

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CENTRAL DISTRICT OF CALIFORNIA
FACET TECHNOLOGIES, LLC,)
)
Plaintiff,)
)
vs.) CASE NO.
) 2:22-cv-01717-MCS-M
LIFESCAN, INC.)
)
Defendant.)

REMOTE VIDEOTAPED DEPOSITION UPON ORAL
EXAMINATION OF JOEL DELMAN

FRIDAY, JULY 7, 2023
8:56 a.m.

(All participants appeared remotely)

REPORTED BY:
MONNA J. NICKESON, RPR, CRR, CCR, CSR CA 14430
JOB: J9868057



800.211.DEPO (3376)
EsquireSolutions.com

1 APPEARANCES:

2
3 FOR THE PLAINTIFF:

4 Giri Pathmanaban, Esq.
5 Ryan Banks, Esq.
6 Latham & Watkins
7 140 Scott Drive
8 Menlo Park, California 94025

9 FOR THE DEFENDANT:

10 Gerald Griffin, Esq.
11 Jodutt Basrawi, Esq.
12 Carter Ledyard & Milburn
13 28 Liberty Street, 41st Floor
14 New York, New York 10005

15 ALSO PRESENT:

16 Angela Lyons, Videographer
17
18
19
20
21
22
23
24
25

I N D E X

FACET VS. LIFESCAN
CASE NO. 2:22-cv-01717-MCS-M
JULY 7, 2023

WITNESS: JOEL DELMAN

PAGE

EXAMINATION BY MR. PATHMANABAN:

5

EXHIBITS

NUMBER

DESCRIPTION

PAGE

Exhibit 1	Opening Expert Report of Joel Delman Regarding Invalidity of U.S. Patent No. 88,840,635	10
Exhibit 3	WO 2007/089930 A2, Lathrop	55
Exhibit 2	List of Materials Considered, Appendix A- Delman Opening Expert Report	55
Exhibit 3A	Extracted pages from Exhibit 3 WO 2007/089930 A2	66
Exhibit 4	US Patent Application Publication No. US 2005/0131441 A1, Iio	96
Exhibit 5	US Patent No. US 8,920,454 B2, Hyoue	104
Exhibit 6	US Patent Application Publication No. US 2007/0162064 A1, Starnes	121
Exhibit 7	US Patent No US 8,647,356 B2, Kim	142
Exhibit 8	JPH05285127A, Morita	154
Exhibit 9	List of Materials Considered, Appendix A, Delman Opening Expert Report	171

1 BE IT REMEMBERED that on JULY 7, 2023, at
2 8:56 a.m., the remote videotaped deposition of
3 JOEL DELMAN was taken before Monna J. Nickeson,
4 Certified Realtime Reporter, Registered
5 Professional Reporter, Certified Livenote
6 Reporter, Certified Court Reporter (WA 3322),
7 Certified Shorthand Reporter (ID 1045), (OR
8 16-0441), (CA 14430), the following proceedings
9 took place:

10 * * * * *

11 THE VIDEOGRAPHER: Good morning. We are
12 now on the record. The time is 8:56 a.m.
13 Pacific on July 7th, 2023. This begins the
14 videoconference deposition of Joel Delman, taken
15 in the matter of Facet Technologies, LLC, versus 08:56
16 Lifescan, Incorporated, filed in the United
17 States District Court, Central District of
18 California, Western division, Case Number
19 2:22-cv-01717-MCS-M.

20 My name is Angela Lyons. I'm your remote 08:57
21 videographer today. The court reporter is
22 Monna Nickeson.

23 Will everyone present please identify
24 themselves and state who you represent, after
25 which the reporter will swear in the witness. 08:57

1 MR. PATHMANABAN: This is
2 Giri Pathmanaban with Latham & Watkins for
3 plaintiff Facet.

4 MR. GRIFFIN: Gerald Griffin, Carter
5 Ledyard & Milburn, for defendant Lifescan, Inc. 08:57

6 MR. BASRAWI: Jodutt Basrawi of Carter
7 Ledyard & Milburn also representing Lifescan,
8 Inc.

9 JOEL DELMAN
10 having been first duly sworn to tell the truth, the
11 whole truth, and nothing but the truth, testified as
12 follows:

13 EXAMINATION

14 BY MR. PATHMANABAN:

15 Q. Good morning. 08:58

16 A. Good morning.

17 Q. Please state your name for the record.

18 A. My name is Joel Delman. That's spelled
19 D-e-l-m-a-n.

20 Q. And where do you live, Mr. Delman? 08:58

21 A. Los Angeles, California.

22 Q. Mr. Delman, are you here today because
23 you have offered some opinions relating to the
24 validity of the '635 patent at issue in this case?

25 A. Yes, that's correct. 08:58

1 Q. And you have been deposed before,
2 correct?

3 A. I have.

4 Q. Approximately how many times?

5 A. Over the years, I think somewhere around
6 15 or 16 is offhand what I believe to be the number.

08:58

7 Q. Okay. So you know the rules of a
8 deposition, basic rules?

9 A. Yes.

10 Q. Okay.

08:59

11 A. In a general sense, yes.

12 Q. When were you first contacted about this
13 case?

14 A. I would need to check my records on that,
15 my emails for the first communications. Honestly, I
16 don't recall when I was first contacted about it.
17 Would you like me to check my emails? I don't know
18 if that's permissible even during the deposition, but
19 I could do so.

08:59

20 Q. Well, can you give me an approximate
21 month and year when you were first contacted about
22 this case without checking your emails?

08:59

23 A. It was earlier in this year, but I really
24 would not prefer to give a month without checking my
25 emails first.

08:59

1 Q. Okay. So it was earlier in 2023; is that
2 right?

3 A. To the best of my recollection, yes.

4 Q. And who contacted you specifically?

5 A. It was either Mr. Griffin or
6 Ehsun Forghany from Morgan, Lewis and Bockius. I
7 don't recall. Maybe it was both of them.

09:00

8 Q. And what did you understand your role to
9 be in this case, when you were contacted?

10 MR. GRIFFIN: Objection.

09:00

11 THE WITNESS: They were looking for an
12 expert witness in the field of industrial design
13 who would be able to assist with certain aspects
14 of the litigation.

15 BY MR. PATHMANABAN:

16 Q. Now, do you understand what this case is
17 about?

18 MR. GRIFFIN: Objection.

19 THE WITNESS: I believe so, yes.

20 BY MR. PATHMANABAN:

21 Q. What is your understanding of what this
22 case is about?

23 A. It is a patent infringement matter in
24 which one party is accusing the other of infringing
25 its intellectual property.

09:01

1 Q. Do you understand that Facet is alleging
2 that Lifescan is infringing the '635 patent?

3 A. Yes.

4 Q. And do you understand what the accused
5 product is in this case?

09:01

6 A. Yes.

7 Q. What do you believe is the accused
8 product?

9 A. The Delica Plus lancet.

10 Q. Now, you have not offered any opinions
11 about infringement or noninfringement, correct?

09:02

12 A. That's correct.

13 Q. And your opinions about -- strike that.
14 Your opinions in this case are all
15 strictly limited to validity, correct?

09:02

16 MR. GRIFFIN: Objection.

17 THE WITNESS: I believe that all of my
18 opinions are restricted to the issue of
19 validity, yes.

20 BY MR. PATHMANABAN:

21 Q. How many hours have you spent working on
22 this case?

23 A. That's another question for which I would
24 probably need to look at my records, timesheets for
25 an exact or fairly accurate answer. I could give you

09:03

1 a range.

2 Q. Sure. I will take a range.

3 A. Sure. Just to be sure I capture what is
4 an accurate answer I'm going to say, at the low end,
5 100 hours, and at the high end, about 150 hours,
6 somewhere in there. I realize that's a large range,
7 but I want to be sure that the real number falls
8 within.

09:03

9 Q. So you've spent between 100 and 150 hours
10 working on this case; is that right?

09:03

11 A. Yes.

12 MR. GRIFFIN: Objection.

13 THE WITNESS: I believe that's true, yes.

14 BY MR. PATHMANABAN:

15 Q. And what is your hourly rate for this
16 case?

09:03

17 A. My hourly rate is \$350 per hour.

18 Q. Sorry about that.

19 A. That's okay. No, I should make a note
20 before, in case it happens. Here in California,
21 during the summer especially, we get these little
22 fraction of a second blackouts from time to time on
23 days that get warmer, at least in certain
24 neighborhoods we do.

09:04

25 We had one earlier in the week. You

09:04

1 know, the light flickers for a second, but
2 unfortunately, the internet goes out and resets
3 itself for a -- you know, it takes a couple of
4 minutes usually.

5 So if that happens and I suddenly do drop 09:04
6 off, you'll know that was the reason and that I will
7 pop back on in a few minutes. Just in case.

8 Q. Sure. Noted. Thank you for letting us
9 know.

10 Let's go ahead and pull up what's been 09:04
11 marked as Exhibit 1, which is your expert report in
12 this case.

13 MR. PATHMANABAN: Angela, could you
14 please pull up that? Thank you.

15 (Exhibit 1 was identified.) 09:05

16 THE WITNESS: Now, I do have a paper
17 binder with paper copies of the report that I
18 would like to refer to. It's just easier and
19 quicker during our deposition.

20 BY MR. PATHMANABAN: 09:05

21 Q. That's fine.

22 Are they -- do you have any notes on this
23 paper copies?

24 A. No. They've just been tabbed to make it
25 easier to find certain things within the documents. 09:05

1 But, no, there are no notes.

2 Q. Okay. So I guess I should ask the
3 question -- withdrawn.

4 What do you have -- did you bring any
5 documents with you to this deposition? 09:06

6 A. Yes. I have copies of my report and its
7 exhibits. I have a binder with the various patents
8 cited in my report, and perhaps other patents. You
9 know, there's quite a few patents. And I also have a
10 binder which I believe contains most or all of 09:06
11 materials that I relied on in my report.

12 Q. Are these all clean copies?

13 A. Yes, they are.

14 Q. And aside from the Zoom platform that
15 we're using for this deposition, do you have anything 09:06
16 else open on your computer right now, any other
17 applications?

18 A. There's probably Chrome is open behind
19 the Zoom application because that's how I opened the
20 Zoom application. But other than that, no, I don't 09:07
21 believe anything else is running.

22 Q. And are you -- where are you physically
23 located right now?

24 A. I am in a room in my house, which is
25 isolated from the rest of the houses as best as can 09:07

1 be from our cats.

2 Q. Got it.

3 We have marked as Exhibit 1 the Opening
4 Expert Report of Joel Delman Regarding Invalidity of
5 U.S. Patent No. 8,840,635; do you see that?

09:07

6 A. I do.

7 Q. Is this the report that you submitted in
8 this case, Exhibit 1?

9 A. It certainly appears to be from what
10 you're showing me on screen.

09:07

11 Q. In preparing this report, did you talk to
12 any other experts in this case?

13 A. No. I only spoke with counsel in this
14 case when preparing the report.

15 Q. Did you talk to anyone from Lifescan to
16 prepare for your report?

09:08

17 A. I don't recall speaking with anyone at
18 Lifescan. If it's listed in my materials considered
19 then that would be a more accurate representation.
20 But to the best of my memory, I did not speak with
21 anyone from Lifescan in the preparation of this
22 report.

09:08

23 Q. Do you see in paragraph 2 of Exhibit 1,
24 you state:

25 I have been asked to provide my analysis

09:09

1 and opinions concerning U.S. Patent No. 8,840,635.

2 And then you state:

3 I have been asked to provide my analysis
4 and opinions concerning the validity of Claims 6, 8,
5 14, and 18 of the '635 patent.

09:09

6 Do you see that?

7 A. Yes, I do see what you're pointing to.

8 Q. Does this report, which is marked as
9 Exhibit 1, contain a complete, full, and accurate
10 statement of your opinions about why Claims 6, 8, 14,
11 and 18 of the '635 patent are invalid?

09:09

12 A. I believe that it does. As I note in my
13 report at some point, I do reserve the right to
14 respond to any, you know, supplemental, rebuttal
15 reports, et cetera, from Facet's expert, and, of
16 course, to present various demonstratives at trial.
17 But I believe that this report is a whole summation
18 of my opinions on the matter you have cited, yes.

09:10

19 Q. You have not submitted any other report
20 other than Exhibit 1 in this case, correct?

09:10

21 A. So, in this case, in the Central District
22 of California, no, I don't believe that there has
23 been any other report submitted. I don't recall
24 submitting any other report in this matter.

25 Q. Okay. So the complete basis for your

09:11

1 opinions about the validity of the asserted claims in
2 the '635 patent is included in this report, correct?

3 MR. GRIFFIN: Objection.

4 THE WITNESS: As I said, I have reserved
5 the right to respond to any particular 09:11
6 responses, rebuttals, et cetera, supplemental
7 reports from Facet to which I'm permitted to
8 respond. And to the extent any new facts or
9 issues are raised or come to light, that may
10 also open up the possibility of additional 09:11
11 consideration and opinions on those facts or
12 matters which are raised in the future. But as
13 the report was submitted, it summarizes my
14 opinion on this matter, yes.

15 BY MR. PATHMANABAN: 09:11

16 Q. You understand that you were required to
17 provide a report that provides your complete opinions
18 and the basis for those opinions that you intend to
19 offer at trial in this case, you understand that?

20 A. Yes, I do. 09:12

21 Q. So did you do that in this report marked
22 as Exhibit 1? Simple question, yes or no.

23 MR. GRIFFIN: Objection. Asked and
24 answered twice now.

25 THE WITNESS: As I said, this report 09:12

1 summarizes my opinions based on the facts as I
2 know them. But I have reserved the right in
3 this report to respond to any new facts which
4 may come to light in the future, any rebuttal
5 and supplemental reports from the other side 09:12
6 that I may be permitted to respond to. Whether
7 I am or not, I don't know. That's up to the
8 court schedule, et cetera. And that I also plan
9 to present certain demonstratives at trial.

10 But, yes, this is a complete report 09:12
11 summarizing my opinions.

12 BY MR. PATHMANABAN:

13 Q. Setting aside -- well, withdrawn.

14 Are you aware of any effort by Lifescan
15 to submit a supplemental report on your behalf in 09:13
16 this case?

17 A. Just so I understand your question,
18 Counsel, you mean a report after the report we're
19 talking about now?

20 Q. Correct. 09:13

21 A. I don't recall any -- hearing about that,
22 no.

23 Q. And setting aside demonstratives that you
24 may present at trial, so the only report that
25 contains the opinions that you intend to offer is 09:13

1 Exhibit 1, correct?

2 MR. GRIFFIN: Objection.

3 THE WITNESS: To the best of my knowledge
4 right now, the report that I have submitted and
5 which we are talking about as Exhibit 1 is the
6 report summarizing my opinions. 09:14

7 But I don't know what you're referring to
8 with respect to a supplemental report. It's
9 possible that the court is permitting me to
10 submit a supplemental report, and if so, I
11 reserve the right to do so, of course. 09:14

12 But as of now, this is my report. But
13 I'm not closing off the possibility should the
14 court permit for me to submit a reply or
15 supplemental report to this. 09:14

16 BY MR. PATHMANABAN:

17 Q. I thought we just talked about and you
18 said you're not aware of Lifescan even seeking the
19 court for permission to file or serve a supplemental
20 report, correct? 09:14

21 A. That is correct. I'm not aware that
22 Lifescan has made such an attempt or request. But
23 just because I'm not aware of it doesn't mean that
24 should the court grant that option, that I wouldn't
25 do so. 09:15

1 Q. You see in paragraph 39 of your report
2 you state:

3 In formulating my opinions, I have been
4 instructed to apply certain legal standards that
5 apply concerning patent invalidity.

09:15

6 Do you see that?

7 A. Yes, I do.

8 Q. Does your report contain all the legal
9 standards that you were asked to apply concerning
10 patent invalidity?

09:15

11 A. I don't know whether every standard that
12 was discussed with me by counsel has been summarized
13 in my report. It's possible that there are certain
14 things which -- certain legal guidance that I was
15 provided with that may not be summarized in the
16 report. I'm not sure.

09:16

17 I have provided a brief and kind of
18 high-level overview in my report of those principles
19 that were provided to me.

20 Q. So you understand -- just looking at
21 paragraph 40, you say:

09:16

22 I understand that issued patents are
23 presumed valid, but this presumption may be overcome
24 by clear and convincing evidence.

25 Do you see that?

09:16

1 A. Yes, I do.

2 Q. So you understand that Lifescan must
3 present clear and convincing evidence of invalidity,
4 you understand that?

5 A. That is the standard that I was told is 09:16
6 relevant to this matter, yes.

7 Q. And you've offered opinions based on
8 anticipation and obviousness, correct?

9 A. Yes, that's correct.

10 Q. And for anticipation, you understand that 09:17
11 the prior art reference must disclose -- well,
12 withdrawn.

13 Do you understand that for
14 anticipation -- sorry. Withdrawn.

15 For a prior art reference to anticipate 09:17
16 an asserted claim, do you understand that that single
17 prior art reference must disclose all elements of the
18 claim; do you understand that?

19 MR. GRIFFIN: Objection.

20 THE WITNESS: So as I state in 09:18
21 paragraph 54 of my report on page 30:

22 If all elements of the claim are
23 disclosed in that prior art reference, either
24 explicitly or inherently, that prior art
25 reference anticipates the claim. 09:18

1 BY MR. PATHMANABAN:

2 Q. Right.

3 And you also state in paragraph 54:

4 This requirement is not met if a single
5 limitation of the claim is missing from the prior art
6 reference.

09:18

7 Right?

8 A. Yes, correct.

9 Q. Okay. So you understand that if the
10 prior art reference does not disclose a single
11 limitation, then it does not anticipate?

09:18

12 MR. GRIFFIN: Objection.

13 THE WITNESS: Yes, I do understand that.

14 BY MR. PATHMANABAN:

15 Q. In paragraph 61, you discuss obviousness,
16 right?

09:19

17 A. Yes. I began a discussion of the legal
18 principles behind obviousness at paragraph 60, I
19 believe, yes.

20 Q. Right.

09:19

21 And on paragraph 61, you state:

22 I have been informed and understand that
23 the obviousness analysis requires a comparison of the
24 properly construed claim language to the prior art on
25 a limitation by limitation basis.

09:19

1 Do you understand that?

2 A. Yes. That's what is written in
3 paragraph 61.

4 Q. So the obviousness analysis has to
5 compare the claim language to the prior art on a
6 limitation by limitation basis, correct?

09:20

7 MR. GRIFFIN: Objection.

8 THE WITNESS: The properly construed
9 claim language to the prior art on a
10 limitation-by-limitation basis, yes.

09:20

11 BY MR. PATHMANABAN:

12 Q. So for an -- for a reference or a
13 combination of references to render the claim
14 obvious, you understand that single reference or
15 combination of references must disclose every
16 limitation of the claim?

09:20

17 MR. GRIFFIN: Objection.

18 THE WITNESS: I guess I would like to
19 kind of reference what I've written in
20 paragraph 60, that:

09:21

21 A patent can be rendered obvious if the
22 differences between the claim subject matter and
23 the prior art are such that the subject matter
24 as a whole would have been obvious at the time
25 the alleged invention was made to a person of

09:21

1 ordinary skill in the pertinent art.

2 And that then is followed by paragraph 61
3 which you read just before, that I've been
4 informed and understand that obviousness
5 analysis requires a comparison of the properly
6 construed claim language to the prior art on a
7 limitation-by-limitation basis.

09:21

8 So, I mean, I think that's a proper
9 high-level definition of what would render a
10 patent obvious and perhaps a bit broader than
11 what you presented to me in your question.

09:22

12 BY MR. PATHMANABAN:

13 Q. Okay. So -- withdrawn.

14 You understand that for a combination of
15 prior art references to render a claim obvious, it
16 should render obvious every limitation of that claim;
17 is that fair?

09:22

18 MR. GRIFFIN: Objection.

19 THE WITNESS: I just want to be sure I
20 understand your question. So as I write in
21 paragraph 61:

09:22

22 An obviousness analysis requires a
23 comparison of the construed -- properly
24 construed claim language to the prior art on a
25 limitation-by-limitation basis.

09:23

1 So I believe that's what you're saying in
2 your question. I'm not a lawyer, I'm not an
3 attorney, but I believe that that's equivalent
4 to what you're asking me. But I prefer to refer
5 to this as a limitation-by-limitation basis.

09:23

6 BY MR. PATHMANABAN:

7 Q. Mr. Delman, do you have the '635 patent
8 with you? Did you bring that as part of the
9 materials you brought with you to the deposition?

10 A. I do, yes.

09:23

11 Q. Okay. And if you look at Claim 6 of the
12 '635 patent --

13 A. Hold up a second, please. I need to turn
14 to it. Okay. You've asked me to take a look at
15 Claim 6?

09:24

16 Q. Yes.

17 A. Okay.

18 Q. And Claim 6 requires, among other things:

19 A gripping handle portion defines a
20 lateral span of at least 1.5 times the lancet
21 thickness.

09:24

22 Do you see that?

23 A. Yes, I do see that in Claim 6.

24 Q. And Claim 8 requires, among other things:

25 The gripping handle portion defines a

09:24

1 length at least equal to the lancet thickness.

2 Do you see that?

3 A. Yes, I do.

4 Q. And these limitations are also present in
5 asserted Claims 14 and 18, correct?

09:25

6 MR. GRIFFIN: Objection.

7 THE WITNESS: Yes, they are.

8 BY MR. PATHMANABAN:

9 Q. Can we refer to the limitations that we
10 just talked about as the dimensional limitations? Is
11 that okay with you?

09:25

12 A. That sounds like a fine shorthand to me,
13 yes.

14 Q. Now, throughout your report, you have
15 used what you said was visual inspection of drawings
16 from the prior art patents to support your opinions
17 that the prior art disclosed these dimensional
18 limitations, correct?

09:26

19 A. That has been part of my analysis. That
20 isn't the only part of my analysis. In each and
21 every instance, the visual inspection was supported
22 by reference to written description disclosure within
23 that prior art as well.

09:26

24 So I wasn't -- to be very clear, I was
25 not just looking at the figures. I was referencing

09:26

1 the figures in the context of the written description
2 disclosure within that prior art, and I believe that
3 my report generally goes to some detail about that
4 written support that was referenced in addition to
5 the visuals.

09:27

6 Q. I understand. Withdrawn.

7 But can you please answer my question?

8 Withdrawn.

9 MR. GRIFFIN: Objection.

10 BY MR. PATHMANABAN:

11 Q. Let me ask it again. Withdrawn.

12 Can we -- withdrawn.

13 Throughout your report, you have used
14 what you said was visual inspection of drawings from
15 the prior art patents to support your opinions that
16 those prior art patents disclosed dimensional
17 limitations, correct?

09:27

09:27

18 MR. GRIFFIN: Objection.

19 THE WITNESS: As I just said, Counsel,
20 that was one thing that I utilized in my
21 analysis, but that, to be very clear, I did not,
22 as it seems your question is suggesting, and
23 perhaps I'm reading more into it than I should
24 be, but it seems that your question is
25 suggesting that the only thing I did was analyze

09:28

09:28

1 the figures or look at the figures for purposes
2 of the dimensional limitation. And I'm making
3 clear in my answer that that is not what I did.

