

In The Matter Of:

*Alina Boyden and Shannon Andrews v.
State of Wisconsin Department of Employee Trust Funds*

*Deposition of Herschel E. Day
Vol. II
June 11, 2018*

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*Original File Day Herschel 6-11-18.txt
Min-U-Script® with Word Index*

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
 SHANNON ANDREWS,

Plaintiffs,

-vs- Case No. 17-cv-264

STATE OF WISCONSIN DEPARTMENT
 OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

Volume II Deposition of HERSCHEL E. DAY,
 taken via videoconference at the instance of the
 Plaintiffs, under and pursuant to the Federal Rules of
 Civil Procedure, before Carmen Harder, RPR, and Notary
 Public in and for the State of Wisconsin, at the offices
 of Hawks Quindel, S.C., 409 East Main Street, Madison,
 Wisconsin, on June 11, 2018, commencing at 12:56 p.m.
 and ending at 1:48 p.m.

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I N D E X

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2 Examination: Page

3 By Ms. Madden 119

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6 Exhibits Identified: Page

7 10 Draft Minutes dated December 30, 2016, 126
 Confidential Closed Session

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9 (The original exhibit was attached to the original
 transcript, and copies were provided to counsel)

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24 (The original transcript was filed with
 Attorney Nicholas E. Fairweather)

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A P P E A R A N C E S

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3 HAWKS QUINDEL, S.C., by
 MS. CAITLIN M. MADDEN,
 4 409 East Main Street,
 Madison, Wisconsin 53703,
 5 appeared on behalf of the Plaintiffs.

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7 AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN
 FOUNDATION, by
 MS. ASMA I. KADRI,
 8 207 East Buffalo Street, Suite 325,
 Milwaukee, Wisconsin 53202,
 9 appeared on behalf of the Plaintiffs.

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11 WISCONSIN DEPARTMENT OF JUSTICE, by
 MR. COLIN T. ROTH,
 MR. STEVEN C. KILPATRICK,
 12 17 West Main Street,
 Madison, Wisconsin 53707,
 13 appeared via videoconference on behalf of the
 Defendants.

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1 HERSCHEL E. DAY, called as a
 2 witness, being first duly sworn, testified on
 3 oath as follows:

4

E X A M I N A T I O N

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6 By Ms. Madden:

7 Q Good afternoon, Mr. Day. Could you please state
 8 and spell your name for the record.

9 A Herschel Day. Herschel is H-e-r-s-c-h-e-l, and
 10 Day is D-a-y.

11 Q And, Mr. Day, you've previously given a deposition
 12 in this case, correct?

13 A Yes.

14 Q So you will recall all of the deposition rules,
 15 but of course, today is a little different since
 16 we're appearing via videoconference and telephone.
 17 So given that lag with the video deposition,
 18 please make sure to give your counsel the
 19 opportunity to object before answering so we can
 20 try and avoid cross-talk, okay?

21 A Okay.

22 Q So as we go, please answer any questions to the
 23 best of your knowledge, and ask me to clarify any
 24 questions that are unclear, all right?

25 A Okay.

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1 Q How did you prepare for today's deposition?
2 A Really, it was just reflecting the last deposition
3 I gave. I did not -- I did not review the
4 documents again after the last deposition I gave.
5 Q Did you meet or discuss with counsel at all in
6 preparation? And if so, please don't tell me the
7 contents of those conversations.
8 A I had only a 15-minute phone call with counsel
9 prior to today's meeting.
10 Q And so you didn't look at any documents you said,
11 correct?
12 A I did not review any of the documents.
13 Q Other than counsel, did you speak with anyone else
14 in preparation for today's deposition?
15 A No, I did not.
16 Q So your deposition today has been reopened for a
17 limited purpose, specifically to talk about a
18 December 30, 2016 meeting of the
19 Government Insurance Board. And, first, can you
20 just refresh for me when you were first appointed
21 to the Government Insurance Board.
22 A I was appointed, I believe, in May of 2013, was my
23 appointment.
24 Q And were you reappointed after that initial
25 appointment?

