, the Auden supply and the
24 Aesica product were alternative sources to one another?

25 A. No, I understood, as it says here, that we source from

1 Auden on an interim basis until we know whether we can
2 move to Aesica, which is our plan and that's what we
3 want to do.

4 Q. Right, but you understood, didn't you, that it was
5 either or? You were not going to get product from both
6 at the same time.

7 A. Yes, that's right, we wanted to move to Aesica and ditch
8 Auden.

9 Q. Okay. Now, we do not have a complete record of the back
10 and forth between you and Pinsent Masons, but I think it
11 is broadly correct, is it not, that Pinsents provided at
12 least a draft of their audit report to you after the
13 email exchange we have just looked at in around autumn
14 2013?

15 A. I do not know. I know there were a number of drafts
16 exchanged.

17 Q. That is fair. Why do not we go back. So if we look at
18 {IR-H/554/5} and then paragraph 2.1. This just helps us
19 with the timing. So it says there that there were
20 follow-up meetings with you in the
21 period June-October 2013 and then subsequent discussions
22 in January 2014, yes?

23 A. Yes.

24 Q. The final report, the one that you referred to in your
25 witness statement, was then presented, I think we have

1 seen, in January 2014, yes?

2 A. That sounds right.

3 Q. We can see here the summary of conclusions, which we

4 have looked at already. So this is the --

5 A. Just above where you were just then, yes.

6 Q. So do you see that, "executive summary", "conclusions",

7 "summary of recommendations". We looked at those and if

8 you look at the conclusions, you see that there are no

9 high risks, but there is one medium risk situation, yes?

10 A. Yes.

11 Q. That's flagging a different concern to the CMA's -- the

12 concern that we are all in the Tribunal about, is it

13 not? It is flagging a concern about whether Auden and

14 AMCo could be accused of resell price maintenance, yes?

15 A. That was the risk that Pinsents flagged, but I think

16 they said the medium risk situation is you need to get

17 this documented, regularised and sort of sorted out so

18 that the relationship is clear.

19 Q. Let us look at -- if we go to page 19 of this document

20 {IR-H/554/19} and if we start with the factual

21 background. So 8.1.1 sets out a summary of the

22 background. You can see there that the MA was granted,

23 it says in the summer of 2012, but it was in fact

24 granted in September 2012, so that is broadly correct.

25 Then if you go to -- if we then go to 8.1.3 which is

1 on page 20 {IR-H/554/20} and the unhighlighted bit that
2 explains the pricing arrangements, yes, including the
3 rebate system that we discussed a little bit earlier.

4 Do you see that?

5 A. Yes.

6 Q. And it does not say anything, does it, about the price
7 at which Amdiphram was supplied before it got its MA --
8 Waymade was supplied before it got its MA, does it?

9 A. Waymade was supplied. I do not think so. I'll take
10 your word for it.

11 Q. And that is not -- is that information that you would
12 have given to Pinsents or not? Did you know what
13 the price was before September 2012?

14 A. Before September 2012?

15 Q. Yes.

16 A. So I knew that there was -- the rebate price was 37 and
17 38.

18 Q. Yes, but did you know that before Waymade got its MA
19 in September 2012 it was not paying £1 a pack, but it
20 was paying the market price to Auden? Did you know
21 that?

22 A. No. In September 2012?

23 Q. Before, in July and August 2012?

24 A. No, I did not know that.

25 Q. So that is not information you could have given on to

1 Pinsents. Did Pinsents -- they do not refer to any
2 discussions between them and Mr McEwan. So are you
3 aware -- apart from the notes that we saw forwarded to
4 them, are you aware that they separately spoke to
5 Mr McEwan? Do you know if they did?

6 A. I am not aware. I cannot remember now. I know that
7 Brian McEwan came to the compliance day, which we
8 arranged at Pinsents. But effectively what I was doing
9 was -- I do not know whether they talked about this
10 audit report. I was taking their questions. I was
11 checking with the business and coming back. So I just
12 do not know at this stage.

13 Q. Presumably, as far as you know, they weren't aware that
14 Mr McEwan had negotiated the 20mg arrangement for
15 Waymade?

16 A. I do not think I was aware of that back at this time.

17 Q. No.

18 A. I still do not know exactly who negotiated the Waymade
19 agreement. I have seen since this investigation started
20 documents that suggest that it was Vijay Patel working
21 with Brian. All I do know is that Brian was introduced
22 to John Beighton at AMCo. Again --

23 Q. But as far as you are aware, I am just trying to
24 establish what you knew of what Pinsent Masons had been
25 told. So as far as you were aware, Pinsent Masons did

1 not know there was a 20mg agreement that Waymade had
2 with Auden and that pursuant to that arrangement profits
3 were transferred to Waymade on the understanding that
4 Waymade would not enter the market with its own product?

5 A. No, I did not know that at the time and Pinsents did not
6 either.

7 Q. If we look at 8.1.3(a) and (b), that records information
8 provided by AMCo management. Presumably that would have
9 been you, yes?

10 A. So this is information I had given to Pinsents, but
11 I think when they say when questioned "the management of
12 Amdiphram". I think that would be Brian McEwan plus the
13 people I have spoken to to check what is going on behind
14 him, if you like.

15 Q. What this explains is that the strategy is to continue
16 to source from Auden until Amdiphram has its own supply
17 source, yes?

18 A. Yes.

19 Q. And it explains that the supply from Aesica is still
20 under development, yes?

21 A. Yes, because of the issues I described earlier, yes.

22 Q. And that there were concerns within AMCo about trying to
23 compete with Auden with a skinny label product, which I
24 am going to come back to. Do not worry. That is just
25 recorded there.

1 A. I think that was just starting to come to light.

2 Q. On page 21, {IR-H/554/21}, we can see the competition
3 concern that Pinsents is considering based on the
4 information it has been given and it is a concern about
5 price fixing or resale price maintenance. Do you see
6 the heading "Price Fixing -- Concerted Practice"?

7 A. Yes.

8 Q. And then at 8.3.1 that explains how that concern derives
9 from the retrospective rebates or from the rebates
10 arrangement?