4 I did look at the figures, but in
5 conjunction with the various written description 09:28
6 support within these prior art references. And
7 in my report, I believe that I go to some effort
8 to detail that written description support which
9 was reviewed in conjunction with the patent
10 figures. 09:28

11 BY MR. PATHMANABAN:

12 Q. Sir, can you listen to my question very
13 carefully. I don't believe I ever inserted "only" in
14 that question at all. You seem to suggest that I was
15 suggesting that you only looked at the patent 09:29
16 figures. So listen to my question very carefully,
17 and I would appreciate a yes or no answer.

18 MR. GRIFFIN: Objection.

19 BY MR. PATHMANABAN:

20 Q. Withdrawn. 09:29

21 Throughout your report, you have used
22 what you called visual inspection from patent
23 drawings to support your opinions that these
24 dimensional limitations were met, correct?

25 MR. GRIFFIN: Objection. 09:29

1 THE WITNESS: Counsel, let me just say,
2 I'm trying to answer your question as best and
3 as honestly as I can. What I'm saying -- and I
4 realize that you're asking for a yes or no
5 answer.

09:29

6 I am telling you that I can't honestly
7 and completely answer that question in a yes or
8 no answer. And I stand by the response that I
9 just gave you, which I'm happy to repeat again
10 if you're asking the question again.

09:30

11 I did look at the visual -- the figures
12 of the patents, of the prior art, but I did so
13 in conjunction with the written description
14 support within those same prior art references.

15 So I did not just look at the patent
16 figures. That was part of my analysis. And I
17 believe that's the only way I can give you a
18 complete and honest answer to the question
19 you're posing.

09:30

20 BY MR. PATHMANABAN:

09:30

21 Q. So in paragraph 126 of your report, here
22 you're speaking about the Lathrop reference, right?

23 A. Hold on one sec while I turn to that,
24 Counsel. Yes, paragraph 126 is in a section
25 discussing the Lathrop reference, yes.

09:31

1 Q. In paragraph 126, you state:

2 Visual inspection of the gripping handle
3 portion's lateral span, open paren, open quote, S,
4 close quote, close paren, with the lancet's thickness
5 T shown in Lathrop's figure confirms to my knowledge
6 that the gripping handle portion defines a lateral
7 span of at least 1.5 times the lancet thickness.

09:31

8 Correct?

9 A. That is a correct read of paragraph 126,
10 but there is further discussion about dimensional
11 limitations in my report after that paragraph, and --
12 which -- which I believe needs to be taken in
13 context.

09:31

14 So that -- but that is correct, you've
15 read that paragraph 126 correctly, but it needs to be
16 taken in the context of the entirety of the report
17 and, more particularly, the entirety of the section
18 on Lathrop.

09:32

19 Because I'm referencing various sections
20 which I'm incorporating by reference, for example, in
21 paragraph 129 and in 128, referencing section XI.F.1
22 incorporated herein to provide for the, as I
23 discussed just previously, the written description
24 support, which was reviewed in conjunction with the
25 visual inspection.

09:32

09:32

1 So you have read me a correct read of
2 126, but it needs to be also read in the context of
3 the entirety of that section.

4 Q. Paragraph 125 is where you start the
5 discussion of element 6-D, which is one of the two
6 dimensional limitations we talked about, correct?

09:33

7 MR. GRIFFIN: Objection.

8 THE WITNESS: Well, I don't know that
9 that's where the discussion begins. It seems
10 that it may begin as early as paragraph 123
11 where I mentioned it as -- I mentioned that
12 dimensional limitation as well.

09:33

13 BY MR. PATHMANABAN:

14 Q. Well, paragraph 123 recites Claim 6 in
15 full, correct?

09:33

16 A. Yes.

17 Q. And that includes elements A, B, C, that
18 do not include the dimensional limitation, right?

19 A. That is correct. I was just -- you know,
20 you asked is 125 where I begin the discussion, and I
21 just mentioned it seems as if it may go back to 123,
22 but...

09:34

23 Q. Okay. And elements A, B, C, you start
24 discussion at paragraph 124, right? Well, withdrawn.

25 You discuss elements 6-A through 6-C in

09:34

1 paragraph 124, correct?

2 A. Yes, that seems to be correct.

3 Q. So paragraph 124 does not discuss the
4 dimensional limitation of Claim 6, right?

5 MR. GRIFFIN: Objection.

09:34

6 THE WITNESS: It does not appear to, no.

7 BY MR. PATHMANABAN:

8 Q. So the substantive discussion about why
9 Lathrop discloses element 6-D, which is one of the
10 dimensional limitations, starts in paragraph 125 of
11 your report, right?

09:35

12 A. I suppose that's a fair description.

13 Q. Okay. And the -- you have a figure here,
14 Figure 1-A of Lathrop, right?

15 A. Yes.

09:35

16 Q. And you have annotated it to add, among
17 other things, an S and a T, right?

18 A. Yes, that's correct.

19 Q. And then right below that starts
20 paragraph 126, and you say:

09:35

21 Visual inspection of the gripping handle
22 portion's lateral span S with the lancet's thickness
23 T shown in Lathrop's figure confirms to my knowledge
24 that the gripping handle portion defines a lateral
25 span of at least 1.5 times the lancet thickness.

09:36

1 Correct?

2 A. That is what paragraph 126 says, but I go
3 on to discuss this dimensional limitation in more
4 detail at paragraph 128 through Claim 8, which as you
5 noted earlier, contains the same limitation.

09:36

6 Q. Well, we'll come to that in a second.

7 But just to be clear, your discussion of
8 element 6-D for Lathrop is limited to paragraph 125
9 and 126. And then in paragraph 127 you conclude:

10 In my opinion, Lathrop renders Claim 6
11 obvious, correct?

09:36

12 MR. GRIFFIN: Objection.

13 THE WITNESS: Again, I believe that all
14 of this -- you have read correctly. But I
15 believe that all of this discussion must be read
16 in the context of section 3 below, which notes
17 from 128 that Claim 8 depends on Claim 6, and
18 that it contains similar dimensional -- the same
19 dimensional limitations. And it is in that
20 section which I reference further written
21 description support that supports the entirety
22 of my opinion on the dimensional limitations
23 with respect to Lathrop.

09:37

24 BY MR. PATHMANABAN:

25 Q. We'll come to that, Mr. Delman. I know

09:37

09:37

1 you want to discuss that, and trust me, I am going to
2 discuss that with you, the following paragraphs. But
3 stick with me for paragraphs 125 through 127, okay?

4 MR. GRIFFIN: Objection.

5 BY MR. PATHMANABAN:

09:38

6 Q. These are the only three paragraphs that
7 you have offered that substantively disclosed --
8 discuss why Lathrop discloses element 6-D before you
9 concluded that Claim 6 was rendered obvious by
10 Lathrop, correct?

09:38

11 MR. GRIFFIN: Objection.

12 THE WITNESS: I'm sorry, Counsel. I
13 really just need to restate that I believe that
14 my opinion on the dimensional elements of
15 Lathrop must be understood in the context of the
16 entirety of my discussion about those
17 dimensional elements, which includes
18 paragraphs 128 and ensuing paragraphs.

09:38

19 So, as I understand your question, no,
20 the entirety of this section on the dimensional
21 elements related to Lathrop is how I support my
22 opinions with respect to those dimensional
23 limitations.

09:39

24 BY MR. PATHMANABAN:

25 Q. So just to be clear, Mr. Delman, in your

09:39

1 discussion of element 6-D, in paragraphs 125 and 126,
2 the only thing you discuss from Lathrop is this
3 Figure 1-A and your visual inspection of that figure,
4 correct?

5 MR. GRIFFIN: Objection.

09:39

6 THE WITNESS: As I've said, I believe
7 that all of the discussion of dimensional
8 limitations with respect to Lathrop needs to be
9 read in the context and with reference to the
10 entirety of my discussion of that, which goes on
11 for several pages -- well, several is a big
12 word, a few pages after paragraph 127.

09:40

13 And I don't believe that, and nor was it
14 my intention, that paragraph 125 -- paragraphs
15 125 to 127 be understood without reference to
16 all of that discussion.

09:40

17 BY MR. PATHMANABAN:

18 Q. Sir, simple question.

19 Paragraph 125 and 126 -- I know you want
20 to discuss the later paragraphs, but my question is
21 limited to paragraphs 125 and 126, you understand
22 that?

09:40

23 MR. GRIFFIN: Objection.

24 THE WITNESS: I do understand what you're
25 asking, but I'm also stating that my response

09:40

1 requires reference to other paragraphs.

2 BY MR. PATHMANABAN:

3 Q. Okay. Let -- my question is limited to
4 paragraphs 125 and 126.

5 In these specific paragraphs, you have 09:41
6 not referred to anything other than Lathrop's figure
7 at -- for your opinion that Lathrop discloses
8 Claim 6, element D, correct?

9 MR. GRIFFIN: Objection.

10 BY MR. PATHMANABAN: 09:41

11 Q. And I'm limiting my question, Mr. Delman,
12 to paragraphs 125 and 126.

13 MR. GRIFFIN: Objection, again.

14 THE WITNESS: If you're asking me if
15 there are words in the paragraphs that you have 09:41
16 just read that refer to what I'm discussing,
17 that this all needs to be read in the context of
18 the entirety of my discussion of the dimensional
19 limitations regarding the Lathrop prior art
20 reference, then you're correct, I don't see a 09:42
21 specific reference to what I've just stated.

22 However, as I've just stated, and to be
23 very clear, my report must be read in its
24 entirety and in the context of the entire
25 discussion about Lathrop. 09:42

1 And that's -- you know, you say that I
2 want to talk about paragraphs 128 onward. Well,
3 if you'd like to talk about them, I'm happy to
4 talk about them. I'm not speaking about them
5 specifically.

09:42

6 I'm just saying that this section on
7 dimensional limitations regarding Lathrop is
8 read and intended to be read with reference to
9 the entirety of my discussion about those
10 dimensional limitations.

09:42

11 BY MR. PATHMANABAN:

12 Q. Now, you conclude in paragraph 127 that
13 Lathrop renders Claim 6 obvious, right?

14 A. That is a summary of that opinion, yes.

15 Q. And to be clear, this opinion, this
16 summary of the opinion, comes right after your
17 discussion of Lathrop's figure and before any
18 discussion of sections incorporated by reference,
19 correct?

09:43

20 MR. GRIFFIN: Objection.

09:43

21 THE WITNESS: I think that you've
22 accurately described the order of presentation,
23 yes.

24 BY MR. PATHMANABAN:

25 Q. Okay. And then you start your discussion

09:43

1 of Claim 8 after paragraph 127, correct?

2 A. Yes.

3 MR. GRIFFIN: Objection.

4 THE WITNESS: That is a correct
5 statement, yes.

09:43

6 BY MR. PATHMANABAN:

7 Q. And you state on paragraph 128:

8 Claim 8 depends from Claim 6 which
9 Lathrop anticipates for the reasons I discussed above
10 in section XI.F.1 incorporated herein.

09:44

11 Right?

12 A. That's correct. And that's why I was
13 referring to this paragraph as needing to be read
14 along with and as a whole with my discussion of the
15 dimensional limitations of Lathrop.

09:44

16 Q. And when you say section XI.F.1, that is
17 going to be the section where you discussed why
18 Lathrop, in your opinion, renders obvious Claim 6,
19 right?

20 MR. GRIFFIN: Objection.

09:45

21 THE WITNESS: That is the intent -- well,
22 I don't know that that's the only discussion,
23 no.

24 To respond to your question in a very
25 similar fashion, you know, there is further

09:45

1 discussion of the dimensional limitations in
2 Lathrop which continues on pages 52, 53 -- and
3 53.

4 So the entirety of this report that is
5 relevant to Lathrop must be read in the context 09:45
6 of the figure that you have referenced
7 previously.

8 This report is not a sentence by sentence
9 isolated -- you know, it's not as if one
10 sentence doesn't necessarily refer to another or 09:46
11 one paragraph doesn't refer to another. You
12 have to read anything, whether it's a book, a
13 novel, fiction, non-fiction, in the context of
14 the whole. You can't take one paragraph or one
15 sentence out of that context and expect that to 09:46
16 be an accurate summary.

17 BY MR. PATHMANABAN:

18 Q. In the instructions about the law that
19 you were given, were you instructed that patent
20 drawings do not define the precise proportions of the 09:46
21 elements and may not be relied upon to show
22 particular sizes if the specification is completely
23 silent on the issue? Were you instructed about that?

24 MR. GRIFFIN: Objection.

25 THE WITNESS: It's a long question with a 09:47

1 big read of the law there. I wonder if you can
2 please read that back to me and maybe even break
3 it up, but at least read it back to me slowly so
4 that I can really hear what you're asking,
5 Counsel.

09:47

6 MR. GRIFFIN: Can you tell us what you're
7 reading from?

8 MR. PATHMANABAN: I'm allowed to ask
9 questions and you can object, but I'll proceed.

10 MR. GRIFFIN: I just wanted to see if you
11 could tell us what you're actually reading from.

09:47

12 THE WITNESS: It would be helpful if
13 you --

14 BY MR. PATHMANABAN:

15 Q. I'm reading from my outline.

09:47

16 A. -- could put that on the screen. It's
17 quite a mouthful from a lawyer especially.

18 Q. Let me ask you, Mr. Delman, do you
19 understand that patent drawings are not supposed to
20 define the precise proportions of the elements shown
21 therein and may not be relied upon to show particular
22 sizes if the specification is completely silent on
23 the issue? Do you understand that?

09:47

24 MR. GRIFFIN: Objection.

25 THE WITNESS: The understanding that I

09:48

1 have may be similar -- it may even be identical
2 to what you've just said, Counsel, but perhaps
3 I'll word it or phrase it in the way that I have
4 been informed by counsel.

5 That the figures in a patent may be 09:48
6 relied upon for disclosure of certain
7 proportions shown in those figures if written
8 description disclosure within that patent
9 supports that understanding.

10 And I'm not saying that as a lawyer. I'm 09:48
11 not a lawyer. But in a general sense, that's my
12 understanding. You can -- you can utilize the
13 figures in a patent drawing for disclosures of
14 proportions, not absolute dimensions, but
15 proportions, if those figures are supported by 09:49
16 written description within the patent.

17 It may be what you've asked me, but
18 that's the way I would summarize what I've been
19 informed by counsel.

20 BY MR. PATHMANABAN: 09:49

21 Q. And where in your report have you cited
22 any written description from Lathrop supporting --

23 MR. GRIFFIN: Objection.

24 BY MR. PATHMANABAN:

25 Q. -- the proportions of its figures? 09:49

1 MR. GRIFFIN: Objection.

2 THE WITNESS: Well, I refer back to
3 section XI.F.1, which I believe is an accurate
4 reference, unless it's a typo. I would need to
5 look. And I incorporate that by reference -- 09:50
6 within this section as support. So that would
7 be in paragraph 129. And I'm continuing to read
8 to see if there's other references.

9 I also refer to in paragraph 30 and
10 incorporated by reference section XI.F.1 A to E, 09:50
11 and note that while these refer to Claim 14,
12 that Claim 14's limitations are analogous in
13 scope to those found in section VIII and are
14 disclosed by Lathrop for reasons I provide above
15 and incorporated here referencing XI.F.1 F. So 09:51
16 that's paragraph 130.

17 BY MR. PATHMANABAN:

18 Q. Mr. Delman?

19 A. Yes.

20 Q. I'm not -- withdrawn. 09:51

21 My question specifically is, show me in
22 your report --

23 MR. GRIFFIN: Sorry, if I can interrupt
24 for one second. Were you finished, Joel?

25 THE WITNESS: No, I was not. I was 09:51

1 continuing to review page 52 and 53 because I
2 believe his question was where have I referred
3 to written description support --

4 MR. GRIFFIN: So I just ask if you could
5 let him finish his answer before you ask another
6 question.

09:51

7 BY MR. PATHMANABAN:

8 Q. Are you done with the answer, Mr. Delman?

9 A. No, I was going to continue. I believe
10 that I just referred to paragraph 130, or maybe I had
11 mentioned 131, which incorporates by reference the
12 support from section XI.F.3.

09:51

13 And then I discuss at paragraph 132 that
14 even if these dimensions were not disclosed or
15 inherent in Lathrop, all of the relative dimensional
16 limitations would have been obvious for a POSITA to
17 apply to Lathrop because Lathrop explicitly
18 recognizes that it was not uncommon for lancet users
19 to suffer from reduced visual acuity and/or impaired
20 manual dexterity, and protecting against inadvertent
21 sticks was needed. And I cite to the Lathrop
22 reference there. So that is further support referred
23 to, which I believe is what you're asking about.

09:52

09:52

24 I continue into paragraph 133, again
25 referencing Lathrop's instruction, when I state that

09:53

1 it would have been -- designing a gripping handle
2 with a lateral span, and I'll just summarize for
3 shorthand, meeting the dimensional limitation, would
4 have been pursued by a POSITA as a matter of routine
5 optimization and with a reasonable expectation of 09:53
6 success in view of Lathrop's instruction that one or
7 more gripping features, quote-unquote, be included in
8 order to help, quote, "facilitate," end quote,
9 removal of the endcap.

10 A POSITA would have utilized dimensions 09:53
11 that would allow a user to easily handle the cap and
12 provide for a more, quote, "ergonomic and
13 user-friendly operation," end quote. A POSITA would
14 have thus routinely designed an endcap that would
15 have been at least 1.5 times the thickness -- 09:54

16 (The Court Reporter requested
17 clarification.)

18 THE WITNESS: I apologize. I sometimes
19 read quickly, and I was trying to slow it down,
20 but I'll do so even more. 09:54

21 And then I go on in paragraph 134, for
22 further written description support, regarding
23 the gripping handle's length being at least
24 equal to the lancet thickness, as recited in
25 Claims 8 and 18, that this would be a natural 09:54

1 choice for a POSITA who would have appreciated
2 that users who have difficulty handling lancets
3 would have a more, quote, "ergonomic and
4 user-friendly," end quote, way to, quote,
5 "facilitate," end quote, removal of the endcap 09:54
6 if the gripping handle had a length at least
7 equal to or larger than the lancet thickness.

8 So I believe that responds to your
9 question as to what written description support
10 I have referred to for Claims 6, 8, 14, and 18. 09:54
11 There's quite a bit there, some of it
12 incorporated by reference, and some of it
13 spelled out in detail.

14 BY MR. PATHMANABAN:

15 Q. Mr. Delman, my question is, show me a 09:55
16 paragraph in this report where you have cited to
17 Lathrop's specification to support your using Figure
18 1-A to derive proportions from the figure. I'm not
19 interested, Mr. Delman, in --

20 MR. GRIFFIN: Objection. 09:55

21 BY MR. PATHMANABAN:

22 Q. -- your view about citing to what Lathrop
23 disclosed about users suffering from reduced visual
24 acuity or whatnot.

25 I'm interested in, have you cited to a 09:55

1 single passage from Lathrop that supports you
2 deriving proportions from Figure 1-A of Lathrop?

3 MR. GRIFFIN: Objection.

4 BY MR. PATHMANABAN:

5 Q. Show me where in your report. 09:56

6 A. Counsel, what I just read to you, and I'm
7 happy to read it again, if you'd like, what I've just
8 read to you is what I have cited in reference of
9 support for those dimensional -- for my read of those
10 dimensional limitations in conjunction with the 09:56
11 Lathrop patent Figure 1-A.

12 Q. Okay. Just to be clear, paragraph 132 is
13 discussing -- what you state here is Lathrop
14 discloses the dimensional limitations -- withdrawn.

15 In paragraph 132 you start saying: 09:56

16 As I note above, Lathrop discloses the
17 dimensional limitations of the asserted claims.

18 Do you see that?

19 A. I do see that, yes.

20 Q. And then you say: 09:57

21 Even if these limitations were not
22 disclosed or inherent in Lathrop, all of the relative
23 dimensional limitations would have been obvious for a
24 POSITA to apply to Lathrop.

25 And then you go on to quote Lathrop from 09:57

1 paragraph 4 and 9 of Lathrop, right?

2 A. I quote Lathrop from a few -- in the
3 ensuing paragraphs on the ensuing -- yes.

4 Q. So paragraph 4 and 9 do not say anything
5 about Lathrop's figures being to scale or otherwise
6 supporting your deriving proportions from the
7 figures, correct?

8 MR. GRIFFIN: Objection.

9 THE WITNESS: No. I don't -- to be fair,
10 you've asked, does it discuss any of Lathrop's
11 figures being to scale. It's my understanding
12 that patent figures are, according to the MPEP,
13 which I believe stands for the Manual of Patent
14 Examining Procedures, I believe that actually
15 guides patent -- people who write patents, I
16 don't know what you call them, attorneys, patent
17 agents, whatever, not to state that they are to
18 scale, but that might be neither here nor there.

19 But in any case, so it doesn't refer to
20 scale, but I believe it provides the support
21 which I have said it does. So I don't agree
22 that it doesn't provide that support, no.

23 BY MR. PATHMANABAN:

24 Q. You have not cited to any place in
25 Lathrop where it says its figures are to scale,

1 correct?

2 A. I don't believe I have cited to a place
3 where the -- that it states the figures are to scale,
4 no.

5 Q. You have not cited to any disclosure in 09:58
6 Lathrop that provides any actual dimensions of the
7 Lathrop device, correct?

8 A. I would need to refer back to
9 section XI.F.1 to see if that is correct or not. I
10 know that some of the references that I have cited in 09:59
11 my report do have certain dimensional disclosures in
12 their specification.

13 I would need to look back to see if the
14 reference -- if the sections I've incorporated by
15 reference do that or not. If you'd like to give me a 09:59
16 moment, I can do that.

17 Q. Please do.

18 A. So I don't -- if you could repeat your
19 question again regarding -- if you can just repeat
20 the question so I'm sure I'm answering your question 10:01
21 precisely.

22 Q. You have not the cited to any disclosure
23 in Lathrop that provides any actual dimensions for
24 any elements of the Lathrop device, correct?

25 A. It -- I have not cited to a disclosure 10:01

1 within Lathrop that provides actual dimensions, that
2 is correct. I have cited to disclosures which
3 support the proportions that I have opined upon, but
4 those disclosures do not include any dimensions.

5 Q. And when you say you have cited 10:01
6 disclosures that support the proportions, you're
7 talking about your citations in paragraph 132 to
8 Lathrop's paragraph 4 and 9; is that right?

9 MR. GRIFFIN: Objection.

10 THE WITNESS: No. I'm including all 10:02
11 citations and references that have been
12 mentioned and which I believe I've just read to
13 you previously, starting from paragraph 128
14 through paragraphs 134.

15 So the entirety of that section includes 10:02
16 a number of references, some of which are
17 incorporated by reference and others which I
18 have cited more specifically in quotations.

19 BY MR. PATHMANABAN:

20 Q. Okay. So tell me what paragraphs -- 10:02
21 withdrawn.

22 So you just told me that you're including
23 all citations and references that you have included
24 in your report from paragraph 128 through 134, right?

25 MR. GRIFFIN: Objection. 10:03

1 BY MR. PATHMANABAN:

2 Q. Tell me which paragraphs from Lathrop you
3 have cited in paragraphs 128 through 134, other than
4 Lathrop's paragraph 4 and 9.

