

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MOM ENTERPRISES, LLC,  
Petitioner,

vs.

ELAINE AND REINHOLD W. VIETH,  
Patent Owner.

~~~~~  
PGR2023-00726

U.S. Patent No. 9,066,958 B2
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Remote Teleconference Hearing Before  
JOHN G. NEW, SHERIDAN K. SNEDDEN, and CYNTHIA M.  
HARDMAN  
Administrative Patent Judges

October 27, 2023  
11:01 a.m. EST

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1 JUDGE HARDMAN: Good morning, counsel.  
2 We are on the record. This is Judge Hardman. I  
3 am joined by Judges New and Snedden. This is a  
4 conference called for IPR2023-00726, MOM  
5 Enterprises LLC versus Elaine and Reinhold W.  
6 Vieth.

7 Let's start with appearances. Who do we  
8 have on the line for Petitioner?

9 MR. CONRAD: Good morning, Your Honors.  
10 This is David Conrad on behalf of the Petitioner,  
11 and I believe I have some colleagues with me on  
12 the line as well and I'll let them introduce  
13 themselves as I'm not sure exactly who is on the  
14 line.

15 MS. KRANING: Casey Kraning is here. My  
16 pro hac form will be forthcoming on behalf of  
17 Petitioner.

18 MR. UNGERMAN: I'm sorry. This is Mark  
19 Ungerman for Patent Owner. Could you repeat your  
20 name again?

21 MR. CONRAD: I'll repeat it. It's Casey  
22 Kraning, K-R-A-N-I-N-G.

23 MS. PATEL: Hello. This is Sarika  
24 Patel, also on behalf of the Petitioner, and my  
25 first name is spelled S-A-R-I-K-A.

1 JUDGE HARDMAN: Okay. Anyone else for  
2 Petitioner?

3 MR. CONRAD: That should be all, Your  
4 Honors.

5 JUDGE HARDMAN: Thank you, Mr. Conrad.  
6 Who do we have on the line for Patent  
7 Owner, please?

8 MR. UNGERMAN: This is Mark Ungerman for  
9 the Patent Owner. I have with me Alan Anderson.  
10 His pro hac vice motion has been filed already.  
11 And, Reagan, are you on?

12 MR. ANDERSON: I don't think she's on,  
13 so that's okay.

14 JUDGE HARDMAN: Okay. Thank you. I  
15 understand that we have a court reporter on the  
16 line. Which party retained the court reporter?

17 MR. UNGERMAN: That would be the Patent  
18 Owner.

19 JUDGE HARDMAN: And, okay, when you  
20 receive the transcript of this call,  
21 Mr. Ungerman, will you please file the transcript  
22 as an exhibit in this proceeding?

23 MR. UNGERMAN: Absolutely.

24 JUDGE HARDMAN: Thank you, sir.

25 Now, we convened this call in response

1 to the parties' request for an initial conference  
2 call. We have received the parties' respective  
3 lists of proposed motions. And I'm going to take  
4 each motion in turn. Thankfully some of these  
5 are mooted or resolved without the need for the  
6 Board's assistance, but we can get there when we  
7 get there and figure that out.

8 I'm going to start with Patent Owner's  
9 list of motions. So with that, let us turn to  
10 that. First, I understand that Patent Owner  
11 seeks authorization to file a motion to compel  
12 routine discover or, alternatively, for  
13 additional discovery, and there are certain  
14 subparts with it here, and I want to take first  
15 subparts (A) and (B) together. (A) generally  
16 references information related to translations of  
17 Harder and Wolf and (B) relates to complete  
18 copies of Harder and the European Pharmacopoeia.

19 Now, in the transmission e-mail from  
20 Patent Owner, I understand that there was some  
21 agreement between the parties on production of  
22 these materials, so, Mr. Ungerman, can you tell  
23 us where that stands?

24 MR. UNGERMAN: Where it stands is that  
25 the Petitioner has agreed to provide the

1 documents in its possession and -- but we have  
2 not received any indication of when that will  
3 happen. The things that we are still seeking  
4 beyond what they have agreed to is a complete  
5 copy of the Harder book, a translation of that as  
6 produced. We are seeking any inconsistent or  
7 nonidentical translations of Harder, and  
8 including information that they have, not  
9 privileged, from a prior litigation which they  
10 have been -- counsel was involved with. They  
11 have refused to look at their information from  
12 the prior litigation on behalf of another party.  
13 But we feel that anything that's nonprivileged  
14 that's in counsel's possession should be  
15 produced. And particularly in light of the fact  
16 that they have used that information for the  
17 benefit of their current client in the parallel  
18 litigation, which I should add has been stayed at  
19 Petitioner's request.

20 As far as the European Pharmacopoeia,  
21 they have not clearly stated whether they have a  
22 copy or not. They claim to be continuing to look  
23 for it and they have agreed to produce it if they  
24 have it, but I have tried to obtain a copy  
25 myself. It's a document from, you know, a number

1 of years ago, and I have been unable to get a  
2 copy, and I think it's incumbent on them to  
3 produce complete copies of any reference they  
4 rely on, and I understand that I asked for this,  
5 or I asked for the references to be not  
6 considered in the preliminary response, and for  
7 the purposes of the institution, that was not  
8 required, but I think for the purposes of  
9 addressing the merits of the underlying  
10 obviousness question, it should be required.

11 JUDGE HARDMAN: All right. Before we  
12 get into whether this is, in fact, information  
13 that Petitioner should or shouldn't produce, let  
14 me turn it over to Petitioner to see if, in fact,  
15 Petitioner has agreed to produce any of these  
16 materials, and if so, when it expects to produce  
17 those. So, Mr. Conrad, please go ahead.

18 MR. CONRAD: Yes, Your Honor. So there  
19 is some agreement here. On the, on the question  
20 of the translations, Petitioner is producing any  
21 translation it has in its possession of the  
22 references, the references that have been  
23 submitted, so if Your Honors are familiar with  
24 the proceedings before institution, there is a  
25 question about another declaration by, I believe,

1 an individual named Tinsworth, and we will be  
2 producing that as well. I'll note that we have  
3 it because it is in a public filing from a prior  
4 litigation with the Patent Owner, so they should  
5 already have a copy of that as well, but we will  
6 go ahead and produce a copy ourselves.

7 And the question of complete copies of  
8 the references, we would agree to produce what we  
9 have in our possession, custody and control, the  
10 Patent Owner's possession, custody and control.  
11 The Patent Owner is correct that my law firm did  
12 represent a prior defendant, unrelated to this  
13 Petitioner, in prior litigation years ago, and  
14 those documents, if any exist from that file, are  
15 not in the possession, custody and control of  
16 Petitioner, and it is incorrect that we have been  
17 using any client files from the prior litigation  
18 from a different client in connection with this  
19 proceeding or the District Court litigation.  
20 What we have are public filings, which were  
21 pretty substantial, because there was a lot of  
22 preliminary work in that earlier case and a lot  
23 of evidence presented in that earlier case, and  
24 those are also materials that Patent Owner has  
25 possession of.

1           So we are producing what we have, and  
2   that's something we can agree to. We do not have  
3   complete copies of these books. They were  
4   obtained via a library service years ago, I  
5   believe, and we don't have any complete copy.  
6   They can be obtain from the library where we  
7   obtained it as well.

8           JUDGE HARDMAN: Okay. I'll turn it back  
9   to Mr. Ungerman. Based on what you heard, what  
10   is -- what do you want the Board to do about,  
11   let's start with the translations, your item  
12   1(A)? What is left for the Board to do at this  
13   stage?

14          MR. UNGERMAN: I guess set a date for  
15   their production. Because I have yet to receive  
16   a date from Mr. Conrad.

17          JUDGE HARDMAN: Mr. Conrad, do you have  
18   a date you can offer at this stage?

19          MR. CONRAD: Yes, Your Honor. Ideally  
20   we would appreciate two weeks from today, because  
21   some of the references are declarations that are  
22   not yet finalized and translations that are not  
23   yet finalized with declarations, and we need some  
24   time to work with a service to complete that, but  
25   then we should have it within two weeks. And can

1 turn it over.

2 JUDGE HARDMAN: I had understood that  
3 item 1(a) covers some preexisting translations,  
4 so is there an impediment to producing that  
5 material sooner than two weeks?

6 MR. CONRAD: No, Your Honor. If there's  
7 anything we already have, like the declaration of  
8 Amy Tinsworth, we can go ahead and produce that  
9 very promptly. I don't know the status of my  
10 paralegal today, but I can set a date for Tuesday  
11 of next week.

12 JUDGE HARDMAN: So for item 1(A), can we  
13 agree to a rolling production of the materials to  
14 be completed within no later than two weeks from  
15 today? Mr. Conrad, is that doable from your  
16 side?

17 MR. CONRAD: That is acceptable for  
18 Petitioner.

19 JUDGE HARDMAN: And, Mr. Ungerman, is  
20 that satisfactory for your side?

21 MR. UNGERMAN: Yeah, that'll be  
22 satisfactory. We'll get -- subject to our  
23 discussion later on of schedule, because I think  
24 some of these issues are likely to require an  
25 extension of due date 1 on our side, but we can

1 get to that when we see what the picture is.

2 JUDGE HARDMAN: Okay. And I'll remind  
3 you that the parties are able to stipulate to  
4 changes to due dates 1, 2, and I think 3 as well  
5 without Board involvement, but I just throw that  
6 out there to put that in everybody's mind.

7 Let's turn now to item 1(B), the  
8 complete copies of the Harder and European  
9 Pharmacopoeia references. I believe I heard  
10 Mr. Conrad say that Petitioner does not have  
11 those items in their possession, custody or  
12 control. Mr. Ungerman, I also understand that  
13 you said you tried to obtain a complete copy of  
14 the European, European Pharmacopoeia, but have  
15 been unable to do so. These are commercially  
16 available materials, so I'm not seeing the reason  
17 why Petitioner should be required to produce the  
18 complete copies, particularly if Patent Owner,  
19 you know, under the Garmin factors, if we were to  
20 permit you to file a motion to compel these  
21 complete copies, you would have to show the  
22 Garmin factors, including, for example, that  
23 there's some -- something more than a mere  
24 allegation that something useful will be  
25 discovered. What is it in the Harder and

1 Pharmacopoeia materials that you think is going  
2 to be relevant to these proceedings?

3 MR. UNGERMAN: Well, yes, Your Honor,  
4 thank you. There's a couple of things. The  
5 supplement 4.3 that they relied on was  
6 essentially a supplement. It was a shell of a  
7 document. They pointed to a very small portion  
8 of it, but it refers to procedures and testing  
9 and limits that are not set forth in the  
10 supplement.

11 Supplement 4.3 is a cumulative  
12 supplement, and I actually do not believe that,  
13 other than what they have provided, we need  
14 anything from the supplement itself. The  
15 supplement refers to the -- and if I suggested I  
16 couldn't find the supplement, I apologize. I am  
17 able to find and acquire a copy of the  
18 supplement.

19 The supplement refers to procedures that  
20 appear in the fourth edition. I think they're  
21 now on the seventh or eleventh edition. I have  
22 been unable to obtain them from the European  
23 treaty organization that releases them because  
24 it's so far out of date, and I have gone on used  
25 book sites and tried to find a copy there and

1 have been unable to find a copy there. So the  
2 supplement is really not useful because it  
3 doesn't provide complete information. It  
4 provides some suggestion that, for the  
5 institution purpose, the Board was willing to  
6 accept giving all inferences in favor of the  
7 Petitioner, but I don't think that's sufficient.  
8 I believe that if they don't produce complete  
9 copies of references, including anything that  
10 potentially is a teaching away, and this applies  
11 to Harder also, that they should be precluded  
12 from relying on those references. They're the  
13 ones that filed this petition, they're the ones  
14 that have the burden to establish the scope and  
15 content of the prior art.

16 JUDGE HARDMAN: I mean I think in  
17 litigation, including in PTAB proceedings, it is  
18 routine for parties to submit excerpts of  
19 voluminous materials, just as a practical matter.  
20 I assume The Pharmacopeia, particularly -- so  
21 there's the supplement, but also, I guess, the  
22 larger volume that's, you know, not the  
23 supplement, the larger volume, I'm sure, is  
24 voluminous material.

25 As I recall the petition, Petitioner

1 relies on this European Pharmacopoeia for just  
2 the discrete issue of the definition of  
3 triglycerides, or medium chain triglycerides. So  
4 what is it exactly that you think is going to be  
5 useful in the larger European Pharmacopoeia  
6 volume 4, or fourth edition, that is going to be  
7 a teaching away or is of some other value in  
8 these proceedings?

9 MR. UNGERMAN: So what the European  
10 Pharmacopoeia is is it's a manual that specifies  
11 the limits and tolerances and nature and  
12 character of ingredients that are put in  
13 pharmaceutical preparations, which they have  
14 alleged that the pharmaceutical preparation in  
15 this case is medium chain triglycerides, but the  
16 claim recites a composition having -- or  
17 consisting of medium chain triglycerides and  
18 expient limited to a single ingredient. They  
19 have relied on the European Pharmacopoeia to say  
20 the triglycerides essentially are pure because of  
21 the triglycerides that are discussed in  
22 connection with a different reference, with the  
23 Harder reference. So for us to know whether  
24 they're pure or not within the scope of what our  
25 claim requires, I need to see the standards that

1 are used in the Pharmacopeia for establishing  
2 sufficient purity for their purposes.

3 JUDGE HARDMAN: Well, I guess just  
4 taking it back to what's proposed here, the  
5 motion for additional discovery, Mr. Conrad, if I  
6 heard you right, you do not have in your --  
7 Petitioner does not have in its possession,  
8 custody or control a complete copy of the fourth  
9 edition of the European Pharmacopoeia; is that  
10 correct?

11 MR. CONRAD: That's correct, and I'll  
12 note in Exhibit 1005, it's the declaration of our  
13 librarian expert, he identified that he had  
14 obtained the European Pharmacopoeia fourth  
15 edition from the National Library of Medicine. I  
16 assume that Patent Owner can do the same.

17 JUDGE HARDMAN: Okay. So in terms,  
18 then, Mr. Ungerman, of you are asking us to  
19 authorize a motion to compel discovery, but  
20 Petitioner is saying it doesn't have that  
21 discovery, so what do you want us to do, then, at  
22 this stage? It seems like that would be a futile  
23 motion, given that Petitioner is saying it  
24 doesn't have it.

25 MR. UNGERMAN: Okay. Then I would, I

1 would like authorization to file a motion to  
2 strike those two references from the petition.

3 JUDGE HARDMAN: I'm just making a note  
4 here of this new request.

5 And when you say "the two references,"  
6 you are talking about the European -- well, which  
7 references are you talking about?

8 MR. UNGERMAN: Yeah. So the Harder book  
9 and the European Pharmacopoeia.

10 JUDGE HARDMAN: Including the  
11 supplement?

12 MR. UNGERMAN: Yes.

13 JUDGE HARDMAN: All right. Well, let's  
14 table that request for now.

15 Please bear with me. I'm turning back  
16 to Patent Owner's list of motions.

17 Let's turn to Patent Owner's motion to  
18 compel routine or additional discovery, 1(C).  
19 This seeks evidence relating to objective indicia  
20 of nonobviousness. Let's start with subitem 1,  
21 periodic sales data and market share information  
22 for certain products.

23 Mr. Ungerman, please elaborate on what  
24 you are seeking here and why.

25 MR. UNGERMAN: All right. So this is --

1     so we're seeking -- I'll address this under the  
2     additional discovery standards. I believe we can  
3     meet the standards described in the Cuozzo Speed  
4     opinion. We can show that the information that  
5     we're looking for has more than a mere  
6     possibility or mere speculation that it'll be  
7     useful. We can show a threshold amount of  
8     evidence that the information exists.

