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

MOM ENTERPRISES, LLC

Petitioner,

vs.

ELAINE AND REINHOLD W. VIETH,

Patent Owner.

Case IPR2023-00726

Patent 9,066,958 B2

DEPOSITION OF
JULIA USHA RAJ, M.D.

May 1, 2024

9:14 a.m. CST

Reported by:

Janice M. Koczek, CSR, CLR

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The deposition of JULIA USHA RAJ, M.D.,
called by the Patent Owner for examination,
reported stenographically by Janice M. Kocek,
License No. 084-002871, Certified Shorthand
Reporter, Certified LiveNote Reporter, and Notary
Public for the State of Illinois, taken at
401 North Michigan Avenue, Chicago, Illinois,
commencing at the hour of 9:14 a.m. CST, on the
1st day of May, 2024.

* * *

1 A P P E A R A N C E S:

2

3 ON BEHALF OF THE PETITIONER:

4 FISH & RICHARDSON

5 1717 Main Street, Suite 5000

6 Dallas, Texas 75201

7 214.747.5070

8 BY: DAVID B. CONRAD, ESQ.

9 conrad@fr.com

10

11 ON BEHALF OF THE PATENT OWNER:

12 ALAN ANDERSON LAW FIRM LLC

13 Crescent Ridge Corporate Center

14 11100 Wayzata Boulevard, Suite 545

15 Minneapolis, Minnesota 55305

16 612.756.7000

17 BY: ALAN M. ANDERSON, PH.D., ESQ.

18 aanderson@anderson-lawfirm.com

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* * *

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"Wochenbettbetreuung in der Klinik und zu Hause		
Exhibit MOM 1007.....		26
Declaration of Accuracy of Translation –		
David Joshua Sherman		
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5	Spoons		
6	Exhibit MOM 2073.....		11
7	SEAK Expert Witness Directory,		
8	J. Usha Raj, M.D., M.H.A.		
9	Exhibit MOM 2074.....		13
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11	Exhibit MOM 2075.....		112
12	Acta Paediatrica article: "The position		
13	of the tongue during rooting reflexes		
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20	FDA Article: "Infant Overdose Risk with		
21	Liquid Vitamin D"		
22	REPORTER'S NOTE: All quotations		
23	are used for clarity and are		
24	reflected in the manner in which		
25	they were read into the record		
	and do not necessarily indicate an		
	exact quote from the document.		

1 (Witness sworn.)

2 JULIA USHA RAJ, M.D.,

3 called as a witness herein, having been first
4 duly sworn, was examined and testified as
5 follows:

6 EXAMINATION

7 BY MR. ANDERSON:

8 Q. Good morning, Dr. Raj. How are you?

9 A. I'm well. Thank you.

09:14 10 Q. Could you please state your full name
11 and present home address for the record.

12 A. Full name is Julia Usha Raj. 401
13 North Wabash Avenue, Unit 29J, Chicago, Illinois
14 60611.

09:14 15 Q. You've had your deposition taken
16 previously, have you not?

17 A. Yes, I have.

18 Q. Let me, nevertheless, go over the
19 ground rules for today just to refresh your
09:15 20 memory. I'm going to go ask you a series of
21 questions. I simply would like your best, most
22 accurate, and obviously truthful answers to
23 those questions. If you do not understand any
24 of my questions, please do not hesitate to ask
09:15 25 me to clarify or rephrase the question,

1 otherwise, we will assume that you understand
2 the question.

3 Okay?

4 A. Yes.

09:15 5 Q. Please answer audibly for the benefit
6 of the court reporter, as you just did, rather
7 than a nod of the head or a common expression
8 such as uh-huh or huh-uh since those could mean
9 different things.

09:15 10 All right?

11 A. I understand.

12 Q. All right. Please wait until I
13 finish my question before you begin your answer.
14 It's important that the two of us not speak at
09:15 15 the same time since it is very difficult for the
16 court reporter to take down more than one of us
17 speaking at once.

18 Okay?

19 A. Agreed.

09:15 20 Q. And you understand that you're under
21 oath here today, the same as you would be if you
22 were in court testifying?

23 A. I do.

24 Q. And are you under any medications or
09:16 25 such that might impair your ability to testify

1 honestly and truthfully here today?

2 A. No.

3 Q. By whom are you presently employed?

4 A. The University of Illinois at

09:16 5 Chicago.

6 Q. And what is your position?

7 A. I'm an endowed professor, the
8 Anjuli S. Nayak endowed professor of pediatrics.

9 Q. How long have you been employed at
09:16 10 the University of Chicago as a professor?

11 A. Since 2008.

12 Q. You said before that you have been
13 deposed previously, correct?

14 A. Yes.

09:16 15 Q. About how many times?

16 A. Not accurately, because I'm just
17 going by memory, but definitely over 20 times
18 over the entire course of my career.

19 Q. And what would be the course of your
09:17 20 career? How many years approximately?

21 A. In this country, since 1978.

22 Q. Do you understand that this case
23 involves a United States patent?

24 A. Yes.

09:17 25 Q. Have you ever testified in a case

1 involving a United States patent previously?

2 A. No.

3 Q. Could you tell me generally the type
4 or types of cases in which you previously have
09:17 5 testified?

6 A. The majority of cases are related to
7 the care of babies and children.

8 Q. And when you say related to the care
9 of babies and children, could you explain that a
09:17 10 bit more, please.

11 What do you mean by that?

12 A. Which part would you like me to
13 explain?

14 Q. Well, care of babies and children can
09:18 15 mean a lot of things.

16 Are you -- are we talking about
17 malpractice cases where something adverse has
18 happened in the care or treatment of the baby or
19 child, or what? Can you just explain a bit
09:18 20 more?

21 A. Right. Sometimes it is a malpractice
22 case where the care of the baby or the child was
23 not up to the standards of care. And sometimes
24 it's related to standards of care of babies and
09:18 25 children.

1 Q. And when you say related to the
2 standards of care for babies and children, is
3 that different for a medical practice case?

09:18 4 A. It is related to, but I am -- in
5 those cases, I'm not opining on what the
6 physician did but I'm opining on what the
7 standards of care were at that time in that
8 particular state.

09:19 9 Q. And do you testify on behalf of the
10 plaintiff or claimant in these cases or the
11 defendant or both?

12 A. Both.

13 Q. When was the last time that you
14 testified in one of these cases?

09:19 15 A. I believe it was maybe almost five
16 years ago.

17 Q. Do you recall what kind of a case
18 that was?

09:19 19 A. That was a case of medical
20 malpractice.

21 Q. What state was it in?

22 A. State of Illinois.

23 Q. And were you appearing on behalf of
24 the plaintiff or the defendant?

09:19 25 A. The plaintiff -- oh, sorry. I get

1 mixed up with that. On behalf of the patient.

2 Q. Okay. Now, you hold yourself out or
3 market yourself out as a potential expert
4 witness through an organization called SEAK --
09:20 5 S-E-A-K, all in caps -- expert witness
6 directory, correct?

7 A. Yes.

8 (Deposition Exhibit 2073 was
9 marked for identification.)

09:20 10 BY MR. ANDERSON:

11 Q. And I'm going to hand you what I have
12 marked as -- what's been marked as Exhibit 2073
13 and 2074.

14 Looking first at Exhibit 2073, which
09:20 15 is one page.

16 A. Yes.

17 Q. It's a screenshot from the SEAK
18 expert witness directory website. And I believe
19 it's the entry for you.

09:20 20 Do you recognize it as such?

21 A. Yes.

22 Q. And how long have you, if you will,
23 marketed yourself as a potential expert witness
24 through SEAK?

09:21 25 A. About five years.

1 Q. And why did you decide to market
2 yourself as an expert witness through SEAK?

3 A. Well, about approximately five years
4 ago, I gave up a major portion of my
09:21 5 responsibilities, which was being the head of
6 the children's hospital and head of the entire
7 department of pediatrics at the University of
8 Illinois Chicago. And at that time, not
9 surprisingly, my salary dropped considerably and
09:21 10 I still had some bills to pay.

11 So this was actually at the advice,
12 strangely enough, of my ex-husband who works as
13 an expert witness. But I have to say, this --
14 this directory has not provided me with any
09:22 15 cases, et cetera. So I'm not renewing it.

16 Q. So the reason why you signed up for
17 SEAK was to provide a source of income?

18 A. That's correct.

19 Q. Are there other expert witness
09:22 20 directory firms that you are listed on?

21 A. I am on a directory called TASA, or a
22 company, and I don't know what that acronym
23 actually stands for. But I was contacted maybe
24 about the same time and -- and -- and this is
09:22 25 actually the first case I have been asked to

1 serve on through TASA.

2 Q. So this matter that you're testifying
3 here on behalf of the plaintiff before, you were
4 contacted through TASA; is that correct?

09:22 5 A. That's correct.

6 (Deposition Exhibit 2074 was
7 marked for identification.)

8 BY MR. ANDERSON:

9 Q. And if you look at Exhibit 2074,
09:23 10 please, do you recognize this as actually the
11 printout of the additional information from the
12 SEAK website regarding you?

13 A. Yeah, I do.

14 Q. Okay. And is your, what I'll call,
09:23 15 bio or information listing on the TASA website
16 the same or similar to this listing to your
17 knowledge?

18 A. I do not know.

19 Q. Did you have involvement in the
09:23 20 preparation of the specialties and experience
21 and additional information sections on the SEAK
22 website?

23 A. That's correct. Yes.

24 Q. Did you have -- were you involved in
09:23 25 the preparation of, you know, whatever listing

1 is on the TASA website for you?

2 A. I don't recall. I don't remember.

3 Q. Okay. Do you recall whether on the
4 TASA website your specialties and experience are
09:23 5 also pediatrics and neonatal care and perinatal
6 medicine as indicated on the SEAK website?

7 A. I don't know for sure, but I would
8 imagine so.

9 Q. Could you tell me what or explain to
09:24 10 us what pediatrics and neonatal, perinatal
11 medicine, what that means or what those
12 specialty areas are?

13 A. Okay. Pediatrics is the specialty of
14 care of children from birth. And it can go past
09:24 15 18 years, but typically it stops at 18. But my
16 department of pediatrics at UIC, which I
17 established, we take care of kids into their
18 mid 20s.

19 And the neonatal, a neonate is from
09:24 20 birth till one month of age. So neonatal care
21 would be over that period of time. It is a
22 subspecialty of pediatrics.

23 And perinatal medicine is what I am
24 board certified in, which is neonatal and
09:25 25 perinatal medicine. So that gives me the

1 knowledge and expertise to confer with
2 specialists that are called maternal-fetal
3 medicine experts. These are specialists within
4 the -- it's a subspecialty of obstetrics. And
09:25 5 so MFM, which is a short form, maternal-fetal
6 medicine specialists, will confer with
7 neonatologists over complicated pregnancies and
8 when they anticipate a baby to be born with
9 problems.

09:25 10 Q. So do I understand you then that
11 neonatal care from birth to one month typically
12 involves a newborn that has some problems, might
13 be in the NICU, something like that?

14 A. Yes. Neonatal care would be any care
09:25 15 of a neonate. It can be anywhere. So a
16 neonatologist might be consulted by a general
17 pediatrician about a baby that might be in a
18 well baby nursery, but they are -- you know,
19 need some additional help to care for the baby.

09:26 20 So any care of a newborn is neonatal care.

21 Q. In your practice, are you involved
22 with clinical care for -- in pediatrics?

23 A. Yes, I am a board-certified
24 pediatrician and a board-certified
09:26 25 neonatologist.

1 Q. So parents can bring their kids to
2 you, you know, they get an appointment with you?

3 A. Yes, they can.

4 Q. You've got a -- you've got a clinic
09:26 5 or something that --

6 A. I do. But I do not currently seek
7 patients in a clinic because we in the past,
8 ever since I became a neonatologist, my practice
9 has been confined to neonatology. So unless it
09:27 10 is a neonate that has been discharged from a
11 neonatal intensive care unit and then is brought
12 to a clinic, typically I would not see a general
13 baby. But because I'm a specialist in neonates,
14 all pediatricians will consult me on any
09:27 15 problems related to a newborn.

16 Q. You said that since you became a
17 neonatologist you've limited your practice to
18 that; is that correct?

19 A. Yes.

09:27 20 Q. And how long ago was that?

21 A. Oh, I've been a neonatologist since
22 1980 when I got -- 1981 is when I -- well,
23 actually, 1982 when I was board certified as a
24 neonatologist. But I finished my training as a
09:28 25 neonatologist in 1980.

1 Q. So basically for almost the last
2 45 years --

3 A. That's correct.

4 Q. -- your specialty has been
09:28 5 neonatology?

6 A. Specialty. However, because I'm a
7 pediatrician and I've also served as a physician
8 and chief of an entire children's hospital, I am
9 also responsible and available for consultation
09:28 10 on any matters related to a child.

11 Q. But your primary focus for your
12 practice has been neonatology since --

13 A. That is correct.

14 Q. You need to slow down a little bit,
09:28 15 ma'am, and let me finish my question.

16 A. Yes.

17 Q. Your focus of your practice since
18 about 1980 has been neonatology, correct?

19 A. Correct.

09:28 20 Q. All right. Now, you mentioned that
21 this matter that you're appearing as an expert
22 witness that came to you through TASA?

23 A. That's correct.

24 Q. And was it TASA that contacted you
09:29 25 directly about this or was it someone from

1 Mr. Conrad's firm, Fish & Richardson?

2 A. I believe it was somebody from his
3 firm.

4 Q. Do you remember who?

09:29 5 A. Yes, I do. Ms. Sarika Patel.

6 Q. And with TASA, is some percentage or
7 amount of your hourly fees that you've collected
8 going to them, to TASA?

9 A. Yes.

09:29 10 Q. How much?

11 A. I don't know.

12 Q. Do the payments for your fees go
13 directly to TASA?

14 A. Yes.

09:29 15 Q. And then -- so TASA is billing Fish &
16 Richardson; is that correct?

17 A. Yes.

18 Q. And then they take their cut and send
19 you the rest?

09:29 20 A. They send me what I have -- my fee
21 schedule.

22 Q. Okay. So the hourly rate that you
23 have mentioned, and we'll get to your
24 declaration, but the hourly rate that you have
09:30 25 mentioned in your declaration is consulting of

1 \$630 an hour, and then for deposition, for your
2 time here, \$780 an hour.

3 How much of the 630 goes to TASA, if
4 you know?

09:30 5 A. I don't know. But I -- I -- my fee
6 schedule is \$500 an hour for any review of
7 documents or just conversations on the phone.
8 But in-person discussions and deposition is \$750
9 an hour.

09:30 10 Q. Okay. So of the consulting, and it
11 looks like they're getting, if my math is
12 correct, \$130 an hour of your fee. And for
13 being here today, they're getting \$30 an hour
14 apparently?

09:30 15 A. I don't know the rate, so it's not --

16 Q. At least if I take the difference
17 between your rate --

18 A. Yes.

19 Q. -- and what's listed here? Okay.

09:31 20 By the way, did you meet with anyone
21 to prepare for testifying here today?

22 A. I met with David.

23 Q. Mr. Conrad?

24 A. Mr. Conrad.

09:31 25 Q. When did you meet with him?