5 MR. GRIFFIN: Objection. 10:03

6 THE WITNESS: I have read to you the
7 citations that I have cited from Lathrop. And
8 as I've said, that I have also incorporated by
9 reference section XI.F, XI.F.1 more
10 particularly, and XI.F.3 -- well, actually, 10:03
11 XI.F.2 as well.

12 So XI.F as a whole seems to have been
13 incorporated by reference in this section on
14 Lathrop. XI.F, mind you, does not bring in
15 citations from Lathrop. 10:03

16 So the other things that I've read to you
17 are the citations from Lathrop. But I have
18 found the same support in my analysis that I've
19 incorporated from XI.F.

20 BY MR. PATHMANABAN: 10:04

21 Q. Now, in paragraph 133 you state that a
22 POSITA would have pursued routine optimization to
23 facilitate removal of an endcap, right?

24 A. Well, what I state that designing a
25 gripping handle meeting the dimensional limitations 10:04

1 would have been pursued by a POSITA as a matter of
2 routine optimization and with a reasonable
3 expectation of success.

4 Q. In your report, have you cited to any
5 prior art patent or publication or any other 10:04
6 authority that recognized the importance of the
7 relationship between the span of a gripping handle to
8 the thickness of the lancet in order to help
9 facilitate removal of the endcap?

10 MR. GRIFFIN: Objection. 10:05

11 THE WITNESS: I believe my report
12 discusses throughout on -- in many, many
13 instances why the relationship -- why having a
14 wide span in an endcap would be most
15 advantageous and would indeed support an endcap 10:05
16 at least as large as a proportional relationship
17 of 1.5 to the thickness of the lancet. I think
18 my report throughout discusses that in many ways
19 and through many references.

20 BY MR. PATHMANABAN: 10:06

21 Q. So, Mr. Delman, I understand that's your
22 opinion. I'm not questioning that's your opinion,
23 okay?

24 My question is, have you found another
25 prior art reference that you cite in your report 10:06

1 which recognized the importance of the relationship
2 between a gripping handle and -- sorry.

3 Have you found another prior art
4 reference that recognized the importance of the
5 relationship between the span of a gripping handle to 10:06
6 the lancet thickness? Is there any other reference
7 that references that relationship?

8 MR. GRIFFIN: Objection.

9 BY MR. PATHMANABAN:

10 Q. And if so, show me where it is. 10:06

11 MR. GRIFFIN: Objection.

12 THE WITNESS: So I will first say that I
13 think I have referenced many references
14 throughout my report which do just that. But if
15 you'd like me to show you one example, I will 10:07
16 review my report and find an example that I feel
17 might be most illustrative of what you're
18 asking.

19 BY MR. PATHMANABAN:

20 Q. Go ahead. 10:07

21 A. So, again, this is just one -- I'm
22 flipping through my report, which is 208 pages, I
23 believe, without exhibits, maybe longer, and cites at
24 least a dozen or more references.

25 But -- so you've asked me for one 10:09

1 example. And I am looking at page 71, paragraph 162.
2 And this is within the discussion of the Saikley
3 reference, S-a-i-k-l-e-y, for the purposes of the
4 court reporter.

5 So in paragraph 162, I state that: 10:09

6 Saikley teaches that the protective cap
7 that is removed before use should be made both a much
8 larger than usual to aid handling, end quote.

9 And I go on to note:

10 To compare the Saikley patent, the 10:09
11 expanded dimensions of the endcap allow for easier
12 use by persons with limited dexterity and vision.
13 The larger surface area provided by the protective
14 sterility cap as compared to previously known designs
15 makes it easier to locate, especially for users with 10:10
16 reduced visual acuity, and renders it easier to pick
17 up off of a flat surface or out of a container, which
18 is particularly advantageous for users with reduced
19 manual dexterity.

20 So it goes on in paragraph 163: 10:10

21 By ending the, quote, "much larger
22 handling tab," end quote, between the primary sheet
23 and secondary sheet Saikley's protective cap provides
24 the user with a large protective cap for handling,
25 end quote. 10:10

1 So this is but one of many, and I
2 could -- I mean, Saikley is full of discussion like
3 this. I could read page after page, if you'd like,
4 discussing the importance and support for having a
5 cap with a large span to assist users with reduced 10:10
6 visual and manual -- visual acuity and manual
7 dexterity in performing the functions they need to
8 perform with these caps.

9 Q. Mr. Delman, are you aware that the court
10 has struck Lifescan's reliance on the Saikley 10:11
11 reference, among other references? Are you aware of
12 that?

13 A. Yes, I have been made aware that certain
14 references were, I guess the word that I would use is
15 the word "excluded," yes. But you've asked me to 10:11
16 read from my report, and I'm reading from my report.

17 Q. Sure. I'm not arguing with you,
18 Mr. Delman. My only question was, are you aware that
19 the court has struck -- I think you answered.
20 Withdrawn. 10:11

21 So you are aware --

22 A. I should specify that I am not aware of
23 each -- I mean, of each and every one offhand by
24 memory, which has been excluded and which has not.
25 If you say that Saikley is among those that's been 10:12

1 excluded, I have no reason to doubt you on that. But
2 offhand, I don't recall that Saikley was among them
3 or wasn't among them.

4 Q. And just to be clear, this reference from
5 paragraph 162 that you read from Saikley is talking 10:12
6 about a much larger handle without reference to the
7 lancet thickness, correct?

8 A. In that paragraph, it doesn't
9 specifically refer to the lancet thickness, no. But
10 that teaching, along with the many other teachings 10:12
11 that I go into with respect to Saikley and the other
12 references, would teach a POSITA that we are talking
13 about a large and wide handle being optimized for use
14 by those with limited dexterity and visual acuity,
15 and that the larger it gets in order to provide that 10:13
16 benefit in structure, the larger the proportion would
17 be relative to the lancet thickness.

18 It doesn't provide any teachings on why
19 one would wish -- why a POSITA would wish to increase
20 the lancet thickness. It only provides teachings 10:13
21 throughout all of my references that a POSITA would
22 want to increase the span of the lancet cap or the
23 handle.

24 So a POSITA would understand that the
25 proportions would be in relation to anything that is 10:13

1 remaining fixed. If you're growing, that it does
2 indeed read upon the issue of a proportion between
3 the span of the handle and the thickness of something
4 which is not increasing.

5 Q. Are you planning on relying on Saikley's 10:14
6 disclosure of a much larger handle and aiding visual
7 acuity, among other things, to support your opinions
8 at trial?

9 A. I would need to be guided by counsel as
10 to whether we're permitted to discuss Saikley at 10:14
11 trial, given this exclusion that you've just
12 referenced. I'm not an attorney.

13 While that exclusion may prevent -- may
14 have otherwise prevented such reliance, and again,
15 I'm not an attorney, so I'm not sure, our discussion 10:14
16 of it here during our deposition may, in fact, make
17 it permissible to discuss.

18 So I don't know. I'm not an attorney and
19 I don't know the Rules of Evidence, so -- if that's
20 the proper term for it. I would need to discuss with 10:14
21 counsel whether that's something we are or are not
22 permitted to discuss in court.

23 Q. So you believe simply because you raised
24 Saikley in this deposition, that may make it okay for
25 you to discuss at trial? 10:15

1 MR. GRIFFIN: Objection.

2 THE WITNESS: I said that I'm not an
3 attorney and I don't know the Rules of Evidence,
4 if, in fact, the Rules of Evidence is the proper
5 description for what allows something into a
6 trial to be presented, et cetera.

10:15

7 What I said is, I would need to discuss
8 with counsel, and counsel would inform me of
9 whether or not it is, after the exclusion of
10 Saikley as you have informed me, but after,
11 again, our discussion of it here in our
12 deposition today, whether or not we're allowed
13 to discuss it at trial. I don't know. I'm not
14 a lawyer. But I can tell you that if counsel
15 says we're not allowed to discuss it, I won't
16 discuss it.

10:15

10:15

17 MR. PATHMANABAN: Let's go off the
18 record.

19 MR. GRIFFIN: Okay.

20 THE VIDEOGRAPHER: Going off video record
21 at 10:16 Pacific time.

10:16

22 (A recess was taken.)

23 THE VIDEOGRAPHER: We are back on video
24 record at 10:28 a.m. Pacific time. I'll pull
25 that document up right now.

10:28

1 (Exhibit 3 was identified.)

2 BY MR. PATHMANABAN:

3 Q. All right. Welcome back, Mr. Delman.

4 A. Thank you.

5 Q. I've marked as Exhibit 3 -- by the way
6 let's quickly go to Exhibit 2.

10:29

7 (Exhibit 2 was identified.)

8 BY MR. PATHMANABAN:

9 Q. Exhibit 2 is your list of materials, does
10 that look right?

10:29

11 A. It does, yes.

12 Q. All right. We'll come back to this one.
13 Let's go to Exhibit 3. And Exhibit 3 is
14 the Lathrop reference, correct?

15 A. I believe so. And I'm just going to --
16 so what -- let's see. Looking for my paper reference
17 of that. Yes. Okay. I've got that.

10:29

18 Q. Okay. We can go to Figure 2-A. I'm
19 trying to move this thing. Actually, let's go to
20 your expert report for a second.

10:30

21 A. Okay.

22 Q. And you see in paragraph 104, you say:
23 Lathrop discloses a primary sheath, or
24 one or more guidance fingers 122 that are preferably
25 provided adjacent the interior free ends of the

10:30

1 U-shaped endcap member.

2 Do you see that?

3 A. I do see that, yes.

4 Q. So your opinion is that Lathrop's
5 guidance fingers are the primary sheath claimed in
6 Claim 1-A? 10:30

7 MR. GRIFFIN: Objection.

8 THE WITNESS: Well, this response is
9 going to be very similar to one I gave you
10 earlier, which is, you have correctly read the 10:31
11 sentence or two from that particular paragraph,
12 but the entirety of my support for Lathrop
13 having a primary sheath for initial embedment of
14 a large lancing tip of an unused lancet therein,
15 Claim 1-A, spans from -- spans from paragraphs 10:31
16 104, which is what you read from, through
17 paragraph 109.

18 So the entirety of that section of my
19 report is what I believe supports Lathrop
20 meeting that limitation. 10:32

21 BY MR. PATHMANABAN:

22 Q. Show me what else you have pointed to --
23 with reference to Figure 2-A, show me in your report
24 what have you pointed to as the primary sheath in
25 Lathrop? 10:32

1 A. Well, I will begin by reading what you
2 read:

3 Lathrop discloses a primary sheath, or
4 one or more guidance fingers that are preferably
5 provided adjacent the interior free ends of the 10:32
6 U-shaped endcap member and which are releasably
7 engaged within corresponding guidance channels of the
8 lancet body, to axially guide the endcap and prevent
9 damage of the lancet tip during endcap removal.

10 These guidance fingers are similar to the spacer ribs 10:32
11 or breakaway connections 518 which indicate an unused
12 lancet in the '635 patent.

13 I then go on in paragraph 105 to state
14 that:

15 Lathrop further provides that the endcap 10:33
16 is typically removed prior to the lancing procedure
17 and the endcap 16 is preferably removed from the body
18 portion to expose the sharp tip element for use.

19 It goes on to say that -- in 106, it goes
20 on to say that: 10:33

21 Although Lathrop does not use the term
22 "embedded," it teaches that the user is to remove
23 endcap 16 by twisting the endcap and severing the
24 connection between the endcap and an integrally
25 molded body portion to break the seal between the 10:33

1 endcap and tip element which allows for easier endcap
2 removal.

3 And in 107 I refer to the provisional to
4 Lathrop, which Lathrop refers back to:

5 Provides for a conventional insert molded
6 lancet with molded in sterility cap.

10:33

7 So I then conclude in 108:

8 A POSITA would have known that an
9 integrally molded cap must be twisted in order to
10 avoid potentially bending or damaging the lancet.
11 Where the seal has not been broken, the needle has
12 not yet been used for sampling or testing and,
13 therefore, remains sterile.

10:34

14 109:

15 In my opinion, Lathrop therefore
16 discloses that the sterility cap comprises a
17 primary --

10:34

18 (The Court Reporter requested
19 clarification.)

20 THE WITNESS: I'm sorry, from what word
21 would you like me to start at?

10:34

22 (THEREUPON, the requested portion of the
23 record was read by the Court Reporter.)

24 THE WITNESS: That the sterility cap
25 comprises a primary sheath for embedment of a

10:34

1 sharp lancing tip of an unused lancet therein.

2 So as I've said to you before, all of
3 these paragraphs in their entirety and in their
4 contextual whole describe why Lathrop has --
5 meets the limitation of 1-A.

10:35

6 BY MR. PATHMANABAN:

7 Q. So in paragraph 104 of your report, when
8 you said:

9 Lathrop discloses a primary sheath,
10 comma, or one or more, quote, "guidance fingers 122
11 that are preferably provided adjacent the interior
12 free ends of the U-shape endcap member," close quote,
13 which, quote, "are releasably engaged within
14 corresponding guidance channels 120 of the lancet
15 body, to axially guide the endcap and prevent damage
16 of the lancet tip 114 during endcap removal," close
17 quote, Lathrop, paragraph 30.

10:35

10:35

18 Are you now saying the guidance fingers
19 are not specifically what you're calling the primary
20 sheath?

10:35

21 MR. GRIFFIN: Objection.

22 THE WITNESS: I'm stating that all of the
23 paragraphs in their entirety that I've just read
24 to you through paragraph 109 support why Lathrop
25 discloses a sterility cap comprising a primary

10:36

1 sheath for initial embedment of a sharp lancing
2 tip of an unused lancet therein.

3 BY MR. PATHMANABAN:

4 Q. Sir, in the paragraphs that you just
5 read, you referenced the guidance fingers 122,
6 correct? That's in there, right?

10:36

7 A. That is referenced, yes.

8 Q. And then guidance channels 120, right?

9 A. Yes.

10 Q. Lancet tip 114?

10:36

11 A. Yes.

12 Q. Spacer ribs or breakaway connections 518?

13 A. Yes.

14 Q. Endcap 16?

15 A. Yes.

10:37

16 Q. Body portion 12?

17 A. Yes.

18 Q. Sharp tip element 14?

19 A. Yes.

20 Q. So is it your testimony that all of these
21 elements make up what's the primary sheath?

10:37

22 MR. GRIFFIN: Objection.

23 BY MR. PATHMANABAN:

24 Q. Including, for example, the needle tip?

25 MR. GRIFFIN: Objection.

10:37

1 BY MR. PATHMANABAN:

2 Q. Or the sharp tip element or the endcap
3 116? Is the whole endcap 116 the primary sheath, is
4 that your testimony?

5 MR. GRIFFIN: Objection. 10:37

6 THE WITNESS: No, that is not my
7 testimony.

8 BY MR. PATHMANABAN:

9 Q. So I'm --

10 A. My testimony -- I'm sorry, I'd like to 10:37
11 finish my answer.

12 My testimony is that all of these
13 paragraphs disclose the teachings which would lead a
14 POSITA to understand that Lathrop discloses the
15 limitations of Claim 1-A. That's what I've just 10:37
16 stated.

17 Q. Looking at Figure 2-A of Lathrop, where
18 does the sharp tip sit?

19 A. I would need to review Lathrop beyond
20 that single figure. So let me take a moment to look 10:38
21 through Lathrop.

22 So I think the best way for me to respond
23 to your question, Counsel, would be to draw on the
24 screen so there's absolutely no possibility for
25 misunderstanding. Am I able to access a pencil or 10:39

1 some means of illus- -- of annotating this figure?

2 Q. Yes.

3 MR. PATHMANABAN: Angela, could you
4 please give Mr. Delman control and give him
5 access to the annotation tools, or maybe he can
6 do that on his own? 10:39

7 THE VIDEOGRAPHER: You can either use the
8 Zoom controls to annotate. There's an annotate
9 button on the bars for Zoom, or you can use the
10 PDF program to draw in the document. 10:39

11 THE WITNESS: I'd rather do it within
12 Zoom, if we can, because that way we're on video
13 and all that. So where do I find that annotate
14 within the Zoom program? I'm full screen in
15 Zoom here, so I don't have a menu at the top.
16 Oh, wait, it does pop down. So where is the
17 annotate menu?

18 THE VIDEOGRAPHER: It should just be a
19 button on that control. Do you guys want to go
20 off the record for this? Or do you want to stay
21 on the record? 10:40

22 THE WITNESS: Hopefully, it won't take
23 more than a second to find the button.

24 BY MR. PATHMANABAN:

25 Q. There should be an annotate button at the 10:40

1 bottom of your screen, the same place where you see,
2 for example, share screen.

3 A. Right. I see share screen, participants
4 chat, raise hand, apps, and whiteboard. I don't see
5 an annotate button. You're right, I have noticed it 10:40
6 before on some other Zoom meetings, but I'm not
7 seeing it here.

8 THE VIDEOGRAPHER: I believe you can also
9 use the --

10 THE WITNESS: Oh, perfect. If I can 10:40
11 click that, then I'm in business.

12 THE VIDEOGRAPHER: You have control of
13 the screen right now.

14 THE WITNESS: Okay. So I'm clicking
15 pencil. Draw free form. Okay. I'm not sure 10:41
16 what color this is going to be. I'm hoping it's
17 something that is bright enough to show up.

18 So if we had x-ray vision, Counsel,
19 the -- the needle would be found -- I just want
20 to be sure I'm drawing it in the right place in 10:41
21 the right way. The -- it doesn't seem to want
22 to draw. Okay. Here we go. No. Okay.

23 Not my best line that I've ever drawn.
24 And I will state for clarity, that needle is not
25 to scale, not to necessarily proper length. 10:41

1 But in terms of location, the needle
2 would be found there within the plastic of the
3 cap if you could see through it or hold it up to
4 a light, et cetera.

5 BY MR. PATHMANABAN:

10:42

6 Q. Okay.

7 THE VIDEOGRAPHER: Would you like control
8 of the document back, Giri?

9 MR. PATHMANABAN: No, no. Hang on a
10 second. Thank you.

10:42

11 BY MR. PATHMANABAN:

12 Q. Go back to the figure, Figure 2-A that
13 you just drew on.

14 A. Do I have control now?

15 Q. Yes. And to be clear, what you have
16 drawn, Mr. Delman, is somewhere along the center of
17 that circle 140; is that right?

18 A. Well, I'm drawing the needle as extending
19 from the -- I'm going to -- I don't have control
20 again, or do I still have control? No.

21 THE VIDEOGRAPHER: You should, yes.

22 THE WITNESS: I do have control? Great.
23 The base of the needle I'm going to just
24 highlight with a little circle, if it allows
25 me -- it doesn't seem to want to allow me --

10:42

10:43

1 would be approximately there.

2 So the base of the needle, the needle is

3 stemming from that point or that vertical line

4 which it intersects with on the left-hand side.

5 It does not necessarily -- as I said, I don't 10:43

6 know the length of the needle here. I don't

7 know if it extends as far to the right-hand side

8 as -- in fact, just for extra clarity, why don't

9 I -- well, now it's too short, but -- all right.

10 Something like that. 10:44

11 BY MR. PATHMANABAN:

12 Q. Okay. And the guidance fingers 122 is
13 not enclosing the needle, correct?

14 MR. GRIFFIN: Objection.

15 THE WITNESS: That's correct. Those 10:44
16 fingers themselves are not enclosing the needle.

17 MR. PATHMANABAN: Go to your report. Can
18 I get control back, please?

19 THE VIDEOGRAPHER: Yes. And are you
20 going to want me to save the -- 10:45

21 MR. PATHMANABAN: Yes.

22 THE VIDEOGRAPHER: Do you want to mark
23 that as, like, 3A or something?

24 MR. PATHMANABAN: Yeah, let's mark this
25 as 3A. 10:46

1 THE VIDEOGRAPHER: Okay. And let me give
2 you control back.

3 (Exhibit 3A was identified.)

4 BY MR. PATHMANABAN:

5 Q. Okay. And going back to your report,
6 Exhibit 1, you state on paragraph 110, and this is --
7 paragraph 110 is below the section titled "Lathrop
8 discloses Claim 1-B" which is the secondary sheath
9 limitation, right?

10:46

10 A. Yes, it is. Correct.

10:46

11 Q. And paragraph 110 states:

12 I observed that Lathrop's endcap 16
13 includes a cap replacement sleeve 40 which is
14 replaced over the tip element 14 after use.

15 Do you see that?

10:46

16 A. Yes, I do see that.

17 Q. So is the cap replacement sleeve 40 the
18 secondary sheath?

19 A. I just need to refer to Figure 2-A again
20 based on the following -- for the paragraph that
21 follows here.

10:47

22 So as I conclude in 114:

23 Lathrop discloses a secondary sheath, the
24 cap replacement sleeve 40, for receiving the sharp
25 lancing tip of a used lancet for placing over the tip

10:48

1 114.

2 So I believe that answers your question.

3 Q. So the answer is, yes, the cap
4 replacement sleeve is the secondary sheath?

5 A. Yes, that -- what Lathrop is referring to 10:49
6 as the cap replacement sleeve, it would be the
7 secondary sheath on Lathrop.

8 Q. And in this Figure 2-A the cap
9 replacement sleeve is 140, correct?

10 A. Well, I'm stating, I'm referring to 10:49
11 Figure 1 -- I'm referring to Figure 1, and it's 1-A,
12 1-B, and 1-C, and I'm stating that, in those figures,
13 the cap replacement sleeve is 40, and the cap
14 replacement sleeve in Figure 2-A would appear to be
15 labeled as 140, yes. 10:49

16 Q. Now, if you go back to your expert report
17 again, and now we're -- the section titled "Lathrop
18 discloses Claim 1-C," and this is the gripping handle
19 portion of the claim, right?

20 A. Uh-huh. 10:50

21 Q. If you can remember to give verbal
22 answers, that'll make it easier for all of us.

23 A. I apologize. Yes, I do see that.

24 Q. Thank you.

25 And here in paragraph 115 you say: 10:50

1 Lathrop features an endcap 16 which
2 further includes one or more gripping features to
3 facilitate its removal.

4 Do you see that?

5 A. I do. And that is in reference to 10:50
6 what -- I'm just looking to see what -- that looks
7 like Figure 2-A. But I'm not seeing -- (sotto voce)
8 endcap 16. Okay. Yes, I do see that. Uh-huh.

9 Q. So in Figure 2-A, is the endcap 16 the
10 gripping handle portion? 10:51

11 A. So I've highlighted on page 51 just above
12 paragraph 126 what constitutes the gripping handle
13 portion in Lathrop for Figure 1-A.

14 Q. So the gripping handle portion you've
15 highlighted in Figure 1-A is this endcap 16, right? 10:52

16 A. It encompasses everything that's shown in
17 green on that -- on that structure.

18 Q. Okay. And that includes the cap
19 replacement sleeve portion 40, correct?

20 A. That is part of the green highlighted 10:53
21 portion. And I note in para- -- well, yes, that is
22 part of the green highlighted portion.

23 Q. And the endcap 16 includes what you have
24 pointed to as both the primary sheath and the
25 secondary sheath, correct? 10:53

1 MR. GRIFFIN: Objection.

2 THE WITNESS: Yes, the primary sheath --
3 so I should note that this particular reference,
4 as with many of the references included in my
5 report, was analyzed utilizing Facet's
6 definition of plain and ordinary meaning as was
7 described in a very vague manner in its
8 infringement contentions.