9             In connection with the sales and market  
10    share data, I'll just identify that counsel for  
11    Petitioner has acknowledged to me that they have  
12    that information. We are looking -- you know,  
13    this all relates to secondary indicia of  
14    commercial success, copying, potentially  
15    long-felt need. So for the purposes of  
16    institution, you found a nexus between Patent  
17    Owner's product, the Ddrops product, and the  
18    claims. We will show that their product, MOM's  
19    product, also embodies the claim; that MOM  
20    attempted, without success, to sell a  
21    noninfringing product; that they created their  
22    new product that is identical to our product for  
23    the purposes of the claims, and for virtually  
24    every other purpose that also embodies the  
25    claims.

1           We can establish threshold evidence that  
2     the difference between their original product and  
3     their new product, the new feature, was the only  
4     change that they made, and they made no other  
5     change; that there is no other element that tends  
6     to establish that their product's commercial  
7     success, that their fact that they copied was due  
8     to anything else. Like this is very much unlike  
9     the Garmin case where the products were very  
10    complicated and had lots of features that were  
11    not in the claims, these products are very simple  
12    and are limited, essentially, to what's in the  
13    claims.

14           So under the --

15           JUDGE HARDMAN: Just pause for a minute,  
16    sir, just so I understand. In terms of objective  
17    indicia of commercial success, Patent Owner seeks  
18    to rely on the sales and marketing of  
19    Petitioner's product; is that correct?

20           MR. UNGERMAN: Yes, in part.

21           JUDGE HARDMAN: And what's the other  
22    part?

23           MR. UNGERMAN: Well, we have sales and  
24    marketing of commercial success of our own  
25    product also.

1 JUDGE HARDMAN: Okay. Thank you for  
2 that clarification. Just in terms of what you  
3 are seeking to compel under item 1(C)(1), that is  
4 going towards sales and data -- sales data and  
5 market share information for, this is  
6 Petitioner's product?

7 MR. UNGERMAN: Correct.

8 JUDGE HARDMAN: Okay.

9 MR. UNGERMAN: And I can also add that  
10 they have produced the information, documents  
11 that we want, in the parallel litigation under a  
12 protective order. So what we're asking for will  
13 not be burdensome for them to produce because  
14 they have already collected it and it's already  
15 there and, in fact, we have offered to not even  
16 require them to, you know, separately go and  
17 search for the information, we can find it  
18 ourselves. But it's protected by the District  
19 Court protective order and can't be used unless  
20 it's deemed produced, you know, in this IPR.

21 JUDGE HARDMAN: Okay. Let me pause  
22 there and turn it over to Mr. Conrad. In terms  
23 of the sales and marketing information of  
24 Petitioner's product, what is your position on  
25 that material?

1           MR. CONRAD: Yes, Your Honor. The  
2 Patent Owner hasn't met the Garmin factors.  
3 There's, in the first instance, no, no nexus here  
4 between the patented invention and the  
5 information that they are seeking. I think their  
6 premise is that our client had a product that was  
7 not a patented product, saw Patent Owner's  
8 product and copied it in order to produce an  
9 infringing product. And the first problem with  
10 that is that there's no infringing product. So  
11 what we have here is a patent on a method of  
12 administering a particular composition. And the  
13 question is is there infringement of that method,  
14 and that's not something that my client does.  
15 Their allegations of infringement is that there's  
16 an instruction to practice of this patented  
17 method.

18           The problem is that the instructions for  
19 this product, before, in the old composition and  
20 the new composition, identifies multiple  
21 different ways of administering the product, only  
22 one of which is alleged to be covered by this  
23 patent. So there's no nexus that can be shown  
24 without, you know, without something that the  
25 Garmin factors require, some mere possibility --

1 something more than a mere possibility that we  
2 copied their product specifically for the -- in  
3 order to make sure that this patented method is  
4 being practiced. And they can't, they can't  
5 prove that because it doesn't make sense, given  
6 that there are multiple ways of administering  
7 that's on a label, and also they have all of  
8 these materials in their hand already from the  
9 underlying litigation, and if anything like that  
10 exists, they should be able to specify it with  
11 specificity. And they have not. It's just a  
12 general allegation of wanting to use these  
13 materials in this case when they are not going to  
14 be able to meet the nexus requirements in any  
15 event.

16 JUDGE HARTMAN: Okay.

17 MR. CONRAD: And I'll point out there's  
18 also, on that front, there's copying alleged. I  
19 think that was maybe, if not stated, implied by  
20 Patent Owner's argument. There's no such  
21 copying, and there's no evidence of that, and if  
22 there was, they would have it, and they haven't  
23 identified it.

24 JUDGE HARDMAN: Okay. That's a good  
25 segue to item 1(C)(2) on Patent Owner's list,

1 documents related to copying. Mr. Ungerman, what  
2 is your current information you have that there  
3 is -- you know, what's your basis for assuming  
4 that Petitioner has copied Patent Owner's  
5 product? Or Patent Owner's patent?

6 MR. UNGERMAN: Okay. So this is the  
7 first time Petitioner has invited us to identify  
8 documents produced under the protective order in  
9 the litigation to demonstrate the existence of  
10 the documents, and I'm happy to do that.

11 First off, not under the protective  
12 order, we have evidence showing that they had  
13 this prior product, it was not successful, it had  
14 problems. We can produce evidence showing that  
15 they asked their manufacturer to manufacture an  
16 identical product for them with identical  
17 instructions, virtually identical instructions to  
18 our client's product.

19 We have evidence showing that the  
20 manufacturer tested only a single formulation,  
21 they didn't go to the manufacturer and say, "Hey,  
22 here's five different options. Can you try these  
23 out?" They said, "Here's one option, please try  
24 it out," and it was exactly the option that they  
25 followed.

1           From the materials under the protective  
2   order, we have evidence tending to show that --  
3   well, not tending to show -- that their objective  
4   was to obtain and capture the Patent Owner's  
5   market share in this process.

6           So I believe this is -- the purpose of  
7   this call and what we are trying to accomplish  
8   is, you know, for us to obtain the authorization  
9   to file a motion where we will spell out all of  
10   these, all of the evidence that we have, but for  
11   the purpose of this, we're aware from the  
12   documents that they have that they have produced  
13   market share information that we would like to  
14   use, they have produced sales information that we  
15   would like to use, they have produced evidence of  
16   copying that we would like to use, and we're  
17   perfectly happy to identify, even if it's by  
18   Bates numbers and without producing a copy, the  
19   numbers of the documents that we would like to  
20   have. We're not asking them to go and dig up new  
21   documents under this request for additional  
22   discovery. We're asking them to produce or have  
23   deemed produced the documents that they have  
24   already produced.

25           JUDGE HARDMAN:   Okay.

1           MR. UNGERMAN: And, you know, I'll  
2     contribute that on their list of motions, they  
3     have asked that some of our client's documents  
4     produced under protective order be deemed to  
5     produce. This was kind of their idea of a way to  
6     address the situation.

7           JUDGE HARDMAN: Okay. Let's table  
8     getting into their list for a moment. I  
9     understand what you are looking for on motion  
10    1(C)(1) and (2). I think the panel is currently  
11    inclined to grant authorization to file such a  
12    motion. Of course, Patent Owner should be well  
13    aware, you are aware of the Garmin standard. You  
14    should also be -- your document request attached  
15    to that motion should be attached to that motion  
16    as an appendix. And just as some guidance, I  
17    think you're probably already well aware, the  
18    instructions should be very easily  
19    understandable, and that any document request  
20    should be very targeted and limited in order to  
21    maximize, you know, the chances of us ultimately  
22    granting your motion to compel discovery.

23           We will, though, after this call, send  
24     out an order summarizing the specific parameters  
25     for any briefing that we authorize, but just as a

1 preview, I think we are inclined to grant that as  
2 to items 1(C)(1) and (2).

3 So then I think we can move on to item 2  
4 on Patent Owner's list. This is a motion to  
5 compel discovery of Petitioner's CEO and two  
6 other people who I believe are officers for sales  
7 and marketing and R&D. So, Patent Owner, can you  
8 please explain why these depositions are  
9 necessary?

10 MR. UNGERMAN: All right. So let me  
11 back up and say that we recognize that IPR is  
12 intended to be an abbreviated proceeding, that it  
13 is short of District Court litigation, but in  
14 this case the Petitioner has come to the Patent  
15 Office seeking the benefit of an IPR and has  
16 sought to stay the District Court proceeding. We  
17 are asking for depositions that are far short of  
18 what we would get in a litigation and limited to  
19 only evidence or testimony regarding these  
20 secondary considerations.

21 We know that the CEO obviously would  
22 have such information. The CEO is the one who  
23 signed the agreements with the formulator and,  
24 you know, has been involved in, you know,  
25 specifying, deciding what products the company

1 will sell.

2 Stephanie Medina on the design and  
3 development was the one who interfaced with the  
4 formulator/manufacturer, the one who proposed to  
5 use the medium chain triglycerides, and the one  
6 who set forth the specifications used by the  
7 manufacturer, so she would be intimately involved  
8 in having evidence relating to copying and  
9 confirming their objectives here.

10 And Carolyn Lloyd is the sales and  
11 marketing person who was involved in the  
12 capturing market share situation that I described  
13 earlier. And those all go to, obviously, the  
14 secondary considerations.

15 JUDGE HARDMAN: If you have --

16 MR. UNGERMAN: And the fact -- I'm  
17 sorry.

18 JUDGE HARDMAN: If you have  
19 documentation or obtained documentation, as we  
20 just discussed, I know you're moving to compel  
21 some sales and marketing data and some  
22 information on alleged copying, if you ultimately  
23 obtain those materials and they are -- why  
24 wouldn't those materials be sufficient? Why are  
25 the depositions in particular needed?

1           MR. UNGERMAN: Well, so depositions  
2 obviously, I think, are required to get  
3 information that's not reflected in the  
4 documents, and they have resisted having -- or  
5 scheduling depositions for these people  
6 specifically because of the pendency of their  
7 motion to stay in view of the IPR, and we believe  
8 that they have information that they will give us  
9 in depositions beyond what is in the documents  
10 that will show their desires in adopting the  
11 identical formulation and virtually identical  
12 instructions that will show their motivations in  
13 their marketing campaigns.

14           JUDGE HARDMAN: I guess if we were to  
15 permit --

16           MR. UNGERMAN: You know, and the --

17           JUDGE HARDMAN: If we were to permit  
18 this motion, you would have to brief the Garmin  
19 factors, something more than a mere possibility  
20 or mere allegation that something useful will be  
21 discovered, you know, you have to show that  
22 there's no ability to generate equivalent  
23 information by other means. I'd like you to, you  
24 know --

25           MR. UNGERMAN: I think --

1 JUDGE HARDMAN: -- if you are able, to  
2 identify something specific in the testimony of  
3 any of these three people that you are not able  
4 to get from a document beyond just, you know --  
5 obviously a deposition is a different proceeding  
6 than a document and you get information in  
7 different ways, but what specific pieces of  
8 information would come from the testimony that  
9 wouldn't be available in documentation?

10 MR. UNGERMAN: Well, documentation is  
11 never complete and never tells the whole story.  
12 Also, authentication of documents is another  
13 issue that's a relatively minor issue. But  
14 without having access to the decision-makers,  
15 we'll be in a position of at least being  
16 challenged on having direct evidence of their  
17 copying. So we have lots of inferential  
18 evidence, but the direct evidence, there's  
19 nothing better than direct evidence, and we don't  
20 have access to equivalent evidence because it's  
21 their people, they refuse to provide access to  
22 them. So as far as depositions go, that really  
23 should be, you know, virtually automatic, that  
24 particular factor. We can't develop direct  
25 testimony of their executives without taking the

1 testimony of their executives.

2 JUDGE HARDMAN: Okay. Let me hear from  
3 Mr. Conrad on this request, please.

4 MR. CONRAD: Yes, I think Your Honor's  
5 instinct is correct here, that this is contingent  
6 upon them not being able to get the evidence  
7 through the documents, assuming that they can  
8 prove that they have a right to discovery on the  
9 documents in the first place. If they were to  
10 get access to the documents, which they do in the  
11 other proceeding, it's simply going to have all  
12 of the explanation for the change that was made  
13 in the formulation, the reasons for the change,  
14 it's all in the documents. And it doesn't help  
15 them, which is why there's this suggestion that  
16 obviously these individuals are going to expand  
17 on it in a way that helps them.

18 So I think that the best approach for  
19 this request would be let the Patent Owner make  
20 their case for why they deserve discovery,  
21 document discovery, and if they can provide  
22 specificity that shows that the documents suggest  
23 that an individual actually knows that they were  
24 copying Ddrops' composition, then, you know,  
25 that's a different story, but they can't make

1     that case that this individual or any of these  
2     individuals would know that, and at this point  
3     it's just an allegation and a fishing expedition.

4             MR. ANDERSON: Your Honor, this is Alan  
5     Anderson. May I speak? My pro hac vice motion  
6     is pending, but hasn't been acted upon yet.

7             JUDGE HARDMAN: Mr. Anderson, you are on  
8     behalf of Patent Owner?

9             MR. ANDERSON: Yes, ma'am.

10            JUDGE HARDMAN: Yes. Go ahead, please.

11            MR. ANDERSON: Thank you. And as  
12     background, I am lead counsel for the Patent  
13     Owner and exclusive licensee in the underlying  
14     litigation, so I have perhaps, at least on our  
15     side, the most knowledge of these documents, and  
16     I would respectfully disagree with counsel for  
17     Petitioner's argument as to what the documents  
18     show or what the individuals may, you know,  
19     allegedly additionally know.

20            As I'm sure you're aware, with any  
21     entity, the documents only tell part of the  
22     story. Here we have clear documentation that  
23     they were aware of Ddrop's highly successful  
24     product, which was successful due to its patented  
25     features, that their noninfringing product was

1 not working in the market and had various  
2 defects, and that they then embarked on copying  
3 our product by instructing their -- by having  
4 their manufacturing entity simply develop a  
5 product using one of only a multiple of possible  
6 compositions, which happens to be our patented --  
7 our composition that's included in the terms of  
8 the patent.

9 At the same time, they were well aware  
10 of our product and our -- and embarked on an  
11 express statement to steal market share from us,  
12 and as part of that, we should be able to take  
13 the depositions of these executives to confirm  
14 that they had, that they had discussed a  
15 strategy, knowing of Ddrop's product, to steal  
16 market share and to copy it, despite the fact  
17 that it was clearly marked as a patented product.

18 That is information that you cannot get  
19 simply from the documents, because the documents,  
20 invariably, are what I will call the here's what  
21 to do without any explanation or discussion of  
22 their plan or their knowledge of the success of  
23 our product, their desire to copy it, and to  
24 proceed to steal market share.

25 So I'm aware of the various factors and

1 criteria to be able to take such a deposition. I  
2 note that when we get to the Petitioner's  
3 motions, they desire to take the deposition of  
4 our CEO as well as, as Mr. Ungerman stated,  
5 require us to -- or to bring the motion to  
6 produce the same sorts of commercial success  
7 documents that we seek. And so I think for  
8 purposes of this hearing, the panel should allow  
9 us to file a motion to compel for the same  
10 reasons or along the same lines as item 1(C).  
11 Thank you.

12 JUDGE HARDMAN: Mr. Conrad, I'm sure you  
13 want to respond to the contentions. I will say  
14 at this stage I think the panel is leaning toward  
15 denying the request for authorization to compel  
16 these depositions without prejudice to -- it  
17 seems premature at this stage. I'm not really  
18 hearing any specifics that call for the  
19 depositions of these folks. I think some of  
20 this, assuming that Patent Owner is granted  
21 authorization to compel the documents that we're  
22 talking about, I think some of this maybe could  
23 be answered with the documents alone, or we can  
24 have more targeted information on what exactly  
25 the depositions of these people -- why they are

1 specifically necessary.

