

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

3
4 MOM ENTERPRISES, LLC,)
5 Petitioner,)
6 vs.) Case IPR2023-00726
7 ELAINE AND REINHOLD W.) Patent 9,066,958 B2
8 VIETH,)
9 Patent Owner.)

10

11

12

13 ATTORNEYS' EYES ONLY

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16 The virtual deposition of CHRIS TEMOVSKY,
17 called by the Petitioner for examination, pursuant
18 to agreement and pursuant to the applicable rules,
19 taken stenographically by Sandra L. Rocca, CSR, CRR,
20 via Zoom, on the 27th of March, 2024, at the hour of
21 9:00 a.m.

22

23

24

25 Certification No. 084-003435, 1245

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1	I N D E X		
2	WITNESS		PAGE
3	CHRIS TEMOVSKY		
4	EXAMINED BY		
5	Mr. Conrad		5
6	Mr. Palen		127
7	Mr. Conrad		135
8	* * * * *		
9	E X H I B I T S		
10	NUMBER	MARKED FOR ID	
11	Exhibit 1001	U. S. Patent No. 9,066,958	27
12	Exhibit 1003	Complaint	77
13	Exhibit 1017	Canadian Patent Application CA 2,558,202 A1	21
14	Exhibit 1030	Amazon.com web pages for Ddrops Organic Baby 400 IU	39
15	Exhibit 1031	web.archive.org pages for Baby Ddrops	51
16	Exhibit 1032	Amazon.com web pages for Ddrops Baby Tummy Relief Organic Gripe Water	84
17	Exhibit 1034	Target.com web pages for Mommy's Bliss Baby Organic Vitamin D Drops	109
18	Exhibit 1035	carton label for Mommy's Bliss Organic Baby Vitamin D Drops	109
19	Exhibit 2004	C. Temovsky Declaration 6/28/23	10
20	Exhibit 2048	DDROPS-0022416 to 22424 Kaderali dep Exhibit 30	101
21			
22			
23			
24			
25			

1	E X H I B I T S		
2	(continued)		
3	NUMBER		MARKED FOR ID
4	Exhibit 2059	DDROPS-0019844 to 19852 Medina dep Exhibit 41	127
5	Exhibit 2071	C. Temovsky Declaration 2/8/24	9

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09:01:31 1 MR. CONRAD: This is David Conrad on behalf
09:01:34 2 of Petitioners.
09:01:36 3 MR. PALEN: Good morning. Matthew Palen
09:01:39 4 with the Alan Anderson Law Firm representing Patent
09:01:43 5 Owners. I'll be defending the deposition of Chris
09:01:46 6 Temovsky.
09:01:46 7 CHRIS TEMOVSKY,
09:01:46 8 having been first duly sworn, was examined and
09:01:46 9 testified as follows:
09:01:56 10 CROSS EXAMINATION
09:01:56 11 BY MR. CONRAD:
09:01:58 12 Q Good morning, Mr. Temovsky.
09:01:59 13 A Good morning.
09:02:00 14 Q Please state your name -- can you state your
09:02:04 15 name for the record?
09:02:04 16 A Chris Temovsky.
09:02:05 17 Q Mr. Temovsky, have you been deposed before?
09:02:08 18 A Yes, I have.
09:02:10 19 Q About how many times?
09:02:12 20 A Once that I can recall.
09:02:16 21 Q How long ago was it?
09:02:18 22 A Over ten years ago.
09:02:20 23 Q All right. So then it would not have been
09:02:24 24 by Zoom, I take it?
09:02:25 25 A No, no.

09:02:26 1 Q Well, then I will go over a few ground rules
09:02:31 2 to refresh your memory and also to acknowledge the
09:02:35 3 new digital age in which we do these things. The
09:02:38 4 first is that because this is being transcribed, if
09:02:45 5 you can wait until I finish my question before you
09:02:48 6 answer and I will do my best also to wait until you
09:02:53 7 finish your answer before I ask my next question.
09:02:56 8 Okay?
09:02:56 9 A Yes.
09:02:56 10 Q And any responses from you will need to be
09:03:03 11 audible, so head shakes or nods are not going to
09:03:07 12 work.
09:03:07 13 A Okay. Can you hear me well now?
09:03:10 14 Q I can hear you well now, yes.
09:03:12 15 A All right.
09:03:13 16 Q You understand that you are under oath today
09:03:17 17 just as if you were in a court of law on the witness
09:03:19 18 stand testifying in front of a judge or jury, right?
09:03:23 19 A Yes, I do.
09:03:23 20 Q If you need a break, we can take one. Just
09:03:32 21 let us know and we'll go off the record. The only
09:03:34 22 restriction I ask of you is if there's a question
09:03:37 23 pending that you answer the question first and then
09:03:39 24 we can go on break. Okay?
09:03:41 25 A Okay.

09:03:42 1 Q What do you have in front of you at your
09:03:48 2 desk?

09:03:49 3 A I have my keyboard, my mouse, my cellphone
09:03:53 4 and a cup of coffee.

09:03:55 5 Q Sounds like my desk. Do you have any notes
09:04:01 6 with you or anything up on your screen related to
09:04:05 7 this action?

09:04:06 8 A No, nothing.

09:04:07 9 Q Okay. Great. If that changes, just let me
09:04:11 10 know.

09:04:11 11 A Yes.

09:04:12 12 Q But you have the ability to open exhibits
09:04:15 13 today, correct?

09:04:16 14 A I should be. I would like to try once you
09:04:20 15 send me something.

09:04:20 16 Q We'll get to that and find out at that
09:04:23 17 moment.

09:04:27 18 How did you prepare for today's deposition?

09:04:30 19 A How did I prepare? I read the documents
09:04:38 20 that we had prepared and sent in through our lawyers
09:04:45 21 and I made sure my computer is functioning properly.
09:04:49 22 And I got up nice and early and got into the office
09:04:52 23 so I don't get stuck in Toronto traffic.

09:04:55 24 Q Okay. Did you meet with any lawyers in
09:05:02 25 preparation for today's testimony?

09:05:04 1 A I met with my lawyers to understand what we
09:05:10 2 need to do here today.
09:05:11 3 Q When was that?
09:05:12 4 A I met with Alan about three weeks ago.
09:05:24 5 Q For how long?
09:05:25 6 A For half a day.
09:05:27 7 Q Did you meet with any lawyers since that
09:05:33 8 time in preparation for today's testimony?
09:05:35 9 A With Matthew just to understand how we will
09:05:44 10 be technically working things here today.
09:05:45 11 Q And how long did you meet with him?
09:05:48 12 A About maybe 20 minutes.
09:05:53 13 Q When was that?
09:05:54 14 A I met with Matthew last Friday. And
09:06:00 15 actually this morning, we just had a five-minute to
09:06:04 16 make sure everything is working properly and that
09:06:08 17 I'm feeling comfortable and, you know --
09:06:11 18 Q Okay.
09:06:12 19 A -- ready to do this.
09:06:13 20 Q Did you meet with anyone else affiliated
09:06:18 21 with the Ddrops Company in preparation for today's
09:06:21 22 testimony?
09:06:21 23 A Outside of the Ddrops Company or --
09:06:28 24 Q Affiliated, inside or outside?
09:06:31 25 A In preparation, no. I have met with Ddrops

09:06:41 1 Company in preparation of the declarations that we
09:06:44 2 did, but not to do with today.
09:06:48 3 Q I'm going to drop into the chat window
09:07:11 4 Exhibit 2071.
09:07:14 5 A I've got the chat window open.
09:07:14 6 (Document marked previously as
09:07:20 7 Exhibit 2071 was presented.)
09:07:20 8 BY MR. CONRAD:
09:07:20 9 Q Bear with me.
09:07:25 10 A Okay. So let me open this up. It's
09:07:32 11 downloading.
09:07:33 12 Q You can -- apologies. Please delete that
09:07:37 13 one.
09:07:38 14 A Okay.
09:07:41 15 Q Sorry. That is my copy.
09:07:47 16 A All right. It's cleared now.
09:07:49 17 Q Okay. It should be uploading now.
09:08:16 18 A There's nothing there yet. Oh, there.
09:08:22 19 Okay. 14 megabyte file.
09:08:28 20 Q Yes, that's it. Let me know when you have
09:08:31 21 it open.
09:08:31 22 A Just downloading it right now.
09:08:49 23 Q Do you have that open now?
09:08:50 24 A Yes, I do. Yep. It's on my other screen
09:08:54 25 here. Now where did your screen go? The image that

09:09:02 1 we had with everyone from the meeting has
09:09:07 2 disappeared. Just trying to see.
09:09:18 3 MR. PALEN: Was it in your browser?
09:09:25 4 THE WITNESS: Here we go. I got it back.
09:09:28 5 We've got it. It went into my icon for some reason.
09:09:35 6 BY MR. CONRAD:
09:09:40 7 Q Mr. Temovsky, Exhibit 2071 is your
09:09:43 8 declaration that was submitted in this IPR
09:09:47 9 proceeding, correct?
09:09:48 10 A Yes. I just want to see what date this one
09:09:51 11 is because there was -- just want to scroll down to
09:10:04 12 the signoff and the date. Yes, the February 8th
09:10:09 13 declaration, correct.
09:10:09 14 Q Have you submitted any other declarations in
09:10:17 15 connection with this IPR proceeding?
09:10:20 16 A There was a declaration that was done in the
09:10:23 17 summer of 2023, June of 2023.
09:10:30 18 Q Let me drop into the chat window
09:10:36 19 Exhibit 2004.
09:10:36 20 (Document marked previously as
09:10:36 21 Exhibit 2004 was presented.)
09:10:49 22 THE WITNESS: I'm looking for the chat
09:10:50 23 window. Okay. Exhibit 2004. I'm just downloading
09:11:09 24 it and I'm trying to open that one up. There it is.
09:11:28 25 Okay. So we've got 2004 and 2071 on my screen to

09:11:40 1 the right.

09:11:41 2 Q Great. And Exhibit 2004 is the declaration
09:11:46 3 that you were referring to that you submitted in
09:11:50 4 June of 2023?

09:11:52 5 A Correct. June 28, 2023, yes.

09:11:55 6 Q Okay. Great. Let's talk about your
09:12:05 7 background briefly.

09:12:07 8 A Sure.

09:12:07 9 Q How did you end up working for the Ddrops
09:12:18 10 Company?

09:12:18 11 A I had a career in pharmaceuticals and
09:12:26 12 towards the end of my corporate career in
09:12:29 13 pharmaceuticals, I was looking to start a company.
09:12:34 14 And I had come to meet Reinhold and Elaine Vieth who
09:12:44 15 had this interesting product and they were looking
09:12:46 16 to start a company as well and we decided to form a
09:12:51 17 partnership and started our Ddrops Company.

09:12:56 18 Q How did you meet Dr. and Mrs. Vieth?

09:13:03 19 A I met them through a colleague of mine who
09:13:08 20 worked with me at Solvay Pharmaceuticals. When that
09:13:14 21 company was closed, we were still in touch and he
09:13:20 22 had moved on to a different role. And he had
09:13:25 23 mentioned that he was aware of a couple that had an
09:13:32 24 interesting product and they were looking to take it
09:13:34 25 to market. So he put me in touch with them, their

09:13:39 1 name. I remember looking them up in the Yellow

09:13:43 2 Pages and I contacted them.

09:13:45 3 Q About what time was that?

09:13:46 4 A That was around the end of 2006, beginning
09:13:54 5 of 2007, somewhere there.

09:13:57 6 Q Were you aware of whether or not they had
09:14:00 7 filed for a patent application at that time?

09:14:03 8 A At that time, when I made my first phone
09:14:09 9 call to them?

09:14:10 10 Q Yes.

09:14:13 11 A No, I wasn't aware.

09:14:14 12 Q At what -- were you involved at all in the
09:14:23 13 decision for the Vieths to file for a patent
09:14:27 14 application?

09:14:28 15 A No.

09:14:28 16 Q Was that something that was already done
09:14:31 17 before you began working in earnest with them?

09:14:37 18 A I was aware of the patent. It would have
09:14:45 19 been soon after meeting them and understanding the
09:14:51 20 product really and that they had this very
09:14:53 21 interesting IP around it.

09:14:57 22 Q And the patent application that you're just
09:15:10 23 mentioning there, that's a Canadian patent
09:15:12 24 application, is that correct?

09:15:13 25 A Yes, right.

09:15:15 1 Q In your declaration, Exhibit 2071, I believe
09:15:24 2 you refer to a Canadian Patent Number 2,578,881 in
09:15:34 3 paragraph 14 of your declaration?

09:15:37 4 A Paragraph 14. Let me just go to that
09:15:39 5 paragraph. November 4th, 2008, yes.

09:15:49 6 Q That's the patent you were just referring
09:15:54 7 to?

09:15:54 8 A It would have been the Canadian patent. I
09:15:57 9 had heard about this patent that Dr. Vieth had
09:16:01 10 applied for and that would be the patent that at the
09:16:09 11 time was what I referred to, yes.