11 A. Yes, I can see that.

12 Q. Is that why the rebates arrangement was not referred to
13 in the first written agreement?

14 A. No, it is not. It was not referred to, because it was
15 not in our minds when we created the drafts and we
16 tidied it up. That was effectively us -- we had not
17 liked the rebate concept. There had been a reason given
18 by the Amdiphram management of why Auden had requested
19 it, but, no, it was not the reason it was not put in the
20 agreement.

21 Q. If we look at 8.3.2, they say that they have not been
22 provided with any documentation which would indicate
23 that there has been an infringement of chapter 1 or
24 article 101. However, as a result of the nature of the
25 informal and reciprocal arrangement between Auden and

1 Amdiphram, it is not possible to wholly exclude the
2 possibility of a serious competition law infringement
3 such as price fixing.

4 That is not exactly a clean bill of health, is it?
5 What they are saying is they cannot give you a clean
6 bill of health, because the arrangements have been
7 undocumented, yes?

8 A. Exactly, that is why it was the medium risk and that is
9 why I raised it with them I was concerned. They would
10 come back and say we agree there is a concern. It was
11 the medium risk I referred to.

12 Q. And not only because the arrangements had not been
13 undocumented, but because there was a recurring theme of
14 informal contact between Auden and AMCo, yes?

15 A. I do not know if that's right. I am not sure if the
16 recurring theme of contacts between Auden and AMCo --
17 sorry, Auden and AMCo, there was no contact. Auden and
18 Waymade, I do not know if that came up in relation to
19 Hydrocortisone or some of the other points that were
20 raised. But I agree with you, it was a risk. It was
21 the biggest risk of the whole audit. That is why we
22 followed their recommendation.

23 Q. That is right. We saw in the summary of conclusions
24 that they were concerned about this recurring theme of
25 informal contact?

1 A. Across all of the points, yes.

2 Q. If we look at paragraph 8.4.1, so that is under the
3 heading "Recommendations" and you can see there that:

4 "We would suggest that further investigation is
5 undertaken."

6 Yes?

7 A. Yes.

8 Q. "Important to this investigation will be identifying the
9 extent to which Amdiphram employees have met with and/or
10 exchanged information with Auden employees.

11 "As set out below at 9.21 [which we do not have,
12 because that has been redacted] meetings with
13 competitors (where there is no clear agenda or note of
14 the meeting) are considered by competition regulators to
15 indicate that anti-competitive behaviour has taken
16 place. This taken together with the informal nature of
17 the arrangements adds uncertainty as to the intention of
18 the parties and increases the risk that the [if we can
19 go over] arrangements may be more likely to be perceived
20 as anti-competitive, simply by virtue of their
21 opaqueness."

22 Now, you did not carry out a further internal
23 investigation, did you? The CMA did not find any record
24 of it when it was investigating?

25 A. No, I think that's what is referred -- the further

1 investigation is the update of January 2014. So when it
2 came through, there was the -- we dug around getting the
3 information. There was then an ongoing dialogue with
4 Pinsents and, as I say in 8.4.2, their recommendation
5 was to document it, which we, as it says there, we were
6 doing. But the update explains in 8.6 -- explains that
7 we carried on talking to them and doing further
8 investigation and I was working with Brian to do exactly
9 what they had said.

10 Q. Mr Sully, the second recommendation, which is at 8.4.2
11 is about formalising the arrangements in contract, but
12 can we go back to 8.4.1. The first recommendation isn't
13 about that specifically. It is asking -- it is saying
14 that:

15 "We would suggest further investigation to identify
16 the extent to which Amdiphram employees have met with
17 and/or exchanged information with Auden employees."

18 That specific investigation was not conducted, was
19 it?

20 A. Yes, I think it was. That was me talking to who has met
21 with Auden since we took over here and, as far as I was
22 aware, nobody had and making sure that there wasn't
23 anything like that going on. As I say, I then on the
24 second recommendation brought in Brian to go and
25 negotiate it. I am not aware of Brian having -- or

1 anyone in AMCo having met anyone from Auden since
2 control had been -- since Cinven had acquired Amdiphram.

3 Q. We saw, did we not, that in autumn of 2013 that
4 Mr McEwan was talking to Mr Patel that there were
5 records of calls that you did not attend. So those are
6 informal contacts, are they not?

7 A. No, so those are the second recommendations. So that is
8 me and Brian working together. He's got the
9 relationship with Auden McKenzie and in September he
10 spoke to them and took out this rebate and then he
11 carried on negotiating to get the agreements in place
12 and was reporting, as I said, in emails back to me.

13 Q. So can I take it that your understanding of this is that
14 despite the fact that Pinsents were saying, well, it is
15 important to -- there has been a recurring theme of
16 informal contacts between Auden and Amdiphram employees
17 and that should be investigated, that did not cause you
18 to think that maybe there is a bit of an issue about
19 Mr McEwan talking to Mr Patel at Auden without any
20 record of what they are saying, because in a sense you
21 thought, well, that's all about getting down --
22 formalising the agreement so it doesn't matter that that
23 is an informal contact that is not recorded. Is that
24 your evidence?

25 A. Yes, yes, so Brian had the contact. We had to put in

1 place the agreement with Auden. Brian was the person
2 who knew them. He was working closely with them. He
3 appeared from what I could tell to be completely genuine
4 and was giving me rapid answers and we worked together
5 to put an agreement in place. I certainly did not see
6 his negotiating and documenting of this arrangement as
7 being the kind where Amdipharm employees should not be
8 meeting with competitors. This was a specific
9 negotiation to do something Pinsents had recommended and
10 I was fully involved. I wasn't there personally.

11 Q. I am sorry to cut across you. So you did not understand
12 that the calls between Mr McEwan and Mr Patel, which
13 were in part to negotiate a forward looking agreements
14 and increased volumes, you did not think that fell into
15 the category of exchanges that should be documented,
16 because you thought that's all about recording an
17 agreement so we do not need to worry about Pinsent's
18 competition advice on that?

19 A. Yes, in essence, yes, and I understood that the
20 recording of what is going on was the fact that Brian
21 and I were speaking closely and he was telling me what
22 was coming out of the meetings and I was in control of
23 the drafts and we were working together to document this
24 situation.