2 So with that sort of preview on the  
3 panel's thinking, Mr. Conrad, is there anything  
4 you want to add on that?

5 MR. CONRAD: Not really, Your Honor,  
6 given that I disagree with what counsel said, but  
7 I don't need to respond here. I think that we  
8 can just show the documents, if that ever comes  
9 into play, and it'll answer -- it'll provide my  
10 answer to his contentions.

11 JUDGE HARDMAN: Okay. So moving on to  
12 number 3 on Patent Owner's list, this is a motion  
13 to set schedule for Petitioner to serve  
14 supplemental information, schedule depositions,  
15 and comply with discovery requests.

16 Mr. Ungerman, can you give us a little  
17 more insight into what you are asking for there?

18 MR. UNGERMAN: Okay. So, as you will  
19 recall -- well, we already discussed the  
20 supplemental, the initial supplemental  
21 information that they are seeking to make, and we  
22 have a schedule for that.

23 They have also sought -- or included on  
24 their list, you know, motions to provide  
25 supplemental information on secondary

1     considerations. I think they can't have it both  
2     ways. They -- at this point I don't think they  
3     can establish that they could not have produced  
4     the information, the supplemental information at  
5     this time, and to allow them to wait to respond  
6     just seems unfair and impossible to satisfy the  
7     requirements for being in the interest of  
8     judgment and the standards for seeking  
9     supplemental information more than a month out.  
10    And I don't think we should allow them to list  
11    these items now and try to use that to get the  
12    benefit of the lower standard for supplemental  
13    information within one month.

14                 JUDGE HARDMAN: Mr. Ungerman, I guess  
15    I'm not clear on, when you are talking about  
16    Petitioner to serve supplemental information,  
17    what supplemental information are we talking  
18    about? Is this about the information on the  
19    public acceptability of the prior art references  
20    and the translation information or are you  
21    talking about Petitioner's request to serve  
22    supplemental information about potential  
23    objective indicia?

24                 MR. UNGERMAN: The latter, Your Honor.

25                 JUDGE HARDMAN: Okay. So let's table

1     that because we can talk about that when we get  
2     to Petitioner's -- that's listed in Petitioner's  
3     motion, so we'll get there.

4             Is there anything we need to discuss  
5     about scheduling depositions and complying with  
6     discovery requests?

7             MR. UNGERMAN: Well, again, they have  
8     submitted declarations in their petition, and  
9     we're entitled to take the depositions of those  
10    people, and I have been asking for their  
11    availability for quite a while now and I'm  
12    getting nowhere with those requests, so I would  
13    like to have them provide us dates, at least, for  
14    the depositions promptly.

15            JUDGE HARDMAN: Okay. And before I turn  
16    to Mr. Conrad, is there anything, Mr. Ungerman,  
17    about schedule for complying with discovery  
18    requests? I'm not sure what that refers to.

19            MR. UNGERMAN: Well, so we'll be filing  
20    the motions, it relates to that, and the  
21    supplemental, the inconsistent information that  
22    was in their petition that should fall within the  
23    first item that we talked about.

24            JUDGE HARDMAN: Okay.

25            MR. UNGERMAN: So you have already set

1 the schedule for that.

2 JUDGE HARDMAN: Okay. Thank you.

3 Mr. Conrad, where do we stand on  
4 scheduling depositions of the declarants?

5 MR. CONRAD: I believe the only  
6 declarant is our expert, and I understand Patent  
7 Owner's frustration. All I can say at this point  
8 is we're working on it, and we will provide  
9 dates, and we are happy to engage in any  
10 extensions necessary to ensure that Patent Owner  
11 is not prejudiced if it isn't provided to them or  
12 there's not a schedule that they can get his  
13 deposition quickly, so I think this is premature  
14 for the Board. If it is an issue, I'm sure we'll  
15 come back to it, but I believe that will get them  
16 the information they need and no one is going to  
17 be prejudiced.

18 JUDGE HARDMAN: Is there -- just there  
19 seems to be a subtext here. Is there a problem  
20 with getting availability from your expert?

21 MR. CONRAD: Not at the moment, not -- I  
22 haven't gotten enough information from the expert  
23 on availability yet. We are still working on it  
24 and awaiting it. There's nothing at this point  
25 to suggest that we cannot.

1 JUDGE HARDMAN: Okay. I do --

2 MR. UNGERMAN: We also have the  
3 translators. I apologize.

4 JUDGE HARDMAN: Go ahead.

5 MR. UNGERMAN: We have --

6 MR. CONRAD: I'm sorry, I didn't --  
7 sorry, Mark, go ahead.

8 MR. UNGERMAN: Oh, we have the other  
9 declarant and there's now going to be additional  
10 supplemental declarants, so, you know, we need  
11 all those people.

12 MR. CONRAD: Okay. I apologize. I  
13 didn't know you were going to make a request for  
14 the translators. If you can let us know which of  
15 the translators you would like their deposition  
16 for, then we will get that as well.

17 MR. UNGERMAN: All of them.

18 JUDGE HARDMAN: Okay. So, so do we  
19 have -- okay. I'm going to leave this to the  
20 parties for meeting and conferring amongst  
21 yourselves. Just as some general guidance,  
22 obviously be mindful of the upcoming dates for  
23 Patent Owner's response. Obviously that can be  
24 extended by stipulation, as needed, so that  
25 should be on the table too, but you should all be

1 mindful that there seems to be a number of  
2 depositions here, they should be taken quickly  
3 and mindful of the upcoming deadlines.

4 Motion to enter a protective order. I  
5 understand the parties have been working that  
6 out. That's something the parties usually take  
7 care of themselves, and then to the extent you  
8 need us to authorize you to file a motion to  
9 enter a protective order, you can also file it at  
10 the time you seek to have a document filed under  
11 seal. You can file that together with your  
12 proposed protective order at that time.

13 Is there anything, Mr. Ungerman, for the  
14 Board to address in connection with the  
15 protective order at this point?

16 MR. UNGERMAN: We are working on it. We  
17 have every expectation that we will not require  
18 any assistance from the Board on that.

19 JUDGE HARDMAN: That's great to hear.  
20 Thank you, sir.

21 Mr. Conrad, anything to add on that?

22 MR. CONRAD: No, Your Honor.

23 JUDGE HARDMAN: Okay. The motion for  
24 pro hac vice admission, I see that Patent Owner  
25 has filed those, so I think that is taken care

1 of.

2 Let's turn to Petitioner's list of  
3 proposed motions, please.

4 MR. CONRAD: Yes.

5 JUDGE HARDMAN: Starting with --

6 Let me just put it into the record.

7 Starting with item 1, Petitioner's motion,  
8 Petitioner seeks authorization to file a motion  
9 for supplemental information concerning generally  
10 translation material as well as public  
11 accessibility of prior art references.

12 Mr. Conrad, do you want to elaborate on  
13 this?

14 MR. CONRAD: Yes, Your Honor. This was  
15 alluded to prior to institution. Petitioner  
16 seeks authorization to file supplemental  
17 information, which will include additional  
18 declarations from translators, both supplemental  
19 declarations as well as new declarations and  
20 translations not previously submitted. One of  
21 them is the declaration of Tinsworth, which was  
22 alluded to previously, but not submitted with the  
23 petition, and the -- there should be an  
24 additional translation as well and declaration of  
25 an additional translator to support the accuracy

1 of the translation, as well as a supplemental  
2 declaration from the librarian expert to support  
3 the public availability of the references.

4 JUDGE HARDMAN: On the Tinsworth  
5 declaration, I think earlier we had agreed that  
6 you would send that out soon as part of the  
7 rolling production. Is that what you said?

8 MR. CONRAD: Yes, Your Honor, that was  
9 when we could provide --

10 JUDGE HARDMAN: Okay.

11 MR. CONRAD: I apologize. Yes, we are  
12 providing that starting on Tuesday.

13 JUDGE HARDMAN: Okay. So that seems  
14 like it no longer needs to be a part of this  
15 request, correct?

16 MR. CONRAD: That's correct.

17 JUDGE HARDMAN: Okay. Mr. Ungerman,  
18 what is your position on this request?

19 MR. UNGERMAN: We have consistently  
20 stated that we consent and encourage them to do  
21 this as promptly as possible.

22 JUDGE HARDMAN: Okay. Okay. I think  
23 the panel is inclined to grant Petitioner  
24 authorization to file this motion. We will put  
25 the parameters in terms of briefing and timing in

1 a forthcoming order.

2 But then let's move to item 2 on  
3 Petitioner's list, motion to compel routine  
4 discovery. This is a sort of broad category, I'd  
5 say, seeking permission to use all documents  
6 produced in the underlying District Court  
7 litigation as well as any other documents Patent  
8 Owner is aware of regarding Vigantol oil.

9 I'll preface this, Mr. Conrad, by saying  
10 this seems really quite overbroad, inconsistent  
11 with the Garmin factors, so with that, why don't  
12 you tell us a little bit more about what you're  
13 seeking and how it's consistent with the Garmin  
14 factors.

15 MR. CONRAD: Certainly, Your Honor. As  
16 stated, it only seems inconsistent simply because  
17 it's not disclosed here the extent of the  
18 production of the coinventor Dr. Vieth. It's not  
19 a significant production and it really is a  
20 production that's limited to the information that  
21 would be authorized anyways under the routine  
22 discovery. I believe it's a total of 58  
23 documents.

24 So what we are seeking through routine  
25 discovery is inconsistent information. The

1 Patent Owner has argued and Dr. Vieth submitted a  
2 declaration in the preliminary proceeding that  
3 suggested that he did not seriously work with  
4 Vigantol oil prior to working on the invention of  
5 this patent, and we have information in our hand  
6 that we believe is inconsistent with that, and  
7 those 58 documents provide that information.

8           So the request for all of his documents  
9 is simply just an easy way to say those are the  
10 ones that are subject to routine discovery. More  
11 specifically, we simply want information that  
12 relates to his knowledge and awareness in working  
13 with Vigantol oil prior to the invention of --  
14 prior to the filing of this patent. It includes  
15 a laboratory notebook that mentions Vigantol oil,  
16 e-mails with the manufacturer of the product,  
17 scholarly articles in which the inventor has  
18 published and mentioned the product, and anything  
19 else of that nature.

20           JUDGE HARDMAN: And, counsel, what is  
21 the relevance to the issues here? You know,  
22 we're deciding patentability based on printed  
23 publications, prior art, that sort of thing. Why  
24 does it matter whether Mr. Vieth was familiar  
25 with or worked with Vigantol oil, the oil being

1 obviously a separate item, a product, versus  
2 printed publications that are of concern to us  
3 here?

4 MR. CONRAD: Yes, Your Honor. The  
5 petition is premised upon a disclosure in the  
6 Harder reference of placing one drop of the  
7 commercial product, Vigantol oil, onto a surface,  
8 and it does identify that the composition is  
9 Harder medium chain triglycerides, but the Patent  
10 Owner contends that that disclosure is not  
11 enough. So simply the inherency of that, the  
12 disclosure of that product itself to a person of  
13 ordinary skill in the art, is something that the  
14 petition seeks to prove. And so the Patent  
15 Owner's work with this product prior to the  
16 filing of this patent, communications with others  
17 who might be familiar with the product, all of  
18 that information would be evidence of the state  
19 of the art that a person of ordinary skill in the  
20 art who reads Harder sees that it says "use  
21 Vigantol oil" would know the composition.

22 JUDGE HARDMAN: Mr. Ungerman, what is  
23 your response on this motion?

24 MR. UNGERMAN: Well, so, first off --

25 MR. ANDERSON: May I respond?

1 MR. UNGERMAN: Sure, Alan, go ahead.

2 MR. ANDERSON: Your Honor, may I  
3 respond? This is Mr. Anderson.

4 JUDGE HARDMAN: Yes, Mr. Anderson.

5 MR. ANDERSON: Thank you. I think you  
6 are -- the panel's inclinations are quite correct  
7 in that this request is overly broad and not  
8 focused. There are hundreds of pages produced by  
9 Dr. Vieth in the underlying litigation.

10 I note they also ask for any other  
11 documents that Patent Owner is aware of regarding  
12 Vigantol oil. As Your Honor indicated, Vigantol  
13 oil is not one of the items of prior art that are  
14 at issue here. This petition relates to printed  
15 publications and combinations of printed  
16 publications.

17 This is, I think, a classic overly broad  
18 fishing expedition and the Petitioner's request  
19 is to me very much an example of the pot calling  
20 the kettle black where they oppose our request  
21 for documents to show secondary indicia, and here  
22 they make a blanket request for all documents  
23 produced in the underlying District Court  
24 litigation, which would include documents of the  
25 Patent Owner regarding an entity, or a thing,

1 Vigantol oil, that's just not relevant here. I  
2 don't think that they have made any sort of  
3 necessary prima facie showing that they could  
4 possibly meet the Garmin factors for such a  
5 motion.

6 JUDGE HARDMAN: Thank you, counsel. I  
7 do have a concern here on this one. We do have a  
8 declaration from Mr. Vieth, or Dr. Vieth, in the  
9 record, and I heard Mr. Conrad allege that there  
10 is inconsistent information in the documents that  
11 he's seeking, and so that would fall under  
12 routine discovery, and for that reason the panel  
13 is leaning towards authorizing this motion  
14 because I do have the concern if there is  
15 information inconsistent with what's in the  
16 declaration, I do think Petitioner would be --  
17 you know, would have a reason to evaluate that.

18 So we will authorize this motion.  
19 Again, the parameters will be in a forthcoming  
20 order. Just as guidance to Petitioner, I would,  
21 again, you know, suggest that you keep your  
22 requests really narrow and focused. For example,  
23 as he's sitting here now, the portion of any  
24 other documents Patent Owner is aware of  
25 regarding Vigantol oil does seem to go beyond

1 something that would qualify as routine discovery  
2 or even additional discovery under the Garmin  
3 factors, so just keep that in mind with your  
4 forthcoming motion.

5 MR. CONRAD: Thank you, Your Honor.

6 JUDGE HARDMAN: Okay. We have the  
7 motion for protective order which we have already  
8 addressed.

9 On Petitioner's list we have item 4 and  
10 item 7. They both are proposed motions to compel  
11 live deposition testimony, one of Dr. Vieth and  
12 one of Chris Temovsky. So, Mr. Conrad, please  
13 address those motions.

14 MR. CONRAD: Yes, Your Honor. Actually,  
15 I think for items 4 through 7, perhaps they are  
16 premature at this point, because it really would  
17 depend upon what Patent Owner puts into their  
18 response to the petition as to whether these  
19 requests are necessary, and especially number 7  
20 as well, we wouldn't seek to depose Mr. Temovsky  
21 at all unless they submit a declaration from him  
22 or otherwise shows, their response shows that he  
23 would have information relevant to what they put  
24 in there. So on those requests, I think that  
25 they are premature until we see what Patent Owner

1 submits in the response. With one exception.  
2 Number 4 is Dr. Vieth, and we would need his  
3 testimony to explain the materials that we will  
4 receive under the motion for supplemental -- or  
5 motion for routine discovery.

6 JUDGE HARDMAN: Okay. Assuming that we  
7 do grant your motion for discovery, routine  
8 discovery and/or additional discovery, and then  
9 you need the deposition of Dr. Vieth, I guess it  
10 sounds premature at this point. So just to  
11 confirm, I heard you say that items 4 through 7  
12 are premature --

13 MR. CONRAD: Yes.

14 JUDGE HARDMAN: -- and I think the panel  
15 agrees with that. Is that correct, Mr. Conrad?