09:16:11 12 Q Okay. So that patent -- the application for
09:16:15 13 that Canadian patent was filed on September 14,
09:16:25 14 2006. And that was, you say, before you met with
09:16:31 15 Dr. and Mrs. Vieth to start forming the company?

09:16:34 16 A Yeah, I did not know them that far back.

09:16:38 17 Q What are you aware of as to how Dr. Vieth
09:16:50 18 and Mrs. Vieth came up with the idea that ultimately
09:16:56 19 led to their patent?

09:16:58 20 A Well, what I'm aware of is Elaine is a
09:17:03 21 registered nurse and -- Elaine Vieth, and she had
09:17:10 22 hands-on experience with infant feeding and had
09:17:16 23 noticed that when it came to vitamin D in Canada,
09:17:21 24 that the technology -- the leading product here was
09:17:28 25 a really inferior technology and there had to be a

09:17:32 1 better way to deliver vitamin D. And in speaking
09:17:36 2 with her husband, he looked at it critically and
09:17:44 3 came up with an absolutely elegant delivery profile
09:17:49 4 with the product that we market right now, the one
09:17:53 5 drop vitamin D and unique delivery system.

09:17:57 6 Q At that time in 2006, there was no one drop
09:18:08 7 vitamin D delivery system on the market in Canada,
09:18:14 8 correct?

09:18:16 9 A 2006, no, there wasn't because I had a
09:18:23 10 two-year-old at that time and the only vitamin D
09:18:27 11 that we could give her was the D-vi-sol.

09:18:33 12 Q And D-vi-sol was a liquid medication that
09:18:39 13 provided via dropper, is that right?

09:18:42 14 A Yes, it's a liquid emulsified medication and
09:18:46 15 you need one milliliter to dispense one dose with a
09:18:53 16 bulb dropper at the time.

09:18:57 17 Q Were you aware of whether or not in the U.S.
09:18:59 18 in 2006 there was any vitamin D product that
09:19:05 19 delivered a daily dose in one drop?

09:19:08 20 A No.

09:19:09 21 Q At the time in 2006, were you aware of
09:19:13 22 anywhere else in the world of a vitamin D product
09:19:16 23 that delivered a dose in one drop?

09:19:18 24 A No. My scope was Canada.

09:19:22 25 Q Did Dr. Vieth or Mrs. Vieth ever mention to

09:19:30 1 you the existence of other one drop vitamin D

09:19:34 2 products anywhere else in the world?

09:19:35 3 A No.

09:19:36 4 Q I'm curious how the partnership you
09:19:53 5 mentioned was formed. So my first question is did
09:19:59 6 you start the company as a partnership between the
09:20:01 7 Vieths and you or is there some other structure or
09:20:05 8 arrangement?

09:20:06 9 A No, it was -- it was a partnership between
09:20:12 10 myself and Elaine Vieth and Reinhold would assist us
09:20:22 11 with knowledge, guidance. He was always, you know,
09:20:28 12 linked with Elaine. But it was myself and them.

09:20:31 13 Q Who were I guess the equity owners of the
09:20:38 14 Ddrops Company when it was first formed?

09:20:40 15 A When the partnership was first formed, the
09:20:45 16 two equity owners are CSS Pharmaceutica, which is my
09:20:51 17 company, and Fifth -- the Fifth Child, which is
09:20:57 18 Elaine Vieth's company.

09:21:00 19 Q Did Mrs. Vieth have that company prior to
09:21:14 20 the partnership with Ddrops or was that formed in
09:21:15 21 connection with starting Ddrops?

09:21:19 22 A I'm not sure. I think she did have a
09:21:23 23 company and I would -- I would think that was the
09:21:30 24 company, but I'm not 100 percent certain.

09:21:33 25 Q And you said that your company was CSS

09:21:40 1 Pharmaceutical?

09:21:40 2 A Pharmaceutica, yes.

09:21:47 3 Q Are the sole owner or were you the sole
09:21:49 4 owner of that company?

09:21:50 5 A Yes, I was and I am the sole owner of that
09:21:53 6 company.

09:21:53 7 Q How has the structure of Ddrops changed
09:21:59 8 since it was first formed in this partnership?

09:22:01 9 A It has not changed. We're still of equal
09:22:07 10 partners in the Ddrops Company, which is the
09:22:10 11 partnership.

09:22:11 12 Q So Ddrops Company is a partnership, the two
09:22:29 13 partners of Ddrops Company are CSS Pharmaceutica and
09:22:34 14 the Fifth Child, which are companies solely owned by
09:22:40 15 you and Mrs. Vieth respectively?

09:22:44 16 A Yes. CSS is solely owned by myself.
09:22:53 17 Mrs. Vieth owns the Fifth Child, but the structure
09:22:56 18 of the Fifth Child, I'm not certain within their
09:23:00 19 family how that is owned.

09:23:04 20 Q Today your title is co-president, is that
09:23:10 21 correct?

09:23:10 22 A Correct, yes.

09:23:11 23 Q Who is the other president of Ddrops?

09:23:13 24 A The other co-president of Ddrops today is
09:23:17 25 Simon Vieth.

09:23:18 1 Q And who is Simon Vieth?

09:23:20 2 A Simon Vieth is the son of Elaine Vieth and
09:23:26 3 Reinhold Vieth.

09:23:27 4 Q When did he first become involved with
09:23:31 5 Ddrops?

09:23:32 6 A Simon became involved around 2010, 2011 from
09:23:44 7 what I can recall.

09:23:44 8 Q When did he reach the role of co-president?

09:23:52 9 A Co-president was reached when Elaine retired
09:23:59 10 and basically assigned her responsibilities to

09:24:05 11 Simon. So Simon and I operate as partners. That
09:24:12 12 was -- it's been about maybe six, seven years. It
09:24:19 13 was before COVID; somewhere between 2015 and 2020.

09:24:35 14 Q Let's go back to before -- your time before
09:24:47 15 Ddrops when you were working at Solvay
09:24:50 16 Pharmaceuticals. That was where you were working
09:24:57 17 when you left to form Ddrops, is that correct?

09:25:00 18 A That company was shut down and it was where
09:25:06 19 I was working up until my job there was terminated.

09:25:10 20 Q And when was that?

09:25:12 21 A It was 2006, I believe in the fall.

09:25:19 22 Q What was the focus of the products that you
09:25:25 23 were responsible for?

09:25:25 24 A Our top product was a gastrointestinal aid,
09:25:39 25 and then I was responsible for all the products in

09:25:43 1 the company. My role was vice-president of sales
09:25:46 2 and marketing. And so we had heart medication, we
09:25:53 3 had a product for inner ear disease. We had
09:26:02 4 products for -- actually some of the early
09:26:05 5 cannabinoid predecessor products. The company
09:26:14 6 basically was -- oh, and we had a really innovative
09:26:21 7 product for joint disease, topical -- topical
09:26:27 8 diclofenac.

09:26:30 9 Q Prior to Solvay, I understand that you were
09:26:41 10 working at Syntex which had been acquired by Roche,
09:26:47 11 is that right?

09:26:47 12 A Correct, yes.

09:26:48 13 Q What sort of products were you working with
09:26:54 14 there in your role?

09:26:56 15 A At Syntex, well, it started with the
09:27:03 16 blockbuster anti-inflammatory drug Naprosyn and its
09:27:11 17 associated conjugate naproxen sodium also known as
09:27:18 18 Anaprox. I worked on the launch of a very
09:27:21 19 innovative product for stroke therapy, so a product
09:27:26 20 called ticlopidine. I also worked on the pregnancy
09:27:41 21 portfolio, the Synphasic Bredicon which are
09:27:45 22 basically the pill.

09:27:46 23 Q Okay. In your time at Syntex or Roche or
09:27:53 24 Solvay, did you work with any products that were
09:28:00 25 vitamin supplements?

09:28:04 1 A Actually when I was at Roche in primary
09:28:09 2 care, when I was the head of primary care, as part
09:28:14 3 of the Roche portfolio, we had a vitamin product
09:28:18 4 called Redoxin, which is an effervescent vitamin
09:28:23 5 product. And it -- that would have fallen under my
09:28:31 6 portfolio, but it was considered a non-promoted
09:28:34 7 product, but I always found it an interesting -- an
09:28:38 8 interesting product.

09:28:40 9 Q What do you mean by effervescent?

09:28:44 10 A It's basically a tablet that you put into a
09:28:47 11 cup of water. It dissolves and you drink it.

09:28:52 12 Q Okay.

09:28:54 13 A A very old Roche product actually. Roche,
09:29:00 14 as I came to learn when I was there, they actually
09:29:04 15 had back in their origin a vitamin product.

09:29:12 16 Q So let's go back to Mrs. Vieth. Why is it
09:29:23 17 that if they are both named inventors on this patent
09:29:27 18 that you ended up in a partnership just with her and
09:29:30 19 not with the three of you or just with Dr. Vieth,
09:29:34 20 for example?

09:29:37 21 MR. PALEN: Objection, calls for
09:29:43 22 speculation.

09:29:43 23 BY MR. CONRAD:

09:29:43 24 Q So you can answer, but I will -- I will
09:29:45 25 rephrase the question anyways.

09:29:48 1 Why did Dr. Vieth not join the partnership
09:29:52 2 when Ddrops was formed?
09:29:56 3 MR. PALEN: Objection, calls for
09:30:01 4 speculation.
09:30:01 5 BY MR. CONRAD:
09:30:02 6 Q You can answer.
09:30:02 7 A Can I answer? Elaine was the person that I
09:30:08 8 saw as my working partner. She -- it's her company.
09:30:15 9 She's, you know, very entrepreneurial and that was
09:30:20 10 my contact person.
09:30:23 11 Q If Dr. Vieth has a co-ownership of the
09:30:31 12 patent, what reasons are you aware of why he
09:30:38 13 wouldn't be an equity co-owner of the company?
09:30:45 14 A I don't understand the question. Can you
09:30:50 15 just put that to me again?
09:30:53 16 Q Sure. I'm just trying to understand the
09:30:55 17 dynamics of the relationship because Dr. Vieth and
09:31:00 18 Mrs. Vieth, to my understanding, are the co-owners
09:31:06 19 of the patent so they have an equal share in the
09:31:10 20 rights of the patent. But when it came to
09:31:15 21 commercializing it and forming a company to
09:31:19 22 commercialize that patent, Dr. Vieth doesn't seem to
09:31:25 23 have his own individual share in the company. Do
09:31:29 24 you know why that is?
09:31:30 25 A I don't know why that is. That would be a

09:31:33 1 question for Mrs. Vieth in terms of how the Fifth
09:31:40 2 Child Company is structured.

09:31:43 3 Q So you're not familiar with the ownership
09:31:46 4 structure of the Fifth Company?

09:31:49 5 A I'm not -- in terms of detail, no. I don't
09:31:57 6 know -- I know the family is involved in it, the
09:32:00 7 children are involved in it, but I don't know what
09:32:03 8 the structure is.

09:32:04 9 Q To your knowledge, which individuals have a
09:32:09 10 financial interest in the Ddrops Company? And by
09:32:17 11 financial interest, I'm referring to an ownership in
09:32:21 12 profits or equity, that type of financial interest.

09:32:25 13 A From how I see it, it's Elaine Vieth and on
09:32:29 14 my day-to-day over the last years, it's Simon.

09:32:33 15 Q And how is it that Simon has a share in the
09:32:43 16 profits or equity?

09:32:48 17 A When we have -- we talk about the financial
09:32:55 18 situation of the company, the profitability, the
09:32:58 19 loss, when we have our meetings with accountants,
09:33:02 20 the person that I meet with with our accountants is
09:33:06 21 Simon, Simon Vieth.

09:33:09 22 Q I'm going to drop into chat a new exhibit.

09:33:09 23 (Document marked previously as

09:33:09 24 Exhibit 1017 was presented.)

09:33:40 25 ///

09:33:40 1 BY MR. CONRAD:

09:33:57 2 Q This is Exhibit 1017.

09:34:11 3 A Just downloading it.

09:34:36 4 Q Do you have that open?

09:34:37 5 A Yes, I do.

09:34:38 6 Q Okay. Exhibit 1017 is the Canadian patent
09:34:43 7 application that we were referring to earlier. What
09:34:48 8 role did you play in the prosecution of this patent
09:34:56 9 between the time of filing to its issuance by the
09:34:58 10 Canadian Patent Office?

09:35:02 11 A When was the time of filing, David?

09:35:05 12 Q The filing was -- on here it says
09:35:10 13 September 2006. And then the issuance, according to
09:35:15 14 your declaration, was November 4, 2008.

09:35:25 15 A November 4, 2008. Okay. So your question
09:35:32 16 was what was my role in this patent?

09:35:37 17 Q Yes, in the prosecution of the patent at the
09:35:40 18 Canadian Patent Office, if any role?

09:35:44 19 A The only role I would have had -- nothing in
09:35:52 20 2006 that I can recall. Well, I didn't know about
09:35:57 21 it in 2006, '07. There was one patent infringement
09:36:02 22 case with Atria Labs and that was in 2008. So my
09:36:15 23 involvement, I do recall meetings where we had -- we
09:36:26 24 had to discuss an infringer on the patent in -- it
09:36:35 25 would have been -- I'm thinking it would have been

09:36:37 1 around the end of 2008.