1 A. Yesterday.

2 Q. About how long?

3 A. I don't know, about an hour maybe.

4 Q. Was this in person or virtually?

09:31 5 A. In person.

6 Q. Do you remember where you met?

7 A. Yes, in the -- no, in the Marriott

8 Hotel.

9 Q. Did you review any documents to

09:31 10 prepare to refresh your memory to testify today

11 during this meeting with Mr. Conrad?

12 A. I did look at my declaration. Let me

13 see. What else did we review? Okay. We did

14 look at, just cursorily but not really review,

09:32 15 the documents that were sent to me, but it was

16 just sort of just like did you -- you know,

17 refresh my memory that that's what I had

18 reviewed. But I did look at a small portion of

19 a declaration of a pediatrician that you have

09:32 20 retained.

21 Q. Dr. Horowitz ring a bell?

22 A. I don't remember the name.

23 Q. Okay. Do you remember -- when you

24 said "small portion," do you recall what

09:32 25 portion?

1 A. Yes.

2 Q. What portion?

3 A. It was a portion where -- again, I
4 don't remember the exact language so I'm going
09:32 5 to give you the gist of it -- is that he did not
6 think that babies could be fed with a spoon. Or
7 I don't know whether he used babies or infants,
8 but, you know.

9 Q. That's what you recall?

09:33 10 A. That's what I recall.

11 Q. Do you recall why you reviewed that
12 portion of that declaration?

13 MR. CONRAD: I'm just going to
14 caution the witness not to disclose any
09:33 15 communications between you as an expert and
16 me as an attorney.

17 THE WITNESS: Okay. So I will not
18 answer that.

19 BY MR. ANDERSON:

09:33 20 Q. Okay. Anything else that you recall
21 reviewing in preparation other than your
22 declaration, the documents that were sent to
23 you, and then this small portion of the
24 pediatrician's declaration on our side?

09:33 25 A. No.

1 Q. Other than the meeting yesterday with
2 Mr. Conrad, did you meet with anyone else to
3 prepare for your deposition today, either
4 virtually or in person?

09:34

5 A. No.

6 Q. You said that Ms. Patel first
7 contacted you to retain you in this matter; is
8 that correct?

9 A. Yes.

09:34

10 Q. Do you recall when that was?

11 A. Again, I don't remember exactly, but
12 maybe a couple months ago.

13 Q. By the way, have you ever testified
14 on behalf of or worked with Fish & Richardson
09:34 15 prior to this case?

16 A. No.

17 (Deposition Exhibit 1040 was
18 introduced for identification.)

19 BY MR. ANDERSON:

09:35

20 Q. I'm going to hand you a document that
21 has been marked previously in this matter as
22 Exhibit 1040. It is a copy of the declaration
23 of Dr. J. Usha Raj.

24 A. Yes.

09:35

25 Q. And it's dated April 11th, 2024.

1 Please take a moment to look at this
2 document, Exhibit 1040, and tell me whether you
3 recognize it.

4 A. Yes, I do.

09:35 5 Q. And is that your signature on the
6 first page of Exhibit 1040?

7 A. It is.

8 Q. On the first page, you declare that
9 you believe everything in your declaration is
09:35 10 true and correct essentially, correct?

11 A. That is correct.

12 Q. And as you sit here today, is it
13 still your position and testimony under oath
14 that everything in your declaration is true and
09:36 15 correct?

16 A. Yes.

17 Q. Are there any changes or additions or
18 modifications that you wish to make to your
19 declaration as you sit here today?

09:36 20 A. No.

21 Q. Did you write the first draft of your
22 declaration and the following eight pages?

23 A. Yes, I wrote the declaration.

24 Q. You wrote the first draft of it?

09:36 25 A. Absolutely.

1 Q. Okay. And do you recall how much
2 time you spent in preparing your declaration
3 prior to signing it on April 11th, 2024?

4 A. I don't recall.

09:36 5 Q. Can you give me an approximation in
6 terms of number of hours?

7 A. I really can't because, you know, I
8 work sporadically. So it's probably somewhere
9 jotted down because I will be putting it in my
09:37 10 invoice. But I don't remember now.

11 Q. Have you submitted an invoice to TASA
12 yet?

13 A. No.

14 Q. Do you recall how many -- or did you
09:37 15 share any drafts of your declaration with
16 counsel from Fish & Richardson?

17 A. Yes. I sent them the draft.

18 Q. About how many drafts, do you recall?

19 A. Just once.

09:37 20 Q. Just one draft?

21 Do you recall how long prior to
22 April 11th, 2024?

23 A. I don't know. Not long. Maybe a
24 week. I really don't remember all these exact
09:37 25 dates.

1 Q. By the way, was Ms. Patel your
2 contact person for preparation of your
3 declaration at --

4 A. She was my contact person, yes.

09:37 5 Q. That's who you dealt with?

6 A. Yes.

7 Q. Do you recall whether you received
8 any comments or revisions back when you -- after
9 you submitted the draft?

09:38 10 A. No. They just added these additional
11 things like the top portion of it, this -- you
12 know, the actual numbers of these documents.
13 They added all that. But the essence of my
14 declaration was unchanged.

09:38 15 Q. If you would turn to page 3 of your
16 declaration, please, there is a listing in
17 paragraph 3 of five documents that you
18 considered.

19 Do you see that?

09:38 20 A. Yes.

21 Q. Are those the documents that you were
22 sent or at least some of them that you reviewed
23 yesterday?

24 A. No, I did not review all of them, no.

09:38 25 Q. Okay. Did you review any of them

1 yesterday?

2 A. I didn't review any, but we just,
3 like I said earlier, just went rapidly looking
4 at these documents. But we did not review any
09:39 5 portion of it.

6 Q. Okay. But are these the documents
7 that you recall receiving in connection with the
8 preparation of your declaration?

9 A. Yes.

10 (Deposition Exhibit 1006,
11 Exhibit 1007, Exhibit 1021,
12 Exhibit 1022 and Exhibit 1023
13 were were introduced for
14 identification.)

15 BY MR. ANDERSON:

16 Q. All right. So just, if for no other
17 reason so I have less paper to carry, I'm going
18 to hand you copies of these exhibits. The first
19 is Exhibit 1006. The second is 1007. The third
09:39 20 is Exhibit 1021. Then we have 1022. And 1023.

21 Could you just take a moment and look
22 at those five items and just confirm that those
23 are documents and that, as you state in
24 paragraph 3, you considered in the preparation
09:40 25 of your declaration?

1 (Witness reviewing document.)

2 THE WITNESS: Yes. They appear to be
3 the same.

4 BY MR. ANDERSON:

09:40 5 Q. All right. I wanted you to have
6 those as we refer to something because you may
7 refer to some of them later. But let's go back
8 to your declaration beginning at the
9 introduction, page 2.

09:41 10 A. Uh-huh.

11 Q. In paragraph 1 you state that you
12 have been retained to, and I'm quoting, "provide
13 assistance regarding U.S. Patent
14 Number 9,066,958, the '958 patent."

09:41 15 Do you see that?

16 A. Yes.

17 Q. What assistance were you retained to
18 provide?

19 A. Very specifically I was asked to give
09:41 20 my opinion on the translations of a portion of a
21 document that was originally written in German.

22 Q. What opinion were you asked to
23 provide with respect to the translations of a
24 portion of the document originally written in
09:42 25 German?

1 A. Well, to read the translation and to
2 opine on what I understood from the translation,
3 what it actually said. I don't speak German so
4 I was not asked to opine on the accuracy of the
09:42 5 translation but to opine on what it said.

6 Q. So -- just so we have it clear, you
7 don't speak German?

8 A. No, I do not.

9 Q. Do you read German?

09:42 10 A. No, I do not.

11 Q. Have you ever previously in your
12 career been asked to give an opinion on what a
13 translated foreign language document means or
14 may mean?

09:43 15 A. Not that I recall.

16 Q. Do you have any special training in
17 linguistics?

18 A. No.

19 Q. Do you -- have you ever been
09:43 20 qualified as an expert witness on interpreting
21 the meaning of a document or a reference?

22 A. Yes. I'm asked to interpret
23 documents or references that are written in
24 English related to whatever the topic is, yes,
09:43 25 if it is within my area of expertise.

1 Q. Okay. And just so I'm clear, that's
2 in the context of your work as an expert opining
3 as to standards of care; is that correct?

4 A. Or care given or anything related to
09:44 5 a case that I've agreed to be an expert on.

6 Q. Okay. And in those cases, it's an
7 English language document, correct?

8 A. Yes.

9 Q. And you're testifying as to whether
09:44 10 or not that standard of care has or hasn't been
11 met, correct?

12 A. I'm testifying on whatever the topic
13 is after reading documents that are in English.

14 Q. So just again so we're clear, you've
09:44 15 never previously testified about what, for
16 example, a variety of translations in any
17 foreign language may mean?

18 A. No. This is the first time I've been
19 asked to opine on a translation of an original
09:44 20 document in German. But I'm only opining on
21 what is in the translation.

22 Q. You have no special skills or
23 experience on opining as to what a foreign
24 language translated or series of translations --
09:45 25 translated document means, correct?

1 A. I'm afraid I don't really understand
2 that question.

3 Q. Sure. You have no particular
4 training or experience in the interpretation of
09:45 5 what foreign language translations mean,
6 correct?

7 A. It's a little ambiguous, your
8 question. I can interpret what is in a
9 translated English version. I cannot opine
09:45 10 whether the translation is accurate or not
11 because I do not know the original language.

12 Q. But you've not been retained, I think
13 you specified this, as an expert for the
14 purpose, as you have here, of reviewing a series
09:46 15 of translations and then giving an opinion as to
16 what they mean to you as a pediatrician or
17 neonatologist?

18 MR. CONRAD: Objection. Vague.

19 THE WITNESS: I agree, your question
09:46 20 is rather vague.

21 BY MR. ANDERSON:

22 Q. Okay. What don't you understand
23 about my question?

24 A. Well, could you restate it, please,
09:46 25 so I can actually answer it precisely.

1 Q. Sure. I certainly shall endeavor to
2 do so.

3 You have no -- you have not
4 previously been retained to review a series of
09:46 5 translations of a foreign language document and
6 then provide your opinion on what those
7 translations mean to you as a neonatologist?

8 A. Yes. I think I answered that. This
9 is the first time.

09:47 10 Q. Okay. And I think you testified
11 previously that you've never previously
12 testified as an expert witness in a case
13 involving a United States -- a patent, correct?

14 A. Correct.

09:47 15 Q. Have you ever testified previously in
16 a case that involved the administration or use
17 of vitamin D to infants?

18 A. No.

19 Q. Have you ever testified as an expert
09:47 20 witness regarding the need for vitamin D
21 supplementation in infants or children?

22 A. No.

23 Q. Have you ever testified as an expert
24 witness involving the risks of administration of
09:48 25 vitamin D to infants or children?

1 A. No.

2 Q. Do you know what the risks or
3 consequences may be from a vitamin D deficiency?

4 A. Yes.

09:48 5 Q. And what are they or is it?

6 A. Well, vitamin D deficiency leads to a
7 condition known as rickets.

8 Q. And rickets can cause thinning, soft
9 and misshapen bones, things like that?

09:48 10 A. Yes.

11 Q. It can be a very serious affliction;
12 would that be fair?

13 A. Yes.

14 Q. Would you agree that excessive
09:48 15 vitamin D can have a lot of adverse
16 consequences?

17 A. Yes.

18 Q. Including things like nausea and
19 vomiting?

09:49 20 A. Yes.

21 Q. Loss of appetite?

22 A. Yes.

23 Q. Excessive thirst?

24 A. Yes. I mean, that's not the
09:49 25 predominant feature but could be.

1 Q. Frequent urination?

2 A. Could be.

3 Q. Constipation?

4 A. That's correct.

09:49 5 Q. Abdominal pain?

6 A. Could be.

7 Q. Muscle weakness?

8 A. All of these are possible, yes.

9 Q. Muscle and joint aches?

09:49 10 A. Could be.

11 Q. Confusion?

12 A. Yes. Could be. I mean, these are

13 all very general symptoms.

14 Q. Sure.

09:49 15 A. And it could be part of

16 hypervitaminosis D.

17 Q. Yeah, yeah. It can be fatigue and

18 also kidney damage?

19 A. Yes.

09:49 20 Q. Excessive vitamin D -- or vitamin D

21 can be toxic?

22 A. Excessive vitamin D can be toxic.

23 Q. And an excessive amount of vitamin D,

24 for example, for infants can be a very small

09:50 25 amount?

1 A. You have to be more precise than
2 that.

3 Q. Tell me how small -- at what level
4 can vitamin D become toxic to an infant?

09:50 5 A. You know, I'll have to go refresh my
6 memory on that.

7 Q. If you know?

8 A. But I would say in general if you're
9 giving several times, several times a daily dose
09:50 10 and giving it daily so that there's accumulation
11 of Vitamin D in the body, then only the baby
12 will start to show those toxic signs.

13 Q. In your practice as a neo --
14 specializing in neonatology since about 1980,
09:50 15 could you describe to what extent, if any, you
16 were involved with the administration of vitamin
17 D supplements to infants or children?

18 A. I'm sorry. Please repeat that
19 question.

09:50 20 Q. Sure. During your career as a
21 neonatologist --

22 A. Yes.

23 Q. -- beginning approximately in 1980,
24 could you tell me to what extent, if any, you
09:51 25 have been involved with the administration of

1 vitamin D to infants or children?

2 A. All the time.

3 Q. And when you say "all the time," what
4 do you mean? Could you describe more
09:51 5 particularly for us what you -- what your
6 involvement was in that regard?

7 A. Well, if I'm taking care of the baby
8 overall, I would make sure that the baby gets
9 all the essential nutrition. And if it is in
09:51 10 the form of oral nutrition, then we make sure
11 that the right amount is being given. If the
12 baby is deficient in vitamin D, that a
13 proportionately higher amount is given.

14 So, yes, I would say almost daily we
09:51 15 would oversee that the right amount of all the
16 nutrition, not just vitamin D, is being given to
17 the infant. Or in the case of a child, the
18 right amount is being given and so on.

19 Q. Okay. When you say "oversee," would
09:52 20 you actually be doing the administration or
21 would you be simply, you know, telling someone
22 make sure this infant is getting sufficient
23 vitamin D?

24 A. Neonatologists generally are not
09:52 25 doing the direct patient care except in cases of

1 very specialized interventions.

2 Q. Do you recall ever yourself
3 administering vitamin D to an infant or child?

4 A. I have, but I can't remember exactly
09:52 5 when because sometimes the nurses might be busy
6 or they ask for help. But it's not routine.

7 Q. And when you administer or tell
8 someone to administer vitamin D, was there a
9 form or product that you -- that you
09:52 10 consistently used or that you have used during
11 your 40 years as a neonatologist?

12 A. No, I don't remember a tradename, no.

13 Q. In your practice, have you ever used
14 a vitamin D supplement known as D-Vi-Sol?

09:53 15 A. I don't recall.

16 Q. How about MOMs, the petitioner in
17 this matter, MOM Enterprise?

18 A. No, I don't recall.

19 Q. How about Ddrops?

09:53 20 A. I don't recall.

21 Q. Okay. How about Upspring?

22 A. I don't recall.

23 Q. Do you recall any of the methods of
24 administration that were used for vitamin D
09:53 25 during your instances where you supervised or

1 actually administered vitamin D yourself?