16 MR. CONRAD: That's correct, Your Honor,  
17 with the right for us to request authorization,  
18 should the need arise.

19 JUDGE HARDMAN: Yes. We authorize that.  
20 So we will deny these requests 4 through 7  
21 without prejudice to renew them at an appropriate  
22 time, if needed.

23 Okay. I just wanted to go back to  
24 Patent Owner's item -- bear with me while I go  
25 back to that list, please. Patent Owner's item

1 1(B), this would be complete copies of Harder and  
2 the European Pharmacopoeia. We had -- we  
3 established that Petitioner says it doesn't have  
4 the complete copies in its possession, custody or  
5 control. We had an alternative request from  
6 Mr. Ungerman to file a motion to strike those two  
7 references because complete copies were not  
8 submitted.

9           Something, though, I wanted to circle  
10 back to this, because I heard Mr. Conrad say that  
11 one of the declarants, the librarian declarant, I  
12 believe, said that she obtained copies of these  
13 references from a particular library, and so my  
14 question is, for Mr. Ungerman at this stage, have  
15 you approached that library, and if not, why not?  
16 Because it seems like, under the Garmin factor of  
17 ability to generate the equivalent information by  
18 other means, it appears that these materials are  
19 available at the library where the librarian  
20 obtained them. Is that an avenue that you have  
21 tried?

22           MR. UNGERMAN: No, Your Honor, but we  
23 think that this doesn't necessarily fall under  
24 the additional discovery, this should be under  
25 routine discovery as part of their threshold

1     burden.

2                 JUDGE HARDMAN: Mr. Conrad, would you be  
3     willing to obtain copies of the complete  
4     references and make them available, you know,  
5     photocopy them or what have you and make copies  
6     available to Patent Owner to resolve this issue?  
7     Is that something that you would be willing to  
8     do?

9                 MR. CONRAD: Certainly, if the cost is  
10    borne by the Patent Owner, we would have no issue  
11    with that. However, there is a problem with the  
12    request, at least as they stated it to us. We  
13    would have no issue providing the copy of the  
14    reference itself. Patent Owner had asked us to  
15    provide translations of the entire reference.  
16    That is, that is not something we have, and if  
17    they want us to do that, then we will do it if  
18    they pay for it.

19                JUDGE HARDMAN: Mr. Ungerman, what is  
20    your response?

21                MR. UNGERMAN: Well, so there's two  
22    issues. The Pharmacopeia is in English, so  
23    there's no issue of translations there. And  
24    that's a very fat book, as I understand, it's  
25    several thousand pages. The supplement portion

1     that they relied on refers back to specific parts  
2     of that book, and that's the information that we  
3     really need.

4             As far as the Harder book, that is a 230  
5     page or so book that's the primary reference that  
6     they have relied on. I think they should be  
7     required to produce it, and I think that the  
8     rules require that if they do produce a document  
9     that's not in English, they are required to  
10    provide a translation.

11            So that's where I stand. It should not  
12    be our cost. This is their petition and their  
13    burden to establish what the references show.

14            JUDGE HARDMAN: Okay. I'm going to put  
15    the parties on hold while the panel confers.

16            Okay, counsel, the panel has conferred.  
17    On the outstanding request for a motion for  
18    authorization to compel complete copies of the  
19    Pharmacopoeia and Harder, we will authorize  
20    Patent Owner to file a motion on that. I think  
21    Mr. Ungerman suggested that it's routine  
22    discovery, so we would particularly like to hear  
23    why this qualifies as routine discovery, and  
24    then, of course, under the additional discovery  
25    factors, you know, we would like you obviously to

1 address them all, and you can address whatever  
2 you want in your motion, but in particular the  
3 Garmin factors that seem particularly relevant  
4 here is that, you know, what is the more than a  
5 possibility that there's really something useful  
6 will be discovered in these references.

7 Patent Owner should consider addressing  
8 the ability to generate equivalent information by  
9 other means, particularly as we discussed these  
10 references appear to be available at a public  
11 library for Patent Owner to go and review them.

12 So -- and also the Garmin factor on  
13 burdensome. These sounds like potentially  
14 voluminous references. There is a cost to  
15 providing them, and so, you know, Patent Owner  
16 should address that, if you choose to, in your  
17 motion.

18 And in particular, there is sort of this  
19 related issue of if Patent Owner is -- if we  
20 compel Patent Owner to produce the full Harder  
21 document and you are going to require that they  
22 also produce a translation of that full book, you  
23 know, there should be some justification for that  
24 as well.

25 So that's just some general guidance to

1 the parties. I think we have addressed all the  
2 outstanding issues and, again, we will be sending  
3 out an order with timing, et cetera.

4 With that, first, Mr. Ungerman, is  
5 there -- or Mr. Anderson, is there anything that  
6 you would like to address before we adjourn?

7 MR. ANDERSON: This is Dr. Anderson.  
8 No, Your Honor, from me.

9 MR. UNGERMAN: Yes, I go with --

10 MR. ANDERSON: Sorry. Go ahead, Mark.

11 MR. UNGERMAN: No, no, no. I was just  
12 deferring to you.

13 MR. ANDERSON: All right.

14 JUDGE HARDMAN: And, Mr. Conrad, is  
15 there anything else before we adjourn that you  
16 would like to raise?

17 MR. CONRAD: No, Your Honor. Thank you.

18 JUDGE HARDMAN: Okay. Well, thank you,  
19 everybody. Again, if Patent Owner can file the  
20 transcript of this call when it's ready, we would  
21 appreciate that. And we are adjourned. Thank  
22 you, everybody.

23 MR. ANDERSON: Thank you.

24 MR. UNGERMAN: Thank you.

25 MR. CONRAD: Thank you.

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[Hearing adjourned at 12:22 p.m. EST]

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## 1 CERTIFICATE OF REPORTER

2 I, Denise M. Munguia, RDR, CRR, CRC, CLR,  
3 California CSR #14033, Michigan CSR #15974, a  
4 Notary Public within and for the State of Ohio, the  
5 officer before whom the proceedings were taken, do  
6 hereby certify that the foregoing transcript is a  
7 true and accurate record of these proceedings; that  
8 said proceedings were taken in Stenotype notes by  
9 me on the 27th day of October, 2023, commencing at  
10 11:01 a.m. EST and ending at 12:22 p.m. EST.

11 I further certify that present on behalf of  
12 Petitioner MOM Enterprises, LLC were David B.  
13 Conrad, Esq., Sarika N. Patel, Esq., and Casey M.  
14 Kraning, Ph.D., Esq., of Fish & Richardson and on  
15 behalf of Patent Owner Elaine and Reinhold W. Vieth  
16 were Mark Ungerman, Esq., of Ungerman IP, PLLC, and  
17 Alan M. Anderson, Ph.D., Esq., of Alan Anderson Law  
18 Firm, LLC.

19 I further certify that I am not related to,  
20 nor associated with any of the parties or their  
21 attorneys, nor do I have any disqualifying  
22 interest, personal or financial, in the actions  
23 within.

24 IN WITNESS WHEREOF, I have hereunto set my  
25 hand and affixed my seal of office at North  
Olmsted, Ohio, on this 31st day of October, 2023.

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Denise M. Munguia, Notary Public  
Within and for the State of Ohio

My commission expires May 23, 2025.

| <b>A</b>                                                                                              |                                                             |                                                                                                                     |                                                                                                |                                                                              |
|-------------------------------------------------------------------------------------------------------|-------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|
| <b>a.m</b> 1:20 54:6                                                                                  | <b>address</b> 17:1<br>24:6 38:14                           | <b>allege</b> 45:9                                                                                                  | <b>approached</b><br>48:15                                                                     | 47:19 50:19                                                                  |
| <b>aanderson...</b><br>2:17                                                                           | 46:13 51:1,1<br>51:16 52:6                                  | <b>alleged</b> 14:14<br>20:22 21:18<br>26:22                                                                        | <b>appropriate</b><br>47:21                                                                    | <b>authorized</b><br>41:21                                                   |
| <b>abbreviated</b><br>25:12                                                                           | <b>addressed</b><br>46:8 52:1                               | <b>allegedly</b><br>30:19                                                                                           | <b>argued</b> 42:1                                                                             | <b>authorizing</b><br>45:13                                                  |
| <b>ability</b> 27:22<br>48:17 51:8                                                                    | <b>addressing</b><br>7:9 51:7                               | <b>allow</b> 32:8<br>34:5,10                                                                                        | <b>argument</b><br>21:20 30:17                                                                 | <b>automatic</b><br>28:23                                                    |
| <b>able</b> 11:3<br>12:17 21:10<br>21:14 28:1,3<br>29:6 31:12<br>32:1                                 | <b>adjourn</b> 52:6<br>52:15                                | <b>alluded</b> 39:15<br>39:22                                                                                       | <b>art</b> 13:15 34:19<br>39:11 42:23<br>43:13,19,20<br>44:13                                  | <b>availability</b><br>35:11 36:20<br>36:23 40:3                             |
| <b>Absolutely</b><br>4:23                                                                             | <b>adjourned</b><br>52:21 53:1                              | <b>alternative</b><br>48:5                                                                                          | <b>articles</b> 42:17                                                                          | <b>available</b><br>11:16 28:9<br>48:19 49:4,6<br>51:10                      |
| <b>accept</b> 13:6                                                                                    | <b>administering</b><br>20:12,21<br>21:6                    | <b>alternatively</b><br>5:12                                                                                        | <b>asked</b> 7:4,5<br>22:15 24:3<br>49:14                                                      | <b>avenue</b> 2:8<br>48:20                                                   |
| <b>acceptability</b><br>34:19                                                                         | <b>Administrati...</b><br>1:18                              | <b>amount</b> 17:7                                                                                                  | <b>asking</b> 15:18<br>19:12 23:20<br>23:22 25:17<br>33:17 35:10                               | <b>awaiting</b> 36:24                                                        |
| <b>acceptable</b><br>10:17                                                                            | <b>admission</b><br>38:24                                   | <b>Amy</b> 10:8                                                                                                     | <b>assistance</b> 5:6<br>38:18                                                                 | <b>aware</b> 23:11<br>24:13,13,17<br>30:20,23<br>31:9,25 41:8<br>44:11 45:24 |
| <b>access</b> 28:14<br>28:20,21<br>29:10                                                              | <b>adopting</b><br>27:10                                    | <b>and-</b> 2:6,14                                                                                                  | <b>associated</b><br>54:11                                                                     | <b>awareness</b><br>42:12                                                    |
| <b>accessibility</b><br>39:11                                                                         | <b>affixed</b> 54:13                                        | <b>and/or</b> 47:8                                                                                                  | <b>assume</b> 13:20<br>15:16                                                                   | <b>B</b>                                                                     |
| <b>accomplish</b><br>23:7                                                                             | <b>ago</b> 7:1 8:13<br>9:4                                  | <b>Anderson</b> 2:14<br>2:15 4:9,12<br>30:4,5,7,9,11<br>43:25 44:2,3<br>44:4,5 52:5,7<br>52:7,10,13<br>52:23 54:9,9 | <b>assuming</b> 22:3<br>29:7 32:20<br>47:6                                                     | <b>B</b> 2:3 5:15,17<br>54:7                                                 |