09:36:41 2 Q So after the Canadian patent application
09:36:44 3 issued?

09:36:45 4 A Yeah, it would have been after the -- I
09:36:53 5 believe so, yes.

09:36:55 6 Q Okay. During the prosecution of this
09:37:00 7 application, according to paragraph 15 of your
09:37:04 8 declaration, the Vieths granted an exclusive
09:37:09 9 worldwide license to all patents or patent
09:37:13 10 applications relating to that invention to the
09:37:16 11 Ddrops Company, Inc.?

09:37:19 12 A Right.

09:37:20 13 Q What is the Ddrops Company, Inc.?

09:37:24 14 A The Ddrops Company, Inc. is a separate
09:37:31 15 company -- it does not sell Ddrops -- where the
09:37:36 16 patent technology sits, from what I understand and
09:37:42 17 we were granted an exclusive license to that
09:37:47 18 technology and we pay a royalty.

09:37:50 19 Q Who are the equity owners of the Ddrops
09:38:00 20 Company, Inc.?

09:38:00 21 A The Ddrops Company, Inc., I would think it's
09:38:13 22 Elaine Vieth. In fact, I recall when we were
09:38:18 23 putting the structure together that this is owned by
09:38:27 24 Elaine and I believe we pay a royalty to Elaine.

09:38:31 25 Q Is she the sole equity owner, to your

09:38:35 1 knowledge?

09:38:35 2 A I don't want to speculate, but I believe so.

09:38:47 3 Again, I'm not an expert on the details of the

09:38:52 4 Vieths property ownership. I can speak to mine, but

09:38:57 5 I don't know the family dynamic in detail.

09:39:01 6 Q What is the financial terms between your

09:39:09 7 company, Ddrops, and Elaine's, the Ddrops Company

09:39:14 8 which owns the patent -- or has an exclusive license

09:39:20 9 to the patent? My apologies.

09:39:22 10 A That's okay. We calculate a royalty for the

09:39:27 11 sale of our Patented Product based on the sales that

09:39:36 12 we collect in a given year and then we pay that

09:39:41 13 royalty back to them.

09:39:47 14 Q Is that -- is there a royalty rate

09:39:51 15 associated with that?

09:39:52 16 A Yes, there is.

09:39:54 17 Q What is that?

09:39:57 18 A The royalty rate I believe is on the Redacted

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
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12

Q Can you turn to the exhibit we just were --

09:41:35

13

had up, Exhibit 1017, the Canadian patent

09:41:38

14

application?

09:41:39

15

A Exhibit 1017. Okay. All right.

09:41:46

16

Q Do you see -- if you can turn to the page

09:41:55

17

numbers on the very bottom page, 12.

09:42:04

18

A Page 12.

09:42:06

19

Q Yes.

09:42:10

20

A Page 12. Okay.

09:42:11

21

Q Do you see there are some numbered claims

09:42:14

22

there?

09:42:18

23

A Bottom of page 12. Where it says Example 3?

09:42:25

24

Q No.

09:42:28

25

A Hold on.

09:42:29 1 Q I apologize. You're right. I've got my
09:42:33 2 numbers wrong. I told you something different than
09:42:37 3 what I was doing. The number -- very bottom of
09:42:40 4 page 14 there are numbered claims?

09:42:42 5 A Oh, yes, okay. I see, yes.

09:42:46 6 Q And do you see claim 1 of that patent
09:42:49 7 application is directed to a composition?

09:42:52 8 A A composition comprising vitamin D in a
09:42:58 9 medium-chain triglyceride medium. That claim,
09:43:01 10 correct.

09:43:02 11 Q Yes. So does Ddrops have a patent on the
09:43:08 12 composition of the Baby Ddrops product in Canada?

09:43:14 13 A Ddrops has the license to use the patent.
09:43:20 14 We don't have a patent.

09:43:22 15 Q It was a bad question. My apologies.

09:43:26 16 The Canadian patent application that Ddrops
09:43:29 17 has licensed, that patent has a claim directed to
09:43:35 18 the composition of the Baby Ddrops product, is that
09:43:40 19 correct?

09:43:40 20 MR. PALEN: Objection, calls for a legal
09:43:41 21 conclusion.

09:43:41 22 THE WITNESS: The patent consists of the
09:43:48 23 composition and the use is how I see it.

09:43:53 24 BY MR. CONRAD:

09:43:57 25 Q And that's true for the Canadian patent

09:43:59 1 application, Canadian patent?

09:44:01 2 A Yes, because --

09:44:02 3 MR. PALEN: Objection, calls for a legal
09:44:03 4 conclusion.

09:44:04 5 THE WITNESS: -- we market towards the one
09:44:07 6 drop, clean product and the specific use.

09:44:15 7 BY MR. CONRAD:

09:44:18 8 Q So in your mind, the Canadian patent would
09:44:22 9 not be infringed by a one drop vitamin D product
09:44:27 10 that doesn't describe or is not used to put one drop
09:44:39 11 on the surface of an object for an infant to be
09:44:45 12 sucked from the surface?

09:44:48 13 A If the product was, what, water and it's one
09:44:57 14 drop of water intended to be sucked from the
09:45:01 15 surface, our patent has nothing to do with that.
09:45:03 16 Our patent has to do with one drop of MCT oil placed
09:45:11 17 on the surface and sucked from the surface to remove
09:45:18 18 the product.

09:45:19 19 Q Let me drop into chat Exhibit 1001.

09:45:19 20 (Document marked previously as
09:45:19 21 Exhibit 1001 was presented.)

09:45:44 22 THE WITNESS: Just downloading.
09:45:46 23 Exhibit 1001. This is the United States patent?

09:45:49 24 BY MR. CONRAD:

09:45:49 25 Q This is the United States patent that's at

09:45:56 1 issue in this Patent Office proceeding and in the
09:45:59 2 district court litigation.
09:46:00 3 A Okay.
09:46:01 4 Q And that exhibit, if you can turn to page 6?
09:46:06 5 A Okay.
09:46:07 6 Q You'll see numbered claims there.
09:46:16 7 A Page 6, where it says Example 6, example --
09:46:21 8 okay. The invention claimed is and then there's 1,
09:46:24 9 2, 3.
09:46:26 10 Q Yes.
09:46:26 11 A It goes to 12. Yes, okay.
09:46:29 12 Q Let's look at claim number 1.
09:46:33 13 A All right.
09:46:33 14 Q And you see it begins, "A method of
09:46:37 15 delivering a nutritional or therapeutic amount of
09:46:40 16 vitamin D to a human being, said method comprising"?
09:46:44 17 A Yes, correct.
09:46:45 18 Q And so your understanding is that claim 1 of
09:46:51 19 the -- of this '958 patent is directed to a method
09:46:58 20 of using a composition and not just the composition
09:47:01 21 itself, right?
09:47:03 22 MR. PALEN: Objection, calls for a legal
09:47:05 23 conclusion.
09:47:05 24 THE WITNESS: As I read it, number 1 claim,
09:47:10 25 a method of delivering a nutritional or therapeutic

09:47:13 1 amount of vitamin D to a human being, said method
09:47:18 2 comprising. And then it goes into sub-points 1
09:47:22 3 and 2.

09:47:23 4 BY MR. CONRAD:

09:47:23 5 Q Right. And we were just talking about the
09:47:26 6 Canadian patent. And I believe you were saying that
09:47:32 7 the patent has nothing to do -- it doesn't have -- I
09:47:41 8 don't want to put words in your mouth so I'm trying
09:47:43 9 to make sure I get this correct.

09:47:45 10 You said if the -- if it's not the one drop
09:47:52 11 with medium-chain triglycerides that is delivered on
09:47:59 12 the surface of an object for a person to suck or
09:48:05 13 lick, then it has nothing to do with your patent?

09:48:10 14 MR. PALEN: Objection, calls for a legal
09:48:12 15 conclusion; also misstates the prior testimony.

09:48:15 16 THE WITNESS: No, the example I used, David,
09:48:17 17 was water. You asked me about if you used water --
09:48:22 18 I believe your question was -- I used the example if
09:48:28 19 it's water that's sucked off, does it fit the
09:48:32 20 patent. No, the patent isn't about water. The
09:48:34 21 patent is about vitamin D in MCT oil that's licked
09:48:40 22 or sucked off a clean surface. Right. So I'm
09:48:45 23 trying to understand your question. I'm struggling.

09:48:48 24 BY MR. CONRAD:

09:48:48 25 Q Sure. Is it your understanding that this

09:48:53 1 patent covers a product for delivering vitamin D in
09:49:04 2 MCT oil using any method of providing that oil to
09:49:12 3 the person?

09:49:13 4 MR. PALEN: Objection, calls for a legal
09:49:15 5 conclusion; also ambiguous as to this patent.

09:49:18 6 THE WITNESS: David, which patent are we
09:49:22 7 talking about, the United States one or the Canadian
09:49:25 8 one? I'm getting a little lost here.

09:49:27 9 BY MR. CONRAD:

09:49:28 10 Q Sure. The '958 patent?

09:49:29 11 A The '958 patent which -- hold on. My screen
09:49:33 12 went blank here. That's the U.S. patent?

09:49:36 13 Q Yes.

09:49:38 14 A So my understanding is the patent covers
09:49:44 15 vitamin D in one drop that's licked or sucked off a
09:49:52 16 clean surface.

09:49:54 17 Q And a product that is a vitamin D in MCT oil
09:50:03 18 with a different method of providing that product to
09:50:07 19 the person is not covered by this patent, right?

09:50:11 20 MR. PALEN: Objection, calls for a legal
09:50:13 21 conclusion.

09:50:16 22 THE WITNESS: Like I said, the way I
09:50:23 23 understand the patent is it's one drop of
09:50:26 24 therapeutically useful vitamin D placed on a clean
09:50:32 25 surface that's adhered to that surface and the baby

09:50:37 1 sucks or licks the product off and receives its
09:50:42 2 therapeutic dose. That's what this patent covers.
09:50:44 3 BY MR. CONRAD:
09:50:49 4 Q Can you go to paragraph 18 of Exhibit 2071,
09:50:55 5 which is your declaration.
09:51:01 6 A What page again? Sorry.
09:51:03 7 Q Paragraph 18?
09:51:07 8 A 18, okay. This reads, "Ddrops sells
09:51:11 9 vitamin D supplements."
09:51:13 10 Q Yes.
09:51:14 11 A Okay. Including vitamin D supplements for
09:51:16 12 infants. Okay.
09:51:17 13 Q All right. In your declaration in that
09:51:21 14 paragraph you say that Ddrops sells its Baby Ddrops
09:51:24 15 product and method and then in parenthesis you call
09:51:29 16 that Patented Product?
09:51:29 17 A Patented Product, yeah.
09:51:31 18 Q The U.S. patent, the '958 patent, does not
09:51:38 19 cover just a product, correct?
09:51:44 20 MR. PALEN: Objection, calls for a legal
09:51:46 21 conclusion.
09:51:46 22 THE WITNESS: The patent covers the product
09:51:51 23 and how the product is to be used to deliver a
09:51:54 24 therapeutic dose.
09:51:57 25 ///

09:51:57 1 BY MR. CONRAD:

09:52:04 2 Q I think we agree with each other here, but
09:52:08 3 I'm not getting a "yes" or "no" so I'm trying to
09:52:10 4 figure out where we're differing.

09:52:17 5 The '958 patent, the U.S. patent, is not
09:52:22 6 co-extensive with the Baby Ddrops product alone,
09:52:27 7 right?

09:52:28 8 MR. PALEN: Objection, calls for a legal
09:52:30 9 conclusion.

09:52:30 10 THE WITNESS: What do you mean by
09:52:32 11 co-extensive? Sorry, I don't know that word.

09:52:34 12 BY MR. CONRAD:

09:52:34 13 Q Sure. What I'm saying is the '958 patent
09:52:39 14 requires not only, for example, the Baby Ddrops
09:52:42 15 product, but a particular method of using the
09:52:44 16 product as well, right?

09:52:46 17 MR. PALEN: Objection, calls for a legal
09:52:47 18 conclusion.

09:52:47 19 THE WITNESS: Product and use, yes.

09:52:52 20 BY MR. CONRAD:

09:52:53 21 Q And someone that just purchases the Baby
09:52:57 22 Ddrops product is not using the patented invention
09:53:03 23 of the '958 patent, right?

09:53:06 24 MR. PALEN: Same objection.

09:53:08 25 THE WITNESS: Somebody that purchases the

09:53:10 1 product, the way I see it, is looking to get a
09:53:15 2 therapeutic dose of vitamin D. If they read the
09:53:18 3 directions, which are clear on the product, it
09:53:22 4 consists of placing that product onto a clean
09:53:28 5 surface such as a nipple or a washed hand and
09:53:34 6 sucking the product or licking the product off that
09:53:36 7 clean surface so that you can deliver a therapeutic
09:53:41 8 dose.