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1 A I was reappointed, yep, to a second two-year term
2 in 2015.
3 Q So would you have been up again for reappointment
4 in 2017?
5 A Yes.
6 Q And were you reappointed then?
7 MR. ROTH: Objection. We're
8 already going beyond the scope of the
9 reopened deposition.
10 MS. MADDEN: I'm just trying to get
11 into his experience with the GIB. These are
12 pretty brief questions that we can probably
13 just proceed with before we get into the
14 meeting. I think we can know if he's on the
15 GIB right now.
16 MR. ROTH: Go ahead.
17 Q Okay.
18 A I have to -- okay. I'm not certain that I've been
19 reappointed. I have not received paperwork that
20 indicates that, and the ETF has not told me that
21 I've been reappointed necessarily. I will note --
22 and I did not follow up on this -- at the last
23 board meeting an updated roster was published, and
24 it did show that my appointment went through May
25 of '19. So it's possible ETF received some

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1 paperwork that I have not to this point or that I
2 haven't been notified.
3 Q But you've still been attending meetings?
4 A Yes.
5 Q Okay. And just to make sure that going forward
6 we're using the same terminology, in your previous
7 deposition there was discussion about ETF's ban on
8 state employee health insurance coverage for
9 procedures, services, and supplies related to
10 surgery and sex hormones associated with gender
11 reassignment. And I'm going to refer broadly to
12 that as the exclusion. Does that make sense?
13 A Yes.
14 Q And so previously you've provided testimony about
15 the vote by GIB on July 12, 2016 to remove that
16 exclusion, correct?
17 A Yes.
18 Q So today we're going to focus mainly on another
19 GIB meeting, the one that was held on December 30,
20 2016. And you've previously testified that at
21 that meeting the board voted to reinstate the
22 exclusion.
23 I know you've got some documents printed out.
24 Can you please pick up the one that was marked at
25 your last deposition as Exhibit 6. These are the

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1 December 30, 2016 open meeting minutes.
2 A Okay. I've got them.
3 Q And do you recognize these as the minutes from
4 that, the open component of that meeting?
5 A Yes.
6 Q Were you in attendance at that meeting?
7 A I attended via phone.
8 Q And how did you find out about this meeting?
9 A I believe, best I remember, I believe I found out
10 via e-mail, that there was an e-mail either the
11 day prior or two days prior letting us know that
12 this would be held on the Friday, the 30th.
13 Q Do you remember who you got that e-mail from?
14 A I believe it was from Sara Brockman at ETF. I
15 just -- I don't know for certain I should say.
16 Q Was she who would typically send out e-mails about
17 meeting times?
18 A She would typically forward communications to the
19 board, meeting agendas, any attachments, and
20 notifications of the meetings, yes.
21 Q And was this a regularly scheduled meeting?
22 A It was not.
23 Q So if you can take that exhibit and turn to
24 page 2. In the second paragraph it says
25 "Mr. Potter from the Department of Justice (DOJ)

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1 attended the meeting in order to discuss the
 2 July 12, 2016, Board action to approve changes to
 3 the Guidelines Contract and Uniform Benefits for
 4 2017."
 5 Did I read that correctly?
 6 A Yes.
 7 Q And was this discussion in the open portion of the
 8 meeting, was that pertaining to the exclusion?
 9 A Are you saying was the discussion from Mr. Potter
 10 during the open session in regard to the
 11 exclusion; is that your question?
 12 Q Yes. I'm asking -- he attended to discuss
 13 something, and I'm asking if what he attended to
 14 discuss was the exclusion.
 15 A I can't say I remember the discussion in open
 16 session that day, and whether or not Mr. Potter
 17 commented in open session, I don't recall.
 18 Q Do you recall if anyone commented in open session
 19 about the exclusion?
 20 A I think I do, and I believe I previously -- in my
 21 prior deposition I referenced that as well I
 22 think. I remember one comment from a board member
 23 in again what I believe was open session at that
 24 time.
 25 Q And what board member was that?