10:55

9 So under Facet's -- I just wanted to be
10 clear that under Facet's understanding of
11 gripping -- of gripping -- of the court's claim
12 construction in that regard, that would
13 include -- the gripping handle portion would
14 include the primary sheath and include a
15 gripping handle portion that was -- that met the
16 limitations of between extending between the
17 primary sheath and a secondary sheath.

10:55

18 So I just want it to be clear that the
19 analysis we're discussing is utilizing Facet's
20 understanding of those terms as demonstrated or
21 as illustrated in its infringement contentions.

10:56

22 BY MR. PATHMANABAN:

23 Q. I don't see anywhere in your report where
24 you said your reading of Lathrop and your mapping of
25 Lathrop to the claim elements was based on Facet's

10:56

1 infringement contentions. Can you point me to where
2 you said that?

3 A. So, in certain of my analysis, for
4 example, in the Softclix reference, which begins at
5 page 97, I'm quite explicit in doing so. As you can 10:56
6 see, starting on page 97, the illustrations make it
7 clear that I'm doing it under Facet's plain and
8 ordinary meaning of gripping handle.

9 In this section, I don't explicitly say
10 so, but I believe it's clear throughout, and that my 10:57
11 analysis may in some circumstances, in some examples,
12 be done through my understanding as a POSITA of -- of
13 the plain and ordinary meaning of gripping handle,
14 for example, and that others are going to be through
15 Facet's. 10:57

16 Q. But in your discussion of Lathrop in your
17 report, you didn't say that your understanding of a
18 gripping handle in Lathrop is based on Facet's
19 infringement contentions, right?

20 A. I did not state that explicitly in the 10:57
21 Lathrop section, no. But I believe it's clear in my
22 report that I am examining these from both Facet's,
23 as well as my -- as my understanding of the plain and
24 ordinary meaning of gripping handle portion in other
25 references that are cited. 10:58

1 Q. So, in other words, your understanding of
2 gripping handle portion that you've cited in Lathrop
3 includes the primary sheath and the secondary sheath,
4 right?

5 MR. GRIFFIN: Objection.

10:58

6 THE WITNESS: The gripping handle portion
7 is, as I note in my opinion -- let me find the
8 exact words -- it defines a gripping handle
9 portion extending between the primary sheath and
10 the secondary sheath. That's what I've opined
11 upon in 119.

10:59

12 And as I said, this is under Lathrop's
13 understanding of the plain and ordinary meaning
14 of gripping handle portion as was illustrated
15 and as best that I could understand it, and I
16 don't agree with it, in its infringement
17 contentions.

10:59

18 BY MR. PATHMANABAN:

19 Q. Now, for this limitation, 1-D -- excuse
20 me. Withdrawn.

11:00

21 For this limitation 1-C, which is the
22 gripping handle portion extending between the primary
23 sheath and the secondary sheath, in your report, you
24 don't have any opinions that if Lathrop does not
25 disclose this limitation, that the limitation would

11:00

1 have nonetheless been obvious to a person of skill in
2 the art, correct?

3 MR. GRIFFIN: Objection.

4 THE WITNESS: Well, I believe I analyzed
5 this, as I do everything, through -- from the 11:01
6 perspective of a person of ordinary skill in the
7 art, and I understand the teachings of Lathrop
8 as such a POSITA.

9 I may not spell that out in -- I don't
10 believe I use the word "POSITA" in section D, 11:02
11 paragraphs 115 through 119, but it's understood
12 that it is through the eyes of a POSITA making
13 this analysis.

14 BY MR. PATHMANABAN:

15 Q. That's not my question. I understand 11:02
16 that you looked at all the references through the
17 eyes of a POSITA.

18 My question is, you don't have any
19 opinions in your report that Lathrop renders obvious
20 this limitation 1-C, correct? 11:02

21 A. Well, no, that's not true. If you take a
22 look at page 44, the heading to section 11 states:

23 Facet's own prior art anticipates and/or
24 renders obvious the asserted '635 patent claims.

25 And then subheading A just beneath that 11:03

1 states:

2 All asserted claims are rendered obvious
3 by Lathrop.

4 So I'm -- I'm not sure how your question
5 would sync with those two headings at all. 11:03

6 Q. Do you have anywhere in your report --
7 well, withdrawn.

8 Your conclusion in paragraph 119 of this
9 section C is:

10 In my opinion, Lathrop discloses a 11:03
11 gripping handle portion extending between the primary
12 sheath and the secondary sheath.

13 Do you see that?

14 A. I believe we're talking about section D,
15 but I do see that, yes. 11:04

16 Q. My apologies.

17 A. Section D, which refers to Claim 1-C. So
18 just to be clear, yeah.

19 Q. Right.

20 If a judge or a jury disagrees with you 11:04
21 that Lathrop discloses this gripping handle portion
22 extending between the primary sheath and the
23 secondary sheath, you don't have an alternative
24 opinion that that limitation is rendered obvious by
25 Lathrop, correct? 11:04

1 MR. GRIFFIN: Objection.

2 THE WITNESS: No. I believe that I've
3 stated, per the heading to this entire section,
4 that all asserted claims are rendered obvious by
5 Lathrop.

11:04

6 BY MR. PATHMANABAN:

7 Q. You see in paragraph 132, you state:

8 As I note above, Lathrop discloses the
9 dimensional limitations of the asserted claims. Even
10 if these limitations were not disclosed or inherent
11 in Lathrop, all of the relative-dimensional
12 limitations would have been obvious for a POSITA to
13 apply to Lathrop.

11:05

14 Do you see that?

15 A. Yes, I do.

11:05

16 Q. Now, that is for the relative dimensional
17 limitations.

18 You don't have a similar section that
19 says even if the gripping handle limitation was not
20 disclosed or inherent in Lathrop, that limitation
21 would have been obvious to a POSITA to apply to
22 Lathrop. You don't have that kind of section in your
23 report, do you, sir?

11:05

24 MR. GRIFFIN: Objection.

25 THE WITNESS: I don't see a sentence that

11:05

1 specifies the exact words you're using. No, I
2 don't see it. But I have a heading for the
3 entire section which specifies that Lathrop
4 renders obvious all the claims of the
5 '635 patent. I have two headings that state 11:06
6 that, in fact. The heading to 11 and the
7 subheading A. And my analysis throughout
8 discusses that obviousness analysis.

9 I don't believe -- I believe it would be
10 a much longer and rather tedious report were I 11:06
11 to repeat every single sentence and every single
12 word for every -- in the exact same manner.

13 That's not required. My report is very clear
14 that that is my opinion, whether I have those
15 exact words or not, on that particular claim 11:06
16 limitation.

17 BY MR. PATHMANABAN:

18 Q. Going to paragraph 133 of your report,
19 you state -- we talked about this before, but I'm
20 going to talk about the second half of that 11:07
21 paragraph -- withdrawn.

22 In paragraph 133, you state:

23 A POSITA would have utilized dimensions
24 that would allow a user to easily handle the cap and
25 provide for a more ergonomic and user-friendly 11:07

1 operation. A POSITA would have thus routinely
2 designed an endcap that would have been at least a
3 1.5 times the thickness of a standard lancet.

4 Do you see that?

5 A. I do see it on screen. And I apologize, 11:07
6 I accidentally moved away from it in my paper
7 version, so I'm getting back to it now. I do see
8 that, yes.

9 Q. Now, adjusting the ratio of the span of
10 the handle to the thickness of the lancet is not the 11:08
11 only way to make for a more ergonomic and
12 user-friendly operation, is it?

13 A. A POSITA may have been able to accomplish
14 that through other means, yes. But I don't know that
15 other means are required when the most obvious and a 11:08
16 very effective one is right before a POSITA's eyes.

17 Q. Would, for example, providing a different
18 kind of material to grip the handle make it more
19 ergonomic?

20 A. It might. And mind you, you're speaking 11:08
21 only in the most general sense without any
22 illustrations. But at the same time -- for example,
23 by other material, I'm assuming you don't mean
24 sandpaper. I'm assume you mean something soft and
25 grippable, like rubber, perhaps? 11:09

1 Q. Correct.

2 A. Well, while rubber may make something
3 more grippable, these are -- these lancets are very
4 inexpensive commodity type items. And the addition
5 of a second material like rubber, which would most 11:09
6 likely have to be applied in some permanent fashion
7 through an insert molding technique or similar, that
8 adds significant cost to what is an item that needs
9 to be very inexpensive, having worked on things just
10 like this. 11:09

11 I know that rubber, while it may be
12 grippy, would, from a cost standpoint, be rather
13 unfeasible in most circumstances on a low-cost item
14 like this, to add a secondary overmold of rubber or
15 similar. 11:10

16 So while there may be a positive to it,
17 it would have significant negatives. Whereas,
18 creating a gripping handle as I've described here,
19 and the motivation for doing so, would have little,
20 if any, cost impact, for example. 11:10

21 Q. A gripping handle has multiple
22 dimensions, right?

23 A. Well, it's a three-dimensional object,
24 so, yes, would it have multiple dimensions. Yes.

25 Q. So it would have, for example, the 11:10

1 length, it would have a height, it would have a
2 thickness, correct?

3 A. I would imagine so, yes.

4 Q. And you could vary any of one of those to
5 get a more economic and user-friendly operation,
6 correct? 11:10

7 MR. GRIFFIN: Objection.

8 THE WITNESS: No, not necessarily. And
9 again, we're speaking in a vacuum here of words,
10 which often is not often the best way to discuss 11:10
11 highly visual and, in this case, manipulable
12 objects.

13 But noting that constraint, there is a
14 reason when something -- a POSITA understands
15 that when making a gripping handle designed to 11:11
16 be twisted, for example, by somebody with low --
17 or reduced or limited manual or visual
18 dexterity, that increasing the span of that
19 handle is an obvious and likely to be highly
20 effective way to increase their leverage and 11:11
21 grip on that item.

22 Increasing length or thickness is not at
23 all necessarily something which provides those
24 same mechanical advantages or affordances to a
25 gripping handle, but increasing the span would. 11:11

1 Take, for example, to use something
2 that's separate from the lancets that we're
3 speaking of here, there's a reason why a house
4 key is generally wide where you grip it. And
5 there's a reason why there are dozens of 11:12
6 products sold for people with low dexterity or
7 arthritis, for example, that you attach to the
8 head or the handle of a house key to provide
9 greater span for increased leverage and
10 grippable surface in a meaningful way for 11:12
11 mechanical advantage to turn that key.

12 The analogy applies similarly to a
13 lancet. Making the key longer wouldn't do that.
14 In fact, it might do quite the opposite in terms
15 of providing a benefit to the user. Making the 11:12
16 key thicker, I cannot imagine that would provide
17 any benefit whatsoever.

18 But making the key wider, absolutely.
19 And that's the same analogy that applies to this
20 lancet. You can't say just increasing any 11:12
21 dimension provides a benefit. Not at all.

22 BY MR. PATHMANABAN:

23 Q. The lancet itself has multiple
24 dimensions, correct?

25 MR. GRIFFIN: Objection. 11:13

1 THE WITNESS: Yes, it's a
2 three-dimensional object.

3 BY MR. PATHMANABAN:

4 Q. Okay. And so, again, it's got a length,
5 height, and a width? 11:13

6 A. Correct.

7 MR. GRIFFIN: Objection.

8 THE WITNESS: Yes. And it would have
9 various features with their own -- if you wanted
10 to drill down, each of those features might have 11:13
11 its own independent or somewhat independent
12 dimensions themselves.

13 BY MR. PATHMANABAN:

14 Q. Right.

15 So there are multiple permutations of 11:13
16 dimensions between the gripping handle and the
17 thickness, correct?

18 A. If your question is could there be, yes,
19 the answer is there could be different proportions or
20 relationships between the size of a gripping handle 11:14
21 and the thickness of any other part of the lancet,
22 including the lancet body itself.

23 But just because you could have those
24 dimensions doesn't mean that a POSITA would
25 understand them to provide for a gripping handle or a 11:14

1 gripping handle as should be understood per the
2 teachings here.

3 Apologies, maybe you can edit out all the
4 times I'm wiping my nose for my allergies today.

5 Q. California. 11:15

6 A. Yes, this time of year.

7 Q. All right. Let's go to your opinions
8 about Iio.

9 A. Okay. What page are we on for that,
10 Counsel. 11:15

11 Q. I think it's around paragraph 221. I
12 don't know what page it is. Let me find it.

13 A. I can get it from the paragraph, that's
14 not a problem. Actually, it looks like Iio -- the
15 discussion of Iio starts at paragraph 210, as I see
16 it, on page 98. 11:15

17 Q. You are correct. And let's start there.
18 Here you have a section titled "All
19 Asserted Claims Are Anticipated By Iio," right?

20 A. Yes. 11:16

21 Q. And to be clear, this is not an opinion
22 based on obviousness. This particular section
23 relates to anticipation by Iio, right?

24 A. It does, yes. And I would just want to
25 also note, the Footnote 2 there, which notes that it 11:16

1 discloses two embodiments, Iio does, and that the
2 analysis -- that my analysis here is relying
3 exclusively on the second embodiment.

4 Q. Okay. Around paragraph 242 you discuss
5 element 6-D; do you see that? 11:18

6 A. Just turning to that in my paper version.

7 Q. Let me just read it for the record.

8 A. Okay.

9 Q. Paragraph 242 states:

10 As to 6D's limitation of the gripping 11:18
11 handle portion defines a lateral span of at least
12 1.5 times the lancet thickness, I believe Iio
13 discloses a lateral span for its gripping handle
14 portion, which is annotated as S in the figure below.

15 Do you see that? 11:18

16 A. Yes, I do see that.

17 Q. And you've marked as S and you marked a T
18 in Figure 8 and Figure 9-A of Iio, correct?

19 A. Yes, that's correct.

20 Q. Okay. And then in paragraph 243 you say: 11:18

21 A cursory visual comparison of the
22 gripping handle portion's lateral span, S, with the
23 lancet's thickness, T, shown in Iio's figures
24 confirms to my knowledge that the gripping handle
25 portion defines a lateral span of at least 1.5 times 11:19

1 the lancet thickness.

2 Do you see that?

3 A. I do see that. And I'll say -- I wanted
4 to say two things about it. The first is, perhaps a
5 poor choice of words in the sense that I think there 11:19
6 was a draft that -- or an edit that didn't quite get
7 in that was the word "even" to begin that sentence.
8 So even a cursory visual comparison.

9 I don't at all mean to imply that I only
10 made a cursory visual comparison because, believe me, 11:19
11 that is far from what I did. I made a very
12 comprehensive visual comparison.

13 But I would also note that the
14 paragraph 243 goes on at some length, and the ensuing
15 paragraphs, to discuss textual support, written 11:20
16 description support, for that visual comparison.
17 That visual comparison was neither cursory nor made
18 without significant, as described here in my report,
19 written description to support that visual
20 comparison. 11:20

21 Q. Are you saying that there was a draft
22 where there was an edit that said paragraph 243
23 should start with an "even" that did not make its way
24 into the final version?

25 A. I meant to say or I did say -- I won't 11:20

1 ask the court reporter to read back my sentence. I
2 meant to say that there should have been such an
3 edit.

4 In reading -- in the way you read it to
5 me today, I just want to clarify that I don't want to
6 imply by the wording of section 243 that only a
7 cursory visual comparison was made. Far from it.

11:20

8 And that adding the word "even" to the front of -- to
9 the to the beginning of that sentence would make it a
10 more accurate read.

11:21

11 Q. Who wrote the drafts for your reports --
12 your report?

13 A. So, counsel and I had extensive
14 discussions about the -- all of the contents of this
15 report. And each section was either drafted at my
16 direction or included sections that I drafted and
17 were then plugged in straight from -- straight from
18 my hand.

11:21

19 So the report was drafted either by
20 myself -- both by myself and at my direct direction
21 pursuant to extensive conversations with counsel.

11:21

22 Q. Which counsel?

23 A. That would have been particularly
24 Ehsun Forghany and Joe Basrawi. Joe, apologies if I
25 butchered your last name. Those were the primary

11:22

1 counsel who I worked with on the report. There may
2 have been one or two others involved at various
3 points.

4 Q. So Iio's specification does not state
5 that its figures are to scale, correct? 11:22

6 A. No, it does not. Again, it's my
7 understanding that the patent office doesn't really
8 want you to make such a specification.

9 Q. And Iio does not provide any dimensions
10 for either its handle or the lancet body, correct? 11:22

11 MR. GRIFFIN: Objection.

12 THE WITNESS: So, to be clear, Iio
13 doesn't provide a specific dimension, but it
14 provides extensive information as I've outlined
15 to teach a POSITA about the proportions and 11:23
16 relationships of those particular features that
17 you've just mentioned.

18 So it doesn't say the lancet body is
19 5 millimeters or whatever, 10 millimeters,
20 1 centimeter, but it discusses the relationship 11:23
21 amongst its various features and components in
22 its design that teach a POSITA, as I've
23 explained here, all that needs -- a POSITA would
24 need to understand that it meets the limitation
25 of a gripping handle to portion defining a 11:23

1 lateral span of at least 1.5 times the lancet
2 thickness.

3 BY MR. PATHMANABAN:

4 Q. Iio does not provide a specific
5 proportion of the lateral span to the lancet
6 thickness, correct? 11:24

7 A. Well, maybe I don't understand the term
8 you're using. Could you maybe make more clear what
9 you mean by specific proportion? Because as I've
10 said, Iio provides a POSITA with abundant information 11:24
11 to understand the proportions of these components.
12 So what do you mean by specific?

13 Q. Well, Iio doesn't say the ratio of the
14 span of the handle to the lancet thickness should be
15 greater than 1.5, correct? 11:25

16 A. It doesn't say it in the manner that
17 you've just said it, but it says it in the manner
18 that I've explained it does in my report here.

19 It explains the proportions and
20 relationships of all of these components, which allow 11:25
21 a POSITA to understand that the lateral span defined
22 is at least 1.5 the lancet's thickness.

23 Q. So in this paragraph 243, you also say:
24 And as also shown, for example, in the
25 Figures 8, 9, and 11, Iio's gripping handle portion 11:26

1 has a significantly broader lateral span than the
2 secondary sheath.

3 Do you see that?

4 A. I do see that. And I see that the
5 sentence after that states, just for context:

11:26

6 This reinforces that the dimensions
7 depicted reflect that the lateral span of the
8 gripping handle portion is more than 1.5 times the
9 lancet thickness.

10 Q. In paragraph 221 or just below it, you
11 show a comparison of Figure 9-A from Iio with
12 Figure 11-B. Do you see this?

11:26

13 A. Hold on a second, I'm just trying to find
14 it -- okay. Yes. I do see that, yes.

15 Q. All right. And Figure 9-A shows the
16 unused lancet and Figure 11-B shows a used lancet,
17 correct?

11:27

18 A. Yes. Just to -- to be clear for the
19 record, Figure 9-A shows an unused lancet that is
20 currently embedded in the primary sheath, and
21 Figure 11-B purports to show the used needle that has
22 been placed into the secondary sheath.

11:28

23 Q. Okay. In Figure 9-A -- now, in both
24 Figures 9-A and 11-B you have colored the secondary
25 sheath as brown, correct?

11:28

1 A. Brown. I'm not seeing -- yeah. Okay. I
2 see what you're saying. My printout the colors --
3 I'm going to go by the screen.

4 It's a different color brown between 9-A
5 and 11-B, would you agree with that, Counsel? But
6 9-A seems to show it in a light tan and 11-B seems to
7 show it in a darker brown.

11:28

8 Q. Okay. But you'd agree that what you've
9 marked as the secondary sheath is sort of on the left
10 of the green block in Figure 9-A?

11:29

11 A. Uh-huh.

12 Q. And on the right of the green block in
13 Figure 11-B, right?

14 A. Yes.

15 Q. And that's because in 11-B it's actually
16 reversed because the used lancet is being put back
17 into the -- into the secondary sheath, right?

11:29

18 A. Yes. It's been flipped around, so to
19 speak, yeah.

20 Q. Now, looking at Figure 9-A and 11-B,
21 you -- do you agree that the size of the secondary
22 sheaths are different?

11:29

23 A. Yes, they're shown in a very different
24 size. But the reason for that is, this is a diagram.
25 It's explaining -- and it's called out as such within

11:29

1 the patent itself, it's a diagram showing a method.
2 It's showing how to use this thing, how the needle is
3 embedded in the first drawing and how it is then
4 inserted for protection into the secondary sheath in
5 its second drawing.

11:30

6 And as a diagram, it's highlighting
7 things through size and other means. For example,
8 I'll note that the shape of the needle itself is
9 completely different between the two drawings. It's
10 not relevant to a POSITA because a POSITA is looking
11 at this for the reasons of understanding how this is
12 working, how the method of inserting this into a
13 primary sheath in Figure 9-A and how it's inserted
14 into a secondary sheath in Figure 11-B. It's a
15 diagram.

11:30

11:30

16 So -- but, yes, the -- but that's the
17 reason the proportions are shown in somewhat
18 different way, and the reason why a POSITA would not
19 be looking to these diagrams necessarily to
20 understand those proportions as being accurately
21 portrayed.

11:30

22 Q. In paragraph 244, you cite to Iio and
23 say:

24 Iio also goes on to explain that said
25 disposal slot of the puncture needle cap has an

11:31

1 opening that is larger than an opening of the
2 protection slot, and also that the disposal slot,
3 opened paren, secondary sheath, close paren, has,
4 quote, "a larger aperture," close quote.

5 Do you see that?

11:32

6 A. I do.

7 Q. So the disposal slot is the secondary
8 sheath here?

9 A. Correct.

10 Q. And the protection slot is the primary
11 sheath, right?

11:32

12 A. Let me just be sure that -- I believe
13 you're correct, but let me just be sure that's how
14 the terms are being used in my report.

15 Yes, I believe the protection slot is
16 referring to the primary sheath.

11:33

17 Q. So this passage that you're quoting from
18 Iio is comparing the size of the primary sheath to
19 the secondary sheaths, right?

20 A. Paragraph 244 does focus on that, on
21 page 116, at least. Let me read the rest of it.

11:33

22 Well, you know, the paragraph goes on to
23 state after the portion that you've just read that:

24 These textual disclosures align with what
25 is shown in Iio's figures, in particular Iio's

11:34

1 Figures 8 and 9A-9C for Iio's second embodiment,
2 which plainly depict what the text describes, i.e.,
3 that an opening of the disposal slot, open paren,
4 secondary sheath, close paren, of the puncture needle
5 cap, open paren, gripping handle portion, close 11:34
6 paren, is larger than an opening of the protection
7 slot, open paren, primary sheath, close paren. A
8 POSITA would therefore have appreciated that Iio's
9 figures, in particular 8 and 9-A through C,
10 accurately depict relative dimensions, including that 11:34
11 the lateral span of the gripping handle portion is at
12 least 1.5 times the lancet thickness.

13 So to your question, which implied that
14 all it talks about is this single relationship
15 between the secondary sheath and the primary sheath, 11:34
16 I would not agree. It goes on to speak to the
17 broader proportions and relationships that are
18 discussed throughout these pages that discuss this
19 limitation of Iio.

20 Q. Now, in paragraph 245, you discuss the 11:35
21 relative proportion of the size of the user's thumb
22 depicted in Iio's Figure 9-A; do you see that?