2 A. Yes.

3 Q. What was the form or forms?

4 A. Well, we sometimes give the vitamin D

09:53 5 in an IV solution that has all the nutrition for

6 the baby if the baby cannot take anything by

7 mouth. And if the baby can take it by mouth,

8 then we can give it, depending on how tiny the

9 baby is, either with an NG, nasogastric, tube.

09:54 10 Or if the baby is a bigger baby, then we can

11 give it with a spoon.

12 Q. When you say a "bigger baby," how

13 big? Age or weight?

14 A. A full-term baby would be about, you

09:54 15 know, 40 weeks' gestation, over 2-1/2 kilos.

16 Q. And when you say "by spoon," how do

17 you give it to them by spoon?

18 A. Well, if you had to give it, we would

19 put the drops in a spoon and give it to the

09:54 20 baby.

21 Q. When you put the drops in the spoon,

22 do you then put the spoon in the baby's mouth?

23 A. That's correct. And to clarify, in

24 most of the situations in a normal term baby

09:55 25 where we give vitamin, it's usually given as a

1 complex of vitamins. We don't only give vitamin
2 D, in a general sense.

3 Q. So the drops in the spoon are like a
4 full spoonful?

09:55 5 A. No. It's usually 1 mL, 1 milliliter
6 because it is a multivitamin preparation usually
7 speaking in a normal baby. That's what we would
8 do.

9 Q. And you put the spoon in the baby's
09:55 10 mouth and then what?

11 A. The baby sucks on it right away. The
12 babies -- all babies have a very strong suck
13 reflex.

14 Q. And is there a particular type of
09:55 15 spoon that you put in their mouth or just a
16 tablespoon?

17 A. No, usually a small plastic spoon
18 with rounded contours that's not going to hurt
19 the baby's mouth.

09:56 20 Q. So this multivitamin complex that
21 you're putting in the spoon, it contains
22 whatever the appropriate dose is of vitamin D
23 and other vitamins?

24 A. That's in general, yes. If -- again,
09:56 25 let me specify, if we want to give it separately

1 because the baby's exclusively breast fed. If
2 the baby is being bottle fed, then we might just
3 mix it with the milk.

09:56 4 Q. Okay. So if the baby is being breast
5 fed, you put this multivitamin solution into a
6 spoon and then you stick the spoon in the baby's
7 mouth?

8 A. Oh, yeah.

09:56 9 Q. Okay. And you do that for someone
10 who's like, you know, three days old?

11 A. Well, we usually do not start
12 multivitamins at day 3.

09:57 13 Q. Okay. At what age would you start
14 administering this multivitamin solution that
15 you mentioned?

09:57 16 A. I would say generally we will say, if
17 it's a normal term baby, it goes home around
18 second or third day, we will say, you know, tell
19 the mother to fill the prescription. So usually
20 it's around two weeks or so.

21 Q. And when you say "fill the
22 prescription," is there a particular product or
23 multivitamin product that you're prescribing?

09:57 24 A. I don't remember. Again, as I think
25 I answered that, I do not remember the trade

1 names of any of these products.

2 Q. Okay. Looking back at paragraph 1 of
3 your declaration, the third to last sentence in
4 that paragraph, it says, quote, "Specifically I
09:58 5 have been asked to review translated versions of
6 the prior art reference Harder and opine on how
7 a pediatrician would have understood Harder as
8 it relates to the claims of the '958 patent."

9 Do you see that?

09:58 10 A. Yes.

11 Q. And who asked you to do the review
12 and give that opinion?

13 A. Ms. Patel.

14 Q. And have you ever given an opinion as
09:58 15 to how a pediatrician -- I think -- I'm just
16 asking the same question a different way but let
17 me just ask it again.

18 Have you ever been asked to give an
19 opinion on how a pediatrician would have
09:58 20 understood a foreign art or foreign language
21 document as it relates to the claims of a
22 patent?

23 A. That is not what I was asked to do.

24 Q. What were you -- tell me what you
09:59 25 were asked to do again, please.

1 A. Is to read the translation and opine
2 on a translation and would a pediatrician
3 understand what it says.

4 Q. Okay. But that's something you've
09:59 5 not previously done, correct?

6 A. I believe I answered that.

7 Q. That's correct?

8 A. That's correct.

9 Q. Okay. And in connection with your
09:59 10 work here, did you review the claims of the '958
11 patent?

12 A. No.

13 Q. Turning to the next page, the
14 paragraph 3, where you have the five exhibits
10:00 15 that I've handed you listed.

16 A. Right.

17 Q. I'd like to just go through those one
18 by one, and my question is what use, if any, did
19 you make of them more particularly in connection
10:00 20 with the preparation of your declaration.

21 So if we could start with the first
22 exhibit I handed to you, which was the bottom
23 one on your pile.

24 A. This one?

10:00 25 Q. Yes. This is Exhibit 1006. It is an

1 excerpt from an edited volume entirely in
2 German.

3 A. Yes, I see it.

4 Q. And now you don't -- as I understand
10:00 5 it, you don't speak or read German, correct?

6 A. Correct.

7 Q. So did you make any use of this
8 exhibit other than sort of have it in your
9 possession in connection with your work on your
10:00 10 declaration?

11 A. I just looked through it to see
12 what's in there. And I see there's a table of
13 contents and some stuff and there's a picture.
14 But obviously I did not try to read it because I
10:01 15 do not read German.

16 Q. Okay. Then the next exhibit listed
17 is 1007. It's a --

18 A. Which one is it?

19 Q. 1007, if you look in the lower
10:01 20 right-hand corner. I think it's the first one
21 over here.

22 A. This one here. Okay.

23 Q. Yes. It says Declaration of Accuracy
24 of Translation.

10:01 25 Do you recall what use or

1 significance this document was in connection
2 with the preparation of your declaration?

3 A. Yes. I did review this translation,
4 yes.

10:01 5 Q. And in the last sentence of
6 paragraph 3 of your declaration you state, "Of
7 these, I understand from counsel that the
8 Exhibit 1007, translation of Harder, is the
9 primary translation petitioner relied upon in
10:02 10 its petition."

11 Do you see that?

12 A. Yes, I see that.

13 Q. Who told you that?

14 A. I don't think anybody told me that.

10:02 15 Q. It says "I understand from counsel."

16 A. Well, when -- as I said, when I got
17 the declaration back with this added, I'm not
18 sure who added it, but I agreed with it.

19 Q. Okay. So paragraph 3 was something
10:02 20 that was added by counsel?

21 A. Right. The itemization of the
22 documents with these numbers was added by
23 somebody in their office. And I agreed with
24 them that this is what I primarily relied on.

10:02 25 Q. Okay. So did someone from Fish &

1 Richardson tell you that Exhibit 1007 is the
2 primary translation the petitioner relied upon
3 in their petition?

10:03 4 A. No, they didn't tell me. It was in
5 this revised declaration and I read it before I
6 signed it and I agreed with it.

7 Q. Okay. Well, what is the basis for
8 your agreeing with the statement that was added
9 that Exhibit 1007 translation is the primary
10:03 10 translation petitioner relied upon in its
11 petition?

12 A. Because it is to my reading the most
13 complete and most recent translation.

14 Q. Well, what's your basis for
10:03 15 determining whether a translation is complete or
16 not?

17 A. Well, there are -- there is one --
18 one document which had a little portion. And
19 then there was another document that was -- that
10:04 20 Mr. Sherman, I guess, I guess modified. There
21 is this Rebecca Amy Tinworth translation was
22 modified by Joshua Sherman.

23 And then there's another portion that
24 had a -- there's another declaration that just
10:04 25 has sort of like a confirmation of what's in

1 this translation. So there was nothing -- so
2 this would be the most complete. And that was
3 my understanding.

4 (Brief pause.)

10:05 5 BY MR. ANDERSON:

6 Q. Well, as you -- turning back to
7 Exhibit 1007, as you read it, did you have an
8 understanding that Mr. Sherman made an addition
9 to Ms. Tinworth's translation?

10:05 10 A. Well, he I would say amended it. I
11 don't know, you know, accurate -- I can't tell
12 you whether it's an addition and all that. But
13 in his statement he has reviewed hers and made
14 some amendments -- amendments. And therefore, I
10:06 15 am -- did rely primarily on this translation.

16 Q. Well, let's look at what's been --
17 what I've handed you as Exhibit 1021, please.

18 A. 1021. Which is that?

19 Q. I think it's that one right there.

10:06 20 A. This one?

21 Q. Yes. And this is a declaration of
22 Amy Tinworth as a translator, correct?

23 A. Yes.

24 Q. And she declared under penalty of
10:06 25 perjury that her attached translation was a

1 true, full, and accurate translation of the
2 attached German document.

3 Do you see that?

4 A. Yes.

10:06 5 Q. And then if you look at the next
6 page?

7 A. Of this 2021 (verbatim)?

8 Q. 2021. And then compare that to the
9 attachment to Mr. Sherman's declaration of
10:07 10 Exhibit 1007.

11 A. Uh-huh.

12 Q. Do you see that the first page of the
13 translation is identical to Ms. Tinworth's?

14 A. Appears to be so.

10:07 15 Q. And the second page is identical to
16 Ms. Tinworth?

17 A. Yes.

18 Q. And the next page, page 3?

19 A. Yes.

10:07 20 Q. Page 4?

21 A. Appears to be so.

22 Q. The next page?

23 A. Yes.

24 Q. Page 6?

10:08 25 A. Yes.

1 Q. And then page 7?

2 A. Yes.

3 Q. So my question is why did you pick

4 Mr. Sherman's modified, somewhat modified

10:08 5 translation of Ms. Tinworth's translation as

6 opposed to Ms. Tinworth's translation?

7 A. Because he says in his declaration

8 that he has reviewed, if you look at Item

9 Number 3, "a translation and confirm that the

10:09 10 addition of 'to be licked off' on page 4 of the

11 translation in the fifth line makes the

12 translation a more accurate reflection of the

13 German text.'" "

14 And this was a more recent, I guess,

10:09 15 translation because he signs off on it.

16 Q. Okay. Well, Ms. Tinworth says that

17 she's qualified to provide a translation and she

18 declared under penalty of perjury that her

19 translation was a true, full, and accurate

10:09 20 translation.

21 Do you see that?

22 A. I see that.

23 Q. And in Mr. Sherman's declaration, he

24 says that Ms. Tinworth is competent to perform

10:09 25 the translation.

1 Do you see that?

2 A. Yes.

3 Q. So why pick Mr. Sherman's over
4 Ms. Tinworth's?

10:09 5 A. Because he's added something there,
6 and -- and this declaration of Steven Benyunes
7 -- how do you say that?

8 Q. It's Benyunes, but I will spell it
9 for you. B-e-n --

10:10 10 A. Benyunes.

11 Q. -- y-u-n-e-s.

12 A. Yes. And he's also read this whole
13 declaration and he sort of seems to agree with
14 the translation. So I feel the confirmation of
10:10 15 this translation, I'm going to go with that.

16 Q. Well, you don't have, as you said
17 before, any translation or linguistic skills
18 that would allow you to pick and choose between
19 translations; do you?

10:10 20 A. No, I don't.

21 Q. And if you look at the dates of these
22 four competing translations --

23 A. Uh-huh.

24 Q. -- you'll see that Ms. Tinworth's is
10:10 25 the first?

1 A. That's correct.

2 Q. And Mr. Benyunes's -- excuse me,
3 Mr. Sherman's second supplemental declaration is
4 the last?

10:11 5 A. And then -- yeah, and then Benyunes
6 is about the same time, I guess.

7 Q. So have you ever -- have you ever in
8 your work obtained a translation of a foreign
9 language document?

10:11 10 A. No.

11 Q. So you have no experience in --

12 A. Well, just a minute. I have to
13 revise that.

14 Q. Okay.

10:11 15 A. I do occasionally, because I'm a
16 researcher, find articles written in another
17 language, and then I will request a translation.
18 And usually the author will have a translation
19 of their scientific paper.

10:11 20 Q. Okay. Have you ever asked a -- asked
21 a qualified translator to do a translation for
22 you?

23 A. No.

24 Q. Have you ever asked for multiple
10:12 25 translations until you got one that you liked?

1 A. No.

2 Q. You usually take the first
3 translation you get, correct?

4 A. I cannot opine since I've never done
10:12 5 it, and I wouldn't know how I would react.

6 Q. Well, as a researcher in your field,
7 do you think it would be appropriate for a
8 researcher to keep getting multiple translations
9 until they got one that they liked?

10:12 10 A. I would say it would be appropriate
11 for a researcher, if they're not confident of
12 the first translation, to get additional
13 translations.

14 Q. On what basis would a researcher know
10:12 15 whether a translation -- whether they were
16 confident in the translation?

17 A. I could only talk about scientific
18 papers.

19 Q. Uh-huh.

10:12 20 A. And if in a scientific paper the
21 methods and the results are not consistent, then
22 yes.

23 Q. But if they're consistent, you would
24 have no reason to keep on trying to get another
10:13 25 translation?

1 A. That would seem reasonable, yes.

2 Q. In paragraph 4 --

3 A. Where are we?

4 Q. Sorry. Back to your declaration. I

10:13 5 apologize.

6 A. Page 4?

7 Q. Page 3, paragraph 4. It says that

8 your testimony refers to the knowledge of a

9 pediatrician as of the earliest priority date of

10:13 10 the '958 patent.

11 Do you see that?

12 A. Yes.

13 Q. What is the earliest priority date of
14 the '958 patent that you applied?

10:13 15 A. Well, now you're asking me -- this is
16 I think early 2000 sometime, but I cannot tell
17 you exactly. But I -- since I've been
18 practicing since 1978, I did not think that this
19 was prior to '78.

10:14 20 Q. Well, the words in paragraph 4, was
21 that something that was added after your first
22 draft or did you write that?

23 A. No, that was added, and I agreed.

24 Q. Okay. You said you never looked at
10:14 25 the '958 patent in connection with your work in

1 this matter, correct?

2 A. Yes.

3 Q. So as you sit here today, you do not
4 know what the earliest priority date of the '958
10:14 5 patent is, correct?

6 MR. CONRAD: Objection. Misstates
7 testimony.

8 MR. ANDERSON: You can go ahead and
9 answer.

10:14 10 MR. CONRAD: You can answer the
11 question if you understand it.

12 THE WITNESS: Please restate it. I'm
13 getting confused.

14 MR. ANDERSON: Please reread the
10:14 15 question.

16 (Record read as requested.)

17 THE WITNESS: I do not know the exact
18 date. I do know that it was during the
19 time of my practice as a
10:15 20 neonatologist/pediatrician, and I vaguely
21 remember it's in the 2000s. But don't
22 quote me on it because I don't exactly
23 recall the date.

24 BY MR. ANDERSON:

10:15 25 Q. Okay. So as far as you know, it was

1 sometime between about 1980 and the present
2 time, more specifically generally sometime in
3 the 2000s; is that correct?

4 A. That is what I recall.

10:15 5 Q. Okay. In this sentence, you refer to
6 the knowledge of a pediatrician.

7 Do you see that?

8 A. Yes.

9 Q. What did you do, if anything, to
10:15 10 determine what the knowledge of a pediatrician
11 was as of the earliest priority date of the '958
12 patent?