| <b>accuracy</b><br>39:25                                                                              | <b>agree</b> 8:8 9:2<br>10:13                               | <b>answer</b> 33:9<br>33:10                                                                                         | <b>attached</b> 24:14<br>24:15                                                                 | <b>B2</b> 1:12                                                               |
| <b>accurate</b> 54:4                                                                                  | <b>agreed</b> 5:25<br>6:4,23 7:15<br>40:5                   | <b>answered</b><br>32:23                                                                                            | <b>attempted</b><br>17:20                                                                      | <b>back</b> 9:8 15:4<br>16:15 25:11<br>36:15 47:23<br>47:25 48:10<br>50:1    |
| <b>acknowledg...</b><br>17:11                                                                         | <b>agreement</b><br>5:21 7:19                               | <b>anyways</b> 41:21                                                                                                | <b>attorneys</b><br>54:11                                                                      | <b>background</b><br>30:12                                                   |
| <b>acquire</b> 12:17                                                                                  | <b>agreements</b><br>25:23                                  | <b>apologize</b><br>12:16 37:3<br>37:12 40:11                                                                       | <b>authentication</b><br>28:12                                                                 | <b>based</b> 9:9<br>42:22                                                    |
| <b>acted</b> 30:6                                                                                     | <b>agrees</b> 47:15                                         | <b>APPEAL</b> 1:2                                                                                                   | <b>authorization</b><br>5:11 16:1<br>23:8 24:11<br>32:15,21<br>39:8,16<br>40:24 47:17<br>50:18 | <b>basis</b> 22:3                                                            |
| <b>actions</b> 54:12                                                                                  | <b>ahead</b> 7:17 8:6<br>10:8 30:10<br>37:4,7 44:1<br>52:10 | <b>appear</b> 12:20<br>51:10                                                                                        | <b>authorize</b><br>15:19 24:25<br>38:8 45:18                                                  | <b>Bates</b> 23:18                                                           |
| <b>add</b> 6:18 19:9<br>33:4 38:21                                                                    | <b>Alan</b> 2:14,15<br>4:9 30:4 44:1<br>54:9,9              | <b>appearances</b><br>2:1 3:7                                                                                       |                                                                                                | <b>bear</b> 16:15<br>47:24                                                   |
| <b>additional</b><br>5:13 15:5<br>16:18 17:2<br>23:21 37:9<br>39:17,24,25<br>46:2 47:8<br>48:24 50:24 | <b>allegation</b><br>11:24 21:12<br>27:20 30:3              | <b>appears</b> 48:18                                                                                                |                                                                                                | <b>behalf</b> 2:2,10<br>3:10,16,24<br>6:12 30:8<br>54:6,8                    |
| <b>additionally</b><br>30:19                                                                          | <b>allegations</b><br>20:15                                 | <b>appreciate</b><br>9:20 52:21                                                                                     |                                                                                                |                                                                              |
|                                                                                                       |                                                             | <b>approach</b><br>29:18                                                                                            |                                                                                                |                                                                              |

|                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>believe</b> 3:11<br>7:25 9:5 11:9<br>12:12 13:8<br>17:2 23:6<br>25:6 27:7<br>36:5,15<br>41:22 42:6<br>48:12 | 5:2 23:7<br>24:23 31:20<br>32:18 52:20<br><b>called</b> 3:4<br><b>calling</b> 44:19<br><b>Calvert</b> 2:12<br><b>campaigns</b><br>27:13<br><b>capture</b> 23:4<br><b>capturing</b><br>26:12<br><b>care</b> 38:7,25<br><b>Carolyn</b> 26:10<br><b>case</b> 8:22,23<br>14:15 18:9<br>21:13 25:14<br>29:20 30:1<br><b>Casey</b> 2:7 3:15<br>3:21 54:7<br><b>category</b> 41:4<br><b>Center</b> 2:15<br><b>CEO</b> 25:5,21<br>25:22 32:4<br><b>certain</b> 5:13<br>16:22<br><b>Certainly</b><br>41:15 49:9<br><b>CERTIFICATE</b><br>54:1<br><b>certify</b> 54:4,6<br>54:10<br><b>cetera</b> 52:3<br><b>chain</b> 14:3,15<br>14:17 26:5<br>43:9<br><b>challenged</b><br>28:16<br><b>chances</b> 24:21<br><b>change</b> 18:4,5<br>29:12,13<br><b>changes</b> 11:4<br><b>character</b><br>14:12<br><b>choose</b> 51:16<br><b>Chris</b> 46:12<br><b>circle</b> 48:9 | <b>claim</b> 6:22<br>14:16,25<br>17:19<br><b>claims</b> 17:18<br>17:23,25<br>18:11,13<br><b>clarification</b><br>19:2<br><b>classic</b> 44:17<br><b>clear</b> 30:22<br>34:15<br><b>clearly</b> 6:21<br>31:17<br><b>client</b> 6:17<br>8:17,18 20:6<br>20:14<br><b>client's</b> 22:18<br>24:3<br><b>CLR</b> 1:23 54:2<br><b>cmk@fr.com</b><br>2:9<br><b>coinventor</b><br>41:18<br><b>colleagues</b><br>3:11<br><b>collected</b><br>19:14<br><b>combinations</b><br>44:15<br><b>come</b> 25:14<br>28:8 36:15<br><b>comes</b> 33:8<br><b>commencing</b><br>54:5<br><b>commercial</b><br>17:14 18:6<br>18:17,24<br>32:6 43:7<br><b>commercially</b><br>11:15<br><b>commission</b><br>54:18<br><b>communicat...</b><br>43:16<br><b>company</b><br>25:25 | <b>compel</b> 5:11<br>11:20 15:19<br>16:18 19:3<br>24:22 25:5<br>26:20 32:9<br>32:15,21<br>41:3 46:10<br>50:18 51:20<br><b>complete</b> 5:17<br>6:4 7:3 8:7<br>9:3,5,24 11:8<br>11:13,18,21<br>13:3,8 15:8<br>28:11 48:1,4<br>48:7 49:3<br>50:18<br><b>completed</b><br>10:14<br><b>complicated</b><br>18:10<br><b>comply</b> 33:15<br><b>complying</b><br>35:5,17<br><b>composition</b><br>14:16 20:12<br>20:19,20<br>29:24 31:7<br>43:8,21<br><b>compositions</b><br>31:6<br><b>concern</b> 43:2<br>45:7,14<br><b>concerning</b><br>39:9<br><b>conference</b><br>3:4 5:1<br><b>conferred</b><br>50:16<br><b>conferring</b><br>37:20<br><b>confers</b> 50:15<br><b>confirm</b> 31:13<br>47:11<br><b>confirming</b><br>26:9<br><b>connection</b> | 8:18 14:22<br>17:9 38:14<br><b>Conrad</b> 2:3 3:9<br>3:10,21 4:3,5<br>7:17,18 9:16<br>9:17,19 10:6<br>10:15,17<br>11:10 15:5<br>15:11 19:22<br>20:1 21:17<br>29:3,4 32:12<br>33:3,5 35:16<br>36:3,5,21<br>37:6,12<br>38:21,22<br>39:4,12,14<br>40:8,11,16<br>41:9,15 43:4<br>45:9 46:5,12<br>46:14 47:13<br>47:15,16<br>48:10 49:2,9<br>52:14,17,25<br>54:7<br><b>conrad@fr.c...</b><br>2:5<br><b>consent</b> 40:20<br><b>consider</b> 51:7<br><b>consideratio...</b><br>25:20 26:14<br>34:1<br><b>considered</b><br>7:6<br><b>consistent</b><br>41:13<br><b>consistently</b><br>40:19<br><b>consisting</b><br>14:17<br><b>contends</b><br>43:10<br><b>content</b> 13:15<br><b>contentions</b><br>32:13 33:10<br><b>contingent</b><br>29:5 |
| <b>C</b>                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>California</b> 1:23<br>54:2<br><b>call</b> 4:20,25                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

|                           |                       |                        |                        |                       |
|---------------------------|-----------------------|------------------------|------------------------|-----------------------|
| <b>continuing</b><br>6:22 | <b>couple</b> 12:4    | <b>Ddrops'</b> 29:24   | 32:19,25               | 48:25 50:22           |
| <b>contribute</b><br>24:2 | <b>course</b> 24:12   | <b>deadlines</b> 38:3  | 33:14 35:5,9           | 50:23,24              |
| <b>control</b> 8:9,10     | <b>court</b> 4:15,16  | <b>deciding</b> 25:25  | 35:14 36:4             | <b>discrete</b> 14:2  |
| 8:15 11:12                | 8:19 19:19            | 42:22                  | 38:2                   | <b>discuss</b> 35:4   |
| 15:8 48:5                 | 25:13,16              | <b>decision-ma...</b>  | <b>described</b>       | <b>discussed</b>      |
| <b>convened</b> 4:25      | 41:6 44:23            | 28:14                  | 17:3 26:12             | 14:21 26:20           |
| <b>copied</b> 18:7        | <b>covered</b> 20:22  | <b>declarant</b> 36:6  | <b>deserve</b> 29:20   | 31:14 33:19           |
| 20:8 21:2                 | <b>covers</b> 10:3    | 37:9 48:11             | <b>design</b> 26:2     | 51:9                  |
| 22:4                      | <b>CRC</b> 1:23 54:2  | <b>declarants</b>      | <b>desire</b> 31:23    | <b>discussion</b>     |
| <b>copies</b> 5:18        | <b>created</b> 17:21  | 36:4 37:10             | 32:3                   | 10:23 31:21           |
| 7:3 8:7 9:3               | <b>Crescent</b> 2:15  | 48:11                  | <b>desires</b> 27:10   | <b>disqualifying</b>  |
| 11:8,18,21                | <b>criteria</b> 32:1  | <b>declaration</b>     | <b>despite</b> 31:16   | 54:11                 |
| 13:9 48:1,4,7             | <b>CRR</b> 1:23 54:2  | 7:25 10:7              | <b>develop</b> 28:24   | <b>District</b> 8:19  |
| 48:12 49:3,5              | <b>CSR</b> 1:23,24    | 15:12 39:21            | 31:4                   | 19:18 25:13           |
| 50:18                     | 54:2,2                | 39:24 40:2,5           | <b>development</b>     | 25:16 41:6            |
| <b>copy</b> 6:5,22,24     | <b>cumulative</b>     | 42:2 45:8,16           | 26:3                   | 44:23                 |
| 7:2 8:5,6 9:5             | 12:11                 | 46:21                  | <b>difference</b>      | <b>doable</b> 10:15   |
| 11:13 12:17               | <b>Cuozzo</b> 17:3    | <b>declarations</b>    | 18:2                   | <b>document</b>       |
| 12:25 13:1                | <b>current</b> 6:17   | 9:21,23 35:8           | <b>different</b> 8:18  | 6:25 12:7             |
| 15:8 23:18                | 22:2                  | 39:18,19,19            | 14:22 20:21            | 24:14,19              |
| 31:16,23                  | <b>currently</b>      | <b>deemed</b> 19:20    | 22:22 28:5,7           | 28:4,6 29:21          |
| 49:13                     | 24:10                 | 23:23 24:4             | 29:25                  | 38:10 50:8            |
| <b>copying</b> 17:14      | <b>custody</b> 8:9,10 | <b>defects</b> 31:2    | <b>dig</b> 23:20       | 51:21                 |
| 21:18,21                  | 8:15 11:11            | <b>defendant</b>       | <b>direct</b> 28:16,18 | <b>documentati...</b> |
| 22:1 23:16                | 15:8 48:4             | 8:12                   | 28:19,24               | 26:19,19              |
| 26:8,22                   | <b>CYNTHIA</b> 1:16   | <b>deferring</b>       | <b>disagree</b> 30:16  | 28:9,10               |
| 28:17 29:24               |                       | 52:12                  | 33:6                   | 30:22                 |
| 31:2                      | <b>D</b>              | <b>definition</b> 14:2 | <b>disclosed</b>       | <b>documents</b>      |
| <b>Corporate</b>          | <b>D.C</b> 2:12       | <b>Delaware</b> 2:8,8  | 41:17                  | 6:1 8:14              |
| 2:15                      | <b>Dallas</b> 2:4     | <b>demonstrate</b>     | <b>disclosure</b>      | 19:10 22:1,8          |
| <b>correct</b> 8:11       | <b>data</b> 16:21     | 22:9                   | 43:5,10,12             | 22:10 23:12           |
| 15:10,11                  | 17:10 19:4,4          | <b>Denise</b> 1:23     | <b>discover</b> 5:12   | 23:19,21,23           |
| 18:19 19:7                | 26:21                 | 54:2,17                | <b>discovered</b>      | 24:3 27:4,9           |
| 29:5 40:15                | <b>date</b> 9:14,16   | <b>deny</b> 47:20      | 11:25 27:21            | 28:12 29:7,9          |
| 40:16 44:6                | 9:18 10:10            | <b>denying</b> 32:15   | 51:6                   | 29:10,14,22           |
| 47:15,16                  | 10:25 12:24           | <b>depend</b> 46:17    | <b>discovery</b> 5:13  | 30:15,17,21           |
| <b>cost</b> 49:9          | <b>dates</b> 11:4     | <b>depose</b> 46:20    | 15:5,19,21             | 31:19,19              |
| 50:12 51:14               | 35:13 36:9            | <b>deposition</b>      | 16:18 17:2             | 32:7,21,23            |
| <b>counsel</b> 3:1        | 37:22                 | 28:5 32:1,3            | 23:22 24:22            | 33:8 41:5,7           |
| 6:10 17:10                | <b>David</b> 2:3 3:10 | 36:13 37:15            | 25:5 29:8,20           | 41:23 42:7,8          |
| 30:12,16                  | 54:7                  | 46:11 47:9             | 29:21 33:15            | 44:11,21,22           |
| 33:6 42:20                | <b>day</b> 54:5,14    | <b>depositions</b>     | 35:6,17 41:4           | 44:24 45:10           |
| 45:6 50:16                | <b>Ddrop's</b> 30:23  | 25:8,17                | 41:22,25               | 45:24                 |