23 A. I do. And do I -- point me to where I
24 have Figure 9-A just so I can reference it quickly?
25 Is it included in my report or should I look for it 11:35

1 in the patent itself?

2 Q. I don't -- I don't think you included
3 Figure 9-A itself in your report itself, but --

4 A. Would you be able to pull it up on screen
5 for me or should I (indecipherable) in the patent? 11:35

6 Q. Sure.

7 MR. PATHMANABAN: Why don't we mark Iio,
8 please, Angela.

9 THE WITNESS: Actually, we do have Figure
10 9-A, I believe, on page 107. We can bring it in 11:36
11 the patent as well, of course, if you prefer.

12 THE VIDEOGRAPHER: I need to use my mouse
13 if you're going to want me to bring up another
14 exhibit.

15 MR. PATHMANABAN: Let's wait a second. 11:36

16 BY MR. PATHMANABAN:

17 Q. Okay. I've shown Figure 9-A from your
18 report on the screen. And this is what you were
19 referring to in paragraph 245, right?

20 A. Yes. It appears that we are referring to 11:36
21 Figure 9-A and the user's thumb depicted within this
22 figure, yes.

23 Q. And the user's thumb depicted, that's a
24 cartoon, correct?

25 MR. GRIFFIN: Objection. 11:37

1 THE WITNESS: I don't know what you mean
2 by cartoon, Counsel. Cartoon is Toy Story.
3 This is a drawing of a user's thumb.

4 BY MR. PATHMANABAN:

5 Q. Well, it's not a real thumb, right? 11:37

6 A. It's not a photograph of a thumb, no.
7 No, it is not.

8 Q. And there's nothing in Iio explaining the
9 size of the thumb, correct?

10 A. There is nothing in Iio that specifically 11:37
11 explains the size of a thumb. However, I believe
12 that a POSITA understands what the size of an average
13 thumb is, granted it doesn't specify if this is a
14 child's thumb or an adult's thumb. We have to assume
15 it is a human thumb just for the purposes of the 11:37
16 patent and the teachings of the patent.

17 So I think a POSITA can bring a certain
18 degree of common sense to viewing this image and
19 understand the size of a thumb. In fact, I think a
20 POSITA would be expected to bring that degree of 11:38
21 common sense to this image.

22 Q. But to be clear, you're not an expert on
23 the size of human anatomy, are you?

24 MR. GRIFFIN: Objection.

25 THE WITNESS: No, I'm not. I have 11:38

1 utilized various ergonomic databases in my work
2 at various times, but I don't consider myself an
3 expert on human anatomy, no.

4 BY MR. PATHMANABAN:

5 Q. Are you offering expert testimony on the 11:38
6 size of a human thumb?

7 MR. GRIFFIN: Objection.

8 THE WITNESS: I have provided a citation
9 at some point in my report, and I don't recall
10 exactly where, to an average size from an 11:38
11 authoritative reference. And if you want me to
12 find that, I can.

13 BY MR. PATHMANABAN:

14 Q. Iio doesn't describe or disclose the size
15 of this thumb, correct? 11:39

16 A. Iio discloses a picture of a thumb in a
17 manner and with a great deal of written description
18 support to allow a POSITA to understand that it is an
19 average-sized human thumb and it is not intended to
20 be some miniature or giant-size thumb. 11:39

21 Q. Sir, my question is, does Iio
22 specifically say what the size of this thumb is?

23 MR. GRIFFIN: Objection.

24 THE WITNESS: It does not -- it does not
25 specifically state the size of the thumb in this 11:39

1 image, no.

2 BY MR. PATHMANABAN:

3 Q. And it does not specifically say the size
4 of the lancet body either, correct?

5 A. It does not specifically give a dimension 11:40
6 for the size of the lancet body, that is correct.

7 Q. And it does not give a specific size for
8 the gripping handle, correct?

9 A. It does not give a specific size for the
10 gripping handle. But as I've discussed at length in 11:40
11 my report, it provides all the information that a
12 POSITA would need to understand the proportions and
13 relationships of the size of that gripping handle to
14 the thickness of the lancet.

15 And as I note with respect to this 11:40
16 picture, this picture provides further support for
17 that because it includes the relative proportions of
18 the size of the user's thumb. Mind you, proportions,
19 not dimensions.

20 But it gives the relative size of the 11:40
21 proportions as compared to the gripping handle
22 portion in the lancet thickness, for example. And it
23 goes on in some detail to explain that.

24 Q. In paragraph 246, you say:

25 Beyond this, Iio textually describes a 11:41

1 specific thickness for a thin plastic film having a
2 thickness of 0.1 millimeter or less in the puncture
3 you needle separation groove.

4 Do you see that?

5 A. Yes, that is correct.

11:41

6 Q. And the plastic film thickness is
7 depicted in Figure 9-A with a groove, correct?

8 A. Sorry, what page is 9-A on again, or
9 scroll back up to it, if you could. I just turned
10 the page.

11:42

11 Q. Yeah. So there's Figure 9-A here.

12 A. Uh-huh.

13 Q. What is the plastic film here?

14 A. The plastic film -- well, it's cut off.

15 I don't recall what the -- maybe I should look at the
16 patent to see what is being called out in 9-A there.
17 It looks like that is -- okay. Now I'm looking at
18 9-A.

11:42

19 So that is -- that line pointing to the
20 groove is called out as 65-A. So let me look that up
21 and see what that is called out as in the patent
22 itself. I don't want to make any assumptions.

11:42

23 MR. PATHMANABAN: Let's mark Iio, please,
24 Angela.

25 (Exhibit 4 was identified.)

1 THE WITNESS: Figure 9-A. So I'm looking
2 through here. If you know where it is and want
3 to save some time, Counsel, I'm more than happy
4 to take your direction on where 65-A is called
5 out in Iio from Figure 9-A. Otherwise, I'm 11:43
6 going to fumble around and try to find it
7 myself.

8 BY MR. PATHMANABAN:

9 Q. I believe you cited paragraph 104 of Iio,
10 if that helps. 11:43

11 THE VIDEOGRAPHER: Is this the correct
12 document?

13 MR. PATHMANABAN: Yes.

14 THE VIDEOGRAPHER: Thank you.

15 BY MR. PATHMANABAN: 11:43

16 Q. And I've marked the Iio reference as
17 Exhibit 4.

18 A. Yes, you're correct, it is paragraph 104.
19 (Sotto voce.) Okay. So if you could please repeat
20 your question again, Counsel, regarding this puncture 11:44
21 needle groove and film.

22 Q. So is the thin plastic film of 0.1
23 millimeter thickness shown as 65-A in Figure 9-A
24 of --

25 A. No.

1 (Parties speaking simultaneously.)

2 (The Court Reporter requested

3 clarification.)

4 BY MR. PATHMANABAN:

5 Q. Is the thin plastic film the element 65-A 11:44
6 in Figure 9-A?

7 A. No. The patent makes clear that 65-A is
8 the puncture needle separation groove, which is --
9 which connects -- or it's the groove between or the
10 connection juncture, if you will, between the body 11:44
11 and the cap, and that the film having a thickness of
12 0.1 millimeters or less is in the puncture needle
13 separation groove 65-A.

14 So you're not looking at the film there.
15 You're seeing that this is a groove of two mating 11:45
16 surfaces or a parting line between two surfaces that
17 mate, and embedded within that groove or line that
18 you're seeing there is this extremely thin piece of
19 film.

20 Q. Okay. So we're not even seeing the thin 11:45
21 plastic film in Figure 9-A?

22 A. Figure 9-A does not show the film. It
23 shows the groove that the film is embedded within,
24 thus, providing a POSITA with the understanding, in
25 addition to the direct dimension that is given in the 11:45

1 patent, that the film is 0.1 millimeters or less,
2 that that line you're looking at is probably thicker
3 than the film itself.

4 Q. So the line is where I'm mousing over
5 right now? 11:46

6 A. Yes.

7 Q. Is that the line? Okay.

8 A. I believe, yes, that is the puncture
9 needle separation groove.

10 Q. This -- this line, which is labeled as 11:46
11 65-A, is the same thickness shown in this Figure 9-A
12 as all the other lines, correct?

13 A. Approximately so, yes. And as I said,
14 this is something of a diagram, and line weight with
15 respect to patent drawings, there are rules about 11:46
16 line weight that as a non-attorney and a non-patent
17 prosecutor, I don't know what the rules are about
18 line weight in a patent figure.

19 Q. So because the thickness is the same of
20 the thin plastic film to all the other black lines 11:47
21 shown on Figure 9-A, you can't really extrapolate
22 what the thickness of the other elements of Figure
23 9-A are, correct?

24 MR. GRIFFIN: Objection.

25 THE WITNESS: I would disagree. For one 11:47

1 thing, all the patent figures need to be
2 reviewed. A POSITA would not only look at one
3 patent figure in isolation. There are other
4 views which show this puncture needle groove.
5 And, granted, it shows it as a line. I don't
6 know how else you would draw a groove.

11:48

7 A groove as they describe it here is the
8 meeting point between two surfaces, so it is
9 depicted as a line. That line is -- a POSITA
10 would not understand that that line is an
11 accurate depiction of the gap between those
12 surfaces when a piece of thin film is inserted
13 into that gap.

11:48

14 But when the POSITA understands that it
15 is a thin film, film has a meaning to a POSITA,
16 and when that film is described as
17 0.1 millimeters or less, it provides a POSITA
18 with the teachings to understand proportions as
19 I've described in my report.

11:48

20 BY MR. PATHMANABAN:

11:48

21 Q. Now, you have a separate section titled
22 "Iio in View of Peckham Renders Obvious Claims 6, 8,
23 14, and 18."

24 Do you see that?

25 A. I do. And I'm just going to turn to that

11:49

1 in my paper report here.

2 Q. No, you don't have to because I'm not
3 going to ask you any questions about it.

4 A. Okay.

5 Q. My only question is, do you understand
6 that the Peckham reference was part of the references
7 that was excluded by the court?

11:49

8 A. As I said, I don't remember which
9 specific references were subject to this exclusion.
10 But I will take your word that you are telling me the
11 truth and that Peckham is among them.

11:49

12 Q. And you don't, in your report, have a
13 separate section for why Iio by itself renders the
14 asserted claims obvious, correct?

15 MR. GRIFFIN: Objection.

11:49

16 THE WITNESS: Let me just check my
17 contents on one thing, if you can allow me that.
18 I don't believe I have a separate section that
19 discusses Iio with respect to obviousness absent
20 in view of Peckham.

11:53

21 BY MR. PATHMANABAN:

22 Q. Okay. So if the jury decides that you
23 and Lifescan have not shown by clear and convincing
24 evidence that Iio discloses every limitation of every
25 asserted claim by itself, then Iio would not

11:53

1 invalidate the '635 patent, correct?

2 MR. GRIFFIN: Objection.

3 THE WITNESS: If Iio isn't shown, or if a
4 jury or judge doesn't agree that Iio anticipates
5 every claim of the '635 patent, then, if they 11:53
6 don't believe that it anticipates it, then Iio
7 would not render the '635 patent invalid through
8 anticipation, that is correct, if I understand
9 your question.

10 BY MR. PATHMANABAN: 11:54

11 Q. Iio would not render the '635 patent
12 invalid to anticipation, and you have not offered any
13 separate grounds for Iio to render it obvious by
14 itself, correct?

15 MR. GRIFFIN: Objection. 11:54

16 THE WITNESS: I have flipped through my
17 report in the, you know, in our deposition
18 today, and I don't see that I have offered a
19 distinct separate opinion to that effect.

20 But it is possible there is language in 11:54
21 my report which does address that in a manner
22 that I'm not seeing here.

23 So, obviously, if it is in my report and
24 I'm not seeing it here today, then I'm not
25 negating the fact that I stated it in my report 11:54

1 or I rendered an opinion in my report.

2 But as I see it at the moment and, you
3 know, pursuant to your question, I don't see a
4 separate section devoted to obviousness out --
5 of Iio outside of a combination with Peckham, if 11:55
6 that's your question.

7 MR. PATHMANABAN: Let's go off the
8 record.

9 THE WITNESS: Okay. Guys, can I just
10 mention -- 11:55

11 THE VIDEOGRAPHER: Going off video record
12 at 11:55 a.m. Pacific time.

13 (A recess was taken.)

14 THE VIDEOGRAPHER: We are back on video
15 record at 12:08 p.m. Pacific time. 12:08

16 BY MR. PATHMANABAN:

17 Q. Welcome back, Mr. Delman.

18 A. Thank you.

19 Q. Let's put back up the exhibits. Thank
20 you. If we go to paragraph 284 of your report. 12:09

21 A. Okay.

22 Q. I'm sorry.

23 A. That's okay. No, take your time. I know
24 there's a lot of -- a lot of material here to cover.

25 Q. All right. So you also have an opinion 12:10

1 that the asserted claims are rendered obvious by
2 Hyoue, is that how you say it?

3 A. You know, I have been instructed that the
4 proper pronunciation is Hyoue.

5 Q. Hyoue?

12:10

6 A. That's how I have been pronouncing it,
7 yes.

8 Q. Just for the record, what's spelled as
9 H-y-o-u-e we will pronounce as Hyoue; is that right?

10 A. Hyoue. That's the way I've been doing
11 it.

12:10

12 Q. Okay. Got it. Hyoue. Okay. Hyoue.
13 If I go to paragraph 284 is where you
14 identify a secondary sheath in Hyoue; is that right?

15 A. That is the -- well, that section C is
16 the discussion of the secondary sheath, yes.

12:11

17 Q. And what you've called a secondary sheath
18 is space 200; is that correct?

19 A. Yes, that is what I have identified as
20 the secondary sheath. And I'm just calling up the
21 patent itself to have it as reference as we discuss
22 here.

12:11

23 MR. PATHMANABAN: So let's pull up the
24 Hyoue reference, please, Angela, as Exhibit 5.

25 (Exhibit 5 was identified.)

12:12

1 BY MR. PATHMANABAN:

2 Q. And I have the Hyoue reference here,
3 Mr. Delman, and it's on your screen. And if I look
4 at Figure 3, and the part 200 is what you've
5 identified as the secondary sheath; is that correct? 12:13

6 A. That is correct.

7 Q. Where is the closed end 204?

8 MR. GRIFFIN: Objection.

9 THE WITNESS: So, Counsel, if I could --
10 oh, I see. From paragraph 285 it notes a 12:13
11 closed -- opposite a closed end 204.

12 BY MR. PATHMANABAN:

13 Q. Correct.

14 A. Are you asking me to identify it in a
15 figure, for example? It's called out in Figure 4, 12:14
16 which you currently have on screen, yes. That would
17 be the closed end 204, yes.

18 Q. So the closed end 204 is separate from
19 the secondary sheet 200, correct?

20 MR. GRIFFIN: Objection. 12:14

21 THE WITNESS: I'm not sure I understand
22 the question. I mentioned the closed end
23 labeled as 204 in paragraph 285 because a POSITA
24 would understand that by having the space 200
25 distinct from the primary sheath and opposite a 12:15

1 closed end, that Hyoue's protective cap allows
2 users to easily distinguish one end from the
3 other after removing the cap, and to also
4 readily identify the sheath intended to depose
5 of the used lancet needle. 12:15

6 Indeed, Hyoue provides that this
7 configuration makes it possible to substantially
8 separate the distal end portion of the
9 puncturing member after the lancet has been
10 used. So that's why I disclose or mention 12:15
11 closed end 204.

12 BY MR. PATHMANABAN:

13 Q. Okay. So my question is that the closed
14 end 204 is not part of the secondary sheath, right?

15 MR. GRIFFIN: Objection. 12:16

16 THE WITNESS: Well, in general, I would
17 say that it -- the inner wall of that -- of that
18 surface, if that were to -- I don't know whether
19 204 includes -- perhaps I can -- could I have
20 control of the screen, please? 12:16

21 MR. PATHMANABAN: Sure. Angela, can you
22 please give him control?

23 THE WITNESS: Okay. Where are those
24 amazing pencil -- fill and sign edit, is that
25 what I'm looking for? 12:16

1 BY MR. PATHMANABAN:

2 Q. I think so.

3 A. Got it. Okay. Pencil. Okay. So I just
4 want to highlight this surface here. So that surface
5 is part of the enclosure of the secondary sheath. It 12:17
6 depends on, you know, if 204 were -- my understanding
7 of 204 is that it's opposite the close -- that the
8 secondary sheath is opposite that closed end.

9 There's a material thickness there. So,
10 in a sense, the opposite side of 204 is a part of the 12:17
11 enclosure comprising the secondary sheath. But the
12 surface 204 itself would not be, no.

13 Q. And if I go to your report -- sorry, can
14 I get control? Yeah, thank you.

15 The gripping handle portion in your 12:18
16 report on top of page 139 is -- includes this entire
17 section with the green circular object along with the
18 platform-type thing, right? Whatever you have
19 colored in green on page 138.

20 A. Yes, and notably excluding the 104 below 12:18
21 that which is the cylindrical form shown in white.
22 And, again, this analysis was performed pursuant to
23 my understanding of Facet's read of the plain and
24 ordinary meaning of gripping handle portion.

25 Q. So the gripping handle portion includes, 12:18

1 in your analysis of Hyoue, the secondary sheath and
2 the primary sheath as well; is that right?

3 A. So, again, analyzing Hyoue pursuant to
4 Facet's description of the plain and ordinary meaning
5 of gripping handle portion in its infringement 12:20
6 contentions, Hyoue does disclose a gripping handle
7 portion extending between the primary sheath and the
8 secondary sheath as I state in section 289.

9 Q. So my question was, in what you've
10 labeled as a gripping handling portion, Figure 6 of 12:20
11 Hyoue, that includes what you believe to be the
12 primary sheath and the secondary sheath, correct?

13 A. Well, let me just see what 104 is labeled
14 as in Figure 6. So as I see the highlighting here,
15 it is not the entirety of the -- of the secondary 12:21
16 sheath, which is highlighted in this illustration.
17 But what has been highlighted would include of
18 necessity some element of the secondary sheath and
19 the primary sheath. Again, under Facet's description
20 of its plain and ordinary meaning of gripping handle 12:22
21 portion.

22 Q. In paragraph 295 you say:

23 As to element 6-D's limitation of the
24 gripping handle portion defines a lateral --

25 (The Court Reporter requested 12:23

1 clarification.)

2 BY MR. PATHMANABAN:

3 Q. As to element 6-D's limitation of the
4 gripping handle portion defines a lateral span of at
5 least 1.5 times the lancet thickness, you state:

12:23

6 A visual inspection of Figure 6 below
7 with the lateral span annotated S would indicate that
8 Hyoue discloses this limitation.

9 Right?

10 A. I'm sorry. I wasn't -- I wasn't quite
11 able to follow your question. If you could repeat it
12 or perhaps simplify it just a touch.

12:23

13 Q. Yeah.

14 In paragraph 295 you state that:

15 A visual inspection of Hyoue's Figure 6
16 below with the lateral span annotated S would
17 indicate that Hyoue discloses this limitation.

12:23

18 Correct?

19 A. That is a correct read of a part of
20 paragraph 295, 295 continues on page 139. And then
21 the analysis of the dimensional limitation with
22 respect to Hyoue continues through, let's see, it
23 looks like it goes through page 142.

12:24

24 So you have read a -- you've read that
25 sentence correctly, but it needs to be taken in the

12:24

1 context of the one, two, three, four pages which
2 follow it discussing the dimensional limitations that
3 that sentence refers to.

4 Q. Hyoue doesn't disclose any dimensions for
5 any of it its components, correct? 12:25

6 A. It does not disclose dimensions, but it
7 does disclose, as I describe on pages 139 to 142,
8 what a POSITA would need to readily understand the
9 proportions of the dimensional limitations in the
10 records. 12:25

11 Q. Hyoue doesn't tell you that its patent
12 figures are to scale, correct?

13 A. I don't believe that any reference in
14 this matter has mentioned its patent figures as being
15 to scale. And as I said, it's my understanding the 12:26
16 patent office specifically instructs not to state the
17 patent figures are drawn to scale.

18 Q. When did you come to that understanding
19 that the patent office instructs --

20 A. By patent office, that is my layman's 12:26
21 reference to what I have been informed is some
22 instruction in the Manual of Patent Examining
23 Procedures, or the MPEP, which I discussed at counsel
24 at some point in this matter, which has some notation
25 as to the use of a phrase like, "drawn to scale." 12:26

1 And my recollection is that the MPEP
2 guides against or counsels against using any such
3 reference to scale in patent figures. But I could be
4 mistaken. I'm not an attorney. That's my
5 recollection of my discussion. 12:27

6 Q. When did you have that discussion with
7 counsel?

8 A. I'm sorry, did you say where or when?

9 Q. When.

10 A. I don't specifically recall. 12:27

11 Q. Was it after you served your report?

12 A. I don't specifically recall.

13 Q. Now, in paragraph 295, you don't cite to
14 anything from Hyoue, other than its Figure 6,
15 correct? 12:27

16 A. So you're referring specifically to
17 paragraph 295?

18 Q. Yeah.

19 A. Uh-huh. No, that doesn't seem to be an
20 accurate statement. Because paragraph 295 continues 12:28
21 for quite a ways on the following page beneath
22 Figure 6 to discuss written description support that
23 was read in conjunction with the figure.

24 And then, as I stated previously,
25 pages 139 to 142 all discuss further written 12:28

1 description support that a POSITA would use to
2 understand the issue of dimensional limitations in
3 conjunction with the patent figures.

4 Q. Well, let's start with paragraph 295,
5 then we'll work our way down. 12:29

6 Show me where in paragraph 295 you cite
7 to written description support from Hyoue?

8 A. So I state that:

9 A POSITA would recognize that having an
10 endcap with a lateral span of at least 1.5 times the 12:29
11 lancet thickness would provide a lancet user with
12 optimal rotational leverage to apply the twisting
13 force on the cap required to facilitate ease of
14 disengagement of the cap from the lancet body. A
15 POSITA would understand that such a lateral span 12:29
16 would allow the mold to more readily detach through
17 minimal rotation of the cap, such that its
18 disengagement from the lancet body would not bend or
19 otherwise damage the needle sharp.

20 So that is my summary of teachings from 12:30
21 the Hyoue reference as would be understood by a
22 POSITA.

23 Q. Sir, you don't have a cite to Hyoue in
24 paragraph 295, other than to Figure 6, correct?

25 A. I believe it's very clear that the 12:30

1 context of the continuation of paragraph 295 on 139
2 is all with reference to the Hyoue reference. I'm
3 not talking about anything else in all of these
4 paragraphs and pages here under this heading.

5 So I think it's readily understood that 12:30
6 whatever I'm speaking about here is a teaching that a
7 POSITA would understand from Hyoue.

8 Q. When you say, "It is my opinion that a
9 POSITA would recognize that having an endcap with a
10 lateral span of at least 1.5 times the lancet 12:31
11 thickness would provide a lancet user with the
12 optimal rotational leverage to apply the twisting
13 force on cap required to facilitate ease of
14 disengagement of cap from the lancet body," that
15 sentence is not present in Hyoue, is it, sir? 12:31

16 MR. GRIFFIN: Objection.

17 BY MR. PATHMANABAN:

18 Q. That's your opinion about what a POSITA
19 would recognize, but that's not something that Hyoue
20 says, correct? 12:31

21 MR. GRIFFIN: Objection.

22 THE WITNESS: I believe that is a
23 POSITA's understanding of the teachings of
24 Hyoue. But you are correct that those words are
25 not necessarily spelled out as I've written them 12:31

1 in the Hyoue patent.