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1 A JP Wieske.
 2 Q And what did he say in open session?
 3 A The comment in open session was in reference to if
 4 we did not reinstate the exclusion, then, you
 5 know, there was this idea that we could not, as
 6 best I recall, could not put the toothpaste back,
 7 you know, in the container. That's the comment
 8 that I recall from open session.
 9 Q And at some point in open session do you recall a
 10 motion to go into closed session?
 11 A Yes.
 12 Q And who made that motion?
 13 A According to the minutes, it would be
 14 Chuck Grapentine.
 15 Q So do you have an independent recollection of him
 16 making that motion?
 17 A I do not.
 18 Q Do you recall if he was prompted to make that
 19 motion by anyone?
 20 A I do not, no.
 21 Q And according to page 3 of the minutes, it looks
 22 like you did vote to go into closed session,
 23 correct?
 24 A Correct.
 25 Q And what was the reason that you voted to go into

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1 closed session?
 2 A To confer with counsel, which seemed an
 3 appropriate reason to go into closed session.
 4 Q We're going to turn to what will be marked as
 5 Exhibit 10 to your deposition. So these are the
 6 closed session minutes from December 30, 2016.
 7 A Okay.
 8 (Exhibit No. 10 marked for
 9 identification)
 10 Q And for the record, these minutes were an
 11 attachment to the document -- to an e-mail Bates
 12 labeled ETF 570.
 13 According to these minutes, it lists the
 14 board members that were present. It also lists
 15 others present. There's four people identified
 16 here. Can you please go through each and identify
 17 what their role was in this closed session.
 18 A It is difficult for me to identify their role in
 19 the closed session because I was attending via
 20 phone. I wasn't always aware of who was speaking
 21 at what time.
 22 Q Okay.
 23 A So I can't with any certainty -- I can't with any
 24 certainty describe their role in the closed
 25 session.

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1 Q Well, the first person listed under OTHERS PRESENT
 2 is Kadimma Mbanefo I think. What was that
 3 person's role as Information Technology Services,
 4 or do you -- let me rephrase.
 5 Do you recall them saying anything during the
 6 closed session?
 7 A I do not recall any comments from them in closed
 8 session.
 9 Q Was someone from Information Technology Services
 10 frequently present during closed sessions?
 11 A Other closed sessions the board has had, has
 12 somebody from IT or Information Technology been
 13 present; is that the question?
 14 Q Yes.
 15 A I don't believe it was uncommon for somebody to be
 16 there to make sure that the microphones were
 17 working and the technology was, yeah, functioning
 18 appropriately.
 19 Q So do you have reason to believe that this person
 20 had any role other than that in this particular
 21 closed session?
 22 A I do not have any reason to believe that they had
 23 a role beyond that in this closed session.
 24 Q It also lists that Cheryllynn Wilkins from the ETF
 25 was present. Do you recall what her role was

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1 during this closed session?
 2 A I do not specifically.
 3 Q Was she typically present in closed sessions of
 4 GIB?
 5 A It's difficult for me to say because ETF staff are
 6 usually given the opportunity to, you know, invite
 7 staff to stay for a closed session at the approval
 8 of the board. I can't say with any clarity that I
 9 know if she was regularly invited to the closed
 10 session or not.
 11 Q Do you recall if she was specifically invited to
 12 this meeting, to this closed session?
 13 A I do not.
 14 Q And next is listed David Nispel from ETF. What
 15 was his role in this meeting?
 16 A David was there at least, I believe, to provide
 17 legal counsel, you know, on behalf of ETF.
 18 Q And Kevin Potter from the Department of Justice,
 19 what was his role in this meeting?
 20 A Again, I believe he was there to provide legal
 21 counsel from DOJ's perspective.
 22 Q Do you recall seeing any documents as part of this
 23 closed session?
 24 A I don't recall seeing any documents at this time.
 25 Q And I know you weren't there in person, but do you