| <b>counsel's</b> 6:14     | 31:15                 | 26:25 27:1,5           | 42:10 45:12            | <b>Dr</b> 41:18 42:1  |
|                           | <b>Ddrops</b> 17:17   | 27:9 28:22             | 46:1,2 47:5,7          | 44:9 45:8             |
|                           |                       | 31:13 32:16            | 47:8,8 48:24           | 46:11 47:2,9          |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 52:7<br><b>drop</b> 43:6<br><b>due</b> 10:25 11:4<br>18:7 30:24                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <b>essentially</b><br>12:6 14:20<br>18:12<br><b>EST</b> 1:20 53:1<br>54:6,6<br><b>establish</b><br>13:14 18:1,6<br>34:3 50:13<br><b>established</b><br>48:3<br><b>establishing</b><br>15:1<br><b>et</b> 52:3<br><b>European</b> 5:18<br>6:20 11:8,14<br>11:14 12:22<br>14:1,5,9,19<br>15:9,14 16:6<br>16:9 48:2<br><b>evaluate</b> 45:17<br><b>event</b> 21:15<br><b>everybody</b><br>52:19,22<br><b>everybody's</b><br>11:6<br><b>evidence</b> 8:23<br>16:19 17:8<br>18:1 21:21<br>22:12,14,19<br>23:2,10,15<br>25:19 26:8<br>28:16,18,18<br>28:19,20<br>29:6 43:18<br><b>exactly</b> 3:13<br>14:4 22:24<br>32:24<br><b>example</b> 11:22<br>44:19 45:22<br><b>exception</b> 47:1<br><b>excerpts</b> 13:18<br><b>exclusive</b><br>30:13<br><b>executives</b><br>28:25 29:1<br>31:13 | <b>exhibit</b> 4:22<br>15:12<br><b>exipient</b> 14:18<br><b>exist</b> 8:14<br><b>existence</b> 22:9<br><b>exists</b> 17:8<br>21:10<br><b>expand</b> 29:16<br><b>expectation</b><br>38:17<br><b>expects</b> 7:16<br><b>expedition</b><br>30:3 44:18<br><b>expert</b> 15:13<br>36:6,20,22<br>40:2<br><b>expires</b> 54:18<br><b>explain</b> 25:8<br>47:3<br><b>explanation</b><br>29:12 31:21<br><b>express</b> 31:11<br><b>extended</b><br>37:24<br><b>extension</b><br>10:25<br><b>extensions</b><br>36:10<br><b>extent</b> 38:7<br>41:17 | <b>fall</b> 35:22<br>45:11 48:23<br><b>familiar</b> 7:23<br>42:24 43:17<br><b>far</b> 6:20 12:24<br>25:17 28:22<br>50:4<br><b>fat</b> 49:24<br><b>favor</b> 13:6<br><b>feature</b> 18:3<br><b>features</b> 18:10<br>30:25<br><b>feel</b> 6:13<br><b>figure</b> 5:7<br><b>file</b> 4:21 5:11<br>8:14 11:20<br>16:1 23:9<br>24:11 32:9<br>38:8,9,11<br>39:8,16<br>40:24 48:6<br>50:20 52:19<br><b>filed</b> 4:10<br>13:13 38:10<br>38:25<br><b>files</b> 8:17<br><b>filing</b> 8:3 35:19<br>42:14 43:16<br><b>filings</b> 8:20<br><b>finalized</b> 9:22<br>9:23<br><b>financial</b> 54:12<br><b>find</b> 12:16,17<br>12:25 13:1<br>19:17<br><b>firm</b> 2:14 8:11<br>54:10<br><b>first</b> 3:25 5:10<br>5:14 20:3,9<br>22:7,11 29:9<br>35:23 43:24<br>52:4<br><b>Fish</b> 2:2,7 54:8<br><b>fishing</b> 30:3<br>44:18<br><b>five</b> 22:22 | <b>Floor</b> 2:8<br><b>focused</b> 44:8<br>45:22<br><b>folks</b> 32:19<br><b>followed</b> 22:25<br><b>foregoing</b> 54:4<br><b>form</b> 3:16<br><b>formulation</b><br>22:20 27:11<br>29:13<br><b>formulator</b><br>25:23<br><b>formulator/...</b><br>26:4<br><b>forth</b> 12:9 26:6<br><b>forthcoming</b><br>3:16 41:1<br>45:19 46:4<br><b>found</b> 17:16<br><b>fourth</b> 12:20<br>14:6 15:8,14<br><b>front</b> 21:18<br><b>frustration</b><br>36:7<br><b>full</b> 51:20,22<br><b>further</b> 54:6,10<br><b>futile</b> 15:22 |
| <b>E</b><br><b>e-mail</b> 5:19<br><b>e-mails</b> 42:16<br><b>earlier</b> 8:22,23<br>26:13 40:5<br><b>easily</b> 24:18<br><b>easy</b> 42:9<br><b>edition</b> 12:20<br>12:21 14:6<br>15:9,15<br><b>elaborate</b><br>16:23 39:12<br><b>Elaine</b> 1:8 3:5<br>54:8<br><b>element</b> 18:5<br><b>eleventh</b> 12:21<br><b>embarked</b><br>31:2,10<br><b>embodies</b><br>17:19,24<br><b>encourage</b><br>40:20<br><b>engage</b> 36:9<br><b>English</b> 49:22<br>50:9<br><b>ensure</b> 36:10<br><b>enter</b> 38:4,9<br><b>Enterprises</b><br>1:5 3:5 54:7<br><b>entire</b> 49:15<br><b>entitled</b> 35:9<br><b>entity</b> 30:21<br>31:4 44:25<br><b>equivalent</b><br>27:22 28:20<br>48:17 51:8<br><b>especially</b><br>46:19<br><b>Esq</b> 2:3,3,7,11<br>2:15 54:7,7,8<br>54:9,9 | <b>G</b><br><b>G</b> 1:16<br><b>Garmin</b> 11:19<br>11:22 18:9<br>20:2,25<br>24:13 27:18<br>41:11,13<br>45:4 46:2<br>48:16 51:3<br>51:12<br><b>general</b> 21:12<br>37:21 51:25<br><b>generally</b> 5:15<br>39:9<br><b>generate</b><br>27:22 48:17<br>51:8<br><b>getting</b> 24:8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 35:12 36:20<br><b>give</b> 27:8<br>33:16<br><b>given</b> 15:23<br>21:5 33:6<br><b>giving</b> 13:6<br><b>go</b> 7:17 8:6<br>10:8 19:16<br>22:21 23:20<br>26:13 28:22<br>30:10 37:4,7<br>44:1 45:25<br>47:23,24<br>51:11 52:9<br>52:10<br><b>going</b> 5:3,8<br>12:1 14:4,6<br>19:4 21:13<br>29:11,16<br>36:16 37:9<br>37:13,19<br>50:14 51:21<br><b>good</b> 3:1,9<br>21:24<br><b>gotten</b> 36:22<br><b>grant</b> 24:11<br>25:1 40:23<br>47:7<br><b>granted</b> 32:20<br><b>granting</b> 24:22<br><b>great</b> 38:19<br><b>guess</b> 9:14<br>13:21 15:3<br>27:14 34:14<br>47:9<br><b>guidance</b><br>24:16 37:21<br>45:20 51:25 | <b>happy</b> 22:10<br>23:17 36:9<br><b>Harder</b> 5:17,18<br>6:5,7 11:8,25<br>13:11 14:23<br>16:8 43:6,9<br>43:20 48:1<br>50:4,19<br>51:20<br><b>Hardman</b> 1:17<br>3:1,2 4:1,5<br>4:14,19,24<br>7:11 9:8,17<br>10:2,12,19<br>11:2 13:16<br>15:3,17 16:3<br>16:10,13<br>18:15,21<br>19:1,8,21<br>21:24 23:25<br>24:7 26:15<br>26:18 27:14<br>27:17 28:1<br>29:2 30:7,10<br>32:12 33:11<br>34:14,25<br>35:15,24<br>36:2,18 37:1<br>37:4,18<br>38:19,23<br>39:5 40:4,10<br>40:13,17,22<br>42:20 43:22<br>44:4 45:6<br>46:6 47:6,14<br>47:19 49:2<br>49:19 50:14<br>52:14,18<br><b>HARTMAN</b><br>21:16<br><b>hear</b> 29:2<br>38:19 50:22<br><b>heard</b> 9:9 11:9<br>15:6 45:9<br>47:11 48:10<br><b>hearing</b> 1:15 | 32:8,18 53:1<br><b>Hello</b> 3:23<br><b>help</b> 29:14<br><b>helps</b> 29:17<br><b>hereunto</b><br>54:13<br><b>Hey</b> 22:21<br><b>highly</b> 30:23<br><b>hold</b> 50:15<br><b>Honor</b> 7:18<br>9:19 10:6<br>12:3 20:1<br>30:4 33:5<br>34:24 38:22<br>39:14 40:8<br>41:15 43:4<br>44:2,12 46:5<br>46:14 47:16<br>48:22 52:8<br>52:17<br><b>Honor's</b> 29:4<br><b>Honors</b> 3:9 4:4<br>7:23<br><b>hundreds</b> 44:8 | 25:1 40:23<br><b>include</b> 39:17<br>44:24<br><b>included</b> 31:7<br>33:23<br><b>includes</b> 42:14<br><b>including</b> 6:8<br>11:22 13:9<br>13:17 16:10<br><b>inconsistent</b><br>6:6 35:21<br>41:10,16,25<br>42:6 45:10<br>45:15<br><b>incorrect</b> 8:16<br><b>incumbent</b> 7:2<br><b>indicated</b><br>44:12<br><b>indication</b> 6:2<br><b>indicia</b> 16:19<br>17:13 18:17<br>34:23 44:21<br><b>individual</b> 8:1<br>29:23 30:1<br><b>individuals</b><br>29:16 30:2<br>30:18<br><b>inferences</b><br>13:6<br><b>inferential</b><br>28:17<br><b>information</b><br>5:16 6:8,11<br>6:16 7:12<br>13:3 16:21<br>17:4,8,12<br>19:5,10,17<br>19:23 20:5<br>22:2 23:13<br>23:14 25:22<br>26:22 27:3,8<br>27:23 28:6,8<br>31:18 32:24<br>33:14,21,25<br>34:4,4,9,13<br>34:16,17,18 | 34:20,22<br>35:21 36:16<br>36:22 39:9<br>39:17 41:20<br>41:25 42:5,7<br>42:11 43:18<br>45:10,15<br>46:23 48:17<br>50:2 51:8<br><b>infringement</b><br>20:13,15<br><b>infringing</b> 20:9<br>20:10<br><b>ingredient</b><br>14:18<br><b>ingredients</b><br>14:12<br><b>inherency</b><br>43:11<br><b>initial</b> 5:1<br>33:20<br><b>insight</b> 33:17<br><b>instance</b> 20:3<br><b>instinct</b> 29:5<br><b>institution</b> 7:7<br>7:24 13:5<br>17:16 39:15<br><b>instructing</b><br>31:3<br><b>instruction</b><br>20:16<br><b>instructions</b><br>20:18 22:17<br>22:17 24:18<br>27:12<br><b>intended</b><br>25:12<br><b>interest</b> 34:7<br>54:12<br><b>interfaced</b><br>26:3<br><b>intimately</b> 26:7<br><b>introduce</b> 3:12<br><b>invariably</b><br>31:20<br><b>invention</b> 20:4 |
| <hr/> <b>H</b> <hr/> <b>hac</b> 3:16 4:10<br>30:5 38:24<br><b>hand</b> 21:8 42:5<br>54:13<br><b>happen</b> 6:3<br><b>happens</b> 31:6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <hr/> <b>I</b> <hr/> <b>idea</b> 24:5<br><b>Ideally</b> 9:19<br><b>identical</b> 17:22<br>22:16,16,17<br>27:11,11<br><b>identified</b><br>15:13 21:23<br><b>identifies</b><br>20:20<br><b>identify</b> 17:10<br>22:7 23:17<br>28:2 43:8<br><b>impediment</b><br>10:4<br><b>implied</b> 21:19<br><b>impossible</b><br>34:6<br><b>inclinations</b><br>44:6<br><b>inclined</b> 24:11                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 42:4,13<br><b>inventor</b> 42:17<br><b>invited</b> 22:7<br><b>involved</b> 6:10<br>25:24 26:7<br>26:11<br><b>involvement</b><br>11:5<br><b>IP</b> 2:11 54:9<br><b>IPR</b> 19:20<br>25:11,15<br>27:7<br><b>IPR2023-007...</b><br>3:4<br><b>issue</b> 14:2<br>28:13,13<br>36:14 44:14<br>49:6,10,13<br>49:23 51:19<br><b>issues</b> 10:24<br>42:21 49:22<br>52:2<br><b>it'll</b> 17:6 33:9,9<br><b>item</b> 9:11 10:3<br>10:12 11:7<br>19:3 21:25<br>25:3 32:10<br>35:23 39:7<br>41:2 43:1<br>46:9,10<br>47:24,25<br><b>items</b> 11:11<br>25:2 34:11<br>44:13 46:15<br>47:11 | 16:10,13<br>18:15,21<br>19:1,8,21<br>21:16,24<br>23:25 24:7<br>26:15,18<br>27:14,17<br>28:1 29:2<br>30:7,10<br>32:12 33:11<br>34:14,25<br>35:15,24<br>36:2,18 37:1<br>37:4,18<br>38:19,23<br>39:5 40:4,10<br>40:13,17,22<br>42:20 43:22<br>44:4 45:6<br>46:6 47:6,14<br>47:19 49:2<br>49:19 50:14<br>52:14,18<br><b>Judges</b> 1:18<br>3:3<br><b>judgment</b> 34:8<br><b>justification</b><br>51:23 | 27:21,24<br>28:4,23<br>29:24 30:2<br>30:18,19<br>33:24 37:10<br>37:13,14<br>42:21 43:21<br>45:17,21<br>49:4 50:25<br>51:4,15,23<br><b>knowing</b> 31:15<br><b>knowledge</b><br>30:15 31:22<br>42:12<br><b>knows</b> 29:23<br><b>Kraning</b> 2:7<br>3:15,15,22<br>54:8                                                                                                                                                                                         | <b>limited</b> 14:18<br>18:12 24:20<br>25:18 41:20<br><b>limits</b> 12:9<br>14:11<br><b>line</b> 3:8,12,14<br>4:6,16<br><b>lines</b> 32:10<br><b>list</b> 5:9 16:16<br>21:25 24:2,8<br>25:4 33:12<br>33:24 34:10<br>39:2 41:3<br>46:9 47:25<br><b>listed</b> 35:2<br><b>lists</b> 5:3<br><b>litigation</b> 6:9<br>6:12,18 8:4<br>8:13,17,19<br>13:17 19:11<br>21:9 22:9<br>25:13,18<br>30:14 41:7<br>44:9,24<br><b>little</b> 33:16<br>41:12<br><b>live</b> 46:11<br><b>LLC</b> 1:5 2:14<br>3:5 54:7,10<br><b>Lloyd</b> 26:10<br><b>long-felt</b> 17:15<br><b>longer</b> 40:14<br><b>look</b> 6:11,22<br><b>looking</b> 17:5<br>17:12 24:9<br><b>lot</b> 8:21,22<br><b>lots</b> 18:10<br>28:17<br><b>lower</b> 34:12 | <b>making</b> 16:3<br><b>manual</b> 14:10<br><b>manufacture</b><br>22:15<br><b>manufacturer</b><br>22:15,20,21<br>26:7 42:16<br><b>manufacturi...</b><br>31:4<br><b>Mark</b> 2:11 3:18<br>4:8 37:7<br>52:10 54:9<br><b>marked</b> 31:17<br><b>market</b> 16:21<br>17:9 19:5<br>23:5,13<br>26:12 31:1<br>31:11,16,24<br><b>marketing</b><br>18:18,24<br>19:23 25:7<br>26:11,21<br>27:13<br><b>material</b> 10:5<br>13:24 19:25<br>39:10<br><b>materials</b> 5:22<br>7:16 8:24<br>10:13 11:16<br>12:1 13:19<br>21:8,13 23:1<br>26:23,24<br>47:3 48:18<br><b>matter</b> 13:19<br>42:24<br><b>maximize</b><br>24:21<br><b>mean</b> 13:16<br><b>means</b> 27:23<br>48:18 51:9<br><b>Medicine</b><br>15:15<br><b>Medina</b> 26:2<br><b>medium</b> 14:3<br>14:15,17<br>26:5 43:9 |
| <b>J</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <b>K</b>                                                                                                                                                                                                                                                                                                                                                                                            | <b>L</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>M</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>JOHN</b> 1:16<br><b>joined</b> 3:3<br><b>Judge</b> 3:1,2<br>4:1,5,14,19<br>4:24 7:11 9:8<br>9:17 10:2,12<br>10:19 11:2<br>13:16 15:3<br>15:17 16:3                                                                                                                                                                                                                                                                                                                                                                                                                       | <b>K</b> 1:16<br><b>K-R-A-N-I-N-G</b><br>3:22<br><b>keep</b> 45:21<br>46:3<br><b>kettle</b> 44:20<br><b>kind</b> 24:5<br><b>know</b> 6:25<br>10:9 11:19<br>13:22 14:23<br>17:12 19:16<br>19:20 20:24<br>22:3 23:8<br>24:1,21<br>25:21,24,24<br>26:20 27:16                                                                                                                                          | <b>label</b> 21:7<br><b>laboratory</b><br>42:15<br><b>larger</b> 13:22<br>13:23 14:5<br><b>law</b> 2:14 8:11<br>54:9<br><b>lead</b> 30:12<br><b>leaning</b> 32:14<br>45:13<br><b>leave</b> 37:19<br><b>left</b> 9:12<br><b>let's</b> 3:7 9:11<br>11:7 16:13<br>16:17,20<br>24:7 34:25<br>39:2 41:2<br><b>librarian</b> 15:13<br>40:2 48:11<br>48:19<br><b>library</b> 9:4,6<br>15:15 48:13<br>48:15,19<br>51:11<br><b>licensee</b> 30:13<br><b>light</b> 6:15 | <b>M</b> 1:16,23 2:7<br>2:15 54:2,7,9<br>54:17<br><b>ma'am</b> 30:9<br><b>Main</b> 2:4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |

|                                |                          |                                    |                                 |                       |
|--------------------------------|--------------------------|------------------------------------|---------------------------------|-----------------------|
| <b>meet</b> 17:3<br>21:14 45:4 | 41:3 43:23<br>45:5,13,18 | <b>needed</b> 26:25<br>37:24 47:22 | <b>obviously</b><br>25:21 26:13 | <b>opinion</b> 17:4   |
| <b>meeting</b> 37:20           | 46:4,7 47:4,5            | <b>needs</b> 40:14                 | 27:2 28:5                       | <b>oppose</b> 44:20   |
| <b>mentioned</b><br>42:18      | 47:7 48:6                | <b>never</b> 28:11,11              | 29:16 37:22                     | <b>option</b> 22:23   |
| <b>mentions</b><br>42:15       | 50:17,20                 | <b>new</b> 1:16 3:3                | 37:23 43:1                      | 22:24                 |