13 A. I relied on my knowledge and I know
14 that I was a highly qualified and very well
10:16 15 trained and practiced pediatrics following the
16 -- how do you say it? -- the state of the art at
17 that time, every time.

18 Q. Okay. Do you recall what the state
19 of the art was for the supplemental
10:16 20 administration of vitamin D say in the year
21 2000?

22 A. 2000 was no different from what I
23 told you earlier. Either -- I think -- I think
24 I answered that earlier; didn't I?

10:16 25 Q. Well, that's what I want to find out.

1 So it was the mix with food multivitamin in a
2 spoon, IV solution, or a nasogastric tube?

3 A. That's correct.

4 Q. Okay. And if we go to paragraph 5 on
10:17 5 the next page of your declaration, ma'am, my
6 question is, do you have any -- I think you said
7 you don't but I just want to confirm -- that you
8 have no revisions, supplements or amendments to
9 your opinions as stated in here -- here in your
10:17 10 declaration as you sit here today, correct?

11 A. Correct.

12 Q. Since you signed your declaration on
13 April 11th, have you been asked to do any
14 additional research or analysis?

10:17 15 A. No.

16 Q. With respect to the four, I'll call
17 it, competing translations that you were given,
18 Exhibit 1007, Exhibit 1021, 1022, and 1023,
19 other than your belief that Exhibit 1007 was
10:18 20 after Ms. Tinworth's translation, was there any
21 other reason why you picked Exhibit 1007 to rely
22 on?

23 A. I believe I answered that; didn't I?

24 Q. Yes. But you said it was after
10:18 25 Ms. Tinworth's and it's because Mr. Sherman said

1 he made some changes or an addition to

2 Ms. Tinworth's?

3 A. And the other gentleman agreed with
4 this translation, Benyunes.

10:18 5 Q. Where does it say that he agrees with
6 Mr. Sherman's addition?

7 A. Well, he does not add or refute any
8 part of this translation, right. I don't see
9 that.

10:18 10 Q. Well, Mr. Benyunes --

11 A. Benyunes.

12 Q. -- in Exhibit 1023 in paragraph 2
13 says, "The attached translation is to the best
14 of my knowledge a true, full, and accurate
10:19 15 translation."

16 A. Uh-huh.

17 Q. Which is the exact same thing that
18 Ms. Tinworth said.

19 A. Well, I'll have to go back and see
10:19 20 whether there's a difference. But I just saw
21 that there was a clarification here. And it
22 made sense to me that that's reasonable. I'm
23 not going to say that I -- I know that -- I
24 didn't go back and check whether "zum Ablecken"
10:19 25 means "to be licked off." I'm sure you did. I

1 could ask you what does that mean.

2 But if somebody says in a declaration
3 that they signed off that "zum Ablecken" is in
4 the text and the direct translation is "to be
10:20 5 licked off," I'm not going to just second-guess
6 and say that he's lying.

7 Q. Well, in Ms. Tinworth's declaration,
8 she says that it's true and correct and full,
9 and if you look at the original German that she
10:20 10 translated, it contains a sentence containing
11 the words "zum Ablecken," and then if you look
12 at her translation, the words "to be licked off"
13 or whatever it was that Mr. Sherman added
14 doesn't appear.

10:20 15 A. Okay.

16 Q. So are you saying that you think
17 Ms. Tinworth lied under oath when she said under
18 penalty of perjury it's a true, full, and
19 accurate translation?

10:20 20 A. I believe she believed it.

21 Q. Well, you have no reason to
22 disbelieve her translation; do you?

23 A. I have no reason to disbelieve that
24 she thought it was an accurate translation.

10:21 25 Q. Did you speak with Ms. Tinworth?

1 A. No.

2 Q. Did you speak with Mr. Sherman?

3 A. No.

4 Q. Did you speak with Mr. Benyunes?

10:21 5 A. No.

6 Q. So you have no basis to in effect

7 select between Mr. Sherman, Mr. Benyunes, or

8 Ms. Tinworth other than you think because

9 Mr. Sherman in a declaration dated February 28th

10:21 10 of 2023 said, "I think you need to add

11 something," and therefore you pick his?

12 A. No, I believe that if somebody adds

13 something and declares under oath that that is

14 an accurate translation, then those of you who

10:21 15 are involved in this case will go and check that

16 translation and to be sure. And I'm sure you

17 know that. I'm not going to ask you. But I

18 then trust that this gentleman has done an

19 accurate translation and has put it there and

10:22 20 has sworn to it.

21 Q. Okay. Do you have any reason to

22 disbelieve Ms. Tinworth's translation in which

23 she swears to being a true, full, and accurate

24 translation?

10:22 25 A. Again, I repeat, I don't -- I don't

1 think that she was lying. She thought it was an
2 accurate thing. Now, we do not know. If we
3 went back and asked her, can you look back on it
4 and do you agree with it, whether she will say
10:22 5 yes, I missed it, one -- one would have to do
6 that; wouldn't one? But since no one has done
7 that, I will take this version as the most
8 accurate version.

9 Q. You have no reason to disbelieve

10:22 10 Ms. Tinworth as you sit here today; do you?

11 A. No, I have no reason to disbelieve
12 that she believed at the time that she wrote
13 that, that that was an accurate translation.

14 Q. And do you have any reason to
10:23 15 disbelieve that Mr. Sherman at the time that he
16 wrote his declaration in February of 2023
17 thought that his addition was accurate?

18 A. I have no reason to disbelieve him.

19 Q. And do you have any reason to believe
10:23 20 that Mr. Benyunes, when he wrote his declaration
21 in October of 2023, thought it was -- that he
22 didn't believe it was accurate?

23 A. No, I don't. But as -- may I add?

24 Q. Sure.

10:23 25 A. You have repeatedly asked me whether

1 I have amended my declaration, which means that
2 people oftentimes, after they write a
3 declaration, do amend it. And therefore, when
4 Mr. Sherman is amending a -- a translation of
10:23 5 somebody because he, I'm assuming, paid very
6 close attention to each word and then made an
7 amendment, I will accept that.

8 So amending and additions are
9 perfectly reasonable. That doesn't mean that
10:24 10 the first person who translated it was lying.
11 They thought that that was an accurate
12 translation.

13 Q. There's no reason to believe that the
14 first person didn't have it correct and that the
10:24 15 second person got it wrong; is there?

16 A. I would be very surprised if somebody
17 under oath takes out two words from a language
18 and translates it and signs on it and that those
19 words are inaccurately translated.

10:24 20 Q. Do you know anything about the
21 circumstances under which Mr. Sherman added
22 those two words?

23 A. I do not.

24 Q. Would it surprise you to know that he
10:24 25 was asked to change that by Fish & Richardson's

1 counsel?

2 MR. CONRAD: Objection. Misstates
3 the record.

4 BY MR. ANDERSON:

10:24 5 Q. You may answer.

6 A. I don't know. I have no opinion on
7 it.

8 Q. Okay. But you never had the -- you
9 were never given the deposition of Mr. Sherman,
10:25 10 correct?

11 A. The declaration --

12 Q. Deposition.

13 A. No, no deposition.

14 Q. And you were never given the
10:25 15 deposition of Mr. Benyunes; were you?

16 A. No.

17 Q. Okay. And to your knowledge, as you
18 sit here today, Ms. Tinworth has never backed
19 away from her translation, her original
10:25 20 translation?

21 A. I do not know.

22 MR. ANDERSON: Do you want to take a
23 short break? We've been going about an
24 hour plus?

10:25 25 MR. CONRAD: I was going to ask you

1 if we could take a break.

2 (Whereupon, a recess was taken
3 from 10:25 a.m. to 10:34 a.m.)

4 BY MR. ANDERSON:

10:34 5 Q. Back on the record.

6 Dr. Raj, in paragraphs 6 through 12
7 of your declaration, you provide information
8 about your qualifications and background,
9 correct?

10:34 10 A. Yes.

11 Q. And we've talked about what
12 neonatology is, correct?

13 A. Yes.

14 Q. And that you've been qualified as an
10:35 15 expert witness in neonatology previously,
16 correct?

17 A. Yes.

18 Q. And we've talked about those sorts of
19 cases as referenced in paragraph 12, correct?

10:35 20 A. Yes.

21 Q. And then if we look at your CV, which
22 is attached to your declaration, it begins on
23 page 9.

24 A. Yes.

10:35 25 Q. I notice that your CV has a date of

1 November 5th of 2022. Is that your most
2 current?

3 A. No.

4 Q. Did you select the CV to attach?

10:35 5 A. I don't remember. It's possible that
6 they got that from TASA because that's an old
7 one. And yeah, I usually keep my CV quite up to
8 date.

9 Q. Okay. So the CV that's attached here
10:35 10 is not your most current; is that correct?

11 A. That's correct. The main difference
12 is, if you wish to know, would be everything
13 subsequent to my training, education, et cetera.
14 Because all of that is the same.

10:36 15 Q. So you didn't pick your CV to attach
16 to your declaration; that was Ms. Patel or
17 someone at her firm, correct?

18 MR. CONRAD: Objection. Misstates
19 testimony.

10:36 20 THE WITNESS: I don't know who
21 attached this. This is not my most current
22 CV. I keep my CV current and I was
23 supposing that this version was sent to
24 them by TASA, but I'm not sure.

10:36 25

1 BY MR. ANDERSON:

2 Q. At least you didn't select this CV
3 and attach it; is that a fair statement?

4 A. That would be, yeah, fair.

10:36 5 Q. When I looked through your list of
6 articles that have been attached --

7 A. Yes.

8 Q. -- it seemed to me, correct me if I'm
9 wrong, that they dealt a lot with issues
10:37 10 relating to the lungs, particularly lambs,
11 rabbits, rats, things like that.

12 Is that a fair general description
13 for a non --

14 A. No, not really. That would be a
10:37 15 layman's description.

16 Q. Okay.

17 A. I would like to explain that all
18 physicians who hold tenured positions in major
19 named universities are required to do original
10:37 20 research or else you don't get tenure. So I
21 actually have almost four job descriptions. One
22 is as a clinician. One is as an administrator
23 in the department or in the hospital. One is as
24 an educator. And one is as a scientist.

10:38 25 As a scientist, my research has been

1 very fundamental discovery research. I discover
2 how cells in the body works. And all my
3 publications are in high impact journals because
4 I have promoted knowledge on some very basic
10:38 5 things. The area of research doesn't always
6 relate to the area of clinical practice.
7 Oftentimes it doesn't, especially if it is very
8 basic bench research.

9 Clinical research, when people do
10:38 10 clinical research, again, it doesn't have to be
11 related to the area of clinical practice, but
12 oftentimes it does.

13 Does that help?

14 Q. I think so. In looking at the
10:38 15 titles, again as a layperson, they seem to deal
16 a lot with issues of the lungs of young -- of
17 the young?

18 A. No.

19 Q. Do you have any kind of specialty --

10:39 20 A. That's not correct.

21 Q. Okay. Do you have any focus or have
22 you had a focus in your research with what I
23 call lung issues?

24 A. Yes, the focus has been on studying
10:39 25 the circulation in the lung primarily, but of

1 all ages, fetuses, newborns, adults. But it's
2 mainly to discover what makes the vasculature in
3 the lung function so that we can then understand
4 morphology when it develops.

10:39 5 Q. You said the vascular?

6 A. Vasculature. My focus has primarily
7 been on the vasculature of the lungs.

8 Q. And then you said --

9 A. In the large majority of my research.

10:39 10 Q. And then to see what -- you said
11 develops, when something develops. I missed
12 that word.

13 A. Okay. So when we do discovery
14 research, what that means is I'm trying to
10:40 15 understand how a gene works, how it regulates
16 the cell function. And I'm finding new things
17 so that people can then understand why that cell
18 or et cetera has led to be abnormalities in a
19 particular disease so then it can lead to
10:40 20 development of protective measures, preventive
21 measures, treatment measures. And it's a whole
22 spectrum of things.

23 You know, I have been doing this for
24 over 40 years. And I'm proud to say with
10:40 25 funding from the National Institutes of Health.

1 So yes. So this is the other hat I wear.

2 Q. In looking back at your declaration
3 at paragraph 13, starts at the bottom of page 5.

4 A. 13, I'm looking at it.

10:41 5 Q. Yeah, paragraph 13. You talk with
6 reviewing translations?

7 A. Yes.

8 Q. That would be the four translations
9 that we looked at earlier before break, correct?

10:41 10 A. Right.

11 Q. You need to slow down and let me
12 finish.

13 A. Sorry.

14 Q. That's okay.

10:41 15 And you then say, "I understand these
16 translations include minor variations,
17 et cetera."

18 Do you see that?

19 A. Yes.

10:41 20 Q. What is that understanding based on?

21 A. Well, this is -- let me see.

22 Q. Let me ask it this way: Is the
23 understanding based on something you were told?

24 A. My understanding is based on

10:41 25 reviewing this and agreeing to it.

1 Q. Okay. So it's based on you reviewed
2 the translations and you found that there were
3 variations in the translation of the sentence
4 which you then quote from page 259; is that
10:41 5 correct?

6 A. Yes, from the translation, yes.

7 Q. You then cite Exhibit 1006, page 21.

8 Do you see that?

9 A. We're back to --

10:42 10 Q. I'm looking at your declaration.

11 A. Oh, yeah.

12 Q. Sorry.

13 A. Okay.

14 Q. In your declaration, you cite
10:42 15 Exhibit 1006, page 21.

16 Do you see that?

17 A. Yes.

18 Q. And Exhibit 1006 is the German
19 language excerpt from --

10:42 20 A. Right.

21 Q. Okay. Did you look through and find
22 the page 21 citation or was that something added
23 to your declaration?

24 A. That was added because I don't read
10:42 25 German. And so this sentence -- and, again, I

1 see that there's a drop, big and tall, and that
2 made sense. And that "zum," et cetera, that
3 German, "zum Ablecken," which Mr. Sherman has
4 added in his modification of the translation, is
10:43 5 in that sentence, so it made sense to me that
6 that's there. And, yes, I did obviously verify
7 that that sentence is in that original document,
8 but I didn't go and translate it, no.

9 Q. You don't know that a capitalized
10:43 10 word in the middle of a sentence in German such
11 as "Ablecken" means it's a noun and not a verb;
12 do you?

13 A. I don't know that. I am going with
14 that -- those words and the -- the translation
10:43 15 in Mr. Sherman's declaration.

16 Q. In the next sentence in paragraph 13,
17 you say, quote, "Specifically I understand the
18 parties are focused on the sentence from each
19 translation read as follows."

10:43 20 Do you see that?

21 A. Yes.

22 Q. What is your understanding of what
23 the parties are focused on based on? Was that
24 something you were told or is that something
10:44 25 that was added to your declaration?

1 A. No, I was asked to -- to review these
2 different translations and to therefore review
3 specifically the one that I felt most
4 comfortable with, which I agree with the -- with
10:44 5 the -- with Ms. Patel that this seemed the most
6 up-to-date one based on the addition. And so I
7 reviewed this particular translation of
8 Mr. Sherman. And so I agree that that's, you
9 know...

10:44 10 Q. You said you agreed with Ms. Patel
11 that Mr. Sherman, Exhibit 1007, was the most
12 accurate; is that correct?