2 BY MR. PATHMANABAN:

3 Q. And the Hyoue patent doesn't say, for
4 example, that the endcap should have a lateral span
5 of at least 1.5 times the lancet thickness. It
6 doesn't say that, does it? 12:32

7 A. It doesn't spell it out in the words
8 you've just used. But as I outline in between
9 pages 138 to 142, it teaches a POSITA that it would.

10 Q. Well, in fact, Hyoue never talks about 12:32
11 the relationship between the sizes of the lancet body
12 and the handle, correct?

13 MR. GRIFFIN: Objection.

14 THE WITNESS: So I am incorporating by
15 reference section XI.G, or various portions of 12:32
16 section XI.G, into my discussion of Hyoue. So
17 I'm going to go back and refer to XI.G for a
18 moment here.

19 BY MR. PATHMANABAN:

20 Q. Sure. 12:32

21 A. If you could please repeat the question
22 that's on the table. I apologize.

23 Q. The Hyoue doesn't say, for example --
24 sorry, withdrawn.

25 The question was, Hyoue never talks about 12:34

1 the relationship between the sizes of the lancet body
2 and the handle, correct?

3 MR. GRIFFIN: Objection.

4 THE WITNESS: So as I discuss at page 141
5 starting from paragraph 303, the dimensional 12:35
6 limitations would have been obvious to a POSITA
7 from the teachings of Hyoue because Hyoue
8 requires that the lancet body endcap be twisted
9 in directions opposite to each other around the
10 puncturing member before being brought away from 12:35
11 each other along the longitudinal direction of
12 the puncturing member in order to prevent the
13 puncturing member from bending at the front
14 owned of the portion of the Lancet body. In
15 other words, needs to be twisted in opposite 12:35
16 directions in a manner that it wouldn't bend the
17 very fragile lancet blade.

18 And a POSITA would recognize that having
19 an endcap with a lateral span at least 1.5 times
20 the lancet thickness would help a user twist 12:36
21 both the cap and lancet body in opposite
22 directions without breaking or bending the
23 needle. A POSITA would thus have routinely
24 designed an endcap that would have been at least
25 1.5 times the thickness of a standard lancet. 12:36

1 So with respect to the actual disclosure
2 in an explicit manner by Hyoue of this
3 dimensional proportion relationship, no, it is
4 not explicitly stated as you suggest.

5 But as I've described just now, it is 12:36
6 explained through Hyoue's teachings that a
7 POSITA would understand and recognize that, of
8 necessity, the endcap would have to be at least
9 1.5 times lateral span of the lancet thickness
10 in order to effectively accomplish what Hyoue 12:37
11 teaches.

12 BY MR. PATHMANABAN:

13 Q. Now, going back to this figure you have
14 on page 139, which is part of paragraph 295, you also
15 have, aside from Figure 6, something called "SKK 12:37
16 Lancet 30G." Do you see that?

17 A. Yes, I do.

18 Q. And if you look at this paragraph or the
19 preceding paragraphs, you never actually talk about
20 this SKK Lancet 30G. Am I wrong? 12:37

21 A. Ahh, let me take a look. Hmm. I guess
22 that is correct, I don't mention the SKK lancet in a
23 caption or description of the image.

24 Q. And I'll represent to you this SKK Lancet
25 30G was not part of Lifescan's preliminary invalidity 12:39

1 contentions. Any reason for you to disagree with
2 that?

3 MR. GRIFFIN: Objection.

4 THE WITNESS: I don't have them in front
5 of me. Do I have a reason to disagree with it? 12:40
6 I do not have a particular reason to agree or
7 disagree with it.

8 But for the sake of our discussion today,
9 I certainly think you're an honest guy, and if
10 you say that it wasn't part of those 12:40
11 contentions, for the sake of our conversation, I
12 can accept that.

13 BY MR. PATHMANABAN:

14 Q. So you're not going to come to trial and
15 talk about this SKK Lancet 30G, are you? 12:40

16 MR. GRIFFIN: Objection.

17 THE WITNESS: I didn't say that, Counsel.
18 I said, if for the sake of our conversation you
19 wanted me to accept your representation. I
20 would need to discuss with counsel what -- and 12:40
21 counsel will advise me what I am permitted to
22 discuss and why or why not I wouldn't be
23 permitted to discuss the SKK lancet.

24 It's my understanding, although I don't
25 have the reference specified in the content of 12:40

1 the report here, and I have not examined, mind
2 you, my materials considered and how this might
3 be listed in my materials considered, but that
4 the SKK lancet is the embodiment of the
5 Hyoue patent, and -- the commercial embodiment 12:41
6 of the Hyoue patent.

7 And whether or not a commercial
8 embodiment of a reference which you can
9 otherwise discuss the reference can be
10 discussed, I don't know what the law on that is, 12:41
11 what the Rules of Evidence are. It may be that
12 a witness is permitted to discuss a commercial
13 embodiment of a patent that they could otherwise
14 discuss the patent.

15 Counsel -- I'll rely on counsel for that. 12:41
16 I can't give that kind of advice. It's above my
17 pay grade.

18 BY MR. PATHMANABAN:

19 Q. Well, we talked earlier, and I think you
20 agreed, that you've not discussed this SKK Lancet 30G 12:41
21 anywhere in your report other than this one figure,
22 correct?

23 MR. GRIFFIN: Objection.

24 THE WITNESS: That isn't what you
25 questioned before. You asked if I had discussed 12:42

1 it, I believe, in the section. I haven't read
2 through every page of my report to see if it
3 might be mentioned somewhere, nor have I
4 examined my list of materials considered to see
5 if might be listed with a Bates number or
6 however you guys do that sort of thing.

12:42

7 So I can't say whether or not this
8 particular image has been referenced or not. I
9 would need more time to examine, for example, my
10 materials considered and, you know, reference a
11 Bates number to everything in there to see if
12 it's been listed. If it's been listed -- if
13 it's been listed in my materials considered,
14 that would be meaningful.

12:42

15 BY MR. PATHMANABAN:

12:42

16 Q. So I'm just doing a search for SKK Lancet
17 30G, and you can see on the screen, you see I've
18 typed SKK Lancet 30G?

19 A. I do see that. Why don't you just type
20 in SKK?

12:43

21 Q. Okay.

22 A. I always instruct my kids, go with the
23 broadest search term. You never know what might turn
24 up.

25 Q. SKK. And then it says:

12:43

1 Phantom PDF has finished searching the
2 whole document. No more matches were found.

3 Do you see that?

4 A. I do see that. Thank you for doing that.

5 Q. Okay.

12:43

6 A. I will take your word that it is not
7 referenced in the body of the report. I don't know,
8 however, whether it is referenced in my materials
9 considered and how it might be listed in that with a
10 Bates number or however you guys, you know, do those
11 things. It seems --

12:43

12 Q. Okay. But we can agree that you have not
13 discussed the SKK Lancet 30G other than this one
14 figure in your -- in the body of your report,
15 correct?

12:43

16 MR. GRIFFIN: Objection.

17 THE WITNESS: Well, to be fair, it says
18 SKK Lancet 30G annotated right under the
19 picture, so there is at least one point where I
20 am referring to the SKK Lancet 30G. But it does
21 not seem that there are any other references
22 written in the body of the report.

12:44

23 BY MR. PATHMANABAN:

24 Q. So you have not explained, for example,
25 why this SKK Lancet 30G is even prior art to the

12:44

1 '635 patent in this report, correct?

2 MR. GRIFFIN: Objection.

3 THE WITNESS: I have not explicitly
4 explained that in the report.

5 BY MR. PATHMANABAN:

12:44

6 Q. You have not explained in this report why
7 you believe this SKK Lancet 30G is the actual
8 commercial embodiment of Hyoue, correct?

9 A. That appears to be correct.

10 Q. All right. So we can either take a break
11 for lunch now or we can start -- I don't know what
12 you want to do, Mr. Delman?

12:44

13 A. Why don't we take -- you know, rather
14 than get into an entire new topic, why don't we grab
15 lunch now, sure. I don't want to keep everybody else
16 hungry just for my sake, and I could probably eat
17 just as well, so...

12:45

18 MR. PATHMANABAN: Okay. Let's go off the
19 record.

20 THE VIDEOGRAPHER: Going off video record
21 at 12:45 p.m. Pacific time.

12:45

22 (A recess was taken.)

23 (Exhibit 6 was identified.)

24 THE VIDEOGRAPHER: We are back on video
25 record at 1:33 p.m. Pacific time.

01:33

1 BY MR. PATHMANABAN:

2 Q. Welcome back, Mr. Delman?

3 A. Thank you.

4 Q. All right. Let's talk about the Starnes
5 reference. And I've marked the Starnes reference as
6 Exhibit 6. Do you see that in front of you?

01:34

7 A. I see that, and I'm just finding it in my
8 binder here.

9 Q. Sure, no problem.

10 And I'm actually going to go back to your
11 expert report, and go to -- and you have an opinion
12 that the asserted claims are rendered obvious by
13 Starnes, right?

01:34

14 A. That is my opinion at page 142.

15 Q. Now, if we go to paragraph 322 of your
16 report, you see you have annotated Figure 4 from
17 Starnes, right?

01:34

18 A. Yes, I do see that.

19 Q. And you have marked in green again the
20 gripping handle portion, correct?

01:35

21 A. That is correct, yes.

22 Q. And, again, that gripping handle portion
23 includes the primary and secondary sheaths in
24 Starnes, according to you?

25 MR. GRIFFIN: Objection.

01:35

1 THE WITNESS: So I believe what's been
2 highlighted on Starnes in Figure 4 is exclusive
3 of that circle in the center, which would be the
4 secondary sheath.

5 BY MR. PATHMANABAN:

01:37

6 Q. So the circle in the center, which is the
7 secondary sheath, is not part of the gripping handle
8 in Starnes?

9 A. So I state in 317 that:

10 Starnes disclose as gripping handle
11 portion extending between the primary sheath and the
12 secondary sheath.

01:37

13 And I don't believe that that yellow
14 portion in the center, which is the secondary sheath,
15 has been highlighted as being part of the green
16 gripping handle portion.

01:38

17 And, again, this is a reference that has
18 been analyzed pursuant to Facet's understanding of or
19 description of a gripping handle portion, the plain
20 and ordinary meaning as it's illustrated in its
21 infringement contentions.

01:38

22 Q. Do you believe that a user would ever
23 grip just the part highlighted in green without
24 gripping the center portion?

25 A. Well, again, I don't agree with Facet's

01:38

1 understanding of gripping handle portion as it
2 described in its infringement contentions. And this
3 analysis was done under Facet's understanding of that
4 term.

5 However, having said that, your -- the 01:39
6 idea that the -- a user would avoid holding it there
7 is not at all the case. Just because they touch
8 something as part of a structure doesn't mean that
9 that part is a gripping handle.

10 The fact that their finger makes contact 01:39
11 with something on these very small products, the
12 finger is going to make contact with all kinds of
13 things, that doesn't mean that the entirety is a
14 gripping handle. Otherwise, the definition of
15 gripping handle would be anything you touch. 01:40

16 Q. So if you go to paragraph 310, you say --
17 this is under a section that says, "Starnes discloses
18 Claim 1-A, a primary sheath for initial embedment of
19 a sharp lancing tip of an unused lancet therein."

20 Do you see that? 01:41

21 A. Yes, I do.

22 Q. And then here you point to:

23 The lancet needle is completely enclosed
24 and sealed by cap member 4.

25 Do you see this? 01:41

1 A. Oh, okay. Yes, I do see that. Yes.

2 Q. So is cap member 4 the primary sheath in
3 Starnes?

4 A. I just want to check the patent on
5 something. 01:42

6 Q. Sorry, which patent are you checking?

7 A. I'm looking at Starnes. (Sotto voce.)
8 Hmm. So I don't think it's a correct statement as
9 you've posed it that the entirety of the cap is the
10 primary sheath. And I don't believe I've stated 01:45
11 it -- I don't believe I've stated that.

12 It says that the cap provides a primary
13 sheath where the unused lancet needle is embedded.
14 And it makes it clear throughout the discussion of
15 the secondary sheath that the secondary sheath is at 01:45
16 a different location from that. It's a separate
17 surface. And it teaches that the cap is to be
18 impaled on the needle, not via the primary sheath,
19 but on a different surface location.

20 So I think that your question or the way 01:46
21 you worded it is not correct. I'm stating that the
22 primary sheath is where the unused lancet needle has
23 been embedded into the cap.

24 Q. Where is the primary sheath in this
25 figure, Figure 4? 01:46

1 A. If you can -- if I can have control and
2 maybe zoom in a little bit, it'll be easier for me to
3 draw.

4 THE VIDEOGRAPHER: You have control now.

5 THE WITNESS: Thank you. It doesn't seem 01:46
6 to -- there we go. Okay. No. What's the tab?

7 BY MR. PATHMANABAN:

8 Q. I think you have to go to comment.

9 A. Comment, yeah, that's what I thought.
10 But when I go to comment, pencil is grayed out. See? 01:47
11 But maybe it's letting me pick it. No.

12 Q. Maybe you need to close out of the find
13 bar, try that.

14 A. Oh, I see what you're saying.

15 THE VIDEOGRAPHER: I don't know why that 01:47
16 is. Let me see if I can -- well...

17 BY MR. PATHMANABAN:

18 Q. Well, why don't you just show with the
19 cursor, Mr. Delman, where you think the primary
20 sheath is. 01:47

21 A. So the primary sheath, can you see my
22 cursor --

23 Q. Yes.

24 A. -- moving up and down in this area here?

25 Q. Uh-huh. 01:47

1 A. That would be where the primary sheath is
2 located.

3 Q. And you believe the gripping handle that
4 you have identified is between the primary sheath and
5 that circle which represents the secondary sheath; is
6 that right? 01:48

7 A. Yes, under -- to be clear, under Facet's
8 description of the plain and ordinary meaning of a
9 gripping handle portion.

10 MR. PATHMANABAN: Can I get control back, 01:48
11 please?

12 THE VIDEOGRAPHER: I gave it back to you.

13 MR. PATHMANABAN: Okay.

14 BY MR. PATHMANABAN:

15 Q. Now, let's go back to Hyoue. And we 01:48
16 talked earlier, here you pointed to the gripping
17 handle portion as including both the primary sheath
18 and the secondary sheath, right?

19 MR. GRIFFIN: Objection.

20 THE WITNESS: I pointed to it as 01:49
21 including the green portions. I noted that
22 certain aspects of the secondary sheath that are
23 not highlighted that remain in white would not
24 be included.

25

1 BY MR. PATHMANABAN:

2 Q. Okay. Let's go to Lathrop. And here the
3 gripping handle portion in Lathrop, according to you,
4 encompasses the primary and secondary sheaths,
5 correct?

01:50

6 MR. GRIFFIN: Objection.

7 THE WITNESS: I noted that the gripping
8 handle portion is encompassed by the green
9 highlighted area, under Facet's application of
10 the plain and ordinary meaning of gripping
11 handle, which I do not agree with. And that in
12 this image does include the secondary sheath and
13 the primary sheath.

01:50

14 BY MR. PATHMANABAN:

15 Q. So even though the primary and secondary
16 sheaths are within the gripping handle portion,
17 according to you, they are between the primary and
18 secondary sheaths; is that right?

01:51

19 A. Under Facet's application of the term
20 plain and ordinary meaning gripping handle portion as
21 best as it can be understood through Facet's
22 infringement contentions.

01:51

23 The contentions were extremely vague. I
24 don't know where and what is included. They don't
25 tell a reader with certainty what would or would not

01:51

1 be included.

2 So I did my best to analyze these
3 references through Facet's application of the plain
4 and ordinary meaning of gripping handle portion.

5 Q. And just to be clear, the qualification 01:51
6 you just made that this analysis of what constitutes
7 the gripping handle portion in Lathrop was through
8 the lens of Facet's infringement contentions is found
9 nowhere in your expert report, correct?

10 A. I believe it's clear. It is not spelled 01:52
11 out in the letters that you may be asking about, but
12 I believe it's clear that that is the case.

13 Q. So does it make any sense if I said, for
14 example, to you that even though America includes
15 California and New York, America is between 01:52
16 California and New York? Does that sentence make any
17 sense to you?

18 A. As I stated --

19 MR. GRIFFIN: Objection.

20 THE WITNESS: -- this analysis was 01:52
21 performed as best I can understand Facet's
22 application of the plain and ordinary meaning of
23 gripping handle portion. I don't agree with it.

24 But whether Facet's definition of
25 gripping handle portion would include or if it 01:53

1 would make sense to include California and
2 New York, I think that was your example, I can't
3 say because that's your definition. My
4 definition would be different, and my definition
5 is different.

01:53

6 BY MR. PATHMANABAN:

7 Q. Okay. So your definition of the ordinary
8 meaning of a gripping handle portion extending
9 between the primary sheath and the secondary sheath
10 would not include the gripping handle portion that
11 you have pointed to in Lathrop; is that right?

01:53

12 A. That's correct. To be clear, I believe
13 that a gripping -- that the word "between" would mean
14 it has to be between.

15 So if you were to ask me if a POSITA
16 would understand the plain and ordinary meaning of a
17 map of America, for example, as whether between
18 California and New York includes California and
19 New York, I would say, no, it's the states that come
20 between California and New York. That would be a
21 POSITA's understanding. But that is not how Facet
22 applied the definition in its infringement
23 contentions.

01:54

24 Q. Have you seen Dr. Collins' infringement
25 report in this case?

01:54

1 A. I have.

2 Q. And when did you see that?

3 A. To be clear, I have not read it in the
4 greatest depth page to page -- first page to last
5 page, but I have seen it, yes. It was submitted, I
6 believe, at the same time mine was submitted, my
7 report was submitted.

01:54

8 Q. And have you seen Dr. Collins' rebuttal
9 report in this case rebutting your opinions?

10 A. Again, with the same qualification that I
11 have not read it in depth from front page to last
12 page, but, yes, I have reviewed it. Yes.

01:55

13 Q. And do you understand that he disagrees
14 with you that Lathrop, for example, includes a
15 gripping handling between the primary sheath and the
16 secondary sheath? Do you understand that?

01:55

17 A. I would need to refer to his report to
18 confirm -- confirm that. And I don't recall right
19 now what he may have said about it. Again, I did not
20 have the benefit of his report when I wrote my
21 report, and my report was based upon the infringement
22 contentions that Facet had submitted.

01:55

23 Q. So going to -- going back to Starnes,
24 withdrawn.

25 Let's go to paragraph 322 of your report.

01:56

1 It says:

2 As to element 6-D's limitation of the
3 gripping handle portion defines a lateral span of at
4 least 1.5 times the lateral thickness --

5 A. Hold on one second, Counselor. I'm just 01:56
6 turning to that paragraph. Okay. Thank you.

7 Q. Here you say:

8 A visual inspection of Figure 4 below
9 with the lateral span annotated S would indicate that
10 Starnes discloses this limitation. 01:56

11 Do you see this?

12 A. Yes, I do see what you've just read.

13 Q. So, again, you are visually inspecting a
14 patent figure of Starnes to try to derive the lateral
15 span, correct? 01:57

16 MR. GRIFFIN: Objection.

17 THE WITNESS: I would not characterize it
18 quite as you have done. I have reviewed the
19 patent figure. I have also, as I note, reviewed
20 the commercial embodiment that's pictured on the 01:57
21 right of the bottom of page 147. And I have
22 reviewed and I discuss the written description
23 support that I read in conjunction with the
24 patent figures and the commercial embodiment.
25

1 BY MR. PATHMANABAN:

2 Q. So this paragraph 322, you don't cite to
3 any written description support from Starnes, other
4 than this Figure 4 itself, right?

5 A. In that particular paragraph. On 01:58
6 page 147, I do not. However, beginning at the top of
7 that same -- of page 148, which is a continuation of
8 that paragraph, I begin to discuss the written
9 description support that I referred to that was
10 critical to my analysis of this reference. 01:58

11 So within paragraph 322, I do, indeed,
12 discuss more than just the visual reference.

13 Q. And Starnes doesn't disclose any
14 dimensions for any of its elements, correct?

15 A. So as I have tried to make clear on some 01:59
16 other references that you've asked about, Starnes
17 does not disclose specific dimensions, but as I
18 describe through to pages 150, it does provide more
19 than sufficient written description support to teach
20 a POSITA of the proportions and to confirm a ratio of 01:59
21 the dimensional limitations that you're asking about.

22 So it does not specifically spell out a
23 dimension, no. But it provides a POSITA with all the
24 information required to understand the dimensional
25 limitation. 01:59

1 Q. And Starnes doesn't say that its figures
2 are to scale, correct?

3 A. No, it does not. None of the references
4 state that.

5 Q. And as to this alleged commercial 02:00
6 embodiment of Starnes that you have here on page 147
7 of your report --

8 A. Yes.

9 Q. -- you have provided no information about
10 whether this commercial -- alleged commercial 02:00
11 embodiment is even prior art to the '635 patent,
12 correct?

13 A. I will have to review my discussion of
14 Starnes to see if what you've just said is or is not
15 correct. So please give me a moment. 02:00

16 So if your question is, do I provide
17 evidence that the Starnes lancet I'm showing in the
18 image is the commercial embodiment of the Starnes
19 patent, which is prior art, I don't believe that I
20 have any specific information provided in my report 02:02
21 to that effect. However, I was informed that this
22 is, indeed, the commercial embodiment of Starnes.

23 Q. You were informed by counsel that what
24 you're showing on page 147 is the commercial
25 embodiment of Starnes, correct? 02:02

1 A. Yes, that is correct.

2 Q. You didn't do any independent analysis of
3 whether that's actually true or not?

4 A. I did not do independent analysis to
5 confirm that, other than to examine very carefully
6 the Starnes lancet and compare it with the patent,
7 which I did, and they sure look the same. But I did
8 not do anything further, other than that.

02:03

9 Q. And you have no way of knowing whether
10 the Starnes lancet that you examined was sold prior
11 to the filing date of the '635 patent, correct?

02:03

12 A. I don't know whether or not it was.

13 Q. You don't know whether the Starnes lancet
14 was commercially available for sale before the filing
15 date of the '635 patent, correct?

02:03

16 MR. GRIFFIN: Objection.

17 THE WITNESS: I do not -- I do not
18 personally know that. Again, I relied on
19 counsel with respect to this product sample.

20 BY MR. PATHMANABAN:

02:04

21 Q. Starnes itself never references any
22 relationship in size between the lateral span of its
23 handle to the thickness of the lancet, correct?

24 A. So as I discuss throughout the Starnes
25 section here, for example, on 148, in conjunction

02:05

1 with my reference to the clear dimensions that --
2 proportions that are visible in the visuals that I've
3 provided on page 147:

4 A POSITA would recognize that having an
5 endcap with a lateral span of at least 1.5 times the 02:05
6 lancet thickness would provide a lancet user with the
7 optimal rotational leverage to apply the twisting
8 force on cap member 4, that's a quote, required to
9 facilitate, quote, "ease of disengagement of tab
10 members 8," end quote, from the lancet body. A 02:06
11 POSITA would understand that such a lateral span
12 would allow these tab members to break more readily
13 through minimal rotation of the cap such that their
14 disengagement would more effectively serve to
15 indicate that the lancet blade has potentially been 02:06
16 bent.