| <b>mere</b> 11:23              | 51:2,17                  | 16:4 17:22                         | 50:25                           | <b>options</b> 22:22  |
| 17:5,6 20:25                   | <b>motions</b> 5:3,9     | 18:3,3 20:20                       | <b>obviousness</b>              | <b>order</b> 19:12,19 |
| 21:1 27:19                     | 16:16 24:2               | 23:20 39:19                        | 7:10                            | 20:8 21:3             |
| 27:20                          | 32:3 33:24               | <b>nexus</b> 17:16                 | <b>October</b> 1:19             | 22:8,12 23:2          |
| <b>merits</b> 7:9              | 35:20 39:3               | 20:3,23                            | 54:5,14                         | 24:4,20,24            |
| <b>met</b> 20:2                | 46:10,13                 | 21:14                              | <b>offer</b> 9:18               | 38:4,9,12,15          |
| <b>method</b> 20:11            | <b>motivations</b>       | <b>nonidentical</b>                | <b>offered</b> 19:15            | 41:1 45:20            |
| 20:13,17                       | 27:12                    | 6:7                                | <b>office</b> 1:1               | 46:7 52:3             |
| 21:3                           | <b>move</b> 25:3         | <b>noninfringing</b>               | 25:15 54:13                     | <b>ordinary</b> 43:13 |
| <b>Michigan</b> 1:24           | 41:2                     | 17:21 30:25                        | <b>officer</b> 54:3             | 43:19                 |
| 54:2                           | <b>moving</b> 26:20      | <b>nonobvious...</b>               | <b>officers</b> 25:6            | <b>organization</b>   |
| <b>mind</b> 11:6 46:3          | 33:11                    | 16:20                              | <b>Oh</b> 37:8                  | 12:23                 |
| <b>mindful</b> 37:22           | <b>multiple</b> 20:20    | <b>nonprivileged</b>               | <b>Ohio</b> 54:3,14             | <b>original</b> 18:2  |
| 38:1,3                         | 21:6 31:5                | 6:13                               | 54:17                           | <b>outstanding</b>    |
| <b>Minneapolis</b>             | <b>mungerman...</b>      | <b>North</b> 54:13                 | <b>oil</b> 41:8 42:4            | 50:17 52:2            |
| 2:16                           | 2:13                     | <b>Notary</b> 54:3,17              | 42:13,15,25                     | <b>overbroad</b>      |
| <b>Minnesota</b>               | <b>Munguia</b> 1:23      | <b>note</b> 8:2 15:12              | 42:25 43:7                      | 41:10                 |
| 2:16                           | 54:2,17                  | 16:3 32:2                          | 43:21 44:12                     | <b>overly</b> 44:7,17 |
| <b>minor</b> 28:13             | <hr/>                    | 44:10                              | 44:13 45:1                      | <b>Owner</b> 1:9      |
| <b>minute</b> 18:15            | <b>N</b>                 | <b>notebook</b>                    | 45:25                           | 2:10 3:19 4:7         |
| <b>MOM</b> 1:5 3:4             | <b>N</b> 2:3 54:7        | 42:15                              | <b>okay</b> 4:1,13,14           | 4:9,18 5:10           |
| 17:19 54:7                     | <b>N.W</b> 2:12          | <b>notes</b> 54:5                  | 4:19 9:8 11:2                   | 5:20 8:4,11           |
| <b>MOM's</b> 17:18             | <b>name</b> 3:20,25      | <b>number</b> 6:25                 | 15:17,25                        | 8:24 11:18            |
| <b>moment</b> 24:8             | <b>named</b> 8:1         | 33:12 38:1                         | 19:1,8,21                       | 15:16 18:17           |
| 36:21                          | <b>narrow</b> 45:22      | 46:19 47:2                         | 21:16,24                        | 20:2 24:12            |
| <b>month</b> 34:9,13           | <b>National</b> 15:15    | <b>numbers</b>                     | 22:6 23:25                      | 25:7 29:19            |
| <b>mooted</b> 5:5              | <b>nature</b> 14:11      | 23:18,19                           | 24:7 29:2                       | 30:8,13               |
| <b>morning</b> 3:1,9           | 42:19                    | <hr/>                              | 33:11,18                        | 32:20 36:10           |
| <b>motion</b> 4:10             | <b>necessarily</b>       | <b>O</b>                           | 34:25 35:15                     | 38:24 41:8            |
| 5:4,11 11:20                   | 48:23                    | <b>objective</b>                   | 35:24 36:2                      | 42:1 43:10            |
| 15:5,19,23                     | <b>necessary</b>         | 16:19 18:16                        | 37:1,12,18                      | 44:11,25              |
| 16:1,17 23:9                   | 25:9 33:1                | 23:3 34:23                         | 37:19 38:23                     | 45:24 46:17           |
| 24:9,12,15                     | 36:10 45:3               | <b>objectives</b>                  | 40:10,13,17                     | 46:25 49:6            |
| 24:15,22                       | 46:19                    | 26:9                               | 40:22,22                        | 49:10,14              |
| 25:4 27:7,18                   | <b>need</b> 5:5 9:23     | <b>obtain</b> 6:24 9:6             | 46:6 47:6,23                    | 50:20 51:7            |
| 30:5 32:5,9                    | 12:13 14:25              | 11:13 12:22                        | 50:14,16                        | 51:11,15,19           |
| 33:12 35:3                     | 17:15 33:7               | 23:4,8 26:23                       | 52:18                           | 51:20 52:19           |
| 38:4,8,23                      | 35:4 36:16               | 49:3                               | <b>old</b> 20:19                | 54:8                  |
| 39:7,8 40:24                   | 37:10 38:8               | <b>obtained</b> 9:4,7              | <b>Olmsted</b> 54:14            | <b>Owner's</b> 5:8    |
|                                | 47:2,9,18                | 15:14 26:19                        | <b>ones</b> 13:13,13            | 8:10 16:16            |
|                                | 50:3                     | 48:12,20                           | 42:10                           | 16:17 17:17           |
|                                |                          |                                    |                                 | 20:7 21:20            |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 21:25 22:4,5<br>23:4 25:4<br>33:12 36:7<br>37:23 43:15<br>47:24,25                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 3:24 54:7<br><b>patel@fr.com</b><br>2:6<br><b>patent</b> 1:1,2,9<br>1:12,18 2:10<br>3:19 4:6,9,17<br>5:8,10,20 8:4<br>8:10,11,24<br>11:18 15:16<br>16:16,17<br>17:16 18:17<br>20:2,7,11,23<br>21:20,25<br>22:4,5,5 23:4<br>24:12 25:4,7<br>25:14 29:19<br>30:8,12 31:8<br>32:20 33:12<br>36:6,10<br>37:23 38:24<br>41:7 42:1,5<br>42:14 43:9<br>43:14,16<br>44:11,25<br>45:24 46:17<br>46:25 47:24<br>47:25 49:6<br>49:10,14<br>50:20 51:7<br>51:11,15,19<br>51:20 52:19<br>54:8 | 37:11<br><b>perfectly</b> 23:17<br><b>periodic</b> 16:21<br><b>permission</b><br>41:5<br><b>permit</b> 11:20<br>27:15,17<br><b>person</b> 26:11<br>43:12,19<br><b>personal</b><br>54:12<br><b>petition</b> 13:13<br>13:25 16:2<br>35:8,22<br>39:23 43:5<br>43:14 44:14<br>46:18 50:12<br><b>Petitioner</b> 1:6<br>2:2 3:8,10,17<br>3:24 4:2 5:25<br>7:13,14,15<br>7:20 8:13,16<br>10:18 11:10<br>11:17 13:7<br>13:25 15:7<br>15:20,23<br>17:11 22:4,7<br>25:14 33:13<br>34:16 39:8<br>39:15 40:23<br>45:16,20<br>48:3 54:7<br><b>Petitioner's</b><br>6:19 18:19<br>19:6,24 25:5<br>30:17 32:2<br>34:21 35:2,2<br>39:2,7 41:3<br>44:18 46:9<br><b>PGR2023-00...</b><br>1:11<br><b>Ph.D</b> 2:7,15<br>54:8,9<br><b>pharmaceuti...</b><br>14:13,14<br><b>Pharmacop...</b> | 13:20 15:1<br>49:22<br><b>Pharmacop...</b><br>5:18 6:20<br>11:9,14 12:1<br>14:1,5,10,19<br>15:9,14 16:9<br>48:2 50:19<br><b>photocopy</b><br>49:5<br><b>picture</b> 11:1<br><b>pieces</b> 28:7<br><b>place</b> 29:9<br><b>placing</b> 43:6<br><b>plan</b> 31:22<br><b>play</b> 33:9<br><b>please</b> 4:7,21<br>7:17 16:15<br>16:23 22:23<br>25:8 29:3<br>30:10 39:3<br>46:12 47:25<br><b>PLLC</b> 2:11<br>54:9<br><b>point</b> 21:17<br>30:2 34:2<br>36:7,24<br>38:15 46:16<br>47:10<br><b>pointed</b> 12:7<br><b>portion</b> 12:7<br>45:23 49:25<br><b>position</b> 19:24<br>28:15 40:18<br><b>possession</b><br>6:1,14 7:21<br>8:9,10,15,25<br>11:11 15:7<br>48:4<br><b>possibility</b><br>17:6 20:25<br>21:1 27:19<br>51:5<br><b>possible</b> 31:5<br>40:21<br><b>possibly</b> 45:4 | <b>pot</b> 44:19<br><b>potential</b><br>34:22<br><b>potentially</b><br>13:10 17:14<br>51:13<br><b>practical</b> 13:19<br><b>practice</b> 20:16<br><b>practiced</b> 21:4<br><b>precluded</b><br>13:11<br><b>preexisting</b><br>10:3<br><b>preface</b> 41:9<br><b>prejudice</b><br>32:16 47:21<br><b>prejudiced</b><br>36:11,17<br><b>preliminary</b><br>7:6 8:22 42:2<br><b>premature</b><br>32:17 36:13<br>46:16,25<br>47:10,12<br><b>premise</b> 20:6<br><b>premised</b> 43:5<br><b>preparation</b><br>14:14<br><b>preparations</b><br>14:13<br><b>present</b> 54:6<br><b>presented</b><br>8:23<br><b>pretty</b> 8:21<br><b>preview</b> 25:1<br>33:2<br><b>previously</b><br>39:20,22<br><b>prima</b> 45:3<br><b>primary</b> 50:5<br><b>printed</b> 42:22<br>43:2 44:14<br>44:15<br><b>prior</b> 6:9,12<br>8:3,12,13,17<br>13:15 22:13 |
| <b>P</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>p.m</b> 53:1 54:6<br><b>page</b> 50:5<br><b>pages</b> 44:8<br>49:25<br><b>panel</b> 24:10<br>32:8,14<br>40:23 45:12<br>47:14 50:15<br>50:16<br><b>panel's</b> 33:3<br>44:6<br><b>paralegal</b><br>10:10<br><b>parallel</b> 6:17<br>19:11<br><b>parameters</b><br>24:24 40:25<br>45:19<br><b>part</b> 18:20,22<br>30:21 31:12<br>40:6,14<br>48:25<br><b>particular</b><br>20:12 26:25<br>28:24 48:13<br>51:2,18<br><b>particularly</b><br>6:15 11:18<br>13:20 50:22<br>51:3,9<br><b>parties</b> 5:21<br>11:3 13:18<br>37:20 38:5,6<br>50:15 52:1<br>54:11<br><b>parties'</b> 5:1,2<br><b>parts</b> 50:1<br><b>party</b> 4:16 6:12<br><b>Patel</b> 2:3 3:23 | <b>patentability</b><br>42:22<br><b>patented</b> 20:4<br>20:7,16 21:3<br>30:24 31:6<br>31:17<br><b>pause</b> 18:15<br>19:21<br><b>pay</b> 49:18<br><b>pendency</b> 27:6<br><b>pending</b> 30:6<br><b>people</b> 25:6<br>27:5 28:3,21<br>32:25 35:10                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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| <p>34:19 39:11<br/>39:15 42:4<br/>42:13,14,23<br/>43:15 44:13<br/><b>privileged</b> 6:9<br/><b>pro</b> 3:16 4:10<br/>30:5 38:24<br/><b>probably</b><br/>24:17<br/><b>problem</b> 20:9<br/>20:18 36:19<br/>49:11<br/><b>problems</b><br/>22:14<br/><b>procedures</b><br/>12:8,19<br/><b>proceed</b> 31:24<br/><b>proceeding</b><br/>4:22 8:19<br/>25:12,16<br/>28:5 29:11<br/>42:2<br/><b>proceedings</b><br/>7:24 12:2<br/>13:17 14:8<br/>54:3,4,5<br/><b>process</b> 23:5<br/><b>produce</b> 6:23<br/>7:3,13,15,16<br/>8:6,8 10:8<br/>11:17 13:8<br/>19:13 20:8<br/>22:14 23:22<br/>24:5 32:6<br/>50:7,8 51:20<br/>51:22<br/><b>produced</b> 6:6<br/>6:15 19:10<br/>19:20 22:8<br/>23:12,14,15<br/>23:23,24<br/>24:4 34:3<br/>41:6 44:8,23<br/><b>producing</b><br/>7:20 8:2 9:1<br/>10:4 23:18</p> | <p><b>product</b> 17:17<br/>17:17,18,19<br/>17:21,22,22<br/>18:2,3,19,25<br/>19:6,24 20:6<br/>20:7,8,9,10<br/>20:19,21<br/>21:2 22:5,13<br/>22:16,18<br/>30:24,25<br/>31:3,5,10,15<br/>31:17,23<br/>42:16,18<br/>43:1,7,12,15<br/>43:17<br/><b>product's</b> 18:6<br/><b>production</b><br/>5:21 9:15<br/>10:13 40:7<br/>41:18,19,20<br/><b>products</b><br/>16:22 18:9<br/>18:11 25:25<br/><b>promptly</b> 10:9<br/>35:14 40:21<br/><b>proposed</b> 5:3<br/>15:4 26:4<br/>38:12 39:3<br/>46:10<br/><b>protected</b><br/>19:18<br/><b>protective</b><br/>19:12,19<br/>22:8,11 23:1<br/>24:4 38:4,9<br/>38:12,15<br/>46:7<br/><b>prove</b> 21:5<br/>29:8 43:14<br/><b>provide</b> 5:25<br/>13:3 28:21<br/>29:21 33:9<br/>33:24 35:13<br/>36:8 40:9<br/>42:7 49:15<br/>50:10</p> | <p><b>provided</b><br/>12:13 36:11<br/><b>provides</b> 13:4<br/><b>providing</b><br/>40:12 49:13<br/>51:15<br/><b>PTAB</b> 13:17<br/><b>public</b> 8:3,20<br/>34:19 39:10<br/>40:3 51:10<br/>54:3,17<br/><b>publications</b><br/>42:23 43:2<br/>44:15,16<br/><b>published</b><br/>42:18<br/><b>pure</b> 14:20,24<br/><b>purity</b> 15:2<br/><b>purpose</b> 13:5<br/>17:24 23:6<br/>23:11<br/><b>purposes</b> 7:7<br/>7:8 15:2<br/>17:15,23<br/>32:8<br/><b>put</b> 11:6 14:12<br/>39:6 40:24<br/>46:23 50:14<br/><b>puts</b> 46:17</p> <hr/> <p><b>Q</b></p> <p><b>qualifies</b> 50:23<br/><b>qualify</b> 46:1<br/><b>question</b> 7:10<br/>7:19,25 8:7<br/>20:13 48:14<br/><b>quickly</b> 36:13<br/>38:2<br/><b>quite</b> 35:11<br/>41:10 44:6</p> <hr/> <p><b>R</b></p> <p><b>R&amp;D</b> 25:7<br/><b>raise</b> 52:16<br/><b>RDR</b> 1:23 54:2<br/><b>reads</b> 43:20</p> | <p><b>ready</b> 52:20<br/><b>Reagan</b> 4:11<br/><b>really</b> 13:2<br/>28:22 32:17<br/>33:5 41:10<br/>41:19 45:22<br/>46:16 50:3<br/>51:5<br/><b>reason</b> 11:16<br/>45:12,17<br/><b>reasons</b> 29:13<br/>32:10<br/><b>recall</b> 13:25<br/>33:19<br/><b>receive</b> 4:20<br/>9:15 47:4<br/><b>received</b> 5:2<br/>6:2<br/><b>recites</b> 14:16<br/><b>recognize</b><br/>25:11<br/><b>record</b> 3:2<br/>39:6 45:9<br/>54:4<br/><b>reference</b> 7:3<br/>14:22,23<br/>43:6 49:14<br/>49:15 50:5<br/><b>references</b><br/>5:16 7:5,22<br/>7:22 8:8 9:21<br/>11:9 13:9,12<br/>16:2,5,7<br/>34:19 39:11<br/>40:3 48:7,13<br/>49:4 50:13<br/>51:6,10,14<br/><b>refers</b> 12:8,15<br/>12:19 35:18<br/>50:1<br/><b>reflected</b> 27:3<br/><b>refuse</b> 28:21<br/><b>refused</b> 6:11<br/><b>regarding</b><br/>25:19 41:8<br/>44:11,25</p> | <p>45:25<br/><b>Reinhold</b> 1:8<br/>3:5 54:8<br/><b>related</b> 5:16<br/>22:1 