25 Q. All right. Now, if we look at -- what you did do was

1 you implemented the firewall several months later and we
2 have seen that already in your evidence. Pinsent Masons
3 were not, we can see on the face of this report, they
4 just were not in a position, were they, to say whether
5 or not there had been anti-competitive conduct, because
6 of the informal exchanges that had been taking place as
7 a recurring theme?

8 A. I think, historically -- so everything Pinsents had
9 asked, we answered. We all had a question mark about
10 whether this -- why is it an informal relationship, but
11 we decided, well, we do not know the past. It is
12 separate from Waymade now. Let us move forward. Let us
13 put it in place and do what the recommendations are
14 going forwards and tidy it up.

15 Q. Mr Sully, I just asked you a simple question, which is
16 Pinsents were not, we can see on the face of this
17 report, they weren't in a position to say whether or not
18 there had been anti-competitive conduct, were they?

19 A. No, in 8.3.2 it says:

20 "It is not possible to wholly exclude the
21 possibility of an infringement. We recommend in 8.4
22 what do about it."

23 Q. And they did not consider the question of why Auden was
24 supplying these tablets at a huge discount, did they?
25 They weren't asked to consider that and they did not

1 look at that?

2 A. So they did not flag any risks with it. They -- as you
3 have read out from the context that I explained I think
4 on the page above, they knew as much as we knew about
5 the situation and, no, they did not ever flag that there
6 could be a concern about that and they did not.

7 Q. All right, Mr Sully. Let us go to paragraphs 83-84 of
8 your witness statement, which are at {B2/2/22}. We can
9 see here there are really three points I want to focus
10 on. So you got advice from Pinsent Masons on 30 May and
11 on 6 June 2014 in relation to a new supply agreement
12 with Auden, yes?

13 A. Yes, the situation was permanently evolving and this was
14 now, exactly -- we went back to them in late May 2014 as
15 a result of the situation we then found ourselves in.

16 Q. So in light of that advice, in other words after you
17 received that advice, you then engaged in negotiations
18 with Auden about the terms of a new agreement, so this
19 would have been in around June 2014, yes?

20 A. Yes, with Pinsents involved.

21 Q. You yourself were not negotiating on value and volume of
22 supply, that was done by Mr Beighton, yes?

23 A. Yes, I think I say that in my statement.

24 Q. You do.

25 A. I was aware of what Mr Beighton had said on value and

1 volumes, as was Pinsents, and we were doing the
2 agreement, but I wasn't saying to -- I do not think
3 I was saying anything on price. I think I did push to
4 say it has to be -- I have been told the volume is
5 12,000 packs so it does have to stay there. So I did
6 some negotiation with Auden's lawyers on volumes.

7 Q. Would it be fair to say that the key commercial terms
8 were being negotiated by Mr Beighton and that you were
9 negotiating -- you were involved in documenting them in
10 the written agreement as before?

11 A. Price and volume was negotiated by Mr Beighton and then
12 followed up by me. But a key part of the agreement was
13 that clause on allowing us to continue our development
14 and being able to launch.

15 Q. And then, just to be clear on timing, to sort of catch
16 us up from where we were before and I am hoping this
17 will be pretty non-contentious, you have already
18 explained that AMCo approached Auden through Mr McEwan
19 in the autumn of 2013 seeking to increase volumes, yes?

20 A. Yes, I think so we looked at a document earlier on that
21 had the increase, but, yes.

22 Q. Exactly. We saw that in the draft supply agreement that
23 was sent out they were for much higher volumes under
24 a three-year agreement. It was 18,000 packs rather than
25 6,000 packs?

1 A. Yes, that is what we tried for.

2 Q. And Auden rejected that?

3 A. Yes.

4 Q. And what they tried to do, I think you explained
5 earlier, was to tie any new deal to the sale of its
6 business?

7 A. Yes.

8 Q. And they were also, I think you also explained earlier,
9 threatening to try to discredit AMCo's competing Aesica
10 product on the basis that it did not have the adult
11 adrenal insufficiency indication?

12 A. Yes, I think that started -- I am not entirely sure when
13 that started. I think that was January 2014 when the
14 negotiations sort of started to go sideways, but
15 I cannot remember exactly when it started.

16 Q. What it led to was a decision in January 2014, did it
17 not, to try to end discussions with Auden about an
18 extended supply agreement?

19 A. Yes, as I say, we thought we are thoroughly fed up with
20 these people. It is sounding like we can launch Aesica
21 in April. Fantastic, let's stop these agreements at the
22 end of March and launch the Aesica agreement.

23 Q. So although you say at paragraph 84 of your statement
24 that negotiations were carried out in the light of
25 Pinsent Mason's advice, you would agree, would you not,

1 that there were negotiations about a new forward-looking
2 agreement before that?

3 A. I am so sorry. Can you say that again?

4 Q. Yes. So although you say at paragraph 84 you talk about
5 negotiations in June 2014 that you say were carried out
6 in the light of Pinsent Mason's advice, I think you have
7 accepted, haven't you, that prior to that in the autumn
8 of 2013 there were negotiations then about a new
9 forward-looking agreement. So negotiations had taken
10 place already before the Pinsent's advice, yes?

11 A. No, I am sorry. I think there are two separate things
12 here. So there was -- the November 2013 discussions
13 were about putting in place this agreement to document
14 the unwritten arrangement.

15 Q. Including a three-year agreement going forward. So you
16 were trying then -- AMCo was trying then to negotiate
17 a new -- yes, to document the past. Let us put that to
18 one side. But also to conclude a three-year agreement
19 going forward for increased volumes. Those negotiations
20 broke down either at the end of 2013 or the beginning of
21 2014 and they restarted again in the spring of 2014,
22 yes?

23 A. No, they were completely separate negotiations by then.
24 So the first negotiations in November 2013 were about
25 documenting the past and going forward saying we want

1 a three-year agreement with as much volume as you can
2 get and this clause that as soon as we can launch our
3 product, the Aesica product which was our plan, we can
4 do so. By this time, which is now in late May 2014, as
5 with this whole story, things had evolved significantly
6 so we did not have the Aesica product to launch. We
7 have covered that.