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1 recall hearing any documents being discussed
 2 during that session?
 3 A I can't recall any specific documents that were
 4 discussed at the closed session.
 5 Q So during the closed session -- and I understand
 6 Mr. Potter provided some legal advice to GIB about
 7 litigation in which the board either is involved
 8 or is likely to become involved in. And any
 9 advice he provided is privileged, so with my next
 10 set of questions, I'm not asking you about advice
 11 that either Mr. Potter or Mr. Nispel provided
 12 relating to potential litigation with GIB. Does
 13 that make sense?
 14 A Yes.
 15 Q But the Court has said that we can ask questions
 16 about the other reasons that the board voted to
 17 reinstate the exclusion even though legal counsel
 18 was present during this meeting. So we can talk
 19 about other reasons separate from legal advice.
 20 Do you understand that, that distinction?
 21 A I think so, yes.
 22 Q If my questions -- if you're uncertain, please ask
 23 as we go forward.
 24 So during this closed session, other than
 25 legal information provided by Mr. Potter or

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1 Mr. Nispel, do you recall any board members
 2 discussing reasons for reinstating the exclusion?
 3 A I can't -- I can't say that I recall honestly any
 4 specific rationale provided for reinstating the
 5 exclusion during the closed session.
 6 Q And when you say you can't recall any rationale,
 7 do you mean any at all or any separate from legal
 8 advice given by counsel?
 9 A Yeah, thank you for the clarification. Any advice
 10 beyond recommendations provided by counsel.
 11 Q If you can take those closed session minutes, and
 12 turn to the second page. And in that first
 13 paragraph, if you can just review that, and let me
 14 know when you've taken a look at it.
 15 (Witness reviews document)
 16 A Okay.
 17 Q So this states that the board deliberated on its
 18 contractual obligations. What obligations is that
 19 referring to?
 20 MR. ROTH: I'm going to object to
 21 the extent it calls for legal conclusions
 22 about the board's contractual obligation.
 23 Also, you know, I'd say this is girding the
 24 line with respect to attorney-client
 25 communication. I think it's been established

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1 that the compliance with contractual
 2 obligations was one of the contingencies,
 3 which, you know, I think has been pretty well
 4 established were developed in consultation
 5 with legal counsel.
 6 So, you know, I'm not sure that it's a
 7 proper question even in the context of the
 8 Court's order that we have here.
 9 MS. MADDEN: Well, if there was --
 10 MR. ROTH: And I'm open to hearing
 11 your view. Look, I mean, I'm just trying to
 12 interpret the order and what I know about the
 13 advice given at the meeting. That's kind of
 14 what I'm thinking. I don't want to give an
 15 instruction not to answer that we're going to
 16 have to revisit yet a third time, but I'm
 17 curious to hear your perspective on that
 18 question.
 19 MS. MADDEN: Sure. And I'm again
 20 attempting to couch this in the context of
 21 the previous instruction I gave, that I don't
 22 want to hear about advice given by counsel.
 23 But if board members raised their own
 24 understanding of contractual obligations or
 25 discussions outside of what they were

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1 instructed by ETF or DOJ, I don't see how
 2 that's legal advice, if they are going
 3 forward with their understanding of it or
 4 discussing it separate from what they were
 5 told by counsel.
 6 So I think that question is proper and
 7 also within the meaning of the order that we
 8 got from the judge.
 9 MR. ROTH: Give me one second,
 10 please.
 11 MS. MADDEN: Sure, no problem.
 12 (Discussion off the record)
 13 MR. ROTH: So I'll just leave an
 14 objection on the record that I think it's
 15 outside the scope of the Court's order. I'll
 16 let the witness answer the question again in
 17 the confines of the instruction you gave him,
 18 that it doesn't implicate advice from either
 19 Mr. Potter or Mr. Nispel. You can answer if
 20 you can.
 21 Q Mr. Day, would you like me to restate the
 22 question, or do you understand what we're asking?
 23 A If you don't mind restating it, I'd appreciate it.
 24 Q No problem. I'm asking what the meaning is in
 25 these minutes where it states the board discussed