51:19<br/>54:10<br/><b>relates</b> 5:17<br/>17:13 35:20<br/>42:12 44:14<br/><b>relating</b> 16:19<br/>26:8<br/><b>relatively</b><br/>28:13<br/><b>releases</b> 12:23<br/><b>relevance</b><br/>42:21<br/><b>relevant</b> 12:2<br/>45:1 46:23<br/>51:3<br/><b>relied</b> 12:5<br/>14:19 50:1,6<br/><b>relies</b> 14:1<br/><b>rely</b> 7:4 18:18<br/><b>relying</b> 13:12<br/><b>remind</b> 11:2<br/><b>Remote</b> 1:15<br/><b>renew</b> 47:21<br/><b>repeat</b> 3:19,21<br/><b>reporter</b> 4:15<br/>4:16 54:1<br/><b>represent</b> 8:12<br/><b>request</b> 5:1<br/>6:19 16:4,14<br/>23:21 24:14<br/>24:19 29:3<br/>29:19 32:15<br/>34:21 37:13<br/>40:15,18<br/>42:8 44:7,18<br/>44:20,22<br/>47:17 48:5<br/>49:12 50:17<br/><b>requests</b><br/>33:15 35:6<br/>35:12,18<br/>45:22 46:19</p> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 46:24 47:20<br><b>require</b> 10:24<br>19:16 20:25<br>32:5 38:17<br>50:8 51:21<br><b>required</b> 7:8<br>7:10 11:17<br>27:2 50:7,9<br><b>requirements</b><br>21:14 34:7<br><b>requires</b> 14:25<br><b>resisted</b> 27:4<br><b>resolve</b> 49:6<br><b>resolved</b> 5:5<br><b>respectfully</b><br>30:16<br><b>respective</b> 5:2<br><b>respond</b> 32:13<br>33:7 34:5<br>43:25 44:3<br><b>response</b> 4:25<br>7:6 37:23<br>43:23 46:18<br>46:22 47:1<br>49:20<br><b>retained</b> 4:16<br><b>review</b> 51:11<br><b>Richardson</b><br>2:2,7 54:8<br><b>Ridge</b> 2:15<br><b>right</b> 7:11 15:6<br>16:13,25<br>25:10 29:8<br>47:17 52:13<br><b>rolling</b> 10:13<br>40:7<br><b>routine</b> 5:12<br>13:18 16:18<br>41:3,21,24<br>42:10 45:12<br>46:1 47:5,7<br>48:25 50:21<br>50:23<br><b>rules</b> 50:8 | <b>S-A-R-I-K-A</b><br>3:25<br><b>sales</b> 16:21<br>17:9 18:18<br>18:23 19:4,4<br>19:23 23:14<br>25:6 26:10<br>26:21<br><b>Sarika</b> 2:3 3:23<br>54:7<br><b>satisfactory</b><br>10:20,22<br><b>satisfy</b> 34:6<br><b>saw</b> 20:7<br><b>saying</b> 15:20<br>15:23 41:9<br><b>says</b> 43:20<br>48:3<br><b>schedule</b><br>10:23 33:13<br>33:14,22<br>35:17 36:1<br>36:12<br><b>scheduling</b><br>27:5 35:5<br>36:4<br><b>scholarly</b><br>42:17<br><b>scope</b> 13:14<br>14:24<br><b>seal</b> 38:11<br>54:13<br><b>search</b> 19:17<br><b>secondary</b><br>17:13 25:20<br>26:14 33:25<br>44:21<br><b>see</b> 7:14 11:1<br>14:25 38:24<br>46:25<br><b>seeing</b> 11:16<br><b>seek</b> 32:7<br>38:10 46:20<br><b>seeking</b> 6:3,6<br>16:24 17:1<br>19:3 20:5 | 25:15 33:21<br>34:8 41:5,13<br>41:24 45:11<br><b>seeks</b> 5:11<br>16:19 18:17<br>39:8,16<br>43:14<br><b>sees</b> 43:20<br><b>segue</b> 21:25<br><b>sell</b> 17:20 26:1<br><b>send</b> 24:23<br>40:6<br><b>sending</b> 52:2<br><b>sense</b> 21:5<br><b>separate</b> 43:1<br><b>separately</b><br>19:16<br><b>seriously</b> 42:3<br><b>serve</b> 33:13<br>34:16,21<br><b>service</b> 9:4,24<br><b>set</b> 9:14 10:10<br>12:9 26:6<br>33:13 35:25<br>54:13<br><b>seventh</b> 12:21<br><b>share</b> 16:21<br>17:10 19:5<br>23:5,13<br>26:12 31:11<br>31:16,24<br><b>shell</b> 12:6<br><b>SHERIDAN</b><br>1:16<br><b>short</b> 25:13,17<br><b>show</b> 11:21<br>17:4,7,18<br>23:2,3 27:10<br>27:12,21<br>30:18 33:8<br>44:21 50:13<br><b>showing</b> 22:12<br>22:14,19<br>45:3<br><b>shown</b> 20:23<br><b>shows</b> 29:22 | 46:22,22<br><b>side</b> 10:16,20<br>10:25 30:15<br><b>signed</b> 25:23<br><b>significant</b><br>41:19<br><b>simple</b> 18:11<br><b>simply</b> 29:11<br>31:4,19<br>41:16 42:9<br>42:11 43:11<br><b>single</b> 14:18<br>22:20<br><b>sir</b> 4:24 18:16<br>38:20<br><b>sites</b> 12:25<br><b>sitting</b> 45:23<br><b>situation</b> 24:6<br>26:12<br><b>skill</b> 43:13,19<br><b>small</b> 12:7<br><b>Snedden</b> 1:16<br>3:3<br><b>soon</b> 40:6<br><b>sooner</b> 10:5<br><b>sorry</b> 3:18<br>26:17 37:6,7<br>52:10<br><b>sort</b> 33:2 41:4<br>42:23 45:2<br>51:18<br><b>sorts</b> 32:6<br><b>sought</b> 25:16<br>33:23<br><b>sounds</b> 47:10<br>51:13<br><b>speak</b> 30:5<br><b>specific</b> 24:24<br>28:2,7 50:1<br><b>specifically</b><br>21:2 27:6<br>33:1 42:11<br><b>specifications</b><br>26:6<br><b>specificity</b><br>21:11 29:22 | <b>specifics</b><br>32:18<br><b>specifies</b><br>14:10<br><b>specify</b> 21:10<br><b>specifying</b><br>25:25<br><b>speculation</b><br>17:6<br><b>Speed</b> 17:3<br><b>spell</b> 23:9<br><b>spelled</b> 3:25<br><b>stage</b> 9:13,18<br>15:22 32:14<br>32:17 48:14<br><b>stand</b> 36:3<br>50:11<br><b>standard</b><br>24:13 34:12<br><b>standards</b><br>14:25 17:2,3<br>34:8<br><b>stands</b> 5:23,24<br><b>start</b> 3:7 5:8<br>9:11 16:20<br><b>starting</b> 39:5,7<br>40:12<br><b>state</b> 43:18<br>54:3,17<br><b>stated</b> 6:21<br>21:19 32:4<br>40:20 41:16<br>49:12<br><b>statement</b><br>31:11<br><b>STATES</b> 1:1<br><b>status</b> 10:9<br><b>stay</b> 25:16<br>27:7<br><b>stayed</b> 6:18<br><b>steal</b> 31:11,15<br>31:24<br><b>Stenotype</b><br>54:5<br><b>Stephanie</b><br>26:2 |
| <b>S</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

|                        |                        |                        |                        |                        |
|------------------------|------------------------|------------------------|------------------------|------------------------|
| <b>stipulate</b> 11:3  | 12:16,18,19            | 46:12,20               | <b>thousand</b>        | 48:21                  |
| <b>stipulation</b>     | 13:2,21,23             | <b>tending</b> 23:2,3  | 49:25                  | <b>triglycerides</b>   |
| 37:24                  | 16:11 49:25            | <b>tends</b> 18:5      | <b>three</b> 28:3      | 14:3,3,15,17           |
| <b>story</b> 28:11     | <b>supplemental</b>    | <b>terms</b> 15:17     | <b>threshold</b> 17:7  | 14:20,21               |
| 29:25 30:22            | 33:14,20,20            | 18:16 19:2             | 18:1 48:25             | 26:5 43:9              |
| <b>strategy</b> 31:15  | 33:25 34:4,9           | 19:22 31:7             | <b>throw</b> 11:5      | <b>true</b> 54:4       |
| <b>Street</b> 2:4,12   | 34:12,16,17            | 40:25                  | <b>time</b> 9:24 22:7  | <b>try</b> 22:22,23    |
| <b>strike</b> 16:2     | 34:22 35:21            | <b>tested</b> 22:20    | 31:9 34:5              | 34:11                  |
| 48:6                   | 37:10 39:9             | <b>testimony</b>       | 38:10,12               | <b>trying</b> 23:7     |
| <b>subitem</b> 16:20   | 39:16,18               | 25:19 28:2,8           | 47:22                  | <b>Tuesday</b> 10:10   |
| <b>subject</b> 10:22   | 40:1 47:4              | 28:25 29:1             | <b>timing</b> 40:25    | 40:12                  |
| 42:10                  | <b>support</b> 39:25   | 46:11 47:3             | 52:3                   | <b>turn</b> 5:4,9 7:14 |
| <b>submit</b> 13:18    | 40:2                   | <b>testing</b> 12:8    | <b>Tinsworth</b> 8:1   | 9:8 10:1 11:7          |
| 46:21                  | <b>sure</b> 3:13       | <b>Texas</b> 2:4       | 10:8 39:21             | 16:17 19:22            |
| <b>submits</b> 47:1    | 13:23 21:3             | <b>thank</b> 4:5,14    | 40:4                   | 35:15 39:2             |
| <b>submitted</b>       | 30:20 32:12            | 4:24 12:4              | <b>today</b> 9:20      | <b>turning</b> 16:15   |
| 7:23 35:8              | 35:18 36:14            | 19:1 30:11             | 10:10,15               | <b>two</b> 9:20,25     |
| 39:20,22               | 44:1                   | 32:11 36:2             | <b>tolerances</b>      | 10:5,14 16:2           |
| 42:1 48:8              | <b>surface</b> 43:7    | 38:20 44:5             | 14:11                  | 16:5 25:5              |
| <b>subparts</b> 5:14   |                        | 45:6 46:5              | <b>total</b> 41:22     | 48:6 49:21             |
| 5:15                   | <b>T</b>               | 52:17,18,21            | <b>TRADEMARK</b>       | <b>U</b>               |
| <b>substantial</b>     | <b>table</b> 16:14     | 52:23,24,25            | 1:1                    | <b>U.S</b> 1:12        |
| 8:21                   | 24:7 34:25             | <b>Thankfully</b> 5:4  | <b>transcript</b> 4:20 | <b>ultimately</b>      |
| <b>subtext</b> 36:19   | 37:25                  | <b>thing</b> 42:23     | 4:21 52:20             | 24:21 26:22            |
| <b>success</b> 17:14   | <b>take</b> 5:3,14     | 44:25                  | 54:4                   | <b>unable</b> 7:1      |
| 17:20 18:7             | 31:12 32:1,3           | <b>things</b> 6:3 12:4 | <b>translation</b> 6:5 | 11:15 12:22            |
| 18:17,24               | 35:9 38:6              | <b>think</b> 4:12 7:2  | 7:21 34:20             | 13:1                   |
| 31:22 32:6             | <b>taken</b> 38:2,25   | 7:8 10:23              | 39:10,24               | <b>underlying</b> 7:9  |
| <b>successful</b>      | 54:3,5                 | 11:4 12:1,20           | 40:1 50:10             | 21:9 30:13             |
| 22:13 30:23            | <b>talk</b> 35:1       | 13:7,16 14:4           | 51:22                  | 41:6 44:9,23           |
| 30:24                  | <b>talked</b> 35:23    | 20:5 21:19             | <b>translations</b>    | <b>understand</b>      |
| <b>sufficient</b> 13:7 | <b>talking</b> 16:6,7  | 24:10,17               | 5:16 6:7 7:20          | 4:15 5:10,20           |
| 15:2 26:24             | 32:22 34:15            | 25:1,3 27:2            | 9:11,22 10:3           | 7:4 11:12              |
| <b>suggest</b> 29:22   | 34:17,21               | 27:25 29:4             | 39:20 49:15            | 18:16 24:9             |
| 36:25 45:21            | <b>targeted</b> 24:20  | 29:18 32:7             | 49:23                  | 36:6 38:5              |
| <b>suggested</b>       | 32:24                  | 32:14,19,22            | <b>translator</b>      | 49:24                  |
| 12:15 42:3             | <b>teaching</b> 13:10  | 33:7 34:1,2            | 39:25                  | <b>understanda...</b>  |
| 50:21                  | 14:7                   | 34:10 36:13            | <b>translators</b>     | 24:19                  |
| <b>suggestion</b>      | <b>Teleconfere...</b>  | 38:25 40:5             | 37:3,14,15             | <b>understood</b>      |
| 13:4 29:15             | 1:15                   | 40:22 44:5             | 39:18                  | 10:2                   |
| <b>Suite</b> 2:4,16    | <b>TELEPHONIC</b>      | 44:17 45:2             | <b>transmission</b>    | <b>unfair</b> 34:6     |
| <b>summarizing</b>     | 2:1                    | 45:16 46:15            | 5:19                   | <b>Ungerman</b>        |
| 24:24                  | <b>tell</b> 5:22 30:21 | 46:24 47:14            | <b>treaty</b> 12:23    | 2:11,11 3:18           |
| <b>supplement</b>      | 41:12                  | 48:23 50:6,7           | <b>TRIAL</b> 1:2       | 3:19 4:8,8,17          |
| 12:5,6,10,11           | <b>tells</b> 28:11     | 50:20 52:1             | <b>tried</b> 6:24      | 4:21,23 5:22           |
| 12:12,14,15            | <b>Temovsky</b>        | <b>thinking</b> 33:3   | 11:13 12:25            |                        |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            |                                                                                 |
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| 5:24 9:9,14<br>10:19,21<br>11:12 12:3<br>14:9 15:18<br>15:25 16:8<br>16:12,23,25<br>18:20,23<br>19:7,9 22:1,6<br>24:1 25:10<br>26:16 27:1<br>27:16,25<br>28:10 32:4<br>33:16,18<br>34:14,24<br>35:7,16,19<br>35:25 37:2,5<br>37:8,17<br>38:13,16<br>40:17,19<br>43:22,24<br>44:1 48:6,14<br>48:22 49:19<br>49:21 50:21<br>52:4,9,11,24<br>54:9,9<br><b>UNITED</b> 1:1<br><b>unrelated</b> 8:12<br><b>upcoming</b><br>37:22 38:3<br><b>use</b> 21:12<br>23:14,15,16<br>26:5 34:11<br>41:5 43:20<br><b>useful</b> 11:24<br>13:2 14:5<br>17:7 27:20<br>51:5<br><b>usually</b> 38:6 | 38:24<br><b>Vieth</b> 1:8 3:6<br>41:18 42:1<br>42:24 44:9<br>45:8,8 46:11<br>47:2,9 54:8<br><b>view</b> 27:7<br><b>Vigantol</b> 41:8<br>42:4,13,15<br>42:25 43:7<br>43:21 44:12<br>44:12 45:1<br>45:25<br><b>virtually</b> 17:23<br>22:17 27:11<br>28:23<br><b>volume</b> 13:22<br>13:23 14:6<br><b>voluminous</b><br>13:19,24<br>51:14<br><b>vs</b> 1:7 | 19:12 23:11<br>23:16,20,22<br>32:21 35:9<br>36:8 42:22<br><b>week</b> 10:11<br><b>weeks</b> 9:20,25<br>10:5,14<br><b>WHEREOF</b><br>54:13<br><b>willing</b> 13:5<br>49:3,7<br><b>Wilmington</b><br>2:8<br><b>WITNESS</b><br>54:13<br><b>Wolf</b> 5:17<br><b>work</b> 8:22 9:24<br>42:3 43:15<br><b>worked</b> 42:25<br><b>working</b> 31:1<br>36:8,23 38:5<br>38:16 42:4<br>42:12<br><b>wouldn't</b> 26:24<br>28:9 46:20 | 24:10 25:2<br><b>1(C)(2)</b> 21:25<br><b>1005</b> 15:12<br><b>11:01</b> 1:20<br>54:6<br><b>11100</b> 2:16<br><b>12:22</b> 53:1<br>54:6<br><b>14033</b> 1:23<br>54:2<br><b>15974</b> 1:24<br>54:2<br><b>1717</b> 2:4<br><b>17th</b> 2:8<br><b>19801</b> 2:8 | <b>5000</b> 2:4<br><b>545</b> 2:16<br><b>55305</b> 2:16<br><b>58</b> 41:22 42:7 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>6</b>                                                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>612.756.7000</b><br>2:17                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>7</b>                                                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>7</b> 46:10,15,19<br>47:11,20<br><b>75201</b> 2:4                            |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>8</b>                                                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>9</b>                                                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                            | <b>9,066,958</b> 1:12                                                           |

## **CERTIFICATE OF SERVICE**

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing **TRANSCRIPT OF REMOTE TELECONFERENCE HEARING** is being served on November 8, 2023, by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and by electronic mail as directed by Petitioner upon the following counsel of record for Petitioners:

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