8 Also, we had gone to our customers and said we want
9 to launch this skinny label product and they had all
10 said we're not interested so --

11 Q. I said we are going to come to that.

12 A. Sorry. It is really important to answer your question
13 properly, because we went back to Pinsents and said,
14 now, this is the situation that has changed. We are now
15 in this new position. What should we do?

16 Q. I think you are reading too much into my question, with
17 respect. All I am saying is both in the autumn of 2013
18 and in the spring or June of 2014, on both occasions you
19 were trying to negotiate a forward-looking agreement for
20 increased volumes, yes?

21 A. They were completely -- I do not accept there is a link
22 between them. They were completely different
23 negotiations.

24 Q. They were trying to do the same thing. They were both
25 trying to achieve -- can we agree this -- they were both

1 trying to achieve a forward-looking supply agreement for
2 increased volumes, yes or no?

3 A. They were -- yes, they were both trying to agree an
4 agreement to get volume while we tried to sort out the
5 Aesica problem, Aesica issues, but they were very
6 different in terms of what we understood them at the
7 time. Because there had been some serious changes in
8 the context of this all during January to May 2014.

9 Q. Now, you were aware, were you not -- so by this time,
10 when it came to June 2014, Mr Beighton was then involved
11 in discussions on the commercial side. That is what you
12 have said in your witness statement.

13 A. Yes, so Brian McEwan had left I think in April 2014 and
14 then John and I worked closely together in May 2014.
15 Actually, we carried on really working closely together
16 because John had been involved, I think from back
17 in December, when it all went into a real mess, like
18 I described earlier on.

19 Q. And you were aware at the time, were you not, that
20 Mr Beighton and Mr Patel would speak on the phone in the
21 same way that Mr McEwan and Mr Patel spoke on the phone,
22 yes?

23 A. So I was aware there were discussions going on. I did
24 not get the impression that there were very many
25 discussions between Mr McEwan and Mr Patel. I did not

1 get the impression there were very many discussions
2 between Mr Beighton and Mr Patel and in both situations,
3 where there was a discussion, they were coming to me and
4 saying, this is the situation, this is what has
5 happened, either by email or John's office was next to
6 mine. So he would come in and say, you know, give me an
7 update. So I felt like, to go back to the compliance
8 point, legal was fully involved in what was going on,
9 which was obviously very important to me.

10 Q. Let us just get up {H/414/1}. If we go to the very
11 bottom of the page and I can tell you that this is from
12 Mr Beighton's PA to him and it is April 2014:

13 "Hi John.

14 "Took a call from Mr Amit Patel from Auden McKenzie.

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

16 And then if we go to {H/514/1}. What we have there
17 are Mr Beighton's expenses and we see that in fact --
18 sorry, page 2, {H/514/2} and if we go to line 32, we can
19 see:

20 "Lunch: John Beighton and Amit Patel

21 (Auden McKenzie)".

22 I think that is the 16 May that that took place.

23 Yes, 16 May. You see that in the second column, yes?

24 A. Yes.

25 Q. Then let us go to {H/479/1}. This is an email from

1 Mr Beighton to you on 27 May 2014 and he says:

2 "Hi Amit,

3 "Many thanks for your text over the weekend."

4 Yes? So it is a draft email that he is going to
5 send to Amit Patel and it is referring to a text from
6 Mr Patel to Mr Beighton. So you would have understood,
7 would you not, at least from this email, that
8 Mr Beighton was in touch with Mr Patel by text, yes?

9 A. Yes.

10 Q. Did you know about the lunch?

11 A. I -- to be honest, I do not recall if I knew about the
12 lunch. I knew that in -- there was some messages going
13 backwards and forwards between John and Auden.

14 Q. Some text messages?

15 A. No, some correspondence. I did not know if it was text
16 or not. Obviously, when I received this, I knew it was
17 a text, because in April there had been some bridging
18 stock discussions and in May there was a concern about
19 the feedback we were getting from customers and this
20 proposal from Auden for a second agreement. So I was
21 aware there was communications.

22 Q. Did you warn Mr Beighton that he should not be
23 contacting Mr Patel in this informal way?

24 A. No, I did not. I did say, look, if you have any
25 correspondence with him, you need to make sure I am

1 fully involved. But it was coming out of a situation in
2 which I was involved, so I was aware he was speaking to
3 him.

4 Q. When you say "involved", you were not involved in the
5 sense of being on the calls or at the lunch?

6 A. No, I was not on the calls or in the lunch.

7 Q. So it must follow, must it not, Mr Sully, I think you
8 would accept, you were not privy to everything that was
9 said between Mr Patel and Mr Beighton in the
10 negotiations which led to the supply being restarted?
11 That must be right.

12 A. Yes, that must be right.

13 Q. And so you are not able to say what discussions they
14 had, or did not have, about AMCo entering or not
15 entering the market independently. You are just not able
16 to give us evidence on that, because you were not there?

17 A. I wasn't at the lunch.

18 Q. Let us go to the second written agreement, which is at
19 {H/528/1}. We can see that this still says "'Own Label'
20 Product Supply Agreement." It is dated 25 June 2014.
21 Again, it is right, is it not, as a matter of fact, that
22 the product was still to be supplied in Auden trade
23 dress and that continued for the duration of the
24 agreement, so the permissions and the authorisations
25 were never applied for, yes?

1 A. To change the trade dress, no, they were never applied
2 for. It carried on being supplied in Auden trade dress.

3 Q. And a lot of this is pretty similar. If we go down to
4 page 5, {H/528/5}. I mean similar to -- the recitals
5 and so on similar to the first agreement. Presumably,
6 you used the template and then you adjusted it, did you,
7 again?

8 A. Yes, Pinsents and I took the first agreement as
9 a template, updated the bits that needed updating and we
10 provided the draft to Auden and its lawyer.

11 Q. So if we go to page 5 and we see the term, a period of
12 two years, but subject to earlier termination, and then
13 duration in clause 1. So you see that -- you can see
14 that it is an agreement for a two-year term subject to
15 earlier termination, yes?