17 So, for example, Starnes does, as a
18 POSITA would be taught by reading Starnes, disclose
19 the proportions that I discuss, the dimensional
20 proportions. And I also cite in support of my 02:06
21 understanding or a POSITA's understanding, and again,
22 in conjunction with the clear indications provided by
23 the figures, I cite back to section XI.H.1 A through
24 E with respect to Claim 14, which includes
25 limitations that are, of course, analogous in scope 02:07

1 to Claim 6.

2 So if you were to read the entirety of
3 the report rather than just that paragraph, you would
4 find a great deal of written description support that
5 a POSITA would learn from in understanding that 02:07
6 Starnes discloses the dimensional relationships that
7 we've been discussing.

8 Q. So you say in paragraph 322:

9 A POSITA would understand that such a
10 lateral span would allow these tab members to break 02:08
11 more readily through minimal rotation of the cap such
12 that their disengagement would more effectively serve
13 to indicate that the lancet blade has potentially
14 been bent.

15 Do you see that? 02:08

16 A. Yes, I do.

17 Q. Are the specific dimensional limitations
18 of the asserted claims the only way to allow tab
19 members to break more readily through minimal
20 rotation of the cap? 02:09

21 MR. GRIFFIN: Objection.

22 THE WITNESS: It may not be the only way
23 to provide for that. But as I note, it is an
24 obvious and perhaps optimal way to most easily,
25 without increasing costs and for other reasons, 02:09

1 provide for extra rotational leverage or the
2 appropriate amount of rotational leverage
3 required to meet the teachings of the patent.

4 As I suggested with my reference or
5 analogy to a house key and the kinds of products 02:09
6 that are sold to make house keys easier to turn
7 for people with arthritis and other physical
8 limitations, there are probably a variety of
9 ways that that -- you can skin that particular
10 cat, I hate that phrase, but I'll use it anyway. 02:10

11 But making the span of the key wider is
12 the most obvious, perhaps, and certainly a high
13 probability of success that a POSITA would
14 understand to make it easier to perform that
15 particular twisting motion and get that 02:10
16 particular result that the patent teaches.

17 BY MR. PATHMANABAN:

18 Q. Let's go to the Kim reference starting on
19 paragraph 330. And your opinion is that the asserted
20 claims are rendered obvious by Kim, right? 02:10

21 A. Yes, that is my opinion at H on 150 --
22 page 150.

23 Q. We go to paragraph 345. Here you have
24 annotated Figure 9-B and 9-C from Kim to show, among
25 other things, the primary sheath, the secondary 02:11

1 sheath, and the gripping handle portion, right?

2 A. I have.

3 Q. And the primary sheath in this Figure 9-B
4 is extending -- well, let me ask the question.

5 The gripping handle portion that you have 02:12
6 highlighted here encircles both the primary sheath
7 and the secondary sheath; is that right?

8 MR. GRIFFIN: Objection.

9 THE WITNESS: I don't know that I would
10 use the term "encircle" with respect to the 02:12
11 primary sheath, but it does -- that would be an
12 appropriate word, perhaps, to describe what it
13 does with respect to the secondary sheath.

14 BY MR. PATHMANABAN:

15 Q. And is your opinion that the gripping 02:12
16 handle portion extends between the primary sheath and
17 the secondary sheath?

18 A. As I state at 347, and to be clear, this
19 analysis was performed through Facet's application of
20 the plain and ordinary meaning of gripping handle 02:13
21 portion as demonstrated by its infringement
22 contentions, as I state at 347, I believe Kim
23 discloses a gripping handle portion of the lateral
24 sorry, I'm reading the wrong paragraph. 342 -- no.
25 That's the wrong paragraph, too. 02:13

1 340, let's try that one. A gripping
2 handle portion extending between the primary sheath
3 and secondary sheath Kim discloses.

4 Q. And under your view of the ordinary
5 meaning of a gripping handle portion extending 02:13
6 between the primary sheet and the secondary sheath,
7 Kim would not disclose such a gripping handle; is
8 that right?

9 A. That is correct. That is correct.

10 Q. So in paragraph 345 you say: 02:14

11 As to element 6-D limitation of the
12 gripping handle portion defines a lateral span of at
13 least 1.5 times the lancet thickness, from a cursory
14 review of Figures 9-B and 9-C, with the lateral span
15 annotated S below, I believe that the lateral span of 02:14
16 the lancet cap is at least 1.5 times, if not more,
17 larger than the lancet thickness.

18 Is that right?

19 A. That is what it states. And with respect
20 to the word "cursory" I would again say that my 02:15
21 intention would be to add the word "from even a
22 cursory review" because I am not intending to imply
23 in any way that I only made a cursory review of the
24 figures.

25 But to be clear, that discussion in 345 02:15

1 is not standing on its own, but it is to be read in
2 the context of the ensuing paragraphs which discuss
3 the written description support for the dimensional
4 limitation.

5 Q. So the Kim reference describes dimensions 02:15
6 for a pedestal 50, correct?

7 A. Yes, that's correct. It does provide a
8 dimension, which I note in paragraph 346 that the
9 pedestal can have a diameter of 1.75 millimeters and
10 a length of 2 millimeters. 02:16

11 Q. But it does not provide a dimension for
12 the thickness of the lancet body, right?

13 A. It does not. But a POSITA reviewing the
14 illustration which does have dimensions applied to
15 the pedestal, and reading and understanding that 02:17
16 visual description in conjunction with the written
17 description I describe in the ensuing paragraphs on
18 pages 156, 157, and 158, I believe, would readily
19 understand that the dimensional limitations we've
20 been discussing are met based upon the teachings of 02:17
21 the patent.

22 Q. To be clear, the pedestal 50 is this
23 portion?

24 A. Yes. I believe your little hand there is
25 on pedestal 50, yes. 02:17

1 MR. PATHMANABAN: Okay. Let's pull up
2 the Kim reference, Angela, please, as in
3 Exhibit 7.

4 (Exhibit 7 was identified.)

5 BY MR. PATHMANABAN:

02:18

6 Q. Before we get here, the -- the dimensions
7 you're obtaining for Kim is from column 14, lines 35
8 through 38; do you see that?

9 A. I do see that citation, yes.

10 Q. So if we go to column 14 in Kim, which is
11 Exhibit 7, column 14, lines 35 through 38 is what
12 I've highlighted on the screen.

02:18

13 A. Yes, I do see that.

14 Q. Okay. The dimensions provided in
15 column 14 lines 35 through 38, in other words, the
16 specific disclosure in Kim that you point to for the
17 dimensions of the so-called pedestal, this is not
18 with reference to Figure 9 of Kim at all, right?

02:19

19 A. Apparently, you are correct. The
20 citation or the -- the location for that citation in
21 Kim must be a typo. And I'm sure I can find it if
22 you'd like to accord me the time to do so, or perhaps
23 you can even search for it using the find function in
24 the PDF you have on there.

02:20

25 But it seems that the location where my

02:20

1 report states that we should find those dimensions
2 we're not finding them when we look to that location
3 in Kim.

4 Q. Are you saying that there's a separate
5 dimension in Kim for the pedestal in Figure 9?

02:20

6 MR. GRIFFIN: Objection.

7 THE WITNESS: I would like to find the
8 correct location for the citation I have as to
9 the size of the pedestal, 1.75 millimeters and
10 2 millimeters, and that will assist me in
11 responding to your question.

02:20

12 So I can page through and try to find it
13 on my own or if you'd like to do a search.

14 BY MR. PATHMANABAN:

15 Q. I'll give -- why don't I give you
16 control. You can do a search and you can scroll
17 through and tell me where you believe the size of the
18 pedestal of Figure 9 is described, if at all.

02:21

19 A. Well, I'm going to try typing in 1.75 as
20 a search term, and let's see where that takes us.

02:21

21 Q. So the first location it took us to is
22 what you cite in your report, right?

23 A. Uh-huh. Well, the lancets had a needle
24 1 millimeter long and mounted on a -- oh, it says
25 right here. Says right here:

02:21

1 The lancets had a needle 1 millimeter
2 long and 0.15 millimeters in diameter, which was
3 mounted on a 2 millimeter long and 1.75 millimeter in
4 diameter pedestal.

5 So let me just highlight that. So, in 02:22
6 fact, there we are. The lancet mounted on a pedestal
7 described as 2 millimeters long and 1.75 millimeters
8 in diameter.

9 Q. My question was, this is not with
10 reference to Figure 9, is it, what you've highlighted 02:22
11 on the screen from column 14, line 35 through 38 of
12 Kim?

13 A. Well, let's see if there's any other
14 references which might tie it to that. Again, the
15 pedestal is 2.25 millimeters in length 02:22
16 (indecipherable) --

17 (The Court Reporter requested
18 clarification.)

19 THE WITNESS: The pedestal was
20 2.25 millimeters in length and the diameter of 02:23
21 the top surface of the pedestal was
22 1.75 millimeters. I'm reading from example 2 in
23 Kim. And it doesn't find any other matches.

24 So your question being, does this
25 dimension that we found in two places in Kim, 02:23

1 does it refer specifically to Figure 9-C.

2 Well, number 50, as called out in Figure
3 9-C, is called a pedestal. Kim discusses the
4 dimensions of this pedestal, not specifically in
5 the context of Figure 9-C, but discusses the
6 dimensions of this pedestal in two separate
7 locations within the patent.

02:23

8 So where -- although it may not
9 specifically tie those dimensions to Figure 9-C
10 in the patent, I believe that a POSITA seeing
11 the word "pedestal" twice and seeing those same
12 dimensions twice would find it very reasonable
13 that Kim teaches that the pedestal in this
14 drawing would be potentially of a diameter of
15 1.75 millimeters and a length of 2 millimeters,
16 as I say. Kim provides that the pedestal can
17 have a diameter of 1.75 millimeters and a length
18 of 2 millimeters.

02:24

02:24

19 In my opinion, based on Kim's disclosure
20 of the diameter of the pedestal, the lancet
21 thickness looks to be 1.5 to 2 times the
22 diameter of the pedestal, while the lateral span
23 of the gripping handle portion looks to be at
24 least 4 to 5 times the diameter of the pedestal.

02:24

25

1 BY MR. PATHMANABAN:

2 Q. When you say, "looks to be," you're
3 looking at Figure 9, correct?

4 A. When I refer to Figure 9 in conjunction
5 with the written description support that I've been
6 discussing, yes.

02:25

7 MR. PATHMANABAN: Can I have control back
8 Angela, please?

9 BY MR. PATHMANABAN:

10 Q. So the dimension described in column 14,
11 lines 35 through 38, is for a Lifescan device or
12 Abbott device; do you see that?

02:25

13 A. I do see that this section references
14 this Lifescan or Freestyle lancing device produced by
15 Abbott.

02:26

16 Q. And nowhere in Kim does it say that its
17 figures are a -- well, let me ask a broader question.
18 Withdrawn.

19 Nowhere in Kim does it say its figures
20 are to scale, correct?

02:26

21 A. That's correct.

22 Q. And nowhere in Kim does it say that its
23 figures were corresponding to -- in dimensions to the
24 Lifescan or Abbott device described in example 1 in
25 column 14, right?

02:26

1 MR. GRIFFIN: Objection.

2 THE WITNESS: I would need to read
3 through Kim in some detail, and it's quite long,
4 to see if there might be some reference to
5 either of those devices in the context of the 02:26
6 illustration 9-C, Figure 9-C. I'm not sure
7 whether or not it does or doesn't disclose that
8 connection.

9 BY MR. PATHMANABAN:

10 Q. Well, specifically, you don't cite any 02:27
11 tie of the devices described in example 1 to Figure 9
12 in your report, do you? Sorry, I did something. I
13 apologize.

14 A. That's okay. It's a nice picture.

15 MR. PATHMANABAN: I think I need Angela 02:27
16 to pull that back up.

17 THE VIDEOGRAPHER: When you continue to
18 move the mouse, it disables my ability to.

19 MR. PATHMANABAN: Yeah, sorry.

20 BY MR. PATHMANABAN: 02:27

21 Q. So let me re-ask the question.

22 A. Sure.

23 Q. In your report, you do not tie the
24 dimensions described in example 1 to -- withdrawn.

25 In your report, you do not cite anything 02:27

1 in Kim that ties the dimensions described for the
2 Abbott or Lifescan devices in example 1 to Figure 9,
3 do you?

4 MR. GRIFFIN: Objection.

5 THE WITNESS: I don't believe that I
6 explicitly do, no.

7 BY MR. PATHMANABAN:

8 Q. And when you say in paragraph 346, "In my
9 opinion, based on Kim disclosure of the diameter of
10 the pedestal 50, the lancet thickness looks to be 1.5
11 to 2 times the diameter of the pedestal," that's
12 based on your visual inspection of Figure 9, correct?

13 MR. GRIFFIN: Objection.

14 THE WITNESS: As I've said, it is based
15 on my visual inspection of Figure 9 informed by
16 and supported by the various written description
17 support that I've cited in this section on Kim
18 and the dimensional limitations, which includes,
19 but is not limited to, the information provided
20 in Kim with respect to the size the pedestal can
21 be.

22 BY MR. PATHMANABAN:

23 Q. Let's go to page 179 of your report. So
24 on page 179, you see the numbering restarts again
25 after paragraph 400?

1 A. Oh, yeah. Yeah, I do see that.

2 Q. That's just a typo, right?

3 A. Yes. Microsoft Word, it has numbering
4 issues, I'd say.

5 Q. So if we go to paragraph 43 of your
6 second set of numbering.

7 A. Okay.

02:31

8 Q. It starts at page 199. Here you have an
9 opinion that Sakata renders Claims 1, 6, 8, 14, and
10 18 obvious in view of Morita, right?

02:31

11 A. Yes, that's what it says at just above
12 43.

13 Q. If you look at -- paragraph 43 talks
14 about the primary sheath limitation, right?

15 A. Yes, it does.

02:32

16 Q. And paragraph 44 talks about the
17 secondary sheath limitation.

18 A. Yes, it does.

19 Q. And paragraph 46 describes the gripping
20 handle portion, right?

02:32

21 A. Yes.

22 Q. You do not have any section for what you
23 have previously called claim element 1-D with respect
24 to the combination of Sakata and Morita, and that
25 claim element 1-D is:

02:33

1 With the primary sheath attached at a
2 first end of the gripping handle portion and the
3 secondary sheath attached at a second end of the
4 gripping handle portion when the protective sterility
5 cap is removed from the lancet.

02:35

6 Correct?

7 A. Well, let me look through here. Perhaps
8 it was inadvertently left out.

9 So could you repeat the claim again?
10 Because I want to be sure that somehow it may not
11 have gotten incorporated under another heading by
12 accident and the heading may have been left off.
13 What is the claim you're saying I didn't provide
14 analysis for in this particular reference?

02:34

15 Q. Let me show it to you. If I go to the
16 table of contents -- oops. Let's go to some other
17 portion.

02:34

18 You see, for example, for the Lathrop
19 reference, you have discussed a Claim 1-D that:

20 The primary sheath attached at a first
21 end of the gripping handle portion and the secondary
22 sheath attached at a second end of the gripping
23 handle portion when the protective sterility cap is
24 removed from the lancet.

02:35

25 A. Yes, I do see that. Okay. Let me just

02:35

1 see if that discussion may have become incorporated
2 inadvertently in another heading.

3 Well, it looks as if it may have
4 inadvertently, that written discussion, been left out
5 or accidentally deleted with respect to that type of 02:36
6 discussion that seems to be present in other
7 references.

8 However, I would rely upon my
9 illustrations, annotated illustrations, to
10 nonetheless disclose that particular limitation being 02:37
11 met by this combination of Sakata in view of Morita.

12 Q. So your report also has no section for
13 the claim elements that you previously label as 6-A
14 through 6-C, correct?

15 A. And -- 02:37

16 Q. With this combination, Sakata and Morita?

17 A. And what are those claim elements again?
18 If you could just show me that section from another
19 reference to take a look at.

20 Q. So you see -- you see you have defined 02:38
21 Claim 6 --

22 A. Yes.

23 Q. -- in paragraph 123 as 6-A is in
24 combination with the lancet, having a lancet body,
25 defining a lancet thickness. I'm sorry, that 02:38

1 includes B as well.

2 A. That's okay.

3 Q. 6-A is in combination with a lancet. 6-B
4 is having a lancet body defining a lancet thickness.
5 6-C is a sharp lancet tip initially embedded in the
6 primary sheath. Do you see that? 02:38

7 A. I do. It does -- it does not appear that
8 this section discussing a combination of Sakata and
9 Morita specifically includes that language or that
10 written section that the other references do include. 02:39
11 It was apparently inadvertently left out or deleted.

12 But, again, I stand by my analysis and
13 illustrations within the section to support that this
14 combination does meet those limitations.

15 Q. In paragraph 46, you say: 02:39

16 I explained Sakata disclosing the
17 limitation of a gripping handle portion via its
18 operating portion in section X(C) incorporated
19 herein.

20 Do you see that? 02:39

21 A. I do see that, yes.

22 Q. I haven't been able to find a
23 section X(C). Have you?

24 A. Well, until you raised it, I haven't
25 looked for it yet, Counsel. Let me take a look. 02:40

1 Q. While you're doing that, I'm running a
2 search, X(C). And it looks like that's the only --
3 paragraph 46 is the only place that has a reference
4 to X(C).

5 A. It seems to be a typographical error, and 02:40
6 the reference should be to another section. I would
7 have to, you know, rather than just off the cuff take
8 a guess at which section I may have intended to be
9 incorporating by reference within here, I would need
10 to read in more detail to make that correction. 02:41

11 It's a -- it's an unfortunate typo, to be
12 sure, but the intention was, as I have done in other
13 sections, to incorporate by reference an analysis
14 rather than repeat it for -- unnecessarily.

15 Q. Now, in paragraph 47, you provide 02:41
16 annotations of a figure from Morita, correct?

17 A. I just want to open up Morita one second.
18 Yes, I do provide annotations to a figure from Morita
19 though, unfortunately, that figure, at least in the
20 figure there, doesn't seem to be labeled as to which 02:42
21 one it is.

22 Q. I think this is Figure 3 from Morita.

23 A. I think you're right about that. But I
24 apologize, I should have labeled it.

25 Q. That's okay. 02:42

1 What's colored in green is the gripping
2 handle portion, according to you, right?

3 A. Yes, that's correct.

4 Q. And the secondary sheath is this -- what
5 is this part 29, or what's labeled as 29, right?

02:42

6 A. The yellow portion there, yes. Uh-huh.

7 Q. Okay. And after use in Morita, the
8 needle tip extends through 29 into this part 31,
9 correct?

10 A. I would need to examine Morita in some
11 detail to confirm or deny that. So let me take a
12 look.

02:43

13 MR. PATHMANABAN: While he's doing that,
14 can we pull up Morita, please? Mark it
15 Exhibit 8.

02:43

16 (Exhibit 8 was identified.)

17 THE WITNESS: So your question is, would
18 the needle protrude through -- the English
19 version would be awesome, but I do have that
20 here in print.

02:44

21 BY MR. PATHMANABAN:

22 Q. Oh, we probably have a separate
23 translation.

24 A. Yeah, I do have the translation here.
25 Thank you.

02:44

1 So I just want to clarify your question.
2 Are you asking if when the needle is inserted into
3 the secondary sheath would it protrude through that
4 enclosing wall into which it's inserted into the area
5 beneath in that 31 area, the hollow in that 31 area? 02:44

6 Q. Correct.

7 A. I would need to read the disclosures of
8 the patent in some detail to see whether or not it
9 makes mention of that. I don't believe I make
10 mention of it in my report, whether or not that would 02:45
11 be the case, but let me see.

12 Q. And I would direct you to Figure 19,
13 which shows that the needle protrudes through a gap,
14 right?

15 A. 19. Well, Figure 19 is a different 02:45
16 orien- -- yes, I see what you're saying. Okay. All
17 right. I see Figure 19 now. So, yes, if you call
18 Figure 19 up on screen there, why don't we zoom in on
19 that just so we know we're talking about the same
20 thing. 02:46

21 And you're commenting that that is the
22 tip of the lancet blade protruding through into that
23 hollow area there?

24 Q. Yes.

25 A. Okay. So is your question that it does 02:46

1 that?

2 Q. Correct. The needle --

3 A. It appears from Figure 19 that it can do
4 that, yes.

5 Q. Well, not it can. That's what Figure 19
6 shows, that the needle is exposed into this hollow
7 area, right?

02:46

8 A. It does show that, yes.

9 Q. And so, in Figure 3, the needle is -- the
10 used lancet tip is not contained within this part 29,
11 correct?

02:46

12 MR. GRIFFIN: Objection.

13 THE WITNESS: It would appear that the
14 enclosure of the lancet tip includes a certain
15 portion of the interior of 31 as well based upon
16 what you've shown in Figure 19.

02:47

17 BY MR. PATHMANABAN:

18 Q. So going back to your report, the used
19 lancet tip is not enclosed or embedded within what
20 you have labeled as the secondary sheath, correct?

02:48

21 MR. GRIFFIN: Objection.

22 THE WITNESS: Well, I think one thing
23 that you need to perhaps be reminded of is that
24 we're talking about a combination here, that
25 Sakata renders Claims 1,6, 8, 14, and 18 obvious

02:48

1 in view of Morita, and that I have taken the
2 teachings of Morita's secondary sheath and
3 applied it to Sakata.

4 And in doing so, we have taken the
5 learning -- the teaching from Morita that 02:49
6 disposal within the lancet body inserted into
7 the platform part does not pose a health and
8 safety problem of infection, and an illustrative
9 embodiment of Sakata in view of Morita is
10 annotated below. 02:49

11 So, at the end of the day, the
12 combination is what I'm showing here as
13 rendering the relevant claims obvious.

14 And I don't show any indication that the
15 application or the way that I've applied 02:49
16 Morita's secondary sheath, particularly in light
17 of the teaching that disposal within the lancet
18 body inserted into the platform part does not
19 pose a health and safety problem of infection, I
20 am not combining it necessarily in a way where 02:50
21 this protrusion extends through to any other
22 element.

23 So -- so whereby your question, does it
24 extend into 31 as Morita shows, yes, it appears
25 to do so. But, again, I'm not taking all of 02:50

1 Morita and the way it extends into 31. I'm not
2 taking 31 from Morita. I'm taking the secondary
3 sheath from Morita and applying it to Sakata to
4 per- -- to arrive at a combination that renders
5 the claims obvious. 02:50

6 I'm not stating that the needle extends
7 through in that combination, or extends
8 beyond -- or extends beyond the secondary sheath
9 in that combination.

10 BY MR. PATHMANABAN: 02:51

11 Q. I understand.

12 But when we're talking about Figure 3 of
13 Morita, and Morita alone, what you have labeled in
14 Morita as the secondary sheath does not enclose or
15 embed the sharp lancet tip, correct? 02:51

16 MR. GRIFFIN: Objection.

17 THE WITNESS: The sharp lancet tip would
18 extend into 31, which has not been highlighted
19 as the secondary sheath in the illustration
20 you're referring to. 02:51

21 BY MR. PATHMANABAN:

22 Q. So the answer to my question is yes?

23 MR. GRIFFIN: Objection.

24 THE WITNESS: Well, the answer to the
25 question is that the secondary sheath that's 02:52

1 been highlighted in the illustration at the top
2 of 201 does not include a portion of 31 into
3 which the lancet tip would extend into according
4 to Morita on its own.

