

LATHAM & WATKINS LLP
Jeff Homrig (SBN 215890)
jeff.homrig@lw.com
300 Colorado St., Suite 2400
Austin, TX 78701
Tel: 737.910.7300 | Fax: 737.910.7301

Rachel Weiner Cohen (pro hac vice)
rachel.cohen@lw.com
Susan Tull (pro hac vice)
susan.tull@lw.com
Jessica Lam (pro hac vice)
jessica.lam@lw.com
Kelley Storey (pro hac vice)
kelley.storey@lw.com
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Tel: 202.637.2200 | Fax: 202.637.2201

Attorneys for Plaintiff FACET TECHNOLOGIES, LLC
[Additional counsel listed on next page]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FACET TECHNOLOGIES, LLC,
Plaintiff,
v.
LIFESCAN, INC.,
Defendant.

Case No. 2:22-cv-01717-MCS-MARx

**FACET TECHNOLOGIES, LLC'S
PROPOSED TRIAL SCHEDULE
AND SUPPORTING
MEMORANDUM**

ORAL ARGUMENT REQUESTED

Status Conference: September 18, 2023
Place: Courtroom 7C, 7th Floor
Judge: Hon. Mark C. Scarsi

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

[Additional counsel information for Plaintiff FACET TECHNOLOGIES, LLC]

LATHAM & WATKINS LLP
Ryan Banks (SBN 318171)
ryan.banks@lw.com
650 Town Center Drive
20th Floor
Costa Mesa, CA 92626
Tel: 714.540.1235 | Fax:
714.755.8290

Elliott J. Greb (SBN 347483)
elliott.greb@lw.com
12670 High Bluff Drive
San Diego, CA 92130
Tel: 858.523.5400 | Fax:
858.523.5450

Cassandra M. Baloga (pro hac vice)
cassandra.baloga@lw.com
1271 Avenue of the Americas
New York, NY 10020
Tel: 212.906.1200 | Fax:
212.751.4864

DIAMOND McCARTHY LLP
Allan B. Diamond (pro hac vice)
adiamond@diamondmccarthy.com
909 Fannin Street, 37th Floor
Houston, Texas 77010
Tel: 713.333.5100 | Fax: 713.333.5199

DIAMOND McCARTHY LLP
Damion D. Robinson (SBN 262573)
damion.robinson@diamondmccarthy.com
355 South Grand Street, Suite 2450
Los Angeles, CA 90071
Tel: 424.278.2335 | Fax: 424.278.2339

Julian Cokic (pro hac vice)
julian.cokic@diamondmccarthy.com
909 Fannin Street, 37th Floor
Houston, Texas 77010
Tel: 713.333.5100 | Fax: 713.333.5199

PROPOSED TRIAL SCHEDULE

Pursuant to the Court's August 16, 2023 Order, ECF No. 265, Facet hereby submits the following proposed trial schedule. LifeScan has now conducted a two-day physical inspection of the storage closet that Mr. Goodrow referred to as a "museum." As explained in the accompanying Memorandum of Points and Authorities, this inspection revealed nothing genuinely new and material to the claims or defenses in this case. Although the storage closet contains many packages from many different brands, the inspection confirmed that those packages contain just a handful of distinct lancet designs. Each design reflects a structure comparable (or identical) to alleged prior art previously known to LifeScan before the litigation was filed and lancets identified and disclosed by the parties during fact discovery.

The key scheduling question is whether the inspection yielded any new material information that warrants a further delay of trial. So Facet repeatedly asked LifeScan to identify any lancets that LifeScan a) "contends it should be permitted to assert as prior art (i.e., adds something new, and could not have been located in a diligent search); and b) it contends it could not have located in a diligent search, and bear on another of LifeScan's contentions" that would warrant consideration of any schedule other than resuming an immediate trial schedule. To date, LifeScan has failed to identify to Facet even a single lancet it contends falls into either category. Thus, the parties were not able to reach agreement on a schedule.

Concurrently with the parties' discussions, the PTAB granted institution on one of LifeScan's two IPR petitions. LifeScan asked Facet to agree to stay the litigation; Facet declined. LifeScan filed its stay motion concurrently with its proposed trial schedule, and Facet will provide its fulsome opposition in due course. But it is worth noting that the institution decision is contrary to Federal Circuit law. And because LifeScan stipulated to the PTAB that it will not pursue in this court any defenses that it could have brought via IPR, the issues before the jury and the PTAB are distinct. There is no need to delay a trial on the merits, much less for over a year.

Accordingly, Facet respectfully requests that the parties promptly resume trial filings as set forth below, with a trial date of October 31, 2023, or the Court's next available trial date thereafter. Facet's proposed schedule is based on the accompanying Memorandum of Points and Authorities and Declaration of Jeff Homrig attached thereto, upon the papers and record on file herewith, and such oral and document evidence as may be presented at the September 18 status conference.