16 A. Yes.

17 Q. Then we see again -- clause 2 again deals with
18 appointment and exclusivity and 2.2 is the same clause
19 as before, but with a new notice requirement that we did
20 not see in the first written agreement. That is right,
21 is it not? So AMCo must give three months written
22 notice if it wants to come into the market and supply
23 its own product?

24 A. Yes, that's right.

25 Q. And if we just scroll down, we can then see the rest of

1 the clause. So that says at the end, it cannot -- so
2 AMCo cannot bring its own product on the market without
3 giving Auden at least three months written notice of its
4 intention to do so.

5 We will come back to this in a minute when we look
6 at the associated termination clause. But just to
7 confirm as a matter of fact, it is right, is it not,
8 that AMCo did not give notice under this clause at any
9 point during the duration of the agreement?

10 A. Yes, that is right.

11 Q. And if we look at clauses 3 and 4, they are the same as
12 under the first -- pretty much the same, I think.

13 I haven't spotted any material differences. It is under
14 the first written agreement and if we go to page 8, we
15 see clause 5 {H/528/8} and that is the forecasting and
16 it is the same forecast requirement, but we see here
17 that the forecast -- the initial forecast has been given
18 as 12,000 packs per month for the next year, yes?

19 A. Yes, that's right.

20 Q. And presumably you are aware that Auden did supply
21 a fixed 12,000 packs per month to AMCo for every month
22 of the two-year term, yes?

23 A. I am not entirely sure what the volumes were each month,
24 but we put it in as a minimum of at least 12,000 packs
25 and I understand that broadly speaking, yes, that it

1 ended up being about 12,000 packs, despite our desire to
2 have more.

3 Q. Yes, you were not able to negotiate any more, Auden
4 would not agree to give you any more and the CMA was not
5 able to find any record of any updated forecast having
6 been given after that. And that is presumably because
7 there wasn't one, so you kept with the 12,000 packs, did
8 you?

9 A. I do not know. I did not place the forecast as
10 I mentioned earlier.

11 Q. If we go to page 18. {H/528/18}. We can see there
12 clause 17 which is headed "Early termination" and it
13 picks up on the new notice provision that we saw in
14 clause 2. Do you see that 17.2 so:

15 "In the event that Amdiphram notifies Auden under
16 clause 2.2 of its intention to commence supply of its
17 own version of the product in the territory, Auden shall
18 have the option to terminate this agreement on three
19 months' written notice to Amdipharm", yes?

20 A. Yes.

21 Q. So let us go to paragraph 87 of your witness statement
22 which is at {B2/2/23}. What you say there is clause 2.2
23 explicitly allowed AMCo the freedom that it wanted,
24 "while clause 17.2 enabled Auden to terminate the
25 agreement on three months' notice to ensure that it had

1 time to adjust its production volumes and distribution
2 arrangements."

3 Now, on the second point, adjustment of volumes,
4 yes, the reason why Auden would need time to adjust its
5 production volumes is that if AMCo entered with its own
6 product then Auden's production volumes would decrease,
7 would they not?

8 A. Actually I did not understand it that way. I think it
9 was more that -- what I remember was that because of the
10 firm notice period -- so this new clause came into the
11 second agreement because of the point about -- there is
12 three months of firm orders. So there is going to be
13 a mess if it suddenly -- you decide you want to walk
14 away from this agreement. So we had involved Pinsents
15 and so we agreed this clause 17.2. And then in that
16 turn --

17 Q. I am just looking at your witness statement. So you say
18 that it enabled Auden to terminate the agreement to
19 ensure that it had time to adjust its production
20 volumes.

21 And so what I am trying to understand is why it
22 would have needed time, I think it is a straightforward
23 question. I think it would have needed time to adjust
24 its production volumes because had AMCo entered the
25 market then Auden would have needed to manufacture less,

1 yes, because AMCo would have taken some of the market
2 share?

3 A. Yes, I think that must be right.

4 Q. Now, the three-month notice clause that is here reflects
5 the fact, does it not, that independent market entry by
6 AMCo and supply from Auden were alternatives, so they
7 were not both going to happen at the same time. AMCo
8 could launch independently on notice to Auden and if it
9 decided to do that you understood that Auden would
10 terminate the agreement, yes?

11 A. It would have an option to terminate it.

12 Q. And you understood that it would in practice terminate
13 the agreement?

14 A. We suspected they probably would but we did not know for
15 certain.

16 Q. Mr Sully, it was pretty obvious they would, was it not,
17 because there would be absolutely no benefit to Auden,
18 would there, in the arrangements in those --

19 A. We suspected they would have done.

20 Q. In fact, the benefit to Auden in this agreement lay in
21 AMCo taking supply from Auden instead of entering the
22 market independently, did it not. That was the benefit
23 to Auden?

24 A. Sorry, could you say that one more time.

25 Q. The benefit to Auden of this agreement, so the benefit

1 to Auden of supplying this product, 12,000 packs per
2 month, at the price that was agreed, the low price, the
3 benefit to Auden lay in AMCo taking the supply from
4 Auden instead of entering the market with its own
5 product; yes or no?

6 A. No, I do not think so. I think the benefit to Auden --
7 I do not know why they wanted to do it. But I guess the
8 benefit was they would have some visibility of if we
9 were going to launch. What they did not know of course
10 was we had gone to customers and said, do you want the
11 Aesica product and the customers had said no, we are not
12 interested in it. So, as I said to the business and
13 I put in my witness statement, we said, we are either
14 going to have to drop out of this market or we take out
15 a new supply from Auden and they had said because of the
16 firm order period of three months we want some notice so
17 you do not create a mess and distribution arrangements,
18 and presumably volumes, and we had said with Pinsent's
19 support well, that sounds fine.

20 Q. Mr Sully, you say there -- I think you have
21 misunderstood my question. So you say there the benefit
22 to Auden is that they would have had some visibility
23 over when we were going to launch. So that is the
24 clause 2.2. But I am asking a more fundamental
25 question. The benefit to Auden of this supply agreement

1 whereby it was supplying you with 12,000 packs a month
2 at a very, very heavily discounted price in
3 circumstances where it would have otherwise sold the
4 product itself at a much higher price, the benefit to
5 Auden was that AMCo was taking supply from Auden rather
6 than entering the market with its own product?