5 BY MR. PATHMANABAN:

02:52

6 Q. Okay. Now, Morita provides some
7 dimensions, right?

8 A. It does.

9 Q. And if you look at your paragraph 48.

10 A. Okay.

02:53

11 Q. Here you're talking about:

12 The gripping handle portion of Morita
13 explicitly teaches the limitations of Claims 11
14 through 13 --

15 (The Court Reporter requested
16 clarification.)

02:53

17 BY MR. PATHMANABAN:

18 Q. The limitations of Claims 11 through 13
19 as outlined below.

20 Is that what you state?

02:53

21 A. Yes.

22 Q. In this section, you don't actually ever
23 discuss Claim 6, 8, 14, and 18, do you, in the
24 section starting at paragraph 48 of the new numbering
25 on page 203?

02:54

1 A. I don't discuss them explicitly. This
2 was a carryover, these claims, I believe, from my IPR
3 declaration. And in doing so, the subject matter
4 remains wholly relevant, but the -- the specific
5 numbering of the claims would not be congruent, that
6 is correct. 02:54

7 Q. So your report does not have any opinions
8 about the obviousness of Claims 6, 8, 14, or 18,
9 correct?

10 MR. GRIFFIN: Objection. 02:54

11 BY MR. PATHMANABAN:

12 Q. As for -- withdraw the question.

13 As for the combination of Sakata and
14 Morita, your report does not include any opinions
15 about the alleged obviousness of Claims 6, 8, 14, and
16 18, correct? 02:55

17 MR. GRIFFIN: Objection.

18 THE WITNESS: No, that isn't what I said.

19 I said that the subject matter is wholly
20 relevant and on point as I discuss it in the
21 context of the Claims 11 through 13 as it had
22 been carried over from my IPR declaration. 02:55

23 There is a numerical discrepancy, but the
24 analysis remains perfectly valid as to the
25 Claims 6, 8, 14, and 18. 02:55

1 BY MR. PATHMANABAN:

2 Q. So in paragraph 51, you are trying to
3 calculate the span of Morita's gripping handle
4 portion, correct?

5 A. Yes, I believe that is a correct
6 statement.

7 Q. And you purport to add the variables H1
8 and H2 in order to get there, right?

9 A. Yes.

10 Q. If we go to -- go back to your annotation
11 of Morita on page 202, the gripping handle portion
12 span does not extend between H1 and H2, does it?

13 MR. GRIFFIN: Objection.

14 THE WITNESS: Which illustration are you
15 looking at right now, Counsel? I'm sorry.

16 BY MR. PATHMANABAN:

17 Q. It's at the bottom of page 202 of your
18 report.

19 A. What I think I'm trying to show there,
20 we've got a dimension, H1, which, as I believe you're
21 implying, is not highlighted as part of the gripping
22 handling portion, but nonetheless cited as part of
23 the dimension.

24 But what I'm referring to, and I use the
25 word "approximately," I wouldn't have used the word

02:56

02:56

02:56

02:57

02:58

1 "approximately" if H1 was included in the green
2 highlighting.

3 What I'm referring to is the green area
4 just to the left of the secondary sheath that has the
5 H1 dimension on it such that the widest dimension is 02:58
6 approximately the addition of variables H1 and H2.

7 Again, that's why the word
8 "approximately" is in there. I'm adopting the H1
9 dimension over to the area to the left of it, and --
10 and using it in an approximate fashion. 02:58

11 Q. So the area to the left of the H1
12 dimension, which you have labeled as a secondary
13 sheath, is not as wide as H1, correct?

14 MR. GRIFFIN: Objection.

15 THE WITNESS: Its dimension is not -- it 02:59
16 has a smaller magnitude than H1. It would
17 appear to be approximately -- approximately
18 two-thirds.

19 BY MR. PATHMANABAN:

20 Q. And if you were taking the true widest 02:59
21 span of what you've labeled as the gripping handle,
22 you would start from the bottom of the element 31 and
23 go to wherever the green stops, which is
24 approximately two-thirds of way through part 29,
25 right? 02:59

1 A. Yes. If we had that dimension to --
2 provided by the patents teachings, but we do not.

3 Q. We do not, right?

4 A. That's right.

5 Q. We don't have -- we don't have the
6 dimensions for the parts -- for example, we don't
7 have the dimensions for part 35, correct?

02:59

8 A. That is correct.

9 Q. And we don't have the dimension for the
10 part above that, correct?

03:00

11 MR. GRIFFIN: Objection.

12 BY MR. PATHMANABAN:

13 Q. Above 35?

14 A. It doesn't specify that in the figure,
15 no.

03:00

16 Q. So Morita doesn't provide dimensions that
17 would enable you to accurately calculate the span of
18 what you have labeled the gripping handle portion,
19 correct?

20 MR. GRIFFIN: Objection.

03:00

21 THE WITNESS: As I discuss in
22 paragraph 51, in conjunction with the other
23 paragraphs surrounding it, so beginning with 50:

24 The lancet body has a thickness between 4
25 to 7 millimeters.

03:00

1 And this -- the span of -- as I say in
2 51:

3 The span of Morita's gripping handle
4 portion is its widest dimension rather than its
5 longest or shortest. The widest dimension is
6 approximately the addition of variables H1 and
7 H2. H1 is between 2 to 3.5 millimeters, while
8 H2 is between 6 and 15 millimeters, as I draw
9 from paragraph 50. This means that the span of
10 Morita's gripping handle portion is between --

03:00

11 (The Court Reporter requested
12 clarification.)

03:01

13 THE WITNESS: I'm sorry. Where did you
14 lose me there?

15 (THEREUPON, the requested portion of the
16 record was read by the Court Reporter.)

17 THE WITNESS: That means that the span of
18 Morita's gripping handle portion is between 8 to
19 18.5 millimeters, a rather large span. This
20 exceeds the boundaries of 6 to 10.5 millimeters.

03:01

21 And as I go on in paragraph 52 to
22 discuss:

23 The length of the gripping handle
24 portion, by default, is thus at least 6 to
25 10.5 millimeters, as its length is, by

03:01

1 definition, at least larger than its width and
2 span.

3 Thus, as I state in paragraph 53:

4 In my opinion, Morita explicitly teaches
5 the limitations. 03:02

6 So Morita provides us with -- provides a
7 POSITA with more than sufficient information in
8 its written disclosure, and in combination with
9 that written disclosure and the measurements
10 called out in the figure here, to perform the 03:02
11 analysis I just have and confidently arrive at
12 the dimensional limitations we're discussing.

13 THE COURT REPORTER: Counsel, whenever
14 there's a good time for a comfort break for me,
15 I would appreciate it. 03:02

16 MR. PATHMANABAN: Let's go off the
17 record.

18 THE WITNESS: Okay. Shall we take
19 10 minutes?

20 THE VIDEOGRAPHER: Sorry. Going off 03:03
21 video record at 3:03 p.m. Pacific time.

22 (A recess was taken.)

23 THE VIDEOGRAPHER: We're back on video
24 record at 3:13 p.m. Pacific time.
25

1 BY MR. PATHMANABAN:

2 Q. Mr. Delman, you have offered no opinions
3 in your report about why a person of skill in the art
4 would combine Sakata and Morita, correct?

5 A. No. I'm sorry, I don't believe that is
6 correct.

03:14

7 Q. Point me -- point me to where in your
8 report you offered any opinion about why a person
9 skilled in the art would combine Morita with Sakata?

10 A. Well, for one place, a POSITA would have
11 been motivated to -- in paragraph 45 on page 201:

03:14

12 A PHOSITA would have been motivated to
13 combine the features of Sakata and Morita, because
14 Morita describes advantages associated with the
15 secondary sheath, including disposal with the lancet
16 body inserted into the platform part does not --
17 excuse me -- the secondary sheath, including, quote,
18 "disposal with the lancet body inserted into the
19 platform part does not pose a health and safety
20 problem of infection," end quote.

03:15

03:15

21 And then I provide an illustrative
22 embodiment of that below. So that is one point where
23 I specifically provide motivation. Let's see if
24 there's any others.

25 I believe that's the only explicit

03:16

1 mention of motivation for this combination in this
2 section.

3 Q. Go to page 206 of your report. And you
4 have a section saying -- titled "Sakata Renders
5 Claims 6, 8, 14, and 18 Obvious."

03:16

6 Do you see that?

7 A. I do, yes.

8 Q. Is there anywhere in your report where
9 you've identified -- well, withdrawn.

10 This section is talking about obviousness
11 of these asserted claims based on Sakata alone,
12 correct?

03:17

13 A. Yes.

14 Q. Have you described anywhere in your
15 report why Sakata discloses a primary sheath or
16 secondary sheath or a gripping handle as claimed?

03:17

17 A. It would appear that that section was
18 inadvertently deleted or left out.

19 Q. Okay. Would you agree that that section
20 that you just said was inadvertently left out is
21 important to your opinion that Sakata renders the
22 claim as a whole obvious?

03:18

23 A. I'm just looking at Sakata for a second.
24 Well, I believe that discussion of the claims that
25 are specifically, quote-unquote, as I've just said,

03:19

1 "accidentally left out of this section," those are
2 all discussed in the section just before dealing with
3 the combination of Sakata and Morita.

4 So whereas, they were unfortunately not
5 carried over to section V on page 206, as you
6 correctly note, they're in my report. So the
7 analysis was done, and the opinion stands.

03:19

8 The fact that it was accidentally not
9 carried over specifically to the section on page 206
10 doesn't mean that the analysis and the opinion
11 doesn't exist. It just exists a few pages earlier.

03:20

12 Q. Where in your report have you described
13 why Sakata discloses, for example, a primary sheath
14 for initial embedment of a sharp lancing tip of an
15 unused lancet therein?

03:20

16 A. If you take a look at page 199, A,
17 page -- paragraph 43:

18 All claims: Primary sheath for
19 embedment. Sakata discloses this limitation by
20 disclosing that Sakata's cap may include integral
21 molding being used, and the puncture needle can be
22 embedded in the cap part by insert molding, so the
23 sterilization of the puncture needle can be achieved.

03:20

24 (The Court Reporter requested
25 clarification.)

03:21

1 THE WITNESS: Embedded in the cap part by
2 insert molding, comma, so the sterilization of
3 the puncture needle can be achieved.

4 B, All claims: Secondary sheath for
5 receiving. In my opinion, Morita teaches a 03:21
6 secondary sheath as finger pricking device shown
7 in Figure 2. The endcap 15 is removed to expose
8 the lancet body 5 after blood collection, and
9 the lancet fixing means of the lancet attachment
10 part 13 is released to remove the lancet body 5 03:21
11 by hand.

12 I then go on to state C, gripping handle
13 portion. I explain Sakata disclosing the
14 limitation of a gripping handle portion, and we
15 noted that there's a section with an incorrect 03:22
16 reference incorporated.

17 And so I think that everything you're
18 looking for or saying that isn't in here is in
19 here, it just isn't listed on page 206 where I
20 have focused only on the issues of the 03:22
21 dimensional limitation.

22 BY MR. PATHMANABAN:

23 Q. Paragraph 44 you discuss with reference
24 to the secondary sheath for receiving, that is
25 talking about Morita teaching a secondary sheath, 03:22

1 right?

2 A. Yes, that is correct.

3 Q. So you don't have any explanation for why
4 Sakata teaches a secondary sheath in this report,
5 correct?

03:23

6 MR. GRIFFIN: Objection.

7 THE WITNESS: I have an image on page --
8 well, let's see. That shows the combination of
9 Sakata with Morita.

10 Well, it doesn't seem that that
11 particular discussion was included in the report
12 that I can see from my review right now. It's
13 possible it's somewhere else in here and I don't
14 know, but I would need to do a search find, et
15 cetera, in the PDF to see if that might be the
16 case or not. But just from my review at the
17 moment, I don't see it.

03:24

03:24

18 BY MR. PATHMANABAN:

19 Q. Did you carefully prepare your materials
20 considered list to include everything that you
21 considered in rendering your opinions?

03:25

22 A. I usually rely on counsel to prepare that
23 list, and I then review that list. Counsel has the
24 best means of tracking everything that has been sent
25 to me and that I have been provided with by them in

03:25

1 most matters that I'm engaged on.

2 So that was how it worked in this
3 instance. Counsel prepared the list and I reviewed
4 it as carefully as I could. It certainly seems
5 complete to me. But there is always the possibility 03:25
6 for something to be left out, especially in a case
7 where so many different materials have been
8 considered.

9 MR. PATHMANABAN: Let's mark the
10 materials considered, please. 03:26

11 (Exhibit 9 was identified.)

12 THE VIDEOGRAPHER: This will be
13 Exhibit 9.

14 BY MR. PATHMANABAN:

15 Q. Mr. Delman, I've attached, excuse me, 03:26
16 what we marked as Exhibit 9, your materials
17 considered. Do you see that in front of your screen?

18 A. Yes, I do.

19 Q. And you have a number of items listed
20 here, right? 03:26

21 A. Quite a number of items, yes. And
22 there's some statement at the bottom, which I think
23 can be relevant as well. I just want to see how that
24 was written. I also have a paper version of this I
25 can look at. 03:27

1 So I just wanted to see that comment at
2 the bottom. Rather than my searching out the paper
3 version, I just wanted to see the last entry there.
4 Yes. Yes, any other documents or materials which are
5 cited or referenced in the body of my report. Yes, I 03:27
6 wanted to make sure that that was there.

7 Q. So this materials considered list that
8 you believe was carefully prepared and certainly
9 seemed complete to you does not include Facet's
10 infringement contentions in this case. Did you know 03:28
11 that?

12 A. I did not know that before you pointed it
13 out. So assuming it is not listed there, and I will
14 take, of course, your word for it that it isn't, I
15 did consider it, but it appears that perhaps it was 03:28
16 inadvertently left off the list.

17 Q. And we've previously talked about your
18 report did not include any kind of qualification that
19 your opinions regarding the, for example, the
20 gripping handle limitation, was based on Facet's 03:28
21 infringement contentions, right?

22 MR. GRIFFIN: Objection.

23 THE WITNESS: What I indicated is that
24 one of my references was spelled out in detail
25 describing how I was doing that, but I did not 03:29

1 do so for all of the references. And I believe
2 that it is clear when I am performing the
3 analysis one way versus another.

4 BY MR. PATHMANABAN:

5 Q. So we've talked about in this -- today,
6 we talked about starting the Lathrop reference,
7 right?

03:29

8 A. We did, yes.

9 Q. And your opinions about Lathrop
10 disclosing the gripping handle between the primary
11 sheath and the secondary sheath was based on Facet's
12 infringement contentions, right?

03:29

13 A. I believe that is what we had discussed,
14 yes.

15 Q. And you agree that under your own
16 interpretation or under your own understanding of the
17 plain and ordinary meaning of the claim, Lathrop does
18 not disclose a gripping handle (indecipherable); is
19 that fair?

03:30

20 MR. GRIFFIN: Objection.

03:30

21 (The Court Reporter requested
22 clarification.)

23 BY MR. PATHMANABAN:

24 Q. Lathrop does not disclose a gripping
25 handle as claimed?

03:30

1 MR. GRIFFIN: Objection.

2 THE WITNESS: That is correct. I don't
3 believe that Lathrop discloses a gripping handle
4 meeting the plain and ordinary meaning of the
5 term.

03:30

6 BY MR. PATHMANABAN:

7 Q. And the same is true of the Kim
8 reference, right?

9 MR. GRIFFIN: Objection.

10 THE WITNESS: I'm just going to walk
11 through and make sure. So that's the Lathrop.
12 Kim. Yes, the same would be true of the Kim
13 reference.

03:30

14 BY MR. PATHMANABAN:

15 Q. And the same is true of the Hyoue
16 reference?

03:31

17 MR. GRIFFIN: Objection.

18 THE WITNESS: Yes, the same would be
19 true. And just to clarify, what we're -- the
20 exercise that you seem to be going through, in
21 other words, I disagree with Facet's application
22 of the plain and ordinary meaning of gripping
23 handle portion.

03:31

24 And my analysis finding that a gripping
25 handle portion exists on these references was

03:32

1 made through Facet's application of that plain
2 and ordinary meaning, with which I disagree.

3 Based upon its infringement contention,
4 it was impossible for me to truly understand
5 where things began and ended based upon the 03:32
6 brackets used and other indications that were
7 provided were not sufficient.

8 BY MR. PATHMANABAN:

9 Q. And the same is true of the Starnes
10 reference, that is, under your own understanding, 03:32
11 Starnes does not disclose a gripping handle?

12 MR. GRIFFIN: Objection.

13 THE WITNESS: When we speak of gripping
14 handle portion, we are speaking of a gripping
15 handle portion meeting the limitations of the 03:33
16 claim. So it's not just a gripping handle
17 portion, it's a gripping handle portion -- let
18 me just make sure I'm getting -- and that goes
19 for all of the references we've just been
20 discussing, to be perfectly clear. 03:33

21 BY MR. PATHMANABAN:

22 Q. Yes.

23 A. The gripping handle portion between the
24 primary and secondary sheaths. So we can't take that
25 limitation just as gripping handle portion. What I'm 03:33

1 speaking of is a gripping handle portion between the
2 primary and secondary sheath.

3 My understanding is such that under
4 Facet's application of the plain and ordinary
5 meaning, these would have a gripping handle portion 03:33
6 between the primary and secondary sheaths. But under
7 my application and understanding of the plain and
8 ordinary meaning, they would not.

9 So let's please not take it out of the
10 context of the entirety of the limitations. 03:34

11 Q. You have not offered any opinions about
12 secondary considerations of non-obviousness, correct?

13 A. That is correct.

14 Q. You have not offered any opinions about
15 the claims being allegedly invalid based on improper 03:35
16 inventorship or inequitable conduct, correct?

17 A. That is correct.

18 Q. You've not offered any opinions about
19 indefiniteness, right?

20 A. That is correct. 03:35

21 Q. Or a lack of written description or
22 enablement?

23 A. No, I -- I have not offered opinions
24 on -- on validity related to those issues.

25 Q. You used to be a lawyer at one time? 03:35

1 A. Twenty-eight years ago.

2 Q. How long did you practice law?

3 A. Two and a half, three years I guess it
4 was.

5 Q. Did you know any of the lawyers in this 03:36
6 case when you practiced law?

7 A. No, I did not. I'm not -- Joe seems like
8 a pretty young guy. I'm not that young. I'm not
9 sure Joe was out of diapers at that time.

10 Q. Did you ever litigate patent cases? 03:36

11 A. I was never a litigator and I never dealt
12 with patent cases, no.

13 Q. In your professional experience, have you
14 ever worked with lancets?

15 A. Yes. As I describe in my report, I have. 03:36

16 Q. Who did you work for with lancets?

17 A. So my experience with lancets dates back
18 approximately 20 years. The client's names are
19 rather vague to me at the moment. We worked with
20 many clients in the diabetes realm. As to which ones 03:37
21 we worked with lancets on, I wouldn't want to say
22 without finding it in my files. And I did search my
23 files.

24 When my -- when the company was sold at
25 the end of 2017, we had to return all of our 03:37

1 computers, laptops, hard drives, et cetera. I was
2 able to find on one old hard drive some competition
3 entry drafts that I had written for purposes of the
4 lancing device, which I featured some images of and
5 discussion of in my report.

03:37

6 There were other products related to
7 lancets and lancing devices and diabetes meters over
8 the years, but I could not find any hard evidence of
9 what clients they might have been designed for.

10 I could list clients we've worked for in
11 the industry, but I wouldn't be able to state with
12 any definiteness that we did lancing work for them.

03:38

13 Q. Have you -- had you worked with
14 Mr. Griffin before this case?

15 A. No.

03:38

16 Q. Or his firm?

17 A. I didn't know Mr. Griffin before this
18 case.

19 MR. PATHMANABAN: I pass the witness.

20 MR. GRIFFIN: We have no questions.

03:38

21 MR. PATHMANABAN: Okay.

22 THE VIDEOGRAPHER: Can I get transcript
23 and video orders on the record from counsel
24 before we go off?

25 MR. PATHMANABAN: Whatever the standing

03:38

1 order is. I don't know what it is. And we'd
2 like a rough, too, please.

3 THE COURT REPORTER: I was going to ask,
4 Mr. Griffin, because I don't have a standing for
5 you.

03:39

6 MR. GRIFFIN: I'm sorry, what's the
7 question again?

8 THE COURT REPORTER: I don't have a
9 standing order for you, so I'll need your order.
10 Whether you want a copy, whether you need a
11 rough.

03:39

12 MR. GRIFFIN: Yeah. No, I'm thinking.
13 Yeah, we'll take a rough as well. I definitely
14 want a copy and a video. I would have thought
15 we had a standing order. Are you sure we don't?

03:39

16 THE COURT REPORTER: Not according to my
17 records.

18 MR. GRIFFIN: Okay. Let me check. But,
19 yeah, we would like a rough and a copy, please.

20 THE COURT REPORTER: And how about time
21 frame.

03:39

22 MR. GRIFFIN: Just usual time frame is
23 fine with me.

24 THE VIDEOGRAPHER: Okay. Going off video
25 record at 3:40 p.m. Pacific time.

03:40

1 (The deposition of JOEL DELMAN concluded
2 at 3:40 P.M.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEPOSITION ERRATA SHEET

Our Assignment No. J9868057

Case Caption: FACET VS. LIFESCAN

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury
that I have read the entire transcript of
my Deposition taken in the captioned matter
or the same has been read to me, and
the same is true and accurate, save and
except for changes and/or corrections, if
any, as indicated by me on the DEPOSITION
ERRATA SHEET hereof, with the understanding
that I offer these changes as if still under
oath.

Signed on the _____ day of
_____, 2023.

JOEL DELMAN

DEPOSITION ERRATA PAGE

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

SIGNATURE:_____DATE:_____

JOEL DELMAN

DEPOSITION ERRATA PAGE

Page No.____ Line No. ____ Change to:_____

Reason for change: _____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

Page No.____ Line No. ____ Change to:_____

Reason for change:_____

SIGNATURE: _____DATE: _____

JOEL DELMAN

C E R T I F I C A T E

I, MONNA J. NICKESON, CCR, CSR, CLR, RPR, CRR,
the undersigned Certified Court Reporter, authorized
to administer oaths and affirmations in and for the
states of Washington (3322), Oregon (16-0441), Idaho
(1045), and California (14430), do hereby certify:

That the sworn testimony and/or
proceedings, a transcript of which is attached, was
given before me at the time and place stated therein;
that the witness was duly sworn or affirmed to
testify to the truth; that the testimony and/or
proceedings were stenographically recorded by me and
transcribed under my supervision. That the foregoing
transcript contains a full, true, and accurate record
of all the testimony and/or proceedings occurring at
the time and place stated in the transcript.

That I am in no way related to any party to
the matter, nor to any counsel, nor do I have any
financial interest in the event of the cause.

IN WITNESS WHEREOF I have set my hand on
July 14, 2023



MONNA J. NICKESON, CCR, CSR, CLR, RPR, CRR