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1 contractual obligations. And I would like to know
 2 what was discussed outside of a discussion with
 3 counsel on their legal advice as to the board's
 4 contractual obligations.
 5 A I don't recall a conversation outside of a
 6 conversation with legal counsel about the
 7 contractual obligations.
 8 Q The next thing these closed meeting minutes say
 9 was discussed were fiduciary responsibilities.
 10 And subject to the same limitations, what
 11 discussions do you recall relating to that outside
 12 of advice from counsel?
 13 A Again, I can't say I recall anything outside of
 14 the conversation with legal counsel about the
 15 fiduciary responsibility.
 16 Q All right. So you said previously that you don't
 17 recall any rationale presented in this meeting,
 18 this closed session about reinstatement. Do you
 19 recall any discussion of the potential costs of
 20 removing the exclusion?
 21 MR. ROTH: Objection, misstates the
 22 testimony. You can answer if you can.
 23 A Can you repeat the question. Sorry.
 24 Q Sure. Do you recall any discussion of the
 25 potential costs of removing the exclusion?

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1 A Yes, I recall a discussion of cost.
 2 Q And who do you recall raising the issue of cost?
 3 A I don't recall who, who raised the issue.
 4 Q Do you recall if it was a male or a female board
 5 member?
 6 A I do not, not with clarity.
 7 Q And in that discussion of costs, did any board
 8 members provide cost estimates for removing the
 9 exclusion?
 10 A I do not believe any estimates, per se, were
 11 offered by board members. I know that I was asked
 12 what I thought, what I thought or how I thought
 13 the insurers would respond to the reinstatement of
 14 the exclusion.
 15 Q And who asked you that question?
 16 A I don't recall. Sorry.
 17 Q What was your response?
 18 A I believe I responded that it seemed reasonable
 19 the insurers would likely not raise the premiums
 20 in response to the exclusion being reinstated.
 21 Q So just to clarify, this cost discussion was about
 22 a potential cost for reinstating the exclusion; is
 23 that correct?
 24 A Yes.
 25 Q Was there a discussion during this meeting of the

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1 cost of removing the exclusion?
 2 A I don't know that I can say for certain there was.
 3 They're somewhat intertwined, you know, from my
 4 perspective, but I don't know if it was stated
 5 that way in terms of a cost if it was -- if at
 6 that point we would have continued with the
 7 coverage.
 8 Q So you don't recall if any board members said it
 9 would be too expensive to remove the exclusion?
 10 A No, I don't recall anything like that.
 11 Q And you don't recall any information being
 12 presented of what the potential cost of removing
 13 the exclusion would be at this meeting?
 14 A Other than the general conversation I referenced
 15 before, there were no specific cost estimates, no,
 16 at this meeting.
 17 Q When you say the general conversation referenced
 18 before, do you mean your testimony a couple of
 19 minutes ago about the potential costs of
 20 reinstating the exclusion?
 21 A Yes.
 22 Q So you don't recall any discussion about the costs
 23 of removing the exclusion?
 24 MR. ROTH: Objection, misstates the
 25 testimony. You can answer.

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1 A Well, yeah, at that point the exclusion had been
 2 removed right at that stage, so it wasn't -- it
 3 wasn't focused on the cost of keeping it. The
 4 discussion was focused, at least as it pertained
 5 to cost, was focused on What if it were
 6 reinstated; what would the cost be? That's my
 7 recollection.
 8 Q During this closed session did any board members
 9 discuss the safety of the health care covered by
 10 the exclusion?
 11 A Not that I recall.
 12 Q Do you recall any information being provided about
 13 the safety of these procedures? And when I say
 14 these procedures, I'm referring to gender
 15 confirmation surgery and hormone therapy. Do you
 16 recall a discussion of -- information being
 17 provided about the safety of either of those
 18 treatments?
 19 A No, I do not.
 20 Q During the closed session did any board members
 21 discuss the efficacy of either gender confirmation
 22 surgery or hormones, so whether those were an
 23 effective treatment for gender dysphoria?
 24 A I do not recall any discussion on that.
 25 Q Was any information provided during that session