13 A. No, she sent it to me and she asked
14 me if I would, you know, review all of them, and
10:44 15 I agreed that this amendment to the original
16 translation with a very specific addition of two
17 words that have been translated and added is
18 likely to be the most -- more accurate one.

19 And I -- and I think I explained
10:45 20 earlier why I thought so. I didn't think
21 anybody would pick some words and translate it
22 and it would be a total lie because anybody can
23 fault him.

24 Q. Well, you understand that foreign
10:45 25 languages are oftentimes complex in context

1 matters in translations, correct?

2 A. Could be.

3 Q. And you understand that in foreign
4 languages, words can be translated differently,
10:45 5 correct?

6 A. I don't know that I would agree with
7 you on that.

8 Q. Well, I guess I should ask. I mean,
9 you don't have any basis for being able to pick
10:45 10 and choose which translation is more accurate
11 other than basically your gut feel?

12 A. No, no. I'm very -- I very
13 specifically said I do not believe that if
14 somebody adds two words and says that this is a
10:46 15 direct translation and he signs off on it and
16 he's a -- that they would be lying because they
17 can be easily found out. You can go and look it
18 up.

19 Q. Well, you can look at Ms. Tinworth's
10:46 20 translation where she said under oath doesn't
21 have it. How do you pick between the two?

22 A. Well, again, people might overlook a
23 few portions of it. And -- and Ms. Tinworth
24 might well have believed that that was an
10:46 25 accurate translation. And if she was asked --

1 I'm not sure that you did, but if you had asked
2 her, can you review this and then you go back
3 and do you agree. And I haven't read her
4 deposition. I don't know what she would say.

10:46 5 But I just got these, right; and,
6 therefore, I'm going to go with somebody who has
7 picked out two words and has translated it. And
8 I have no reason to believe that he has made up
9 a translation because he has signed off on it.
10:47 10 And if anybody looks those up and finds out to
11 be inaccurate, he's going to be discredited
12 completely.

13 Q. Doesn't Ms. Tinworth discredit him
14 because she gave a translation under oath under
10:47 15 penalty of perjury saying it was true and full
16 and accurate?

17 MR. CONRAD: Objection.

18 Argumentative.

19 THE WITNESS: I think I've answered
10:47 20 your statement maybe five times by now.

21 BY MR. ANDERSON:

22 Q. Okay. You've never before had to
23 pick and choose between competing translations,
24 have you, in your career?

10:47 25 A. You know, I have to say that there

1 was a case -- again, nothing to do with
2 medical/legal or patent law -- where there was
3 an interpretation of results, because I serve on
4 the editorial boards of major scientific
10:48 5 journals, and I have been asked to serve on the
6 panel to review whether somebody has doctored a
7 scientific -- and that the translation was not
8 accurate. Yes, I have.

9 So that was a very general thing.

10:48 10 But I did not obviously have to deal with the
11 original German -- or I don't even remember -- I
12 think it was Chinese language.

13 Q. Yeah. I mean, you've never
14 previously been offered as an expert witness to
10:48 15 give an opinion as to competing translations
16 which you would -- which one you would decide to
17 follow, correct?

18 A. Well, this would be the first case
19 where I am opining on a translation and I was
10:49 20 given several translations and I have agreed
21 that this is the most accurate one based on this
22 amendment that he added. And I've already given
23 you the reasons why.

24 Q. Yes, because it's the amendment?

10:49 25 A. It's because he has very

1 specifically -- I'll repeat again -- taken two
2 words and translated them. And that means he's
3 putting his reputation on the line. Anybody can
4 check those words. And if they meant something
10:49 5 else, then you would be probably the first
6 person to say that, right. I mean, no one has
7 found that they mean anything else.

8 Q. Well, other than Ms. Tinworth?

9 MR. CONRAD: Okay.

10:49 10 THE WITNESS: Again, Ms. Tinworth may
11 have missed it. She believed -- again, let
12 me repeat. I do not think that she was
13 lying. I think she believed that her
14 translation was accurate. That's it.

10:49 15 BY MR. ANDERSON:

16 Q. And you believe that Mr. Sherman
17 believed that his translation was accurate?

18 A. I believe that he absolutely believes
19 that the translation of those two words are what
10:50 20 he puts in it, yes.

21 Q. Okay. And do you believe that
22 Mr. Benyunes absolutely believed that his
23 translation of those words is accurate?

24 A. I think when anybody signs something
10:50 25 under oath, I believe that they believe that.

1 Q. Okay. Going back to paragraph 13,
2 ma'am, where you say, "I understand the parties
3 are focused on the sentence from each
4 translation," how do you know what the -- how
10:50 5 did you learn what the parties were focused on?

6 A. I believe I was -- when I was first
7 contacted by Ms. Patel, she kind of explained in
8 very general terms what the issues were. I
9 can't remember exactly what, when, what was
10:50 10 said. And I'm not going to try to.

11 Q. But you didn't review any of the
12 filings of the parties to determine whether --
13 what they were focused on, as you say here in
14 paragraph 13 of your declaration, correct?

10:51 15 A. I did not review it, any of those
16 other documents, but I was, in my conversations
17 with Ms. Patel, was given a general idea of what
18 the issues were.

19 Q. Were you told by Ms. Patel that the
10:51 20 parties are focused on the sentence from each
21 translation "read as follows," and it goes from
22 there?

23 A. She gave me some general ideas. Now,
24 again, I'm not going to try to recall exactly
10:51 25 what she said.

1 Q. Okay. Then the four subparagraphs to
2 paragraph 13 A, B, C, and D, there's a quotation
3 and then a citation to an exhibit.

4 Do you see that?

10:51 5 A. Yes.

6 Q. Okay. And did you write those -- or
7 pick out those sentences and then add -- and put
8 in the citation?

9 A. No. She put in -- or I don't know
10:51 10 who put it, but I agreed to everything because
11 then I went back and looked at it.

12 Q. Okay. So somebody other than you in
13 your first draft -- after this first draft,
14 after the first draft that you did, put in the
10:52 15 four subparagraphs; is that correct?

16 A. Yeah, the details of it, yes, with
17 the exhibit numbers, et cetera. I think I did
18 write something very -- to that effect,
19 clarified it. Or he or she, whoever.

10:52 20 Q. Okay. But he or she or whoever put
21 in those four subparagraphs --

22 A. Right, the exhibit numbers and the --
23 the numbers.

24 Q. And the quotations?

10:52 25 A. Yeah.

1 Q. Okay. In paragraph 14, you say,
2 quote, "Regardless of the translation used, it
3 is my opinion that a practitioner reading this
4 instruction would understand each of these
10:52 5 instructions to amount to the same steps."

6 And then you go from there. Do you
7 see that?

8 A. Yes.

9 Q. Okay. The instruction that you're
10:53 10 referring to is the translations in
11 subparagraphs A, B, C, and D in paragraph 13; is
12 that correct?

13 A. Yes.

14 Q. And is this a paragraph that you
10:53 15 wrote originally in your declaration in your
16 first draft?

17 A. Yes, more or less. You know, I'm not
18 saying exactly the same words. Yes.

19 Q. Well, do you remember any changes
10:53 20 that were made to your report?

21 A. I don't.

22 Q. Okay. We need to slow down a little
23 bit, otherwise the court reporter is going to
24 come after one or both of us.

10:53 25 A. I don't.

1 Q. Thank you. Okay.

2 What is the basis for your opinion as
3 to how a practitioner reading the instruction
4 would understand it?

10:53 5 A. Because we always give instructions
6 very clearly to both general pediatricians or
7 medical students, residents, and parents in
8 language that is easy to understand. And this
9 language is very clear and easy to understand in
10:54 10 my opinion.

11 Q. Anything else --

12 A. No.

13 Q. -- that your opinion is based on
14 other than what you just said?

10:54 15 A. I'm answering very specifically your
16 question.

17 Q. Yes. And I just want to make sure, I
18 asked you what your basis was for your opinions
19 stated here. You've given an answer. And I
10:54 20 just want to ask, is there anything else? I
21 just want to make sure I've got your complete
22 basis.

23 A. As far as I can -- want to say at the
24 moment.

10:54 25 Q. Well, if you've got anything else to

1 say, say it now. I want to know.

2 A. No, that's -- I think that's
3 sufficient.

4 Q. Okay. Thank you.

10:55 5 In paragraph 15, you state in the
6 first sentence that "As part of my review, a
7 sample of one of the patent owner's Ddrops
8 products was purchased and sent to me to
9 physically inspect."

10:55 10 Do you see that?

11 A. Yes.

12 Q. Was that part of your original review
13 that it was sent to you?

14 MR. CONRAD: Objection.

10:55 15 BY MR. ANDERSON:

16 Q. Let me ask it this way -- a better
17 question: At what point in time in your work on
18 this matter were you sent a sample of one of the
19 Ddrops products?

10:55 20 A. It came after I was retained and I
21 was sent the -- these documents that you just
22 spread out in front of me. And came, I would
23 say soon after, but I can't remember exactly how
24 soon.

10:56 25 Q. Was it sent prior to you completing

1 the first draft of your declaration?

2 A. I only did one draft.

3 Q. Yes. And I said prior to completing
4 the first draft of your declaration. Sorry.

10:56 5 Was it sent to you before then or
6 after?

7 A. Yes, before.

8 Q. And do you know why you were sent a
9 sample of a Ddrops product?

10:56 10 A. Yes.

11 Q. Why?

12 A. I was asked to basically review -- I
13 would say not to review -- asked to actually see
14 how the Ddrops sample, how a drop would come out
10:56 15 of the bottle, whether it would go on a spoon,
16 how -- you know, just basically simulate as if
17 I'm going to give the drop using spoon to a baby
18 and -- and note my observations.

19 Q. Who asked you to do this, to see how
10:57 20 a drop would come out, whether it would go onto
21 a spoon and then, you said, simulate giving the
22 spoon to a baby?

23 A. Right. It was basically -- I mean,
24 there was not specific instructions as to do
10:57 25 this, this, this. But simulate giving it to a

1 baby using a spoon and then make my
2 observations. And I'm a researcher, so I know
3 how to do that. Yes, it was Ms. Patel.

10:57 4 Q. Okay. Just want to make clear. You
5 were asked to simulate giving the Ddrops product
6 to a baby using a spoon and record your
7 observations?

8 A. Yes.

10:58 9 Q. Have you ever used or seen the Ddrops
10 products -- product that you received
11 previously?

12 A. No.

13 Q. Do you know whether the Ddrops
14 product is designed to provide a single drop?

10:58 15 MR. CONRAD: Objection. Vague.

16 THE WITNESS: Yeah, I do not know
17 what it was designed for.

18 BY MR. ANDERSON:

10:58 19 Q. So did you look at the instructions
20 for use on the Ddrops product that you received?

21 A. Yeah, on the -- on the top of it. It
22 came without any insert, but on the top of the
23 box there was some instructions, yes.

24 Q. Do you recall the instructions?

10:58 25 A. You know, I cannot recall it

1 verbatim. If you have a box, we can look at it
2 together.

3 Q. How about just generally, do you
4 recall the instructions?

10:58 5 A. Generally -- generally, it was to put
6 a drop on, as I recall, the nipple or some kind
7 of a firm --

8 Q. Pacifier?

9 A. I can't remember. But some -- some
10:59 10 surface, which included nipple and included --
11 and was not specific as to what the surfaces
12 could be.

13 Q. That's what you recall?

14 A. That's what I recall.

10:59 15 Q. You recall the nipple and then some
16 surface?

17 A. Yeah, definitely. There were more --
18 there were maybe three things there, but it was
19 very general, so...

10:59 20 Q. In paragraph 15 you say, "This
21 product was purchased through Amazon and sent to
22 me. "

23 Do you recall that?

24 A. Yes.

10:59 25 Q. Did you purchase it?

1 A. No.

2 Q. Do you know who purchased it?

3 A. No, I don't.

4 Q. Was it sent to you directly from

10:59 5 Amazon?

6 A. That's correct.

7 Q. Okay. So do you -- did you keep the,

8 what do you call, the package that it came in

9 from Amazon?

10:59 10 A. No.

11 Q. Did you record the date of receipt

12 from Amazon?

13 A. No.

14 Q. There's a -- do you know who paid for

11:00 15 it?

16 A. No.

17 Q. You did not pay for it, though?

18 A. That's correct.

19 Q. Were you told that this sample was

11:00 20 being purchased through Amazon and was going to

21 be sent to you?

22 A. I don't recall that they told me

23 where they were going to buy it or any of that.

24 I was just told to perform an experiment and to,

11:00 25 you know, report back.

1 Q. And this is Ms. Patel?

2 A. Yes.

3 Q. And you then say, "A copy of the web
4 page is shown as Exhibit 1030."

11:00 5 Do you see that?

6 A. Yes.

7 Q. Is that something you wrote or was
8 that added after you sent your --

9 A. No, that was added. I did not write
11:00 10 that.

11 Q. You've never seen Exhibit 1030; have
12 you?

13 MR. CONRAD: Objection. Misstates
14 testimony.

11:00 15 BY MR. ANDERSON:

16 Q. Have you ever seen Exhibit 1030
17 previously?

18 A. I don't recall. I got a package. It
19 had all kinds of things in it. I was asked to
11:01 20 do an experiment and simulate giving the drops,
21 as I've told you, and I proceeded to do it.

22 Q. But my question was --

23 A. Saving the package and what the pages
24 were in it, no, I didn't focus on it. Maybe it
11:01 25 was there, but I do not recall.

1 Q. But as you sit here today, you do not
2 recall having seen Exhibit 1030 previously you
3 said?

4 A. I don't remember, yes.

11:01 5 Q. Now, in paragraph 17 you say you were
6 also sent 12 Munchkin Soft-Tip Infant Spoons.

7 Do you see that?

8 A. Yes.

9 Q. Did you order the 12 Munchkin
11:01 10 Soft-Tip Infant Spoons?

11 A. No.

12 Q. Do you know who did?

13 A. It came in the same package with the
14 drops.

11:02 15 Q. Same package as -- okay, from Amazon?

16 A. Yes.

17 Q. Okay. And were you told by Ms. Patel
18 that she was going to order -- someone was going
19 to order and send you these 12 Munchkin Soft-Tip
11:02 20 Infant Spoons specifically?

21 A. No. I was not told anything
22 specifically.

23 Q. Do you know why the 12 Munchkin
24 Soft-Tip Infant Spoons were selected?

11:02 25 A. I'm going to presume that I was going

1 to do an experiment with the spoons, and there
2 were other spoons in there, too, and give --
3 give -- write out the results of my experiment.

4 Q. Well, you said there were other
11:02 5 spoons in there, too. Were you sent more than
6 just the 12 Munchkin Soft-Tip Infant Spoons?

7 A. Yes, I was.

8 Q. Ah. What other brands or spoon
9 products were you sent?

11:02 10 A. They were I think six large metal
11 tablespoons that my -- that clearly I was not
12 going to use in my experiment and I'm not sure
13 why they were included, but I just ignored them.

14 Q. Any other kind of spoons?

11:03 15 A. No.

16 Q. Did these six large metal tablespoons
17 come from Amazon as well?

18 A. They came in the same package.

19 Q. Is there some reason why you didn't
11:03 20 mention that you were sent six large metal
21 tablespoons along with the 12 Munchkin Soft-Tip
22 Infant Spoons?