Trial Filings (First Round)	9/25/2023
Trial Filings (Second Round)	10/2/2023
Deadline to supplement financial information (through August 31, 2023)	10/4/2023
Disclose additions or changes to damages expert testimony (limited to updating damages calculations only)	10/13/2023
Final Pretrial Conference	10/16/2023
Trial	10/31/2023

Dated: September 13, 2023

Respectfully submitted,

/s/ Jeff Homrig
Jeff Homrig

*Attorneys for Plaintiff FACET
TECHNOLOGIES, LLC*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Facet respectfully requests that the Court order the parties to promptly resume
3 trial filings, and set this case for trial on October 31, 2023, or the Court's next
4 available trial date thereafter. To date, LifeScan has failed to identify any new
5 material information derived from the inspection. Instead, the inspection confirmed
6 that the storage closet contains lancets reflecting a handful of designs known to
7 LifeScan before this case began, produced by Facet during fact discovery, or plainly
8 unrelated to the claims and defenses at issue. Despite this, LifeScan seeks to delay
9 a jury trial on its willful infringement.

10 If it fails to persuade the Court to stay the case, LifeScan seeks a protracted
11 schedule to permit a complete do-over on its invalidity, inequitable conduct, and
12 non-infringing alternatives defenses, along with other discovery and motion
13 practice. But LifeScan cannot show that anything uncovered during the inspection
14 warrants further discovery. The case should be put back on track to trial as soon as
15 possible.

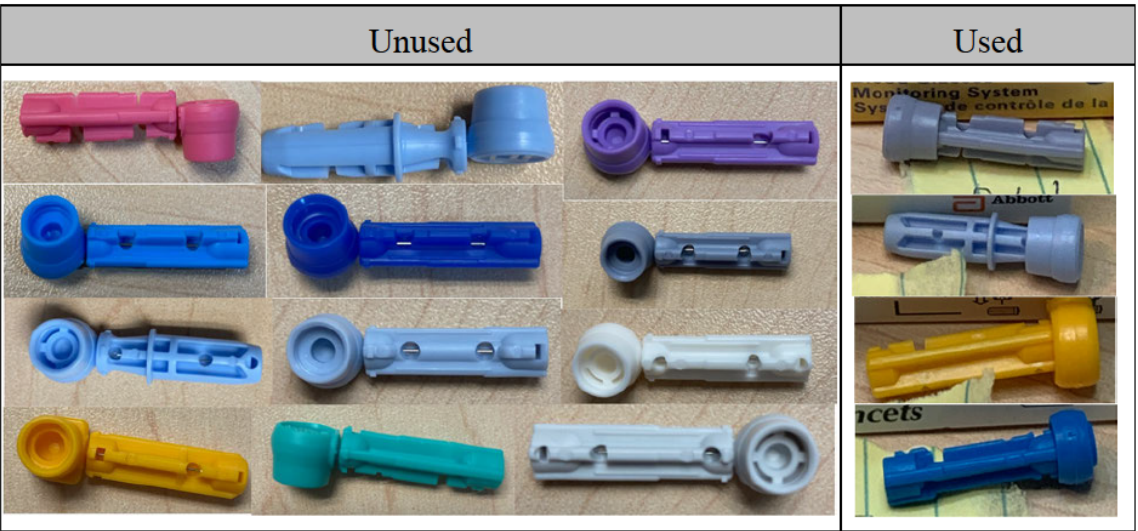
16 **I. THE INSPECTION**

17 LifeScan examined the storage closet on August 23-24. The vast majority of
18 lancets inspected reflect one of just three principal designs: (a) Cup-Shaped Caps;
19 (b) Tube-Shaped Lancets; and (c) Solid Disk Caps. Although sold by different
20 companies under many names, lancets within each category are effectively identical
21 with respect to the claims and defenses at issue. This is illustrated by Exhibit 1
22 which identifies and describes each lancet inspected. As discussed below, each
23 category was known to LifeScan and was disclosed by Facet during discovery.

24 **A. Cup-Shaped Caps**

25 Each lancet with cup-shaped caps is effectively the same: the lancet body is
26 loaded into the lancing device, the cap is removed to draw blood, and then the cap

can be used to cover the exposed needle after use. Exemplary lancets from the inspection are shown below.



Homrig Decl. ¶4.

LifeScan marketed and sold lancets with this design since at least 2006. Ex. 2.





Homrig Decl. ¶4.

Despite this knowledge, LifeScan did not include such lancets in its Preliminary Invalidity Contentions, nor cite them in *timely* interrogatory responses on non-infringing alternatives. But LifeScan's damages expert references them in his report as an alleged non-infringing alternative and, if found to be timely, can testify that they are alternatives. Ex. 3.



Ex. 3.

Facet also produced during fact discovery a detailed spreadsheet identifying third-party lancets, including pictures of nearly 50 lancets, lancet dimensions, and more, including cup-shaped cap designs identical to those inspected (excerpt below).

Lancet Images	Cleanlet Multicolor 28G	EU Medical Softline 30G	KDK Multiset 29G	Roche SoftTouch 28G	SKK Blood Lancet 30G
Lancet Box- Front					
Lancet Box- Back					
Lancet Image					

Ex. 4.