09:53:44 9 BY MR. CONRAD:

09:53:48 10 Q This is going to be in your declaration.
09:53:50 11 Let me find the exhibit.

09:53:59 12 A The 2024 declaration, correct?

09:54:02 13 Q Yes, Exhibit Number 2071. If you can turn
09:54:06 14 to -- on the bottom right there are -- there's a
09:54:12 15 footer and then the last number is a page number.
09:54:16 16 If you can turn to page 51.

09:54:21 17 A 51. 51, it's a picture of our bottle up top
09:54:35 18 and a bottle and carton at the bottom. Is that the
09:54:38 19 page?

09:54:38 20 Q Yes. And this is the Baby Ddrops product
09:54:40 21 that we were just describing, right?

09:54:43 22 A Yes.

09:54:43 23 Q What you called the Patented Product?

09:54:45 24 A The Patented Product, correct.

09:54:46 25 Q Can you turn to the next page, page 52?

09:54:49 1 A Uh-huh, okay.

09:54:52 2 Q And this shows the sides of the package

09:54:56 3 carton with the list of ingredients and the

09:55:00 4 directions, correct?

09:55:01 5 A Correct.

09:55:01 6 Q And the directions state, "For infants less

09:55:10 7 than one year old, place one drop daily on to a

09:55:14 8 mother's nipple or on a clear surface such as a

09:55:17 9 washed finger and allow baby to suck for at least

09:55:21 10 30 seconds. "

09:55:21 11 That's what you were just referring to,

09:55:22 12 right?

09:55:23 13 A Yes, correct.

09:55:23 14 Q It also provides an alternate instruction of

09:55:28 15 "Or mix one drop daily with milk, juice or other

09:55:33 16 food," correct?

09:55:34 17 A Yes, it says that.

09:55:35 18 Q So if someone were to use the alternate

09:55:38 19 instruction of mixing one drop daily with milk,

09:55:41 20 juice or other food, they would not be using the

09:55:45 21 '958 patent, right?

09:55:46 22 MR. PALEN: Objection, calls for a legal

09:55:48 23 conclusion.

09:55:48 24 THE WITNESS: Well, if you're -- as the

09:55:52 25 directions state, infants less than one year old,

09:55:57 1 place one drop. So they would not be giving an
09:55:59 2 infant less than one year old milk, juice or other
09:56:05 3 food. You don't do that.

09:56:07 4 BY MR. CONRAD:

09:56:07 5 Q Well, I agree juice, that would be a bad
09:56:09 6 idea. I'm certain there are some people who do, but
09:56:12 7 you shouldn't.

09:56:14 8 A I've had an infant and you can't go near
09:56:17 9 them with anything like food or even juice. You can
09:56:23 10 cause aspiration. So you got to be so careful when
09:56:26 11 they're tiny.

09:56:28 12 Q We're not talking about newborns here.
09:56:31 13 We're talking about infants less than one year old.
09:56:34 14 To your understanding, do infants less than one year
09:56:37 15 old drink milk from a bottle or eat any sort of
09:56:42 16 solid or pureed food?

09:56:46 17 A If they're -- if they're less than one year
09:56:49 18 old and they're a neonate, no. You know, unless
09:56:53 19 there's a specific bottle designed to feed them, you
09:56:59 20 don't give a tiny newborn baby food.

09:57:03 21 Q I'm not asking about a tiny newborn baby
09:57:07 22 here. I'm asking about an 11-month old, for
09:57:11 23 example. An 11-month old, you would agree, can
09:57:15 24 drink milk out of a bottle, right?

09:57:17 25 A It's possible, sure.

09:57:18 1 Q And an 11-month old can receive solid food
09:57:25 2 such as pureed food at the very least, right?
09:57:27 3 MR. PALEN: Objection, calls for
09:57:29 4 speculation.
09:57:29 5 THE WITNESS: It's possible.
09:57:30 6 BY MR. CONRAD:
09:57:30 7 Q I mean, you are a father, right?
09:57:31 8 A I am, yeah.
09:57:32 9 Q And you had a child, at least one, right?
09:57:36 10 A I have.
09:57:37 11 Q And so you are familiar with the fact that
09:57:40 12 an infant less than one year old, such as an
09:57:46 13 11-month old, can receive Ddrops as one drop mixed
09:57:52 14 with milk or other food, right?
09:57:54 15 A An 11-month old, I could see that, yes.
09:57:58 16 Q Okay. So then someone using that method
09:58:02 17 would not be using the claimed invention of the '958
09:58:08 18 patent, right?
09:58:08 19 MR. PALEN: Objection, calls for a legal
09:58:10 20 conclusion.
09:58:10 21 THE WITNESS: Again, our claim is one drop
09:58:17 22 off a nipple or a clean surface sucked to deliver
09:58:21 23 the effective dose.
09:58:24 24 BY MR. CONRAD:
09:58:25 25 Q So then you agree that if someone follows

09:58:29 1 the alternate instructions on the packaging of Baby
09:58:32 2 Ddrops, that they would not be using the claims of
09:58:37 3 the '958 patent, right?

09:58:39 4 MR. PALEN: Objection, calls -- Chris,
09:58:42 5 please let me get in objections before you answer.
09:58:45 6 Thanks. Objection, calls for a legal conclusion.

09:58:48 7 THE WITNESS: I agree that one drop on the
09:58:51 8 nipple or a clean surface is different than one drop
09:58:59 9 on a food item.

09:59:02 10 BY MR. CONRAD:

09:59:03 11 Q Okay. And so my question was different
09:59:07 12 about -- it wasn't whether they were different. It
09:59:10 13 was this: You agree that the '958 patent is not
09:59:18 14 used by someone that follows the alternate
09:59:20 15 instructions on the label of the Baby Ddrops
09:59:25 16 product, right?

09:59:26 17 MR. PALEN: Objection, calls for a legal
09:59:28 18 conclusion.

09:59:28 19 THE WITNESS: I'm sorry. I still don't
09:59:33 20 understand your question. You know --

09:59:36 21 BY MR. CONRAD:

09:59:36 22 Q Which part don't you understand?

09:59:38 23 A What am I -- what are you trying to get me
09:59:41 24 to agree to? I don't understand. They're two
09:59:45 25 different things. We're saying there's the patented

09:59:49 1 use and product and patent and use and all that, and
09:59:55 2 then there's an alternate way that if you wanted to
09:59:58 3 use the product this way, you're free to use it.
10:00:02 4 Right.

10:00:05 5 But in the case of the infant product, which
10:00:09 6 is what we're looking at here, the -- you can see it
10:00:14 7 says specifically designed for breastfed babies.
10:00:17 8 That is the way this product is intended to be used.

10:00:24 9 Q So I think I understand that you're saying
10:00:41 10 that if you follow the instructions in the first
10:00:45 11 sentence of the directions on the box of the Baby
10:00:49 12 Ddrops product that you would be using the '958
10:00:56 13 patent -- patented method, right?

10:00:58 14 MR. PALEN: Objection, calls for a legal
10:00:59 15 conclusion.

10:00:59 16 THE WITNESS: Yes, infants less than one
10:01:05 17 year old, place one drop daily onto mother's nipple
10:01:08 18 or on a clean surface such as a washed finger and
10:01:12 19 allow baby to suck for at least 30 seconds.

10:01:16 20 BY MR. CONRAD:

10:01:17 21 Q But someone using the method of the second
10:01:19 22 sentence in those directions would not be using the
10:01:22 23 patented method of the '958 patent?

10:01:25 24 MR. PALEN: Objection, calls for a legal
10:01:30 25 conclusion.

10:01:30 1 THE WITNESS: I think I've already said what

10:01:33 2 the intended patented use is. And I read it out.

10:01:37 3 BY MR. CONRAD:

10:01:37 4 Q Right. And the second sentence of the

10:01:42 5 directions on the Baby Ddrops product packaging is

10:01:47 6 not the intended use of the '958 patent, right?

10:01:51 7 MR. PALEN: Objection, calls for a legal

10:01:53 8 conclusion.

10:01:53 9 THE WITNESS: It's an alternate use. It's

10:01:57 10 an alternate way of using the product, but it's not

10:02:03 11 the intended use of the product.

10:02:05 12 BY MR. CONRAD:

10:02:15 13 Q I'm going to drop into the chat window a new

10:02:19 14 exhibit.

10:02:19 15 (Exhibit 1030 marked for

10:02:21 16 identification.)

10:02:21 17 BY MR. CONRAD:

10:02:36 18 Q Apologies.

10:02:48 19 A There's four items there right now.

10:02:50 20 Q Right. Bear with me.

10:02:52 21 A Go ahead.

10:02:53 22 Q I'm dropping into the chat window

10:03:11 23 Exhibit 1030. Let me know when you're there.

10:03:30 24 A It's downloading right now. All right.

10:03:48 25 Q Do you have this open?

10:03:51 1 A Yes, I do.

10:03:52 2 Q I'll represent to you that yesterday, I went
10:03:57 3 to Amazon and I pulled up the product page for the
10:04:01 4 Baby Ddrops product and that is what we see in
10:04:07 5 Exhibit 1030.

10:04:09 6 A Okay.

10:04:09 7 Q Does this look familiar to you?

10:04:12 8 A Yes, yeah.

10:04:13 9 Q And I'll note that here on the left side
10:04:29 10 around the middle of the first page, there is a
10:04:34 11 figure or an image that says "Simply place one
10:04:38 12 drop." Do you see that?

10:04:38 13 A I see it, yes.

10:04:39 14 Q All right. And then there are some
10:04:42 15 instructions that are advertised here on the right
10:04:47 16 of that figure and the first one says "directly onto
10:04:50 17 nipple." Do you see that?

10:04:51 18 A I see it, yes.

10:04:52 19 Q And that is the intended use of the '958
10:04:57 20 patent, right, or that is one example?

10:05:00 21 A That is one example, directly onto nipple
10:05:03 22 and onto a clean surface down below.

10:05:06 23 Q Okay. Good. So we'll go through each one
10:05:09 24 of these. The second one says, "Into a drink." Do
10:05:13 25 you see that?

10:05:14 1 A Yes, I do.

10:05:14 2 Q And that shows a figure of one drop being
10:05:18 3 placed into a bottle with a nipple cap that you put
10:05:23 4 on top?

10:05:23 5 A Correct, yes.

10:05:25 6 Q And I think we agree with each other that
10:05:30 7 that into a drink method is not the intended use of
10:05:33 8 the '958 patent, right?

10:05:35 9 MR. PALEN: Objection, calls for a legal
10:05:36 10 conclusion.

10:05:36 11 THE WITNESS: It's a convenience that's
10:05:40 12 offered.

10:05:41 13 BY MR. CONRAD:

10:05:42 14 Q And the third one at the bottom it says,
10:05:45 15 "Onto a clean surface." And I think you already
10:05:49 16 testified that that third method in Exhibit 1030 is
10:05:54 17 an intended use of the '958 patent?

10:05:58 18 MR. PALEN: Objection, calls for a legal
10:06:00 19 conclusion. Chris, please let me get the objections
10:06:03 20 out.

10:06:03 21 THE WITNESS: Okay, sorry.

10:06:05 22 BY MR. CONRAD:

10:06:05 23 Q Yes. It's also important just for him to
10:06:09 24 get the objections, but for the transcript to be
10:06:11 25 clear too so it will help if you pause. So I'll

10:06:15 1 repeat the question.

10:06:17 2 The third method shown on Exhibit 1030, it

10:06:21 3 says "Onto a clean surface" and my understanding is

10:06:25 4 that you agree that that is an intended use of the

10:06:30 5 '958 patent?

10:06:31 6 MR. PALEN: Objection, calls for a legal

10:06:32 7 conclusion.

10:06:32 8 THE WITNESS: Yes, onto a clean surface is

10:06:37 9 covered by the patent.

10:06:38 10 BY MR. CONRAD:

10:06:39 11 Q And an example of a clean surface that is

10:06:42 12 intended by the '958 patent is a spoon, right?

10:06:47 13 MR. PALEN: Objection, calls for a legal

10:06:51 14 conclusion.

10:06:51 15 THE WITNESS: In this image there is a

10:06:53 16 spoon.

10:06:55 17 BY MR. CONRAD:

10:06:56 18 Q And that's an example of one of the clean

10:06:58 19 surfaces that can be used by the Baby Ddrops product

10:07:04 20 for using the '958 patent, correct?

10:07:08 21 MR. PALEN: Objection, calls for a legal

10:07:09 22 conclusion.

10:07:09 23 THE WITNESS: It's just an image of

10:07:14 24 presumably a clean surface.

10:07:16 25 ///

10:07:16 1 BY MR. CONRAD:

10:07:19 2 Q And this product page is maintained by
10:07:23 3 Ddrops, isn't it?

10:07:25 4 MR. PALEN: Objection, foundation.

10:07:28 5 THE WITNESS: This product page is actually
10:07:33 6 -- it's maintained by Amazon. We just have access
10:07:37 7 to populating it with our images and things provided
10:07:46 8 Amazon approves.