23 A. I thought they were a mistake
24 because, clearly, I was not going to use a large
11:03 25 tablespoon to feed a baby. So I just kept them.

1 Q. Why were you not going to use -- why
2 would you not use a large tablespoon to feed a
3 baby?

4 A. Well, it doesn't make practical sense
11:03 5 to use a large tablespoon to feed a baby or an
6 infant.

7 Q. Why not?

8 A. Let me see if I have to explain this.

9 It's very big. It's probably not going to fit

11:04 10 in the mouth of the baby. It has sharp metal

11 edges. Might be useful in a one-year-old, like

12 the end of the infancy you could use it. But I

13 would not be using a large tablespoon to feed a

14 newborn or a few-month-old baby. And neither

11:04 15 would you.

16 Q. And you -- I want to make this clear.

17 You had no involvement in the decision to pick

18 the Munchkin Soft-Tip Infant Spoons to send to

19 you, correct?

11:04 20 MR. CONRAD: Objection. Misstates
21 testimony.

22 THE WITNESS: I think I said, and I

23 will repeat, I got a package. And in it

24 were these drops, these spoons, and some

11:04 25 metal spoons. And I was asked to simulate

1 giving the drug to a baby as if I was a
2 mother, I suppose, or a nurse or a
3 caretaker.

4 BY MR. ANDERSON:

11:05 5 Q. I understand that. But I'm trying to
6 determine, you were sent this specific brand,
7 Munchkin Soft-Tip Infant Spoons.

8 You didn't pick the brand, correct?

9 A. Correct.

11:05 10 Q. You didn't say anything about the
11 particular type of spoon to send you?

12 A. I did not.

13 However, may I add something?

14 Q. Sure.

11:05 15 A. When I saw the two spoons, I was
16 wondering why I got the metal spoons because I
17 clearly would never use that. When I saw the
18 small infant spoons, that made sense. So I was
19 not going to call up and say, hey, send me
11:05 20 different spoons.

21 Q. Did you call up and say why did I get
22 the metal spoons?

23 A. No, I did not. No, I didn't. I just
24 laughed.

11:06 25 Q. You then say in paragraph 16, "A copy

1 of the web page is shown as Exhibit 1041."

2 Do you see that?

3 A. Yes, I see that.

4 Q. Did you have that in your original

11:06 5 draft or was that added?

6 A. That was added. And, you know,
7 again, I got a whole package. There was a lot
8 of stuff in it, and I didn't save everything.

9 (Deposition Exhibit 1041 was
11:06 10 introduced for identification.)

11 BY MR. ANDERSON:

12 Q. I'm going to hand you what has been
13 marked previously as Exhibit 1041.

14 A. Okay. Yeah, from Amazon, right.
11:06 15 Okay.

16 Q. Please take a moment to look at
17 Exhibit 1041 and tell me whether you recall
18 having seen it previously.

19 A. You know, I can't remember if it was
11:06 20 -- there was a lot of stuff in the packaging. I
21 went straight to the bottle and the spoons and
22 proceeded to do my experiment.

23 I'm not sure, to be accurate, what
24 happened there.

11:07 25 Q. However, this is the -- you recognize

1 this as the apparently the web page for the
2 description of the --

3 A. Yes, I recognize that. One is not --
4 one is very tiny. But those spoons look very
11:07 5 like the ones -- yeah, the spoons look like the
6 ones I got.

7 Q. Okay. And, again, please slow down
8 and wait until I finish my question.

9 Keep that there. I want to take you
11:07 10 to -- do you know when these spoons were first
11 available for purchase?

12 A. You mean when they were on the
13 market?

14 Q. Yes, ma'am.

11:07 15 A. I don't.

16 Q. If you turn to page 3.

17 A. Of this document?

18 Q. Of Exhibit 1041.

19 A. Okay.

11:08 20 Q. Do you see there just above where it
21 says "Videos," the product information, it says
22 "Date First Available, January 9, 2012."

23 Do you see that?

24 A. Yes.

11:08 25 Q. Would you agree that January 9, 2012,

1 is not at or about the earliest priority date of
2 the '958 patent, if you know?

3 A. Yeah, I would say, yeah.

4 Q. That it is?

11:08 5 A. No, I mean, I'm agreeing with you
6 because you asked me when was the patent, I told
7 you I was not sure exactly. So it could be
8 around there. It could be later.

9 Q. Okay. So you don't know if a -- if a
11:08 10 person at or about the time of the earliest
11 priority date of the patent even could have
12 available to them these spoons, correct?

13 A. Right.

14 Can I add something to this line of
11:09 15 questioning?

16 Q. Sure, sure.

17 A. I have throughout my career,
18 including with my own babies, used small metal
19 spoons. Metal spoons are available in a small
11:09 20 size. And metal spoons are used all over the
21 world, many, many situations.

22 Oftentimes when the mother cannot
23 breastfeed and has to give the rest of the feed,
24 in -- in situations where they're unable to have
11:09 25 -- either there's lack of means, the ability to

1 have bottles and nipples and sterilizers, they
2 use spoons.

3 Spoons is something I'm very
4 comfortable with. This was a spoon that I have
11:09 5 not used with my own babies. As I said, I have
6 used small metal spoons to feed them because
7 they were both premature and often had to be
8 given supplemental feeds. So, you know, I mean,
9 it was there. And I kind of liked the spoon.

11:10 10 So if it's an improvement, I applaud whoever
11 made them.

12 Q. Okay. But going back to my question,
13 you don't know whether this spoon was available
14 to anyone at or about the date of -- the
11:10 15 earliest date of priority date for the '958
16 patent, correct?

17 A. Yes. I already answered that. I do
18 not know for sure.

19 Q. And then if you turn to the next
11:10 20 page, please, of Exhibit 1041.

21 A. This one?

22 Q. Yes, the next page 4.

23 A. Okay. Page 4.

24 Q. Okay. And it says under "Ready, set,
11:10 25 feed!" In the second line, "Munchkin's Soft-Tip

1 Infant Spoons were designed specifically to help
2 you with baby's first feedings."

3 Do you see that?

4 A. Yeah.

11:11 5 Q. And it talks about it being "a
6 shallow spoon bowl that makes it easy for your
7 little novice to eat."

8 A. Yes.

9 Q. Okay. Would you agree that the use
11:11 10 for these spoons was intended to assist in
11 introducing an infant to, you know, foods such
12 as pureed vegetables?

13 A. That's what they said. You know,
14 that does not mean that it cannot be used for
11:11 15 other uses.

16 Q. Okay. But at least the uses that the
17 -- that are listed here on Exhibit 1041 are to
18 "introduce or help with baby's first feedings
19 with a shallow spoon bowl that makes it easy for
11:11 20 your little novice to eat," correct?

21 A. Again, that is what they read, and
22 I'll restate, it can be used for anything.

23 Q. Okay. It also says in a highlighted
24 area there with four bullet points that it's for
11:12 25 three months and up?

1 A. Where is that? Which page?

2 Q. Page 4 still.

3 A. Okay. I see that.

4 Q. All right. Do you recall -- if you

11:12 5 go to page 6 of Exhibit 1041, there's a bunch of
6 customer reviews?

7 A. Yes.

8 Q. Did you read or review any of those
9 customer reviews?

11:12 10 A. No.

11 Q. Okay.

12 A. And I will restate once again --

13 Q. Well, there's no question pending
14 right now.

11:12 15 A. Okay.

16 Q. No reason to keep restating. Thank
17 you?

18 A. All right. Because you repeat
19 questions so I would like to restate my answers.

11:12 20 Q. Yes. All right.

21 On paragraph 17.

22 A. Okay.

23 Q. It says, "It is my opinion..."

24 Do you see that?

11:12 25 A. Yes.

1 Q. And you're referring to specifically
2 the Munchkin Soft-Tip Spoon that you were
3 looking at, correct?

4 A. I was referring to that, yes.

11:13 5 Q. And your opinion that a baby can take
6 the whole spoon into its mouth and suck and/or
7 lick the drip off from this spoon is based on
8 the Munchkin Soft-Tip Spoon that you were given,
9 correct?

11:13 10 A. Yes, based on the experiment that I
11 did, but -- do you want me to add or no?

12 Q. Well, I'm asking what your opinion is
13 based on that you state in the last sentence of
14 paragraph 17.

11:13 15 A. Yeah.

16 Q. And you say "the whole spoon."
17 The only spoon that you are referring
18 to is the Munchkin Soft --

19 A. In this particular thing, yes, in
11:13 20 this declaration. Because I did the experiment
21 with those spoons but --

22 Q. Yes, but you didn't do an experiment
23 with any other spoons, correct?

24 A. No, I did an experiment actually with
11:13 25 a metal spoon, big metal spoon.

1 Q. In an infant's mouth?

2 A. No, no. I just saw how the drop
3 would work on this spoon. It would work, but I
4 would not put the whole big metal spoon into a
11:14 5 baby's mouth.

6 Q. Okay.

7 A. But I might put a smaller metal spoon
8 or a spoon made out of any other material that
9 can go into baby's mouth which I have added and
11:14 10 I've told you.

11 Q. Yes. But I've got to look at what's
12 in your declaration.

13 A. Yes.

14 Q. In your declaration --

11:14 15 A. Yes.

16 Q. -- when it says, "It is my opinion
17 that a baby can take the whole spoon into its
18 mouth and suck and/or lick the drop off from
19 this spoon," that is based on your -- on the
11:14 20 Munchkin Soft-Tip Spoon that you were given?

21 A. Based on that. However, I need to
22 point out that in my declaration, I do not use
23 the word Munchkin spoons. I'm describing in a
24 very generic way a small plastic spoon with
11:14 25 rounded edges. And I put it the rounded edges

1 to sort of separate it out from the big metal
2 spoon that was sent to me and I didn't feel like
3 the need to put it there.

4 So any spoon that is not going to
11:14 5 hurt the baby's mouth and it's small enough to
6 go in it. So that is a very general description
7 of the spoon. It does not say it's a Munchkin
8 spoon.

9 Q. So your opinion in paragraph 17 is
11:15 10 based on generic, small plastic spoon which has
11 small edges?

12 A. Yes.

13 MR. CONRAD: Objection. Misstates
14 testimony.

11:15 15 THE WITNESS: What I'm saying is I
16 did the experiment with the Munchkin
17 spoons. Okay. I'm not -- but my statement
18 is describing without using that they have
19 to go buy a Munchkin spoon. It is talking
11:15 20 about a small plastic spoon with smooth
21 edges.

22 BY MR. ANDERSON:

23 Q. That's what I want to make clear.
24 Paragraph 17 of your opinion is based on just a
11:15 25 generic small plastic spoon with smooth edges?

1 A. When you say based on my experiment,
2 I'll repeat again, that I did was with the
3 Munchkin spoons. But my opinion is that any
4 spoon that is like the Munchkin spoon, I guess,
11:16 5 I didn't say it, but any spoon that's small and
6 smooth that's not going to hurt the baby's mouth
7 will function quite well.

8 Q. Okay. You would agree that nowhere
9 in your declaration do you say that your opinion
11:16 10 is that any small plastic spoon with small --
11 with smooth edges that's not going to hurt the
12 baby's mouth could be used?

13 MR. CONRAD: Objection. Misstates
14 the testimony.

11:16 15 THE WITNESS: It says, very clearly,
16 my opinion that a smaller plastic spoon --
17 and I said smaller because I was really
18 thinking about that large metal thing that
19 they gave, but I could have just said small
11:16 20 instead of smaller because it's a
21 qualifying word -- with smooth edges, which
22 is again generic because we don't want any
23 spoon that has sharp edges -- can be used.
24 That's what my opinion says. Smaller --
11:16 25 you know, you'll have to know the context

1 of where that came from. I explained why I
2 use it, relative term -- with smooth edges
3 is suitable.

4 BY MR. ANDERSON:

11:17 5 Q. Okay. So paragraph 17 is based just
6 on a generic smaller plastic spoon which has
7 smooth edges?

8 A. Yes.

9 Q. Okay.

11:17 10 A. The statement says anybody can use a
11 smaller -- a small plastic spoon with smooth
12 edges, whoever manufactured it.

13 Q. In paragraph 18, you say, "Using
14 these products, I was able to follow the steps
11:17 15 for administration I reviewed in Harder."

16 Do you see that?

17 A. Yes.

18 Q. Is that a sentence that you wrote in
19 your original draft?

11:17 20 A. I believe so, yes.

21 Q. And "these products," you're
22 referring to the Munchkin Soft-Tip --

23 A. Yeah, what I was sent, yes.

24 Q. Okay. And the steps for
11:17 25 administration are reviewed in Harder. Which

1 translation did you use to review --

2 (Brief interruption.)

3 THE WITNESS: Sorry.

4 MR. CONRAD: Do you need to get that?

11:18 5 THE WITNESS: No, no.

6 BY MR. ANDERSON:

7 Q. Which translation did you use to
8 determine --

9 A. Well, I use the one --

11:18 10 Q. Ma'am, please slow down. Let me
11 finish my question. The court reporter is going
12 to kill us one of these minutes.

13 A. Okay. Don't kill me.

14 Q. Yeah. Which translation of Harder
11:18 15 did you use to determine the steps for
16 administration that you were referring to in
17 paragraph 18?

18 A. The -- the one we've been discussing
19 all this while, this David Sherman.

11:18 20 Q. Sherman.

21 A. Yes.

22 Q. Okay. Now, you then say, "I first
23 tested whether a drop of the Ddrops vitamin D
24 solution/oil can be placed on the tip of a
11:18 25 spoon. "

1 Do you see that?

2 A. Yes.

3 Q. Okay. And you said, "I wanted to
4 make sure that just one drop can be placed and
11:18 5 that when tilting the bottle upside down to get
6 a drop out, several drops do not fall out."

7 Do you see that?

8 A. Yes.

9 Q. And then you say the test was
11:18 10 positive.

11 A. Yes.

12 Q. Did you note that the Ddrops product
13 is designed to have only a single drop come out?

14 A. I -- I'm not sure I understand that
11:19 15 question. What do you mean did I note? Note
16 what?

17 Q. In the instructions and how it's
18 used, that it is designed to have only a single
19 drop come out?

11:19 20 A. I did not get any instructions that
21 came with the box.

22 Q. There were no instructions for use on
23 the box?

24 A. Not that I recall.

11:19 25 Q. Okay. And so you didn't know whether

1 when you tipped the Ddrops bottle over there
2 would be a plethora of drops or just one or five
3 or two or whatever; is that correct?

4 A. That's what I was testing to see if
11:19 5 it would -- you know, a bunch of drops will come
6 out or just one drop at a time.

7 Q. Okay. And the only solution that --
8 oil that you tested was Ddrops; is that correct?

9 A. That's correct.

11:19 10 Q. You did not test a substance called
11 Vigantol oil, correct?

12 A. No, I did not.

13 Q. Have you ever heard of Vigantol oil
14 other than what -- other than in this case and
11:20 15 what you may have read in those translations?

16 A. No.

17 Q. Okay. You never worked with Vigantol
18 oil?

19 A. No.

11:20 20 Q. You don't know the chemical
21 composition -- the actual composition of
22 Vigantol oil?

23 A. No.

24 Q. You don't know anything about its
11:20 25 characteristics, correct?

1 A. No.

2 Q. That's a --

3 A. No, no, other than what is in that
4 translation.

11:20 5 Q. Yep, okay.