7 A. I am saying that's not right because AMCo could not
8 enter the market with its own product. We tried to. We
9 had spoken to customers. They said we are not
10 interested in it, all of them, full stop. So I do not
11 know why Auden did this agreement, like I did not know
12 earlier on why they did the first agreement. But what
13 I do know is they were prepared to supply us. We knew,
14 and they did not know, that customers did not want
15 a skinny product and we continually monitored the market
16 to check that but we wanted the ability to be able to
17 launch if the market changed, and we had taken advice on
18 this orphan drug issue which is directly relevant to
19 this which put us in this impossible position.

20 PROFESSOR HOLMES: Can I just clarify, you said a moment ago
21 that Auden wanted to supply the whole market. If
22 therefore they had noticed that you were going to
23 produce your own product, why would you have assumed if
24 their motive was only to supply the whole market that
25 they would automatically or you thought it was very

1 likely that they would give you notice terminating it?
2 Why not just continue supplying you so they can maintain
3 their volumes?

4 A. Because we had -- there is no love lost between us and
5 we had a rocky relationship. We suspected that if we
6 launched they would say that but we did not know, and it
7 was left in as an option.

8 PROFESSOR HOLMES: Does that not imply that they thought
9 they would in fact be able to sell that volume though?

10 A. The negotiations for this were pretty fraught and there
11 was a lot of commercial negotiating going on. I suspect
12 that they thought they had a right but they were not
13 entirely sure how strong it was. We actually knew -- we
14 think we resolved the issues later on though they are
15 not ready, for a couple of months as it turned out, but
16 we have got this major problem with the orphan drug
17 thing. Pinsent Masons have said you cannot do anything
18 about it and when we have gone to customers they have
19 said they do not want this product. So effectively we
20 were saying, well, let us keep an interim foot in the
21 market. Let us monitor it. If something changes,
22 brilliant.

23 PROFESSOR HOLMES: Thank you.

24 MS DEMETRIOU: Sir, is the Tribunal happy for me to go on.

25 I see the time. Are you happy for me to go on a little

1 bit because then I can reach the end of a section but
2 I do not want to keep you if that is inconvenient.

3 THE PRESIDENT: First of all, Mr Sully, how are you feeling?
4 A. Fine.

5 THE PRESIDENT: You are. How are you doing for time,
6 Ms Demetriou?

7 MS DEMETRIOU: It is taking a little longer than I had
8 anticipated. I think that we are all right for time and
9 Mr Beighton has been warned for Thursday, so I think we
10 are all right for time.

11 THE PRESIDENT: That is fine. We will go on for a little
12 bit. I think certainly until quarter to five.

13 MS DEMETRIOU: That would be really helpful and I will make
14 sure we stop before then. Thank you.

15 So if we can go to paragraph 90 of your witness
16 statement at {B2/2/24}. You quote something there --
17 I think we need to go to the confidential version in the
18 {IR-B2/2/24}. So you quote from something that a former
19 associate at Pinsent Masons said about the terms of the
20 second written agreement. It says that:

21 "AMCo was keen to ensure that the June 2014
22 agreement did not preclude it from continuing with its
23 own product [and that] AMCo could extract itself from
24 the agreement quickly if the development of its 10mg
25 product was successful and the product marketable."

1 And so this associate understood that the supply
2 agreement and the launch of AMCo's own product were
3 alternative things, yes, so you were not going to have
4 both happening at the same time. It was either or?

5 A. So the associate and the partner working on this
6 understood that we could not launch our Aesica product
7 but that we wanted to, so if things changed and there
8 was customer demand and the development of the issues
9 were basically resolved, we wanted to be able to launch.
10 I do not know if they saw it as an either or.
11 I suspect -- I think everyone just assumed it is
12 probably an either or.

13 Q. Let us go back to the second written agreement at
14 {H/528/22}. We have got schedule A there and that
15 records the product, the price and volumes, yes?

16 A. Yes.

17 Q. Come back to price in a minute, but the contract
18 describes -- for volumes the contract describes 12,000
19 as the minimum volume?

20 A. Yes, that is right, we wanted at least 12,000.

21 Q. But it is right, is it not, that AMCo tried to secure
22 higher volumes and was unsuccessful?

23 A. Yes, Auden were not prepared to give us higher volumes.

24 Q. No.

25 A. So they stuck to the minimum volume quantity.

1 Q. And then on price, the price had gone up to £1.78, yes?

2 A. Yes.

3 Q. From £1?

4 A. Yes.

5 Q. This higher price was acceptable to the business, was it
6 not, because it still enabled the business to get
7 massive profits from this deal. The selling price had
8 also gone up and it was getting more volume. Is that in
9 line with your recollection?

10 A. My recollection was that this was quite a bit higher
11 than the Aesica price which was I think was 1.16 but we
12 knew we could not sell the Aesica product so the
13 business was prepared to take 1.78 because it was that
14 or nothing.

15 Q. If we go to paragraph 97 of your witness statement.
16 {B2/2/26}. Can you just remind yourself rather than me
17 reading it out what that says. (Pause)

18 A. Yes.

19 Q. To summarise, you are saying that the second written
20 agreement was not intended to disguise an unwritten
21 understanding and you did not mislead anyone at all.

22 Then if we go to paragraph 24 of your witness
23 statement at page 8 of the same document. {IR-B2/2/8}.
24 So there you say that you did not arrange for those
25 agreements with the knowledge or intention that they

1 were sham supply agreements intended to disguise the
2 CMA's inferred agreement. If that was the purpose of
3 the two written supply agreements that was never
4 communicated to you.

5 So is it fair, Mr Sully, to summarise your evidence
6 as saying that first of all you were not involved in any
7 deliberate cover up, yes?

8 A. Yes, absolutely not.

9 Q. Your evidence is that you did not understand it to be an
10 express term of the deal that AMCo would forego
11 independent entry. You did not understand it to be an
12 express term which you had omitted from the written
13 contract, yes?