10:07:47 9 BY MR. CONRAD:

10:07:49 10 Q That was what I was getting at. The product
10:07:53 11 description and the marketing copy and the images
10:07:58 12 for the Baby Ddrops product are all provided by
10:08:02 13 Ddrops in this exhibit, correct?

10:08:03 14 A In this exhibit, yes, yeah. We use various
10:08:11 15 images. We've had -- this one -- this image we've
10:08:16 16 had an image of a finger similar to what's on our
10:08:20 17 packaging. So we offer different types of images of
10:08:26 18 a clean surface. The key is clean surface.

10:08:32 19 Q And why is that important?

10:08:34 20 A From a hygienic standpoint. The nipple is
10:08:40 21 obviously the most preferred clean surface because
10:08:43 22 the baby can latch on easiest on the nipple.

10:08:48 23 Q Can you go back to your declaration,
10:09:26 24 Exhibit 2071, please, and turn to paragraph 35.

10:09:30 25 A 2071. Paragraph 35, yes. The one that

10:09:51 1 starts "Ddrops Patented Product was truly
10:09:54 2 revolutionary," right?
10:09:58 3 Q Yes.
10:10:00 4 A Okay.
10:10:00 5 Q In the second sentence you say -- and I'm
10:10:05 6 not going to read the whole sentence here. I'll
10:10:08 7 stop so we can talk about the first part.
10:10:09 8 It says, "Before Ddrops introduced its
10:10:12 9 Patented Product" -- and that's referring to the
10:10:15 10 Baby Ddrops product -- "no other company had ever
10:10:18 11 offered in the United States or Canada a product
10:10:20 12 that has a composition that includes only vitamin D3
10:10:26 13 in MCT oil" and in parentheses "(fractionated
10:10:32 14 coconut oil)."
10:10:33 15 Do you see that?
10:10:33 16 A Yes, I do.
10:10:35 17 Q If I were to stop there, you would agree
10:10:38 18 that that's still a true statement, right?
10:10:39 19 A Well, you have to continue the rest of the
10:10:43 20 sentence. "And instructs that one drop is to be
10:10:47 21 placed on the exterior surface of an object that it
10:10:51 22 adheres to, and giving the object to allow the drop
10:10:56 23 to be sucked and licked." That complete paragraph,
10:11:01 24 yes, I agree to that.
10:11:04 25 Q Okay. Well, then I'm trying to understand

10:11:07 1 if just part of that's true.

10:11:11 2 Is it true that before Ddrops introduced

10:11:14 3 Baby Ddrops, no other company in the U.S. or Canada

10:11:18 4 had a product that has a composition -- had a

10:11:21 5 composition with only vitamin D and MCT oil?

10:11:26 6 MR. PALEN: Objection, calls for

10:11:28 7 speculation.

10:11:28 8 BY MR. CONRAD:

10:11:29 9 Q To your knowledge?

10:11:29 10 A To my knowledge, I can't recall seeing such

10:11:34 11 a product. You know, what we have was very

10:11:46 12 revolutionary. I said that right at the start of

10:11:50 13 paragraph 35, the Ddrops Patented Product was truly

10:11:53 14 revolutionary in the infant and baby vitamin

10:11:57 15 supplement industry.

10:11:59 16 Q In the U.S. and Canada, right?

10:12:03 17 A This is where I operate, yes.

10:12:06 18 Q Well, I just want to make sure I understand

10:12:09 19 the scope of what you're claiming because I'm not --

10:12:12 20 I'm not going to quibble with you. I just want to

10:12:16 21 understand what you're trying to say here.

10:12:19 22 You're not saying that the Baby Ddrops

10:12:22 23 product is a truly revolutionary product in the

10:12:30 24 entire world, right? And I'm talking about the

10:12:34 25 product itself, the one drop vitamin D in MCT oil.

10:12:43 1 A To the best of my knowledge, we're the
10:12:46 2 first. I've never seen a product like this anywhere
10:12:49 3 else, but where I operate, which is Canada
10:12:54 4 principally and in the U.S., and then we've gone to
10:12:57 5 other countries as well, I've not seen anything like
10:13:01 6 our product. Like this is a truly revolutionary
10:13:04 7 product.

10:13:05 8 Q So are you aware of all of the vitamin D
10:13:11 9 products that are offered in Germany, for example?

10:13:14 10 A No.

10:13:15 11 Q So if something was sold there or offered
10:13:21 12 for prescription in Germany, you wouldn't be aware
10:13:24 13 of that, right?

10:13:26 14 A I don't operate in Germany. I operate in
10:13:30 15 Canada, out of Canada.

10:13:34 16 Q In addition to the U.S. and Canada, in what
10:13:36 17 other countries is Ddrops marketing and selling its
10:13:44 18 Baby Ddrops product?

10:13:45 19 A UK is an important market that we've been in
10:13:52 20 for about the last ten years. Australia we've been
10:13:58 21 in for about the last four years; recently Chile,
10:14:10 22 South Korea, China. You know, those are kind of the
10:14:18 23 main countries where we operate.

10:14:20 24 Q When Ddrops first launched its Baby Ddrops
10:14:45 25 product, was it marketed as organic?

10:14:53 1 A When we first --
10:14:54 2 MR. PALEN: Objection.
10:14:55 3 THE WITNESS: Sorry.
10:14:56 4 MR. PALEN: Objection, ambiguous as to what
10:14:58 5 country the launch is in.
10:14:59 6 THE WITNESS: I was just going to ask what
10:15:02 7 country.
10:15:02 8 BY MR. CONRAD:
10:15:02 9 Q Sure. My question was just absolute, right.
10:15:05 10 So I'll state in the U.S. or Canada, when it
10:15:08 11 launched in the U.S. or Canada first, was it
10:15:11 12 advertised as -- marketed as organic?
10:15:15 13 A I'll frame for Canada. When we launched in
10:15:17 14 Canada, it was not -- it was not marketed as
10:15:22 15 organic.
10:15:23 16 Q What about in the U.S.?
10:15:26 17 A When we first launched, it was not organic.
10:15:35 18 And it was through ongoing product development and
10:15:38 19 iterations that we went into organic MCT oil when it
10:15:45 20 became available.
10:15:47 21 Q When did the organic version of Baby Ddrops
10:15:52 22 first launch?
10:15:55 23 A Organic would have been somewhere between
10:16:00 24 2015, '16 and 2020. That's when it became available
10:16:09 25 to us as a product -- a core product feature,

10:16:16 1 ingredient.

10:16:17 2 Q Apologies. I don't mean to interrupt.

10:16:20 3 Continue.

10:16:21 4 A Yeah, that's when we learned about organic
10:16:25 5 as an option to us.

10:16:30 6 Q That was a big range. I think you said
10:16:34 7 about 2015 to 2020. Is it closer to 2020?

10:16:40 8 A I would have to check with our production
10:16:44 9 people or records to see when we purchased the first
10:16:51 10 -- the first oils.

10:16:52 11 Q Can you turn to Exhibit 2004 which is the
10:17:22 12 earlier declaration that you submitted.

10:17:24 13 A Exhibit 2004, okay. All right, David. I'm
10:17:32 14 here.

10:17:33 15 Q Can you turn to -- the page numbering on the
10:17:37 16 bottom, can you turn to page 22?

10:17:44 17 A 22. Page 22, okay. An image of our carton.

10:17:57 18 Q Yes. The Baby Ddrops carton, correct?

10:18:00 19 A Baby Ddrops carton, yes, correct.

10:18:03 20 Q And you see at the top that this was
10:18:06 21 submitted in litigation and filed with the court
10:18:10 22 March 8th, 2017?

10:18:11 23 A Okay, yeah.

10:18:12 24 Q And if you continue onto the next page, 23,
10:18:19 25 the next page 24, 25 and 26, 27, 28 -- I guess it

10:18:32 1 goes on to page 30.

10:18:33 2 A Yeah.

10:18:34 3 Q These are all different figures of the
10:18:35 4 carton and the bottle --

10:18:37 5 A Yes.

10:18:38 6 Q -- of Baby Ddrops at that time, right?

10:18:41 7 A Correct, yeah.

10:18:42 8 Q So at least by 2017, you had not launched
10:18:49 9 the organic version of Baby Ddrops, right?

10:18:52 10 A Well, see this product that is -- that we're
10:18:57 11 talking about here, I noticed the expiry date is
10:19:03 12 2019 on page 26. And I also noticed it says, we've
10:19:14 13 printed here with our laser printer, U.S. patent
10:19:19 14 '958. So this suggests to me that this was probably
10:19:22 15 one of the early batches that we did around 2015,
10:19:29 16 2016 that has -- right around the time we received
10:19:34 17 the U.S. patent. So the reason that I'm kind of
10:19:39 18 thinking it's that vintage is because we have a four
10:19:43 19 years expiry on the product. So 2019,
10:19:46 20 September 2019, you back out four years, you're at
10:19:51 21 what, '15 -- 2015. So this vintage would have been
10:19:58 22 about 2015 product; 2015, maybe early 2016, right.
10:20:11 23 And sorry, your question was?

10:20:13 24 Q Sure. I'm just trying to get -- help you
10:20:16 25 narrow down the launch of the organic version.

10:20:19 1 Okay.

10:20:20 2 A Okay, yeah. 2015, '16, there was no organic

10:20:25 3 -- we didn't have any organic oil, so this would

10:20:29 4 have been our traditional MCT oil.

10:20:33 5 Q Can you turn to page 93 of Exhibit 2004?

10:20:51 6 A Okay.

10:20:52 7 Q This is a picture from -- I believe it's the

10:21:05 8 NPPA?

10:21:06 9 A NPPA, product parent awards, yes.

10:21:10 10 Q And the image for Baby Ddrops in that

10:21:16 11 screenshot doesn't market the product as organic,

10:21:21 12 right?

10:21:21 13 A Correct. I don't see the organic flag on

10:21:24 14 it.

10:21:24 15 Q And the printed date from that web page is

10:21:29 16 March 22, 2017, which is on the bottom right, is

10:21:34 17 that correct?

10:21:34 18 A That is the date I see on the bottom right.

10:21:36 19 Q If you'd turn to page 97.

10:21:44 20 A Okay. 97, yeah.

10:21:48 21 Q Same thing. There's an image of Ddrops

10:21:58 22 being sold and it doesn't show that it's being

10:22:01 23 marketed as organic, right?

10:22:04 24 A This image I don't see the organic flag on

10:22:08 25 it. Now, this is, I believe, the -- was this for an

10:22:15 1 award or is this somebody's website? What is it?

10:22:19 2 Q It looks like it's the Green Choice Award
10:22:22 3 Winners on well.ca?

10:22:26 4 A Yeah. Well, that image -- that image does
10:22:29 5 not show the organic, but it could be, you know -- I
10:22:36 6 don't know if Well had updated their images or not,
10:22:41 7 but yeah, that image -- to your question, that image
10:22:46 8 does not show the organic flag.

10:23:21 9 MR. CONRAD: Let's take a break.

10:23:25 10 (Short recess.)

10:33:23 11 BY MR. CONRAD:

10:33:38 12 Q I'm going to drop into the chat window
10:33:43 13 Exhibit 1031.

10:33:43 14 (Exhibit 1031 marked for
10:33:45 15 identification.)

10:33:45 16 BY MR. CONRAD:

10:33:54 17 Q Please let me know when you have that open.

10:33:55 18 A Downloading. 1031. Just -- okay, 1031.

10:34:09 19 Q I'll represent to you that while we were on
10:34:11 20 break, I went to the internet archive and I went to
10:34:15 21 an archived product page on Ddrops' website for Baby
10:34:24 22 Ddrops. And what I printed out was -- is
10:34:27 23 Exhibit 1031. Okay?

10:34:31 24 A Okay.

10:34:34 25 Q You'll see on the bottom left there's the

10:34:36 1 web address where this came from. You'll see it
10:34:39 2 says web.archive.org and then there's some numbers
10:34:45 3 there. It starts off 20210920. Do you see that?
10:34:52 4 A Yes, I do, yeah.
10:34:53 5 Q So I'll represent that this came from an
10:34:57 6 archived page dated September 2021. All right. Got
10:35:05 7 that?
10:35:05 8 A I don't know about archiving and dates, but
10:35:08 9 yes, that's what I'm reading here.
10:35:10 10 Q All right. That's my representation to you.
10:35:12 11 I'm not asking you to agree with me yet. Okay?
10:35:14 12 A Okay.
10:35:15 13 Q And then at the end of that URL at the
10:35:19 14 bottom is the vitaminddrops.com web page that this
10:35:25 15 came from. Okay.
10:35:28 16 A Where is that?
10:35:29 17 Q On the bottom left.
10:35:32 18 A On page 9?
10:35:34 19 Q On the first page.
10:35:35 20 A Oh, on the first page. Okay. Hang on. I'm
10:35:47 21 on the first page.
10:35:49 22 Q Do you see the bottom left of Exhibit 1031?
10:35:52 23 A Exhibit 1031, bottom left, HTTP -- oh, yeah,
10:35:59 24 webarchive.org and then vitaminddrops.com U. S.
10:36:04 25 products. Okay, I follow what you're saying. It's

10:36:07 1 all in the same line. Yes.