6 In paragraph 20 --

7 A. Yes.

8 Q. -- you say, "I found that if the
9 spoon is held with a slight tilt downwards the
11:20 10 drop stays at the tip of the spoon, and does not
11 fall off, which would make it very easy to give
12 to a baby to lick off."

13 Do you see that?

14 A. Yes.

11:20 15 Q. What was the angle that you held it
16 at?

17 A. Just a tiny tip -- tilt forward and
18 like a fraction of an angle from a horizontal
19 plane. Because it's liquid, and if the
11:21 20 horizontal plane is going the opposite way,
21 gravity will pull down on any liquid and it will
22 slowly roll it down. So if you want to just
23 have the baby just get the drop right away,
24 that's what I meant. However --

11:21 25 Q. So you had to carefully hold the

1 spoon at a particular angle so the drop stayed
2 at the tip?

3 A. Just exactly at the tip. However, if
4 -- if I slowly tilt it down, then it doesn't
11:21 5 immediately roll off because it has some -- some
6 viscosity greater than water. So it does, you
7 know -- but I would imagine that anybody who
8 wants to feed the baby would put the drop on and
9 feed the baby.

11:22 10 Q. How would they feed the baby when
11 they put the drop on the spoon?

12 A. They put the drop on and they'll
13 bring the spoon to the baby, and as soon as the
14 spoon touches any part of the lip or mouth or
11:22 15 even next to the mouth -- and we're talking
16 about now babies, not older kids, who will
17 automatically want to put the spoon in their
18 mouth.

19 Babies have a very strong sucking
11:22 20 reflection. So if you put anything, if I put my
21 finger here on the crown of the mouth, the baby
22 will turn towards it and will want to put it on
23 their mouth. Anything, that they will then want
24 to get that object, nipple, finger into their
11:22 25 mouth. And they will be able to get the drop

1 off the spoon.

2 Q. So is it that the baby then in your
3 view is sticking out their tongue and actually
4 I'll call licking --

11:23 5 A. No.

6 Q. -- or is it rolling off and just
7 hitting their tongue?

8 A. They're not -- a newborn baby will
9 not, if you just hold a spoon in front of it and
11:23 10 not touching their lips, is not going to stick
11 the tongue out obviously. They won't. But if
12 it's touching their mouth, then they will try to
13 get what's on it and they will use their lips,
14 their tongue, everything to suck it off.

11:23 15 So licking will be part of the method
16 by which a newborn, and we're now talking about
17 an infant of a few weeks will get it.

18 An older baby might well reach for
19 the spoon and try, an older infant.

11:23 20 Q. Okay. And do you know what amount of
21 this drop, if you hold it at that angle so that
22 the drop is at the slight downward tilt so that
23 the -- so that the tip of the spoon doesn't fall
24 off, how much of the dose the baby would
11:24 25 actually get?

1 A. Oh, they'll get the whole dose. I
2 mean, it's just this tiny drop. I think as soon
3 as the spoon and the drop goes into the baby's
4 mouth, they will get the entire drop.

11:24 5 Q. You say in paragraph 21 that you
6 found that "if the spoon is tilted backwards,
7 the drop rolls down to the hollow bowl of the
8 spoon."

9 A. Uh-huh.

11:24 10 Q. Then you say, "Therefore, to
11 administer the drop to a baby from the tip of
12 the spoon would require the spoon to be tilted
13 downwards when presenting it to a baby so that
14 the tip -- so that the drop will -- it says
11:24 15 'with roll' forward to the tip of the spoon."

16 Did you mean "will"?

17 A. Yeah, yeah. So basically -- you
18 know, I'm sorry, I did not proofread this
19 accurately. I should have picked that up.

11:24 20 If you just want not to have to put
21 the whole spoon in the baby's mouth, then you
22 just hold the spoon with the drop. And then the
23 drop actually, it forms a very nice globule
24 which tells me that it has a sufficient amount
11:25 25 of water in it so that the surface tension of

1 the liquid is fairly high.

2 Do you understand what I mean by
3 that?

4 Q. I think so. What you're saying is
11:25 5 that the composition of this Ddrops drop is what
6 I'll call just special so that it has the right
7 adherence and viscosity to form that globule
8 that you mentioned on the tip of the spoon?

9 A. No, the word "adherence" does not
11:25 10 apply, no. The terms we want to use is surface
11 tension.

12 Q. Okay.

13 A. Surface tension gives the ability of
14 a liquid to form a globule and not spread out.
11:25 15 And the fact that it makes a nice globule, that
16 means it has sufficient water in it because
17 water has the highest surface tension or it has
18 very low surface tension. And so it has enough
19 water in it so it forms a nice globule.

11:26 20 And I like that because then it stays
21 at the tip and it doesn't roll off unless you do
22 something to force it to start to roll, which it
23 will, such as a gravity or you blow on it or you
24 put pressure on it. But by itself it's not
11:26 25 going to roll off because it has that ability to

1 form a nice globule.

2 Q. Okay. Would you agree that
3 determining what the right composition is to
4 form that nice globule, you know, would take
11:26 5 some trial and effort?

6 MR. CONRAD: Objection. Speculation.

7 THE WITNESS: Yeah, I don't know
8 anything about the preparation. I'm just
9 giving you the results of my experiments as
11:26 10 I observed them.

11 BY MR. ANDERSON:

12 Q. Okay. And you just observed that the
13 Ddrops drop was special because it had that
14 surface tension to form the nice globule?

11:26 15 A. I don't know if I would use special
16 because I have not compared it to any other
17 drop. Perhaps all of them do the same.

18 Q. At least the Ddrops drop does that?

19 A. That's what I said.

11:27 20 Q. Now, you said in paragraph 21, "If
21 the spoon is tilted backwards, the drop rolls
22 down to the hollow bowl of the spoon."

23 Do you see that?

24 A. Yes.

11:27 25 Q. Does that then make it so that you

1 can't administer the drop to the baby, you've
2 got to start over, in effect?

3 A. What do you read in that paragraph?
4 Do you mind reading the rest of it?

11:27 5 Q. It says, "Therefore, to administer
6 the drop to a baby from the tip of the spoon
7 would require the spoon to be tilted downwards
8 when presenting it to a baby so that the drop
9 will roll forward to the tip of the spoon."

11:27 10 Correct?

11 A. If you only want to give it from the
12 tip.

13 Q. Okay. So in paragraph 22 you say
14 "Because the spoon" -- so you're talking about
11:28 15 the Munchkin spoon which you tested?

16 A. Of the same size or any spoon that is
17 small.

18 Q. Yep.

19 A. It does not refer to Munchkin. Okay.
11:28 20 Please, you cannot use words that I have not put
21 in my declaration. I object to that.

22 Q. I understand. But nowhere did you
23 ever say that this applies -- in your
24 declaration did you clearly say that this

11:28 25 applies to all small spoons; did you?

1 MR. CONRAD: Objection. Misstates
2 testimony. Argumentative.

3 And Dr. Raj, I know you want to
4 respond, but let's try do it in
11:28 5 question-answer format.

6 THE WITNESS: Okay.

7 BY MR. ANDERSON:

8 Q. Is there any place that you can point
9 to in your declaration where you said that your
11:28 10 test of the 12 Munchkin spoons that your results
11 and conclusions apply to any small plastic or
12 metal spoon?

13 A. I think in the original statement
14 where I talk about a small spoon with smooth
11:28 15 edges, it just describes a small spoon with
16 smooth edges. Small plastic spoon with smooth
17 edges.

18 Q. Okay.

19 A. So one -- if I read that, I would
11:29 20 infer it's any small spoon.

21 Q. But you didn't state it explicitly
22 that your opinion that -- where you say "the
23 smaller plastic spoon," which I assume that is,
24 that that in effect applies to any small plastic
11:29 25 or metal spoon --

1 MR. CONRAD: Objection.

2 BY MR. ANDERSON:

3 Q. -- with smooth edges?

4 Do I understand your testimony?

11:29 5 MR. CONRAD: Objection. Misstates

6 testimony. Asked and answered.

7 Argumentative.

8 You can answer the question

9 again.

11:29 10 THE WITNESS: I think any reasonable

11 person who read that first statement of

12 mine about a small spoon with smooth edges

13 would assume that I'm talking about a

14 generic small spoon with smooth edges.

11:29 15 I have not in anywhere said this

16 applies only to the spoon that I used in my

17 experiment.

18 I will not, obviously since I

19 did not use multiple spoons, say that I

11:30 20 have tried multiple spoons in my

21 declaration. But my declaration is very

22 generic.

23 BY MR. ANDERSON:

24 Q. Did you ever actually try to

11:30 25 administer one drop of Ddrops with the Munchkin

1 spoon to any infant?

2 A. No.

3 Q. Did you try to administer it with any
4 small spoon, plastic or metal, with an infant
11:30 5 yourself?

6 A. No.

7 Q. Did you ask anyone to see if they
8 could do it?

9 A. No.

11:30 10 Q. Do you know whether it would be easy
11 to put a drop in the spoon, hold the spoon at
12 the right angle, hold the baby, and administer
13 it?

14 A. I think, and I'm going to state it
11:31 15 again, you have to read the entire document, my
16 testimony. It says if you want to only have the
17 drop at the tip and only have the drop given to
18 the baby, then you need to hold it at that
19 angle. But if it rolls down or slides down, it
11:31 20 doesn't matter because the whole spoon can be
21 put into the baby's mouth.

22 And I've also told you earlier that
23 I'm very used to using spoons to feed babies,
24 including small babies, my own babies. I've
11:31 25 seen spoons being used all shapes, sizes. And

1 even the large plastic -- metal spoon has been
2 used. It's just not a spoon that you can put
3 the whole spoon into a baby's mouth, but it has
4 been used.

11:31 5 So I have a lot of experience with
6 using spoons to feed babies.

7 (Deposition Exhibit 2075 was
8 marked for identification.)

9 BY MR. ANDERSON:

11:31 10 Q. I hand you what I have marked as
11 Exhibit 2075.

12 A. Uh-huh.

13 Q. It is a copy of a journal article --
14 I will state for the record that it's an exhibit
11:32 15 to the declaration of Dr. Vieth. The title is
16 "The position of the tongue during rooting
17 reflexes elicited in newborn infants before the
18 first suckle."

19 Have you ever seen this exhibit
11:32 20 previously?

21 A. No. I note the date is 1993. Why
22 are we looking at an article that was published
23 before any of these proceedings have relevance
24 to?

11:32 25 Q. Well, you let me ask the questions.

1 Your counsel can ask you questions.

2 My question is you have not seen this
3 before?

4 A. No, I have not.

11:32 5 Q. Okay. Have you ever done any review
6 of journal articles regarding infant -- the
7 position of infant's tongue during rooting
8 reflexes in newborn infants before the first
9 suckle?

11:32 10 A. I have read a lot of articles about
11 feeding babies, feeding premature babies. All
12 of it. I don't necessarily read Acta
13 Paediatrica because it's not one of the high
14 impact journals. I only read high impact
11:33 15 journals where all the articles are, you know, I
16 would say, very high quality. I'm not saying
17 that this is a bad quality thing. But generally
18 I do not read articles in Acta Paediatrica.

19 Q. You recognize Acta Paediatrica as a
11:33 20 peer-reviewed -- peer-reviewed journal that does
21 publish quality articles?

22 A. Yeah, it is a peer-reviewed journal.

23 (Deposition Exhibit 2076 was
24 marked for identification.)

25

1 BY MR. ANDERSON:

2 Q. Okay. I'm going to hand you next a
3 document I marked as 2076. This is a journal
4 article entitled "Biomechanics of milk
11:34 5 extraction during breastfeeding."

6 A. Uh-huh.

7 Q. And I will state for the record that
8 it is an exhibit to the declaration of
9 Mr. Horowitz.

11:34 10 Have you ever seen Exhibit 2076
11 previously?

12 A. No.

13 Q. Have you reviewed journal articles on
14 the topic of the biomechanics of milk extraction
11:34 15 during breastfeeding?

16 A. I have reviewed many articles on this
17 but not this particular article.

18 Q. Do you recognize the journal that
19 this is from?

11:34 20 A. Yes.

21 Q. And what journal is that?

22 A. PNAS.

23 Q. And what's the name of it?

24 A. Proceedings of National Academy of
11:34 25 Science.

1 Q. Is that a high quality journal?

2 A. It is a high quality journal, yes.

3 Q. And it's peer-reviewed?

4 A. Yes, it is peer-reviewed, and I would

11:35 5 say better than that first journal, the Acta

6 Paediatrica.

7 (Stenographer clarification.)

8 THE WITNESS: Better than the first

9 journal, the Acta Paediatrica.

11:35 10 Are we going to look at this

11 further or no?

12 BY MR. ANDERSON:

13 Q. You've never looked at it, so the
14 answer is no, right?

11:35 15 A. No.

16 Q. Then going back to your declaration,
17 down to the last paragraph -- only five more
18 hours to go.

19 A. All right.

11:35 20 Q. You then say, "I came to the
21 following conclusions in paragraph 23 after
22 performing this test."

23 Do you see that?

24 A. Yes.

11:35 25 Q. And just so we're clear, "this test"

1 is referring to the test that you did with the
2 Munchkin Soft-Tip Spoons that you were sent,
3 correct?

4 A. Right.

11:35 5 Q. By the way, did you test more than
6 one -- of the 12 Munchkin Soft-Tip Spoons or
7 just did you pick one and just test that one?

8 A. I may have done more than one because
9 I think in one situation -- yeah, I think I did
11:36 10 more than one.

11 Q. Did you record any notes of your
12 test?

13 A. No.

14 Q. Did you take any pictures of the test
11:36 15 in process?

16 A. No.

17 Q. Then you have subparts a, b, and c as
18 your conclusions.

19 Do you see that?

11:36 20 A. Yes.

21 Q. Did you write -- are those words that
22 you originally wrote in your first draft of your
23 document?

24 A. Yes.

11:36 25 Q. Okay. And in subparagraph A, you

1 talk about the recommendation in Harder.

2 Do you see that?

3 A. Yes.

4 Q. And that's based on your adoption of

11:36 5 Mr. Sherman's translation, correct?

6 A. Correct.

7 Q. And then the --

8 MR. CONRAD: Apologies. I was just

9 going to say you're starting to answer

11:36 10 quickly again.

11 THE WITNESS: Okay. Yeah, I know.

12 I'm getting tired, I guess. Let me take a

13 deep breath. I'm trying to hurry you

14 along. I'm sorry. Okay. All right.

11:37 15 BY MR. ANDERSON:

16 Q. Then in paragraph b, you say, "The
17 small plastic spoon is suitable for the method
18 of administration described in Harder."

19 Do you see that?

11:37 20 A. Yes.

21 Q. And when you say "the small plastic
22 spoon," you're referring to the Munchkin spoon?

23 A. The spoon I used, yes.

24 Q. Okay. And when you say "the method
11:37 25 of administration described in Harder," again,

1 you are reusing Mr. Sherman's translation,
2 correct?

3 A. Yes.

4 Q. All right. And then you say in part
11:37 5 -- subpart c that "if the drop rolls down to the
6 center of the spoon, either the spoon should be
7 washed, and the drop placed accurately at the
8 tip of the -- of the spoon -- at tip of spoon so
9 that the baby can lick it off. Alternatively,
11:37 10 the entire spoon could be placed in the baby's
11 mouth for the baby to lick and/or suck the drop
12 off."