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1 about the efficacy of those treatments?
 2 A Not that I recall.
 3 Q So I specifically asked about information provided
 4 during this session relating to cost, to safety,
 5 and to efficacy, but was any other information
 6 provided by any board member about reinstatement
 7 during this closed session?
 8 A Can you clarify that for me. When you say Was
 9 information provided?, are you speaking to really
 10 any commentary or, like, a tangible document that
 11 was shared with the GIB?
 12 Q Yes. Specifically I'm asking about documents or
 13 research that was either provided or discussed.
 14 A Yeah, I do not recall any.
 15 Q And I think you've answered. An example would be
 16 if a board member had said I've read some research
 17 that says this about hormone therapy's
 18 effectiveness. Was any information along those
 19 lines provided during the closed session?
 20 A Again, I don't believe so. I don't recall any.
 21 Q Do you recall statements made by any board members
 22 providing a reason for reinstating the exclusion,
 23 again outside of advice provided by counsel?
 24 A I do not.
 25 Q Do you recall board member JP Wieske speaking

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1 during the closed session?
 2 A I can't say I recall that specifically only
 3 because I -- I don't know that I can rely on my
 4 memory to remember what was said in open and what
 5 was said in closed that day.
 6 Q Does that mean you recall him speaking during the
 7 session; you're just not sure if it was the open
 8 or the closed part?
 9 A I'm quite certain that JP spoke in open session
 10 and provided the comments I recalled in open
 11 session earlier. I don't know -- I guess I don't
 12 recall how much, if anything, JP would have said
 13 in the closed session.
 14 Q So that's the toothpaste back in the bottle
 15 comment that you recalled?
 16 A Yes, yes.
 17 Q Do you recall him providing any -- well, strike
 18 that.
 19 During the closed session did any board
 20 members give reasons that the exclusion should not
 21 be reinstated?
 22 A Yes.
 23 Q Which board members?
 24 A Primarily I believe it was Nancy Thompson and
 25 myself.

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1 Q Outside of statements from counsel, what were
 2 Ms. Thompson's reasons that the exclusion should
 3 not be reinstated?
 4 A To the best of my recollection, Ms. Thompson's
 5 comments focused on that we had already said the
 6 exclusion was going to be removed, so it felt --
 7 it felt rather harsh to at the last second
 8 reinstate the exclusion. That's what I recall
 9 about Nancy Thompson.
 10 Q And what were your stated reasons in that meeting
 11 for not reinstating the exclusion?
 12 A I believe I offered support for Nancy's comments
 13 primarily, that we had already said we were going
 14 to cover this. And people were planning to get
 15 the coverage and perhaps making plans to have
 16 gender reassignment surgery or some of the other
 17 benefits that may come with the exclusion, and now
 18 we were going back on our word at the
 19 eleventh hour.
 20 Q Did any board members respond to those comments
 21 from you and Ms. Thompson?
 22 A I don't recall any direct response from those
 23 comments.
 24 Q Do you recall an indirect response to those
 25 comments?

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1 A I do not.
2 Q So we've established that Mr. Potter gave legal
3 advice during the closed session, but did he make
4 any statements during the closed session that were
5 not about the board's potential legal exposure?
6 A I'm not certain I can assign any comments to
7 Mr. Potter just because of the nature by which
8 I've participated in this, meaning via phone. I
9 don't know Mr. Potter's voice, and I don't know
10 that I'd be able to attribute any comments to him.
11 Q So do you recall him providing any policy reasons
12 that the board should or shouldn't reinstate the
13 exclusion?
14 A I do not recall any, no.
15 Q At any point in the closed session, did Mr. Potter
16 direct board members how they should vote on
17 reinstatement?
18 A Not that I recall, no.
19 Q Did any party direct the board on how they should
20 vote?
21 A Not that I recall.
22 Q Do you recall the discussion of the four
23 contingencies during that closed session?
24 A Yeah, I have some vague recollection of that
25 discussion, yes.