10:36:08 2 Q Okay. And vitaminddrops.com is Ddrops' own
10:36:16 3 website, correct?

10:36:16 4 A Yes, it is, yeah.

10:36:17 5 Q And so this -- according to this, as of
10:36:23 6 September 2021, Baby Ddrops was not marketed with an
10:36:28 7 organic label. Do you see that?

10:36:30 8 A Well, it was -- this image does not show the
10:36:36 9 organic label.

10:36:38 10 Q Okay.

10:36:40 11 A You said was marketed. Marketed and what
10:36:43 12 this image shows are two different things. This
10:36:46 13 image does not show the organic label, you're
10:36:50 14 absolutely right on that. But how we marketed it in
10:36:54 15 2021, I don't agree to that.

10:36:58 16 Q All right. Well, in the bottom left, that
10:37:03 17 URL where it says vitaminddrops.com, it says
10:37:08 18 vitaminddrops.com/us-en/products/baby-ddrops.

10:37:16 19 Do you see that?

10:37:17 20 A Right. Yes, I do.

10:37:18 21 Q So you would understand this to be the main
10:37:22 22 product landing page for the U.S. market for Baby
10:37:28 23 Ddrops, right?

10:37:29 24 A Yes, I would, yeah.

10:37:31 25 Q And so on that page, as of September 20,

10:37:36 1 2021, there was no indication that Baby Ddrops was
10:37:41 2 an organic product, right?
10:37:43 3 A On this page on that date, no. Correct.
10:37:49 4 Q And that's true throughout all of
10:37:53 5 Exhibit 1031, there's no indication that Ddrops was
10:37:58 6 advertised here as an organic product, right?
10:38:03 7 A Let me just check the pages. Yeah, there's
10:38:22 8 nothing here that speaks to advertising or noting
10:38:29 9 the organic feature on this page, correct.
10:38:32 10 Q And the image of the product carton and the
10:38:36 11 product label don't feature the organic label,
10:38:41 12 right?
10:38:42 13 A I don't see the organic label here on this
10:38:44 14 page, correct.
10:38:45 15 Q When you looked at the figures that you
10:38:50 16 provided in your declaration, your recent
10:38:53 17 declaration of Exhibit 2071, on page 51 --
10:39:01 18 A Hang on, let me go to 2071, page 51. Right,
10:39:13 19 yeah. It has the organic. It has the organic, yes.
10:39:19 20 Q So it's fair to say then that sometime
10:39:24 21 between 2021 and now is when Baby Ddrops started
10:39:30 22 labeling its product as organic?
10:39:35 23 A No, I don't think you can -- you can deduce
10:39:38 24 that.
10:39:40 25 Q Well, I'm just trying to get the actual fact

10:39:43 1 of when this happened. So so far from what we've
10:39:47 2 seen, we have not seen an organic label from Ddrops
10:39:52 3 prior to 2021, correct?

10:39:55 4 A We're looking at one image of the product
10:39:59 5 website. And from that one image of the product
10:40:02 6 website, it was not there, yes. That I can agree
10:40:09 7 to.

10:40:10 8 Q You're not able to tell me with any more
10:40:14 9 certainty today when Ddrops changed its label to be
10:40:21 10 organic?

10:40:22 11 A I think I mentioned earlier I can find out
10:40:24 12 for you, but at this point I don't know that date.

10:40:29 13 Q What major changes were made to vitamin D
10:40:40 14 drops since its launch, original launch?

10:40:46 15 A It has basically stayed the same. The
10:40:51 16 ingredients are the same. We've -- from time to
10:40:59 17 time the imagery maybe has gotten better, the
10:41:03 18 printing's gotten better. The organic feature came
10:41:08 19 in. We've won all kinds of awards. We try to
10:41:14 20 highlight those. It's basically the same product
10:41:21 21 right from the beginning.

10:41:23 22 Q So other than the change to an organic
10:41:27 23 sourcing of the MCT oil, has there been any other
10:41:33 24 change to the Baby Ddrops product composition or its
10:41:40 25 delivery device, the bottle?

10:41:44 1 A No. I can tell you the bottle has not --
10:41:48 2 it's always been that glass bottle, plastic cap, the
10:41:54 3 Euro dropper or D dropper in it. And the vitamin D
10:42:02 4 -- it's basically two ingredients, it's the MCT oil
10:42:06 5 and vitamin D. So there's -- sure, we've had
10:42:12 6 improvements to the labels over time, better
10:42:16 7 embossing of the box so that it looks a little more
10:42:21 8 appealing, better coloring, better graphics. Just
10:42:25 9 more -- same images, but just better -- we've done a
10:42:30 10 better job of the retail-facing image of the box
10:42:35 11 over time.

10:42:35 12 Q But as far as change to the composition or
10:42:45 13 the bottle itself, apart from the labeling, the
10:42:49 14 organic sourcing is the only major change?

10:42:54 15 A Yeah, that's -- from an evolutionary
10:42:57 16 standpoint, that's the only thing that we -- you
10:43:01 17 know, seeing that the market was calling for more
10:43:04 18 organic-type products over time and, you know, from
10:43:08 19 what I can vaguely recall, you know, they were very
10:43:16 20 expensive at one point and the pricing got better.
10:43:20 21 And we figured, sure, why not evolve into having
10:43:23 22 that as an added product feature.

10:43:27 23 Q Did Ddrops need to change its supplier in
10:43:31 24 order to obtain an organically sourced MCT oil?

10:43:37 25 A I'm not sure if we changed supplier. I

10:43:43 1 would -- I would think we didn't. It was just
10:43:45 2 something that the supplier offered us. And if --
10:43:52 3 you know, again, at a price that made sense so we
10:43:56 4 took it.

10:43:57 5 Q All right. Let's go back to your
10:44:16 6 declaration, Exhibit 2071.

10:44:18 7 A 2071, okay.

10:44:20 8 Q Here you're discussing predecessor products
10:44:26 9 to Baby Ddrops.

10:44:28 10 A What page, David?

10:44:30 11 Q It is page 10, paragraph 37.

10:44:37 12 A Oh, yeah. Okay.

10:44:39 13 Q It says, "These kinds of predecessor
10:44:41 14 products."

10:44:42 15 A Were typically given directly into the
10:44:45 16 mouth, yes.

10:44:45 17 Q By use of a tool, right?

10:44:48 18 A Yeah. Go ahead.

10:44:52 19 Q Sorry. And so these predecessor products in
10:44:56 20 the U.S. and Canada involved a plastic or glass
10:45:01 21 dropper being inserted into the container and
10:45:04 22 drawing a desired dose, right?

10:45:06 23 A Correct.

10:45:07 24 Q And then Baby Ddrops, when it launched
10:45:12 25 didn't use a tool to deliver the dose, right?

10:45:14 1 A Correct, yes.

10:45:15 2 Q It uses what's called a Euro dropper bottle?

10:45:19 3 A Yes. It's integrated -- the mechanism is
10:45:23 4 integrated into the top of the bottle and the cap
10:45:27 5 actually. So when you tighten down the cap, that
10:45:32 6 piece stays in the glass bottle and you take the cap
10:45:35 7 off and you can dispense. Very clean, very elegant
10:45:39 8 way of delivering product.

10:45:41 9 Q Let me make sure I understand that. So what
10:45:47 10 happens when you close the cap? What does the cap
10:45:50 11 do?

10:45:50 12 A So when you build the product, you have a
10:45:56 13 glass bottle, you fill it with the MCT and
10:46:03 14 vitamin D. When you cap it, the cap has the Euro
10:46:09 15 dropper built right into it on first use. So as
10:46:12 16 you're tightening and sealing the bottle, the Euro
10:46:16 17 dropper stays in the bottle. Then you can remove
10:46:19 18 just the cap with the Euro dropper staying inside
10:46:23 19 and you can dispense. So it's a really, really
10:46:27 20 elegant way of sealing the product and offering a
10:46:31 21 dispense mechanism.

10:46:32 22 Q Okay. So during manufacturing, then you've
10:46:36 23 got the glass bottle, it's filled with the
10:46:38 24 composition or filled some -- partway with the
10:46:41 25 composition. And then you take the cap and then

10:46:45 1 screw it on?

10:46:47 2 A The virgin cap, the brand new cap, when you
10:46:51 3 screw it on, it screws that Euro dropper to the
10:46:55 4 exact proper lip dimension so that it seals it and
10:47:01 5 caps the product. So when you go to dispense, that
10:47:04 6 inner piece still stays adhered on the inside of the
10:47:10 7 bottle. Just the cap comes off.

10:47:12 8 Q So when a customer buys it, they will remove
10:47:15 9 the cap but that insert is now still part of the
10:47:20 10 bottle?

10:47:21 11 A Yes.

10:47:21 12 Q And seals the bottle. And then when you
10:47:24 13 turn the bottle over, that dropper is integrated
10:47:30 14 with the bottle and can release a drop?

10:47:32 15 A Perfectly put, yes.

10:47:33 16 Q I had always heard this.

10:47:36 17 A David, there could be a sideline for you
10:47:40 18 here in manufacturing.

10:47:41 19 Q I've always heard the term Euro dropper. I
10:47:45 20 didn't quite understand what that meant. So thank
10:47:47 21 you.

10:47:48 22 But that's different than using a tool like
10:47:50 23 a syringe or an external dropper that you must
10:47:54 24 insert every time to administer, right?

10:47:56 25 A Yeah, like the D-vi-sol, for instance, back

10:48:02 1 in the day, they had a traditional bulb dropper. It
10:48:05 2 was like a glass pipette with a plastic bulb, rubber
10:48:09 3 bulb. And then over time, they evolved into a
10:48:13 4 syringe device. So like we're -- when we came out
10:48:20 5 with this one drop, you know, on the nipple, baby
10:48:24 6 latches on, gets its feeding, gets its vitamin D, it
10:48:27 7 was like how can this be. This is -- like that's
10:48:31 8 it. I remember, you know, at shows you'd
10:48:35 9 demonstrate it and they'd be like, that's it. Like
10:48:38 10 where is the dropper? Why don't we need any of that
10:48:41 11 stuff. You don't need it because by design, it's a
10:48:45 12 better way to deliver.

10:48:48 13 Q The Euro dropper is a better way to deliver
10:48:51 14 that?

10:48:51 15 A One drop. It's a better way to deliver the
10:48:53 16 dose because it's just one drop. See, you can't do
10:48:57 17 it with their products because of the volume.
10:49:01 18 D-vi-sol you need one milliliter. Our product,
10:49:06 19 Patented Product is one drop. So how do you deliver
10:49:09 20 one drop with precision. You know, you don't do
10:49:13 21 that with a device. You do that with the Euro
10:49:15 22 dropper, one drop. The product adheres to the
10:49:19 23 nipple and when the baby latches on, they get their
10:49:23 24 feeding and they get their vitamin D at the same
10:49:26 25 time. It's just brilliant. Like it's an elegant,

10:49:30 1 elegant way of delivering a therapeutic dose.

10:49:34 2 Q Let's talk about MCT oil. Okay?

10:49:39 3 A Sure.

10:49:40 4 Q When Baby Ddrops launched, there were no
10:49:43 5 other vitamin D products that used MCT oil as the
10:49:51 6 carrier, right?

10:49:52 7 A In Canada, none that I'm aware of. Actually
10:49:56 8 anywhere, I'm not aware of MCT being used anywhere.

10:50:00 9 Q For vitamin D?

10:50:01 10 A For vitamin D. There are all kinds of other
10:50:03 11 oils, but not MCT.

10:50:05 12 Q And you're not saying that this was the
10:50:08 13 first supplement to use MCT oil ever, right?

10:50:12 14 A I don't know about other supplements to the
10:50:15 15 degree I do vitamin D.

10:50:18 16 Q Okay. And MCT oil has a property -- several
10:50:29 17 properties, one of which is that it doesn't have an
10:50:32 18 unpleasing or displeasing flavor, right?

10:50:35 19 A That's a huge one because a lot of the other
10:50:38 20 oils have colors, tastes, scents that are very
10:50:45 21 off-putting. MCT is a very neutral flavor profile.
10:50:50 22 You don't really detect it which is, you know, what
10:50:55 23 is so key, as one of its many features.

10:50:59 24 Q And another feature of the MCT oil is that
10:51:04 25 it's stable? It doesn't have a tendency to go

10:51:08 1 rancid like other oils, is that right?

10:51:09 2 A Yes, stability. It doesn't -- it doesn't
10:51:14 3 oxidize as quick as, you know, corn or sunflower or
10:51:20 4 olive oils. And it also has a very, very unique
10:51:24 5 adherence property. It behaves very uniquely for
10:51:33 6 how we're using it in particular in the patented
10:51:36 7 approach. It adheres to the nipple. It adheres to
10:51:39 8 that clean surface so that when the baby latches on,
10:51:44 9 it can lick it off and get the dose. So it's just a
10:51:49 10 brilliant -- it's a brilliant oil really.

10:51:51 11 Q And unlike the liquids, like water or
10:51:55 12 D-vi-sol which would just spill right off of
10:51:59 13 whatever surface you put it on?