13 Do you see that?

14 A. Yes.

11:37 15 Q. Why would you say if the drop rolls
16 down to the center of the spoon the spoon should
17 be washed as one alternative?

18 A. Well, if we want to follow exactly
19 the instructions from -- and that's what I said,
11:38 20 the Harder, recommendation Harder, and you want
21 to use just the drop or the tip of a spoon, then
22 I would recommend that you wash it off so that
23 you don't have excess. If you put another drop,
24 there may be some of the original drop still on
11:38 25 the spoon, so you need to be able to just give

1 the one drop or use a different spoon.

2 Q. And that's because giving a baby more
3 than one drop could result, in effect, starting
4 to overdose them?

11:38 5 A. Well, giving even two drops once is
6 not going to do it. As we discussed earlier,
7 it's chronic overdosing that gives you
8 hypervitaminosis D.

9 Q. Do you recall that in any of the
11:39 10 translations of Harder the translations indicate
11 that Ms. Harder said that if you put two drops
12 in, wash it off and start over, it's important
13 that there be only one drop?

14 A. I believe I recall something about,
11:39 15 you know, not to give more than one drop and
16 just start over, yes.

17 Q. Do you recall that -- or do you know
18 that Vigantol is toxic or can be toxic to
19 infants?

11:39 20 A. Not anymore, as I can understand,
21 than any other vitamin D preparation that if
22 given excessively, repeatedly, can lead to
23 hypervitaminosis D.

24 Q. But you don't know about Vigantol
11:39 25 specifically, correct?

1 A. No, I don't know anything
2 specifically about Vigantol.

3 Q. And then when you say "alternatively,
4 the entire spoon can be placed in the baby's
11:39 5 mouth for the baby to lick and/or suck the drop
6 off," when you're referring to the entire spoon,
7 are you referring to the Munchkin Soft-Tip Spoon
8 that you conducted your experiment on?

9 A. I am because, as I said, I performed
11:40 10 the test and then I say these things. But in
11 the original statement, I think I said a spoon
12 that is small with round edges that -- so any
13 spoon would work.

14 Q. So it's your opinion that the entire
11:40 15 spoon can be placed in a one-day-old's mouth?

16 A. Oh, yes.

17 Q. So from birth on up, you can stick
18 the entire small plastic spoon with rounded
19 edges into their mouth?

11:40 20 A. Oh, yes. The size of the spoon is
21 not much larger than a large nipple of a breast.

22 Q. And if the -- since the placing the
23 entire spoon is in the case where the drop has
24 rolled to the center, okay?

11:40 25 A. That's only if you don't want to wash

1 the spoon and put the drop at the tip, then you
2 can put the spoon into the baby's mouth and the
3 baby will suck and lick the whole thing off.

11:41 4 Q. Okay. So with this bowl or with the
5 drop in the bowl, of the bottom of the bowl,
6 it's your opinion that you stick the whole spoon
7 in and the baby is going to lick it?

8 A. Suck on it. That's what I said. And
9 would probably -- licking, if you look at the
11:41 10 definition of the word, it means using the
11 tongue. And sucking requires using the tongue,
12 lips, and creating sort of a suction around
13 whatever the object is that you're sucking.

14 So if you put a spoon into a baby's
11:41 15 mouth, the baby would likely to do both.

16 Q. Isn't it true that if you put the
17 spoon into the baby's mouth, the infant's tongue
18 is going to be on the underside of the spoon?

19 A. Yeah, but they suck on it. So it's
11:41 20 not like -- you know, if you just put it on the
21 top, then they might just suck on it and then
22 they will just be by suction take it off. But
23 it all depends on where and how you put it.

24 Oftentimes when you put a nipple into
11:42 25 the baby's mouth, they have the tongue that is

1 touched to it and then they put their lips
2 around it. So they kind of use all parts of
3 their mouth.

11:42 4 Q. Sure. But in the case of putting the
5 entire spoon in a baby's mouth, you would agree
6 that the infant's tongue is going to be on the
7 bottom, the underside of the spoon?

8 A. If you just keep it in that
9 particular spot and prevent the baby to suck on
11:42 10 it, then yes. But if a baby starts to suck on,
11 they're going to use all portions of their
12 mouth.

13 Q. So if you put this whole spoon in a
14 one-day-old's mouth and you let it go, they're
11:42 15 going to somehow start to what?

16 A. They're going to suck on it.

17 Q. Suck on it?

18 A. Yes.

19 Q. Okay.

11:42 20 A. They have a very strong suck reflex,
21 as I've told you already.

22 Q. Okay. Would you agree that if an
23 oil, such as this vitamin D oil, is aspirated
24 into an infant's lungs, it can cause
11:43 25 considerable damage?

1 A. First of all, vitamin D, that drop is
2 not pure oil. And I think I explained to you
3 why I think it's not a pure oil. Okay. So it's
4 a mixture.

11:43 5 And I also think that a drop of it in
6 a spoon put into baby's mouth is highly
7 unlikely, highly unlikely that the baby will
8 aspirate it. Because the baby will suck the
9 spoon.

11:43 10 Q. That's not my question, though. My
11 question is would you agree that if a drop of
12 this substance that was aspirated into the
13 infant's lungs, that that can cause damage?

11:44 14 A. A tiny drop of that size even in a
15 normal newborn lung is unlikely to cause any
16 significant damage.

17 Q. Okay. Do babies routinely lick --
18 lick spoons if you stick it in their mouth as an
19 infant, as a one-day-old in your opinion?

11:44 20 A. First of all, I think I told you, we
21 do not give vitamin drops to one-day-olds.

22 Q. But --

23 A. So if you ask me the question, will a
24 baby stick out a tongue and lick something, no,
11:44 25 they don't. They usually will want to suck on

1 anything that you give them.

2 Q. Do you ever review consumer or health
3 updates from the FDA, the Food and Drug
4 Administration?

11:45 5 A. Not routinely unless it's relevant to
6 something that is going to affect babies or
7 et cetera, then I might, yes.

8 Q. I mean, would you agree that the FDA
9 is an authoritative source for such things?

11:45 10 A. Generally speaking. And I say
11 generally speaking because I have, together with
12 a whole team of scientists, have disagreed with
13 the FDA and made them recall their statement.
14 So we are scientists. So we are very particular
11:45 15 and we review everything. So we don't take it
16 as gospel.

17 (Deposition Exhibit 2077 was
18 marked for identification.)

19 BY MR. ANDERSON:

11:45 20 Q. I'll hand you what I have marked as
21 Exhibit 2077.

22 A. Uh-huh.

23 Q. It is a notice from the FDA entitled
24 "Infant Overdose Risk with Liquid Vitamin D"?

11:45 25 A. Uh-huh.

1 Q. And it was published in June of 2010.

2 A. Okay.

3 Q. Have you seen Exhibit -- what is it?

4 A. 2077.

11:46 5 Q. -- 2077 previously?

6 A. No, I have not.

7 Q. Have you ever seen something like

8 Exhibit 2077?

9 A. No, I have not.

11:46 10 Q. Have you ever seen any warnings from

11 the FDA regarding the potential risk of

12 overdosing infants with liquid vitamin D?

13 A. No, because as a physician we know

14 what the risks are. We don't need to be

11:46 15 reminded of the risk.

16 Who is this document meant for?

17 Q. Well, it says the Consumer Health

18 Information. So I'm going to assume consumers.

19 A. Consumers, exactly.

11:46 20 Q. Okay. So you've never -- have you

21 ever provided a similar warning to your patients

22 that don't overdose, that there is an infant

23 overdose risk for liquid vitamin D?

24 A. Oh, we definitely will about

11:46 25 anything. We advise them about everything, yes.

1 Q. And this relates to vitamin D
2 supplement products on the market with droppers.

3 Do you see that in the first
4 sentence?

11:47 5 A. Yes.

6 (Witness reviewing document.)

7 THE WITNESS: Yes.

8 BY MR. ANDERSON:

9 Q. Would you agree that a vitamin D
11:47 10 supplement product that comes with droppers
11 could allow parents and caregivers to
12 accidentally give harmful amounts of the vitamin
13 to an infant?

14 A. I would agree, yes, that a dropper or
11:47 15 any product given in any form can be misused and
16 lead to overdosing.

17 Q. Okay. But would you agree that, in
18 particular, droppers that hold a greater amount
19 of liquid vitamin D that an infant should
11:47 20 receive may result in the risk of overdosing?

21 A. I would not agree because if people
22 follow the instructions, as they would have to
23 follow even with the Ddrops, accurately and give
24 exactly the amount they're supposed to, there
11:47 25 will be no overdose. So the risks occur with

1 any preparation.

2 Q. Yes. And, in fact, if you read the
3 second column here, second bullet point from the
4 FDA, and it tells caregivers to follow the
11:48 5 instructions, as you just said?

6 A. Yes.

7 Q. Okay. But would you agree that with
8 vitamin D supplement products with droppers, a
9 parent or caregiver could accidentally give
11:48 10 harmful amounts of a vitamin to an infant?

11 A. I don't think it is any greater risk
12 than any other form because any parent who does
13 not follow the instructions, including with the
14 Ddrops, if they allowed more than one drop to
11:48 15 fall and gave that, yeah, there's a risk. So
16 the issue is following instructions.

17 Q. Could you take a moment just to read
18 to yourself, since it's only a short document,
19 this and then tell me when you finish.

11:48 20 A. Uh-huh.

21 (Witness reviewing document.)

22 THE WITNESS: Okay.

23 BY MR. ANDERSON:

24 Q. Is there anything within Exhibit 2077
11:49 25 for which you disagree?

1 A. No.

2 Q. Going back to your declaration for a
3 moment, paragraph 77 you reference a small
4 plastic spoon?

11:49 5 A. Which?

6 Q. Sorry. Paragraph 17. Sorry. Yeah.

7 A. Yeah.

8 Q. Do you agree that Harder nowhere
9 refers to using a small plastic spoon?

11:50 10 A. Yes.

11 Q. Would you agree that Harder does not
12 say that a drop can roll down to the center of
13 the spoon and then stick the whole spoon in the
14 infant's mouth?

11:50 15 A. I don't recall that being in there.

16 Q. Okay. I just want to make sure, you
17 didn't in your experiment that you describe in
18 your declaration try any other -- actually try
19 any other spoons other than the Munchkin
11:50 20 Soft-Tip Spoon that you were sent, correct?

21 A. No, I think I told you I did try the
22 metal, big metal spoon.

23 Q. Did you try to hold the big metal
24 spoon so that the drop stayed on the tip?

11:51 25 A. No, I mean, I -- I did the experiment

1 of seeing when it would roll down only with a
2 small spoon. But with a big one, I just want to
3 see if it would stay at the tip and it did.

11:51 4 Q. Okay. So with a big metal spoon that
5 you were sent, if you put the drop in it, it
6 would stay at the tip if you held it at the
7 right angle?

8 A. Yeah. I mean, when I say the right
9 angle, I mean, let me just say, it's not like
11:51 10 down here. All I'm trying to say is if the
11 plane of the spoon is tilting where gravity is
12 going to act on the drop, then of course it's
13 physical forces, Newton's law, it will start
14 flowing. That's all that statement says.

11:51 15 Q. Okay.

16 A. And all that I want to say is if that
17 happens, you don't need to wash it all off,
18 unless you're concerned, you can use -- put a
19 small spoon into the baby's mouth.

11:51 20 Q. But you would not put the large spoon
21 that you were sent into an infant's mouth?

22 A. I think I said that already, and yes.

23 Q. Okay. And you didn't report the
24 results of any experimentation of putting a drop
11:52 25 in the large metal spoon that you were sent in

1 your declaration; is that correct?

2 A. That's correct.

3 Q. In paragraph 23c of your report --

4 A. Yeah.

11:52 5 Q. -- you've got the "alternatively"
6 sentence there?

7 A. Yes.

8 Q. What gave you the idea to follow your
9 alternative instruction?

11:52 10 A. I just looked at the spoon and I
11 recall what I had done repeatedly with my own
12 kids, and I've seen, I will say when I was
13 practicing in India, hundreds of mothers, we
14 used spoons. So yes. I think it's a logical
11:52 15 thing to just use the spoon, give to the baby in
16 its mouth, not have to wash it off, start all
17 over again. Because the drop is the drop, it's
18 still there on the spoon.

19 Q. You did no testing or analysis to
11:53 20 determine whether using this small plastic spoon
21 and placing one drop on the tip that an infant
22 would receive a nutritionally adequate and
23 sufficient dose of vitamin D, correct?

24 A. No, I did not. I just -- you know,
11:53 25 no, I did not do anything, any analysis like

1 that, no.

2 MR. CONRAD: Let's take a break.

3 MR. ANDERSON: Hang on.

4 MR. CONRAD: She needs some water.

11:54 5 Sorry.

6 THE WITNESS: Unless you want to fill
7 my glass, that would be great. Thank you.

8 Thank you, sir.

9 MR. ANDERSON: You're very welcome.

11:54 10 Thank you very much for your
11 time here this morning, Dr. Raj. I have no
12 further questions for you at this time.

13 MR. CONRAD: And I have no further
14 questions.

11:55 15 (Time concluded: 11:55 a.m.)

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1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF COOK)

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5 I, Janice M. Kocek, CSR, CLR,

6 No. 084-002871, do hereby certify:

7 That the foregoing deposition of JULIA
8 USHA RAJ, M.D., was taken at the time and place
9 therein set forth, at which time the witness was
10 put under oath remotely by me;

11 That the testimony of the witness and
12 all objections made at the time of the
13 examination were recorded stenographically by
14 me, were thereafter transcribed under my
15 direction and supervision, and that the
16 foregoing is a true record of same.

17 I further certify that I am neither
18 counsel for nor related to any party to said
19 action, nor in any way interested in the outcome
20 thereof.

21 IN WITNESS WHEREOF, I have subscribed
22 my name this 7th day of May, 2024.

23 

24 JANICE M. KOCEK, CSR, CLR
25 CSR NO. 084-002871.

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ACKNOWLEDGMENT OF DEPONENT

I, _____, do hereby
acknowledge that I have read and examined the
foregoing testimony, and the same is a true,
correct and complete transcription of the
testimony given by me, and any corrections
appear on the attached Errata Sheet signed by me.

(DATE) (SIGNATURE)

NOTARIZATION (If Required)

State of _____
County of _____

Subscribed and sworn to (or affirmed) before me
on this _____ day of _____,
2024, by _____, proved
to me on the basis of satisfactory evidence to
be the person who appeared before me.

Signature: _____
(SEAL)

2

4 DATE: May 1, 2024

5 CASE: MOM Enterprises vs.

6 Elaine and Reinhold W. Vieth

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25 DATE: _____ SIGNATURE: _____

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing Patent Owners' Exhibit 2081 is being served on May 12, 2024, by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and by electronic mail as directed by Petition upon the following counsel of record for Petitioners:

David B. Conrad
Lance E. Wyatt
Sarika Patel
Casey Kraning
Fish and Richardson P.C.
To: IPR53953-0001IP1@fr.com

/Mark E Ungerman/

Mark E. Ungerman
(Reg. No. 32,070)