B. Tube-Shaped Lancets

Exemplary tube-shaped lancets from the inspection are shown below. There is no gripping handle and used lancets can either be discarded directly or the cap can be replaced as it was prior to use and then discarded.



Homrig Decl. ¶4.

This tube design was also known to LifeScan years before this litigation. For example, catalogues in LifeScan's possession identified such lancets (excerpted

below) and [REDACTED]
[REDACTED] (Ex. 5).

BD Lancets

Sterile single use lancets are ultra-thin for greater comfort.

GEMCO Item #	Needle Gauge	Packaging	Unit of Measure	Mfg. Product Code	NDC Number
LBD1	33G	Retail	100/Bx	322057	08290322057
LBD1M	33G	Mail Order	100/Bx	322065	08290322065
LBU1	30G	Retail	100/Bx	325773	08290325773
LBU1M	30G	Mail Order	100/Bx	325773	08290325773
LBU2	30G	Retail	200/Bx	325772	08290325772
LBU2M	30G	Mail Order	200/Bx	325772	08290325772



Items listed in red denote Mail Order Products.

Ex. 6. Yet, LifeScan chose not to assert lancets with this tube design in its Preliminary Invalidity Contentions.

The spreadsheets Facet produced during fact discovery also identified tube-shaped lancets (as excerpted below). Ex. 4.

Lancet Images	UltraFine 29G	Ultra Fine II 30G	Ultra-Fine 33G	MediSense Soft 28G
Lancet Box- Front				
Lancet Box- Back				
Lancet Image				

C. Solid Disk Caps

The third principal design includes a solid disk cap. Regardless of shape, the components are identical: the cap is removed prior to use, and then could be used to cover the exposed needle, or discarded, after use. Exemplary lancets are shown below:



Homrig Decl. ¶4.

This design, too, was known to LifeScan long ago. As just one of many examples, the Roche Softclix (boxed in red above), was described in a [REDACTED] (Ex. 7), and in an [REDACTED]. Exs. 8-9. Yet again, LifeScan elected not to assert such lancets in its Preliminary Invalidity Contentions, but did identify them (belatedly) as non-infringing alternatives in its damages expert report. Facet's document production (below) also identifies and describes them.

Distributor's Name	Product	Box Quantity	Price per Box	Price per Lancet	Product image
Roche	SoftClix	100	16.59	0.1659	

Ex. 10.



Exs. 3-4.

* * *

The inspection also identified a handful of minor design variations of these categories (e.g., solid plastic caps with small “wings”), and lancets with needles that retract (and thus cannot be inserted into the cap) after use. But, here too, all plausibly-relevant variations were known to LifeScan or disclosed by Facet during fact discovery. *See e.g.*, Exs. 4, 6, 11.

Each alleged prior art lancet inspected lacks core features of the asserted claims—a gripping handle, a secondary sheath, or both—rendering its measurements (which LifeScan claims to have needed) irrelevant. But, most importantly for the Court’s decision on the case schedule, none of the lancets inspected adds any new material information to what LifeScan knew before this case began, or received from Facet during fact discovery.

D. LifeScan’s Unfounded Demands For Further Discovery

After the inspection, LifeScan demanded an extended fact discovery period through the end of 2023 to serve new discovery requests¹ and retake depositions, an

¹ LifeScan has served numerous discovery requests seeking to improperly restart discovery on issues far beyond the scope of the inspection. Exs. 12-14.

1 extended period to redo expert reports and file summary judgment motions, and trial
2 in Spring 2024. Homrig Decl. ¶17.

3 While LifeScan's proposed schedule was unwarranted, Facet was willing to
4 agree to a focused, supplemental discovery period *if* the inspection yielded anything
5 that genuinely required further discovery. Facet proposed such a schedule,
6 conditioned on LifeScan identifying specific lancets that it contends a) it should be
7 permitted to assert as prior art (i.e., adds something new, and could not have been
8 located in a diligent search); or b) could not have located in a diligent search, and
9 bear on another of LifeScan's contentions. Ex. 15. LifeScan failed to do so. And
10 the record demonstrates why—the storage closet contains nothing that is genuinely
11 new and material. This case is ripe for trial.

12
13 Dated: September 13, 2023

Respectfully submitted,

14 /s/ Jeff Homrig
15 Jeff Homrig

16 **LATHAM & WATKINS**

17 Jeff Homrig
18 Rachel Weiner Cohen
19 Susan Tull
20 Jessica Lam
21 Kelley Storey
22 Ryan Banks
23 Elliott J. Greb
24 Cassandra M. Baloga

25 **DIAMOND McCARTHY LLP**

26 Allan B. Diamond
27 Julian Cokic
28 Damion D. Robinson

*Attorneys for Plaintiff FACET
TECHNOLOGIES, LLC*

CERTIFICATION OF COMPLIANCE

The undersigned, counsel of record for Plaintiff Facet Technologies, LLC, certifies that the Memorandum of Points and Authorities contains 1000 words, which complies with the word limit of the Court's order at ECF No. 265.

Dated: September 13, 2023

Respectfully submitted,

/s/ Jeff Homrig

Jeff Homrig