14 A. No, I did not understand that we were agreeing not to
15 enter the market, absolutely not.

16 Q. But you did understand, did you not, Mr Sully, that the
17 reason Auden was willing to supply AMCo at this massive
18 discount was because it did not want AMCo to enter the
19 market independently. You understood that much, did you
20 not?

21 A. I do not know why Auden was prepared to go into this
22 agreement. The fact was they offered it. We could
23 not -- it was either leave the market or maintain
24 a foothold in the market using the Auden product and
25 faced with those two bleak alternatives we signed the

1 second agreement. I honestly do not know what Auden
2 thought and we took that subject to monitoring the
3 market and trying to launch the product if something
4 changed but, as you know from my statement, things did
5 not change.

6 Q. You understood, Mr Sully, that AMCo's leverage in the
7 negotiations with Auden was that it had the potential to
8 enter the market independently with a product
9 manufactured under its own marketing authorisation. You
10 knew that was part of the leverage?

11 A. No, that is the commercial negotiating. We could not
12 enter the market. That was the whole point, why we went
13 back to Pinsents and said, what do we do. I suspect
14 there was a fear in Auden's mind they did not know what
15 the position was and of course we were not going to tell
16 them, actually we have gone to our customers and they
17 will not take this thing, it is the full indication
18 only. But that is commercial negotiations. You play
19 off each other's fears. The situation we were in was
20 that we could not sell, we did not have any product to
21 sell either, we did not know when it would be ready. We
22 were being told it would be ready in July. Eventually
23 it came in August but customers had said full stop they
24 did not want it.

25 In that situation I guess if there is a leverage it

1 is leveraging a fear and that is what commercial
2 negotiation as I understand is. We discussed it
3 carefully with Pinsents and it was the same.

4 THE PRESIDENT: So the fear you were leveraging was the
5 potential entering into the market by yourselves but you
6 knew, although Auden did not, that that was an illusory
7 fear.

8 A. I think the fear was that this orphan drug designation
9 which had given a complete windfall for no reason to
10 Auden on an immediate product despite it having been
11 granted for a modified release product in a tiny part of
12 the market I think their fear was that at some point
13 this is going to explode and that someone, probably the
14 MHRA, will say, hold on, this cannot be right. The
15 orphan drug should just be for the slow release product
16 which is what we always thought. We thought this cannot
17 be right. Why should an orphan drug designation and
18 protection be given to Auden's immediate product on the
19 basis of some slow release product for a tiny part of
20 the market. So I suspect their fear was that there is
21 that this bubble could blow.

22 But everything we tried to do in the MHRA and the
23 legal advice we took is that the MHRA were repeatedly --
24 confirmed this is the rule, you cannot do anything about
25 it and Pinsents said there is nothing you can do about

1 challenging that orphan drug rule now that the time has
2 elapsed so you have to put up with it.

3 So I think that was the feeling. There was no
4 suggestion of, well if you do not sign this we are going
5 to be able to launch because we knew we could not
6 launch.

7 PROFESSOR HOLMES: As part of your negotiating leverage with
8 Auden do you know if Amdiphram would have conveyed to
9 Auden the price at which it could obtain the product
10 from Aesica?

11 A. Absolutely not. That would have been considered
12 commercially sensitive information.

13 PROFESSOR HOLMES: Okay, thank you.

14 MS DEMETRIOU: And so, Mr Sully, when you talk about
15 commercial leverage and the fear that Auden would have,
16 that was fear that AMCo would enter the market with its
17 own product, yes, we have established that?

18 A. Sorry, I just thought I said it was fear that this gift
19 horse, this windfall that they had received would burst,
20 but we actually knew from all the digging and checking
21 and everything we had done that actually it seemed cast
22 iron. The MHRA were not going to change their mind.
23 The legal advice was clear, you cannot challenge it, and
24 customers have said they do not want it.

25 Q. Can we leave the orphan designation to one side for

1 a minute. I am looking at the sums of money that we
2 have been discussing that are going from Auden to AMCo
3 under this agreement so now they are increased sums
4 because it is 12,000 -- the volume is 12,000 rather than
5 6,000. The reason why commercially they were prepared
6 to do this deal which on its face looks like a Kamikaze
7 act frankly, the reason commercially they were prepared
8 to do that deal is because they knew you had your own
9 product and could launch if they did not do the deal.
10 That is the only reason they did it, is it not?

11 A. No, it is -- I think it is because of the fear. That is
12 what we thought at the time.

13 Q. The fear of what, Mr Sully?

14 A. If I am being told -- it is very difficult to answer
15 a question if at the time this orphan drug thing was the
16 whole issue subject to the things, so it is a little bit
17 difficult to put that to one side.

18 THE PRESIDENT: Let me articulate what I think you have said
19 about the fear and you can tell me how far I am wrong
20 and Ms Demetriou can ask any questions she wishes.

21 We are talking about reading into Auden's state of
22 mind here so there is a degree of speculation here
23 anyway.

24 A. Exactly.

25 THE PRESIDENT: Your understanding of the fear, as you call

1 it, was that if you entered into the market with your
2 product, you might give rise to a challenge to the
3 orphan drug regime which would explode Auden's market
4 position. In other words, although you did not think
5 the orphan drug protection was fragile, you thought that
6 Auden did think it was fragile and therefore they did
7 not want you to come on the market. Have I encapsulated
8 your evidence right and do tell me if I am wrong because
9 I want to know if I am wrong.

10 A. Yes. So I think that's right with the additional point
11 that if we came into the market nobody -- Auden did not
12 know if customers would choose to buy it or not which of
13 course we knew they would not and so I think it is a two
14 stage of if we had come into the market when we were
15 able to would customers have bought it? Auden -- if
16 none of them had bought it Auden would have won already.
17 There would be no challenge. But if they did decide to
18 buy it then the sort of second limb of it would be --
19 would this orphan drug thing actually be overturned.