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1 Q During your time as part of GIB, had GIB ever used
2 contingencies like that before to decide about
3 changing a policy?
4 A Not to my recollection.
5 Q So, again, with the contingencies to the extent
6 that they were proposed or discussed pursuant to
7 legal advice, that's privileged, and I'm not
8 asking about that. But I am asking if any board
9 members proposed a contingency for a reason other
10 than legal advice provided by counsel.
11 A I'm sorry. I don't know if I can distinguish, you
12 know, the legal advice that was provided. You
13 know, from my perspective it was then translated
14 into the contingencies, right, in essence that the
15 members who were there, board members present,
16 determined, you know, after legal counsel that
17 these contingencies were necessary.
18 Q At some point GIB voted to reconvene in open
19 session; is that right?
20 A Yes.
21 Q And once GIB returned to open session, was there
22 any other discussion about exclusion or
23 reinstatement?
24 A Not that I recall. I believe we went straight
25 into the motion.

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1 Q So there wasn't any discussion in the open meeting
2 about cost, safety, or efficacy?
3 A Not outside the motion that was formerly presented
4 at that time. I don't believe so.
5 Q And you voted against reinstatement, correct?
6 A Correct.
7 Q And what were the reasons that you did that?
8 A You know, there were a few reasons. One was I
9 felt personally that that was discriminatory. It
10 just didn't -- it didn't seem right to me. It
11 felt like the right thing to do was to continue
12 coverage, and that's what I wanted to see. So
13 that was first and foremost in my vote.
14 I guess secondary was the idea that we had
15 already communicated that it would be in place,
16 and I felt it just wasn't appropriate to pull it,
17 you know, at the last minute and suddenly
18 reinstate the exclusion when people likely had
19 been making plans for that coverage starting
20 January 1. And I didn't -- I thought it would
21 leave people in jeopardy if they started treatment
22 at the start of 2017 and then were told all of a
23 sudden that they could not continue or that they
24 could continue, but it wouldn't be covered by
25 their insurance as of a certain date.

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1 So, yeah, those were primary in my
2 consideration I guess.
3 Q Did any other board members vote against
4 reinstatement?
5 A Yes.
6 Q And was that Nancy Thompson as well?
7 A Yes.
8 Q Did you discuss with her her reasons for voting
9 against it?
10 A I did not discuss with Nancy her reasons for
11 voting against it. You know, I alluded to one of
12 her comments earlier, and you know, I certainly
13 think that's why she voted against it, but I did
14 not discuss it with her.
15 Q At any point did you move to again withdraw the
16 exclusion?
17 A Yes.
18 Q And when was that?
19 A The May 2017 board meeting. That's the meeting at
20 which we typically consider the benefits for the
21 following calendar year. And at that meeting I
22 offered an amendment to a motion that would have
23 reinstated coverage.
24 Q And --
25 MR. ROTH: I'll just let you know

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1 I'm going to object to any further questions
 2 along this line. You all had the opportunity
 3 to depose Mr. Day on this exact topic during
 4 his first deposition. I believe a number of
 5 questions were asked on this topic at his
 6 first deposition. There was no instruction
 7 not to answer at the first deposition on this
 8 topic.
 9 It was not the subject of the motion to
 10 compel, and it was not the reason that
 11 Judge Conley ordered that Mr. Day's
 12 deposition be reopened.
 13 So for all those reasons, I think
 14 there's no basis to continue with the
 15 questions about what happened at the May
 16 meeting, Herschel's reasons for reintroducing
 17 his motion.
 18 MS. MADDEN: Well, I have very few
 19 questions on it. And the reason they weren't
 20 asked at his prior deposition was because we
 21 had an incomplete response to an
 22 interrogatory that didn't give all of the
 23 reasons the State was asserting for
 24 reinstatement. I think it's relevant to see
 25 if those reasons were discussed when this