10:52:01 14 A Well, one drop of D-vi-sol, first of all,
10:52:04 15 doesn't deliver the therapeutic dose, but it's a
10:52:06 16 greasy, viscous-type product. It doesn't have any
10:52:10 17 adhesion. MCT has -- it's almost like this freaky
10:52:16 18 property of you can put one drop and it stays where
10:52:19 19 you put it, right. So it's a brilliant thing
10:52:24 20 really.

10:52:47 21 Q Can you turn to paragraph 47 of Exhibit 2021
10:52:55 22 your declaration?

10:52:56 23 A 2021 or 2071?

10:52:58 24 Q 2071. My apologies.

10:53:00 25 A Say it again, 40 --

10:53:03 1 Q Paragraph 47.

10:53:06 2 A 47, okay. "Another competitor at the time

10:53:12 3 Ddrops entered the market was Zarbee's Baby

10:53:17 4 Vitamin D supplement." That one?

10:53:18 5 Q Yes.

10:53:20 6 A Great.

10:53:21 7 Q Zarbee's also was a product before Baby

10:53:27 8 Ddrops that used MCT oil, right?

10:53:29 9 A I believe so, yes.

10:53:30 10 Q But it differed in a few ways, one of which

10:53:34 11 is that it was not a one drop product, right?

10:53:37 12 A Right. You needed a syringe and they had --

10:53:41 13 and they still have like a very odd dose. I believe

10:53:44 14 it's a quarter of a syringe. You need to suck --

10:53:49 15 open the bottle, suck it up, get it into the baby,

10:53:53 16 compress it into the baby. It's sort of a variation

10:54:00 17 of the D-vi-sol approach with a device to deliver

10:54:06 18 the therapeutic dose. There are -- I don't really

10:54:15 19 see them as a competitor. They're there, but it's

10:54:21 20 not really -- it's not an elegant way of delivering

10:54:23 21 vitamin D to an infant.

10:54:25 22 Q Let's go to paragraph 62.

10:54:52 23 A Okay. "The Patented Product has also

10:54:54 24 received prestigious awards." That one?

10:54:58 25 Q Yes. So paragraph 62 through 66 discuss

10:55:04 1 various awards. Were you involved in the process of
10:55:14 2 obtaining or receiving these awards?

10:55:17 3 A As head of sales and marketing, yes. We
10:55:22 4 definitely -- I was involved and my team and I did a
10:55:29 5 lot of work to get what was needed for these awards.

10:55:33 6 Q So that's a question that I realize I didn't
10:55:37 7 ask you earlier. You're co-president today. What
10:55:40 8 has been your role at Ddrops since formation? Has
10:55:43 9 it always been co-president or have you always
10:55:46 10 had --

10:55:47 11 A Yeah, I've always been co-president and I
10:55:50 12 head up sales/marketing and to a degree distribution
10:55:53 13 as well.

10:55:54 14 Q And these awards that you mention here,
10:55:59 15 these are all awards that Ddrops had to prepare an
10:56:05 16 application for and pay an application fee to
10:56:07 17 receive, right?

10:56:09 18 A I believe, yes, they all have some
10:56:13 19 formality. You need to fill out a form. You know,
10:56:17 20 a lot of times the advertisers put these companies
10:56:22 21 in touch with manufacturers and they contact us and
10:56:26 22 say, hey, we've got this award in your area. Would
10:56:31 23 you like to, you know, run for it this year? Here's
10:56:34 24 the form. You fill it out. Sometimes I think they
10:56:38 25 are free. But I do remember writing, you know, an

10:56:43 1 entry fee or whatever for some of these over the
10:56:47 2 years.

10:56:48 3 Q And each of these awards is sort of an
10:56:54 4 advertising and marketing tool, right, where when
10:56:57 5 you receive the award, you get some promotional
10:57:03 6 effort by the award giver to advertise or sell your
10:57:08 7 product, right?

10:57:09 8 A Well, you know, David, it's actually -- what
10:57:11 9 they give you is the moniker, the logo, the use of
10:57:16 10 that logo on your advertising or on your product
10:57:21 11 packaging. They themselves don't market. The
10:57:26 12 companies that do these reviews, they -- you know,
10:57:29 13 generally they form a panel of experts and they put
10:57:32 14 these products out to them that get submitted. And
10:57:36 15 the experts select which is going to be the winning
10:57:42 16 product of the period or the year or whatever. But
10:57:46 17 they don't really market them. They give us the
10:57:48 18 opportunity to then use the logo in our advertising
10:57:53 19 or promotion or in some cases like the Mom's Choice
10:57:58 20 on the product itself.

10:57:59 21 Q How did you come across these awards? Were
10:58:03 22 they identified for you by an advertising agency?

10:58:07 23 A Actually, you know, when I think back to
10:58:11 24 doing the trade shows, I can recall some of the reps
10:58:21 25 for these awards walking around and saying, hey,

10:58:23 1 we're in the baby space. Would you like to submit
10:58:26 2 your product for our award for next year or
10:58:30 3 whatever. So they would actually like come right up
10:58:33 4 to your booth and, you know, here's a package. You
10:58:36 5 might want to consider it.

10:58:38 6 And it was weird, you know. Like once we
10:58:43 7 won one, it's like that awards group, it's like they
10:58:48 8 all watch who is winning what award and you start
10:58:51 9 getting more and more invitations to these awards.
10:58:56 10 And you know, I believe -- I believe that's probably
10:59:00 11 how this all kind of started. And, you know, we
10:59:07 12 don't sign up to every one of them, but the ones
10:59:12 13 that sort of make sense that are in the infant baby
10:59:15 14 space or mom space, you know, if it's not too
10:59:20 15 daunting, why not.

10:59:21 16 Q You mentioned that there might be an expert
10:59:26 17 panel associated with some of these. Do you know
10:59:29 18 what kind of experts actually review the Ddrops
10:59:34 19 product for any of these awards?

10:59:37 20 A No. I'm too distant from knowing how those
10:59:43 21 awards operate. Outside of, you know, whatever we
10:59:48 22 filled in the form which was mostly product
10:59:51 23 information, I don't know how they operate.

10:59:55 24 Q In paragraph 62, at least for the Mom's
11:00:02 25 Choice Awards, you mention in the third line from

11:00:06 1 the last, that it says "where each item is judged on
11:00:11 2 its own merit."

11:00:13 3 Do you see that?

11:00:14 4 A Let's go to that. MCT -- originality and
11:00:23 5 cost, where each item is judged on its own merit.

11:00:27 6 Yeah, whatever is submitted, I'm sure they get
11:00:29 7 judged on their own merit.

11:00:32 8 Q And that means that it's not that Ddrops is
11:00:37 9 compared to other vitamin D products on the market,
11:00:40 10 right? It's just looking at the Ddrops product
11:00:43 11 itself?

11:00:48 12 A I'm trying to -- judged on its own merit
11:00:55 13 would be the product itself, yes.

11:00:57 14 Q All right. Let's go to paragraph 67.

11:01:09 15 A Okay. "Based on my 35 years of experience"?
11:01:20 16 That one?

11:01:21 17 Q Yeah. You say, "Each of the
11:01:25 18 above-referenced awards occurred because of Ddrops'
11:01:30 19 innovative features, specifically the use of the one
11:01:32 20 drop method of administration of vitamin D to
11:01:35 21 deliver a therapeutic dose."

11:01:36 22 Do you see that?

11:01:37 23 A Yes, I do.

11:01:38 24 Q Not specifically the method of putting one
11:01:47 25 drop on a nipple, for example, right?

11:01:50 1 A We're talking about the awards?

11:01:55 2 Q Yes.

11:01:55 3 A Above-referenced awards occurred of Ddrops'
11:02:00 4 innovative features, specifically the use of the one
11:02:03 5 drop method of administration of vitamin D to
11:02:06 6 deliver a therapeutic dose. One drop method of
11:02:10 7 administration of vitamin D to deliver a therapeutic
11:02:13 8 use to me means one drop on the nipple. Baby
11:02:18 9 latches on. It suckles. It gets its feeding and
11:02:23 10 its therapeutic level of vitamin D. So that's --
11:02:28 11 you know, that's to me how you deliver a therapeutic
11:02:30 12 dose.

11:02:32 13 Q But you don't know that, in fact, that that
11:02:38 14 specific method is the reason that these awards were
11:02:41 15 given, right?

11:02:43 16 A Well, we said up above on its merit. This
11:02:48 17 to me is a significant merit of our Patented
11:02:53 18 Product.

11:02:53 19 Q Right. But there's also other ways of using
11:02:56 20 the product, correct?

11:02:59 21 A Not if we're specifically talking about
11:03:03 22 delivering a therapeutic dose to an infant.

11:03:07 23 Q Do you think that parents testing these
11:03:11 24 products for the awards are going to be aware of
11:03:16 25 what is required to deliver a therapeutic dose to

11:03:20 1 the infant based on all of the instructions and the
11:03:25 2 label?

11:03:25 3 MR. PALEN: Objection, calls for
11:03:27 4 speculation.

11:03:27 5 THE WITNESS: I believe parents will have
11:03:33 6 been instructed by their physician or nurse that
11:03:36 7 they need to supplement. They need to supplement
11:03:40 8 based on the guidelines at 400 international units.
11:03:44 9 And that if they look at this product based on its
11:03:50 10 merits, which is one drop on the nipple delivering a
11:03:54 11 therapeutic dose, I think they will clearly see that
11:03:56 12 this is a very convenient, easy, and accurate way to
11:04:03 13 deliver a therapeutic dose to an infant of
11:04:07 14 vitamin D, especially if you compare it to what else
11:04:18 15 is out to D-Vi-Sol or we talked about the Zarbee's
11:04:22 16 product. But if you were comparing these on a
11:04:24 17 panel, we're hands down, you know, a unique, elegant
11:04:32 18 way of delivering the needed dose.

11:04:36 19 BY MR. CONRAD:

11:04:37 20 Q Right. Those are all not one drop products,
11:04:42 21 right?

11:04:42 22 A No, those are 1 milliliter or I believe in
11:04:45 23 the Zarbee's case it's a 0.25 milliliter. They're
11:04:49 24 like an injectable product.

11:04:52 25 Q Let's go -- let's see here. Let's go to

11:05:17 1 paragraph 78 of Exhibit 2071.

11:05:29 2 A Okay. "By 2018, Ddrops had captured
11:05:33 3 [REDACTED] percent of the U.S. infant vitamin D market"?

11:05:37 4 That one?

11:05:37 5 Q Yes. And the U.S. market share you say
11:05:44 6 reached [REDACTED] percent for the infant vitamin D market
11:05:47 7 in 2019?

11:05:48 8 A Yes, correct.

11:05:49 9 Q And you cite an Exhibit S there?

11:05:52 10 A Exhibit S, yes.

11:05:53 11 Q Let's go to that which is on page 202 of the
11:06:02 12 declaration.

11:06:11 13 A 202. Okay. This is the one starts off with
11:06:25 14 a table United States up top?

11:06:27 15 Q Yes.

11:06:29 16 A Yep.

11:06:29 17 Q I want to make sure I understand what this
11:06:33 18 summary is saying. There's a table here -- two
11:06:38 19 tables. The first table is years 2015 to 2018. And
11:06:47 20 it says Baby Ddrops U.S. sales in row 1 and then
11:06:52 21 percent market change in row 2. Do you see that?

11:06:55 22 A Correct, yes.

11:06:56 23 Q Can you explain what these two rows contain?

11:07:00 24 A Sure. Those contain sales dollars in U.S.
11:07:05 25 dollars pulled from our RSA ex-factory -- ex-factory

11:07:13 1 sales pulled from our RSA accounting system. So
11:07:16 2 those are actuals that we shipped to the United
11:07:22 3 States of the Baby Ddrops product.
11:07:26 4 Q So you say ex-factory sales?
11:07:29 5 A Yes.
11:07:30 6 Q What does ex-factory mean?
11:07:33 7 A Ex-factory means sales destined for the
11:07:40 8 United States that leave our dock, leave our
11:07:43 9 factory.
11:07:43 10 Q And these sales represent the sales for
11:07:49 11 sales for Ddrops products that were actually shipped
11:07:52 12 to the U.S. ?
11:07:53 13 A Actually shipped to the U.S., correct.
11:07:54 14 Q What about the percent market change row,
11:07:57 15 what is that indicating?
11:07:58 16 A So if you take the year forward, divided by
11:08:01 17 the year before, that's how you get the percent. So
11:08:06 18 one minus, you know, the total percent. Redac

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]

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11:10:26 1 five. They're the really well-known products.
11:10:31 2 That's what Nielsen picks up. If you're too small,
11:10:34 3 Nielsen doesn't even pick you up.
11:10:39 4 Q So this is saying in 2018 that [Redacted] percent
11:10:43 5 was the market share that Ddrops had in the --
11:10:49 6 A U.S. market share.
11:10:50 7 Q Sorry. Sorry. What's the category that
11:10:52 8 this is?
11:10:54 9 A Liquid infant vitamin D products.
11:10:57 10 Q Okay. And so Ddrops had a [Redacted] percent market
11:11:00 11 share in the U.S. liquid vitamin D product market?
11:11:04 12 A Correct, yes.
11:11:05 13 Q You said for infants only?
11:11:08 14 A I believe we specify this as infant
11:11:13 15 vitamin D category.
11:11:15 16 Q And then in 2019, that market share
11:11:20 17 [Redacted]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
11:11:34 23 A Correct.
11:11:35 24 Q How did the other competitors -- each of the
11:11:39 25 other competitors compare to Baby Ddrops in 2020?