20 THE PRESIDENT: I see, thank you.

21 A. But we of course knew the answer to the first one
22 because our customers had said no.

23 MS DEMETRIOU: So they must have -- just to try and
24 understand further because it is all a little bit of
25 a muddle. I am sure that is my fault. But they, with

1 the skinny label issue, which we are going to come on
2 to, Auden were challenging it and they were issuing lots
3 of threats. We will come and look at that in more
4 detail. But you are saying that there was a risk to
5 them that those threats would not work and that actually
6 this product would be saleable if you came on to the
7 market, and that was a factor which weighed in the
8 negotiations. That is what really persuaded them to do
9 this deal which on its face looks highly detrimental to
10 them.

11 A. So I am saying firstly, we did not know what was in
12 Auden's mind, but if we thought about it, which we did
13 with Pinsents, we suspected their fear was who knows if
14 customers are going to buy it, because presumably Auden
15 were going to customers and saying, will you buy it and
16 of course presumably their customers are saying
17 definitely not, but they did not know, and we had gone
18 to customers and said, we are nearly there on
19 development, will you buy it, and we have been told no.
20 So we felt we knew something they did not and we
21 suspected they had a fear. But they did not know, so it
22 was something like an unknown and so we tried to
23 leverage that to stay in the market because our
24 customers were saying we want this product.

25 MS DEMETRIOU: Thank you very much. That I understand. If

1 we go to -- this is the last document I am going to take
2 you to and then we can stop, so it will just take me
3 another few seconds I think.

4 If we go to {IR-H/611/1}. So these are board
5 minutes, do you see at the top of the page,
6 dated November 2014, yes?

7 A. Yes.

8 Q. And if we go to page -- we can see that you are in
9 attendance, first of all. If we go to page 8 --
10 {IR-H/611/8}. So page 8 of this document, please.

11 EPE OPERATOR: Sorry, the Wifi has just died. (Pause).

12 MS DEMETRIOU: Thank you. It might come up now. It looks
13 promising. (Pause). Thank you.

14 If we scroll down, please, so do you see there under
15 "Competition law" can you read that to yourself. I am
16 not going to read it out because it is redacted.
17 (Pause).

18 A. Yes.

19 Q. Just a couple of points. So that agreement is the
20 agreement we have just been looking at, yes, the one you
21 are referring to there?

22 A. Yes.

23 Q. Then the Chinese wall is what you have been referring to
24 as the firewall in your statement, yes?

25 A. Yes.

1 Q. Where you say there that the 10mg -- that you have
2 entered into the agreement with Auden to avoid conflict
3 what you meant by that was the conflict that would occur
4 if AMCo entered the market with its own product, yes?

5 A. So this is shorthand for the full update to the board
6 which happened back in July and this is in the section
7 where I am just covering what are the ongoing things,
8 compliance things we are monitoring. So I would quite
9 like to see -- I know in July I updated the board on why
10 we've gone into this agreement and I think this is
11 shorthand for that. So ...

12 Q. But conflict, what would you understand by that, looking
13 back? It must be, must it not -- it says, "to sign the
14 agreement to avoid conflict". That must be the conflict
15 that would happen if you came on to the market, yes,
16 whether about the orphan designation or otherwise?

17 A. Can I please see the minutes from the July meeting
18 because this is definitely shorthand back to that.

19 MS DEMETRIOU: Sir, perhaps because I do not have the
20 reference to hand, perhaps I can find that overnight and
21 we can start with that tomorrow.

22 THE PRESIDENT: Of course, that is entirely fine.

23 MS DEMETRIOU: In fact, in case it helps, I think it is
24 actually something that Mr Sully refers to -- 568.1.
25 Shall we just look at it now.

1 THE PRESIDENT: If you want to finish it. I think we'd best
2 finish the point. {IR-H/568.1/1}. That would be at
3 page -- I think we need page 6, please. {IR-H/568.1/6}.
4 Scroll down, please. So it is at the bottom of the
5 page. So:

6 "Mr Sully advised that a supply agreement had been
7 entered into with Auden to avoid a dispute threatened by
8 Auden arising out of the orphan drug status of the
9 product."

10 Yes?

11 A. Yes.

12 Q. Do you want to look at the rest of it?

13 A. Yes, please, that would be helpful. Yes, I think my
14 reference in November to a dispute is shorthand for this
15 update.

16 Q. So if we just go back to the bottom of the previous
17 page, so the dispute is a dispute threatened by Auden,
18 you say, arising out of the orphan drug status. That
19 was essentially Auden saying -- we see this in your
20 witness statement -- saying you have got to explain very
21 clearly that you only have the skinny label and your
22 labelling and presentation and so on?

23 A. Yes, so effectively Auden was threatening back
24 in January to go to customers, go to the MHRA, say we
25 had to put a big warning label on the product, and when

1 we had checked it with Pinsents obviously we knew there
2 was nothing they could do about that and then we looked
3 at the market, seen the volumes for our product and when
4 we went to customers they said no, so the dispute was
5 all those things if you like which was the threats by
6 Auden.

7 Q. So the threats would arise if you entered the market and
8 entering into the supply agreement avoids that dispute,
9 doesn't it, because you are not going to enter the
10 market?

11 A. Yes, we thought on advice that we could not win this
12 dispute, so entering into the supply agreement was the
13 only option we felt we had other than leave the market.

14 MS DEMETRIOU: All right. Thank you, sir, I am very happy
15 to leave it there. Thank you for sitting late. I am
16 sorry we went just over quarter to.

17 THE PRESIDENT: Not at all. Do you want to start earlier
18 than usual tomorrow?

19 MS DEMETRIOU: I do not think we need to looking at time
20 globally this week. I think we are fine and nobody has
21 told me that Mr Beighton is not -- he has been warned
22 for Thursday and so I think that we are on track.

23 THE PRESIDENT: It is simply that these are important
24 matters and I do not want you to feel under any pressure
25 in terms of timing and I do not want Mr Sully to feel

1 under any pressure that he has to confine his answers
2 tightly. I want both of you to have every opportunity
3 to develop your questions and your answers.

4 MS DEMETRIOU: That is very kind, sir, but I think we will
5 be all right starting at the normal time.

6 THE PRESIDENT: I am grateful. In that case 10.30 tomorrow.

7 You remember my warning, Mr Sully. Thank you.

8 (4.48 pm)

9 (The hearing adjourned until Wednesday, 23 November 2022 at
10 10.30 am)

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