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1 motion was made by Mr. Day.
 2 I also think that I will be pretty
 3 brief, and it's something we can just get on
 4 the record now because we really couldn't
 5 have asked that previously because it was a
 6 new rationale provided by the State after
 7 prompting.
 8 MR. ROTH: Well, I mean, it wasn't
 9 the basis of the motion to compel. It wasn't
 10 the basis for Judge Conley's order to reopen
 11 the deposition. You know, if you wanted to
 12 reopen the deposition on that basis, you
 13 could have moved on those grounds, but you
 14 did not.
 15 I mean, frankly, I understand what
 16 you're saying, but I just don't think there's
 17 any reason to continue until you have
 18 permission to ask these questions. We can
 19 look over Judge Conley's order. I mean, I
 20 have it in front of me right now.
 21 MS. MADDEN: Well --
 22 MR. ROTH: It says The defendant
 23 was further directed to produce Mr. Day for a
 24 continuation of his deposition on these
 25 topics. If you read the rest of the order --

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1 I mean, you can point out to me where I'm
 2 missing something, but I don't see anything
 3 in here that addresses the supplementary
 4 interrogatory or the May board meeting.
 5 MS. MADDEN: No, I don't think
 6 you're missing anything. It's, frankly, an
 7 efficiency point right now to see if we can
 8 get these questions answered right now
 9 because we have Mr. Day on the record.
 10 So if you're instructing him not to
 11 answer or saying we can't continue, then I
 12 guess that's where we are. But I have just a
 13 few questions on this topic that I thought we
 14 could try and address right now.
 15 MR. ROTH: Yeah, I think -- I mean,
 16 I understand your position, but we disagree.
 17 And I think, you know, if you want to
 18 essentially reopen all these depositions to
 19 ask about the supplementary interrogatory
 20 response, you know, we've got a meet and
 21 confer about that.
 22 If you disagree, I think that requires
 23 another motion to compel. It's not something
 24 that we're willing to waive an objection to
 25 right now. So I think -- I mean, that's our

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1 position. I'd say unless you have further
 2 questions about the closed session meeting,
 3 you know, I think it's the proper time to
 4 close the deposition.
 5 MS. MADDEN: Well, give me a minute
 6 to look over my notes and confer, and we'll
 7 see if we're done.
 8 MR. ROTH: Okay. Thank you.
 9 (Discussion off the record)
 10 Q Mr. Day, earlier we talked a little about the
 11 four contingencies that were set, and I believe
 12 you said that the board determined they needed the
 13 four contingencies before reinstating the
 14 exclusion. Outside of legal advice, does that
 15 mean the board members discussed the necessity for
 16 those contingencies?
 17 A I'm sorry. It's difficult for me to untether that
 18 from the legal advice that the board was given, so
 19 I don't know, you know, outside of the, you know,
 20 the legal basis that there was discussion that was
 21 in addition to that.
 22 Q So it wasn't a separate discussion among the board
 23 members?
 24 A Not that I recall. I don't recall a separate
 25 discussion amongst board members that was distinct

1 from, you know, the conversation with counsel.
2 MS. MADDEN: Okay. That is all
3 that I have.
4 MR. ROTH: Nothing from us.
5 MS. MADDEN: Okay. Thanks very
6 much, Mr. Day, for making this work.
7 (Adjourning at 1:48 p.m.)
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1 STATE OF WISCONSIN)
2 COUNTY OF DANE) ss.
3
4 I, Carmen Harder, RPR, a Notary Public in and
5 for the State of Wisconsin, do hereby certify that
6 the foregoing deposition of HERSCHEL E. DAY was taken
7 before me on June 11, 2018, and reduced to writing by
8 me, a professional court reporter and disinterested
9 person, approved by all parties in interest and
10 thereafter converted to typewriting using
11 computer-aided transcription.
12 I further certify that I am not related to nor
13 an employee of counsel or any of the parties to the
14 action, nor am I in any way financially interested in
15 the outcome of this case.
16 IN WITNESS WHEREOF, I have hereunto set my hand
17 and affixed my notarial seal of office at Madison,
18 Wisconsin, this 11th day of June 2018.
19
20
21 Notary Public, State of Wisconsin
22 My Commission Expires 9/25/2021
23
24
25

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