11:11:46 1 A Well, D-Vi-Sol was -- D-Vi-Sol has kind of
11:11:53 2 had a precipitous drop over time. Zarbee's has --
11:11:59 3 it's kind of held their own. But the one that
11:12:03 4 really took off is the Mommy's Bliss copycat
11:12:08 5 product. As soon as that one came in and started
11:12:12 6 stealing share from us, that's why we got -- we got
11:12:17 7 knocked right out. We got -- you know, by 2021 we
11:12:22 8 were Redacted market share, let alone the growth
11:12:28 9 we would have had by then. So the one that took the
11:12:32 10 business is Mommy's Bliss.

11:12:38 11 Q Well, you said copycat product. What do you
11:12:41 12 mean by copycat product?

11:12:43 13 A Well, the Mommy's Bliss product, when they
11:12:47 14 changed formulation, they went to MCT and the same
11:12:52 15 directions that we have about licking from a nipple
11:12:55 16 or a clean surface. Up until that time, they had, I
11:13:02 17 believe it was a sunflower-based -- it was a
11:13:06 18 sunflower-based and vitamin E product. I've known
11:13:09 19 of Mommy's Bliss on the market for years. But as
11:13:14 20 soon as their MCT copycat, basically a rip-off of
11:13:19 21 our product, came to market, that's when we got cut
11:13:24 22 off at the knees.

11:13:26 23 Q And in your view, is the sunflower oil
11:13:33 24 version of the Mommy's Bliss product a copycat
11:13:37 25 product?

11:13:37 1 A The sunflower version wasn't a copycat --
11:13:41 2 was not a copycat product. To me it was an
11:13:45 3 irrelevant product. There's all kinds of different
11:13:47 4 oil products out there. I was aware of them, but I
11:13:51 5 didn't see them as a competitor. It's when they
11:13:53 6 made the change and we saw this that we knew we had
11:13:57 7 a problem.

11:13:59 8 Q Let me make sure that I have your testimony
11:14:05 9 clear on this. So you're saying that it wasn't
11:14:07 10 until -- you're saying it was when Mommy's Bliss
11:14:13 11 changed its composition to MCT oil that it caused
11:14:21 12 this Redacted?

11:14:25 13 A No. David, I'm saying when they changed
11:14:30 14 their composition and they copied our instructions
11:14:34 15 about the use of the product on their outer box. So
11:14:39 16 it was twofold. It was the composition moving from
11:14:44 17 sunflower to MCT, but it was also when they called
11:14:47 18 out to use the product one drop on the nipple. So
11:14:51 19 basically they ripped us off. It's a complete
11:14:56 20 copycat of Baby Ddrops.

11:14:59 21 Q And so you're saying that together caused
11:15:04 22 the market share to drop in 2020?

11:15:07 23 A From what I can see because I spotted the
11:15:09 24 product in 2021, but you know, we couldn't
11:15:13 25 understand -- you know, when we looked at these

11:15:17 1 numbers, you know, they clearly were out there for a
11:15:20 2 while with the copycat product. And that's why we
11:15:26 3 dropped so much in share.

11:15:29 4 Q And there's nothing else that you can
11:15:31 5 attribute to the drop in 2020?

11:15:35 6 A No.

11:15:38 7 Q Well, let me ask you this. To your
11:15:44 8 knowledge, when did Mommy's Bliss change its
11:15:49 9 composition to MCT oil?

11:15:52 10 A I spotted it in 2021, so it's not farfetched
11:15:58 11 for me to think that they were probably out there
11:16:01 12 for a while. In 2020, I couldn't -- usually when
11:16:07 13 I'm traveling through the U.S., I go to pharmacies,
11:16:10 14 I check products, I check competitors. Because of
11:16:13 15 the pandemic, I couldn't go anywhere so I didn't --
11:16:17 16 I didn't see what's going on in shelf. But they
11:16:22 17 were probably out there for the better part of 2020
11:16:29 18 and, you know, taking our business without us seeing
11:16:31 19 it.

11:16:32 20 Q Would it surprise you that Mommy's Bliss did
11:16:43 21 not change their formula to MCT oil until 2021?

11:16:48 22 MR. PALEN: Objection, assumes facts not in
11:16:51 23 evidence.

11:16:51 24 BY MR. CONRAD:

11:16:51 25 Q Let me do this. Let me drop in a new

11:16:54 1 exhibit. Let me drop in Exhibit 1003.
11:16:54 2 (Document marked previously as
11:17:09 3 Exhibit 1003 was presented.)
11:17:09 4 BY MR. CONRAD:
11:17:09 5 Q Let me know when you have that open.
11:17:10 6 A Yeah. Hang on. 1003, okay.
11:17:30 7 Q 1003 is the Complaint that Ddrops filed
11:17:36 8 against Mommy's Bliss in district court on March 16,
11:17:41 9 2022. Do you see that?
11:17:42 10 A Okay, yeah.
11:17:46 11 Q Can you turn to paragraph 30?
11:17:55 12 A 30. Upon information and belief.
11:18:08 13 Q Yes. Paragraph 30, this is what Ddrops
11:18:10 14 wrote in its Complaint, "Upon information and
11:18:13 15 belief, prior to 2021, MOM sold one or more
11:18:17 16 vitamin D products under the Mommy's Bliss brand
11:18:20 17 which was made using inferior sunflower oil." And
11:18:24 18 then if you see continuing on in paragraph 31, it
11:18:27 19 says, "Upon information and belief, sometime in
11:18:31 20 2021, MOM replaced the inferior sunflower oil used
11:18:36 21 in its Mommy's Bliss Baby vitamin D products with
11:18:42 22 medium-chain triglyceride (MCT) oil."
11:18:45 23 Do you see that?
11:18:45 24 A Yes, I do, yeah.
11:18:46 25 Q So here Ddrops is saying that it wasn't

11:18:51 1 until 2021 that MOM replaced the medium-chain --
11:18:56 2 replaced its composition with MCT oil. So if that
11:19:00 3 were the case, then what else could the drop in 2020
11:19:03 4 be?

11:19:03 5 A Well, it says upon information and belief
11:19:06 6 sometime in 2021. I know how manufacturing works.
11:19:11 7 How do we know? Right. We believe 2021, but it
11:19:16 8 could have been sooner. You know, we weren't able
11:19:20 9 to travel to the U.S. I wasn't able to see what's
11:19:23 10 going on. They're a U.S.-based company. So
11:19:26 11 something could have been going on even before that.

11:19:29 12 Q Okay. I'm not asking you to speculate.

11:19:34 13 If, in fact, Mommy's Bliss did not change
11:19:38 14 its composition to MCT oil until 2021, then what
11:19:42 15 else could have caused the drop in 2020?

11:19:48 16 MR. PALEN: Objection, calls for
11:19:50 17 speculation.

11:19:50 18 THE WITNESS: I don't know.

11:19:53 19 BY MR. CONRAD:

11:19:53 20 Q Okay. Well, let's talk about a few things
11:19:58 21 then. First off, in 2020, Ddrops didn't label its
11:20:04 22 product as organic, but Mommy's Bliss did, right?

11:20:09 23 MR. PALEN: Objection, assumes facts not in
11:20:11 24 evidence.

11:20:12 25 THE WITNESS: I can't recall the dates of

11:20:15 1 when our product started being labeled and available
11:20:19 2 as organic.

11:20:21 3 BY MR. CONRAD:

11:20:21 4 Q But at least for some period of time,
11:20:24 5 Mommy's Bliss was labeled organic, at least since
11:20:28 6 its inception, but there was a period of time where
11:20:32 7 Ddrops was not, right?

11:20:34 8 MR. PALEN: Objection, assumes facts not in
11:20:40 9 evidence.

11:20:40 10 THE WITNESS: We were not organic at the
11:20:43 11 beginning. Like we discussed earlier in 2015, '16,
11:20:49 12 it was not -- organic was not available to us.
11:20:54 13 Organic oil was not available to us.

11:20:57 14 BY MR. CONRAD:

11:21:00 15 Q Do you know what differences or similarities
11:21:05 16 existed between the dropper mechanism that Ddrops
11:21:11 17 uses -- used and that Mommy's Bliss has used?

11:21:16 18 A Well, the Mommy's Bliss product that I
11:21:24 19 recall is in a plastic squeezable bottle, whereas
11:21:29 20 ours is in a glass bottle with an integrated Euro
11:21:35 21 dropper.

11:21:36 22 Q So at least at some point in time, there was
11:21:41 23 a difference between the way in which one drop was
11:21:44 24 administered between the two products, right?

11:21:48 25 A One from -- if you mean by that one from a

11:21:51 1 plastic bottle and one from a glass bottle, yes,
11:21:54 2 they are different in presentation.

11:21:59 3 Q And do you know whether there's any
11:22:03 4 differences or not to the consumer experience
11:22:05 5 between those two different kinds of bottles?

11:22:10 6 A I'm not aware. I think the key is the
11:22:15 7 delivery of one drop.

11:22:17 8 Q I guess you're not aware, meaning you don't
11:22:21 9 know one way or another whether the consumer has a
11:22:24 10 different experience between a glass Euro dropper
11:22:27 11 bottle and a squeeze one drop bottle, right?

11:22:32 12 A I really can't speak to that.

11:22:36 13 Q Where has Ddrops typically been found in
11:22:46 14 retail stores? Which aisle has it been shelved in?

11:22:52 15 A Typically we're in the vitamin aisle. We
11:22:57 16 are in the children's set as it's called, usually
11:23:03 17 very close to D-Vi-Sol.

11:23:07 18 Q Has that always been the case?

11:23:10 19 A Well, in the case of when we sell to natural
11:23:14 20 health food stores, they don't really have a
11:23:18 21 children's section necessarily. So they tend to
11:23:21 22 group all the lettered vitamins, A, B, C, D, into
11:23:27 23 sections where it's, you know, vitamin A, vitamin B.
11:23:30 24 And we're in vitamin D along with tablets and
11:23:33 25 capsules and what have you.

11:23:36 1 Q What about Mommy's Bliss, do you know where
11:23:38 2 it has been shelved over the years?

11:23:41 3 A Mommy's Bliss I've seen also in the baby
11:23:48 4 section, so close to where the infant Tylenol and,
11:23:55 5 you know, products like that are.

11:23:58 6 Q Has Ddrops ever been in the -- shelved in
11:24:03 7 the baby section of retail stores?

11:24:05 8 A Yes. Yeah, actually we have been.

11:24:08 9 Q And when has that occurred?

11:24:11 10 A Well, in Canada some retailers have moved to
11:24:18 11 that type of placement they call it where, you know,
11:24:26 12 we're in the baby set, but we're also in the vitamin
11:24:29 13 set. Ideally it's a dual placement. As a
11:24:33 14 manufacturer, you want to get placed as many places
11:24:36 15 as you can in the store. So we've been in dual
11:24:41 16 placement there.

11:24:43 17 Walmart, where they have baby sets, we're in
11:24:46 18 baby and we're in vitamins. So yeah, we're -- hey,
11:24:53 19 I'll be in any position I can be that makes sense to
11:24:56 20 a buyer, right. More access you have to the
11:25:01 21 product, the better you're going to do.

11:25:03 22 Q Let's talk about the U.S. and timing though.
11:25:05 23 When did Ddrops -- let me make sure I got this
11:25:10 24 right.

11:25:10 25 In the U.S., is Ddrops categorized in the

11:25:14 1 vitamin section or the baby section or both?

11:25:17 2 A It depends on the retailer. So the quick
11:25:21 3 answer to that is both. But we are seen in baby in
11:25:29 4 say Walmart. We're seen in vitamin set in Target.
11:25:34 5 We're seen in the children's vitamin set in CVS. So
11:25:40 6 it depends on the retailer.

11:25:42 7 Q Being placed in the baby section in the
11:25:50 8 U.S., when did that first occur at a retailer?

11:25:54 9 A At any retailer? Well, the one that comes
11:25:57 10 to mind is Walmart baby section and it's been about
11:26:06 11 a year and a half now.

11:26:08 12 Q So it would have been around 2022 or --
11:26:16 13 yeah, about 2022, is that right?

11:26:17 14 A Well, yeah. Usually, you know, placement is
11:26:21 15 one thing but the discussions on placement happen
11:26:24 16 more than a year out, right. The bigger the
11:26:28 17 retailer, the longer it takes. So yeah, I'd say
11:26:32 18 somewhere around that timing.

11:26:33 19 Q And then the -- so prior to that in the
11:26:42 20 U.S., Mommy's Bliss in most U.S. retailers, to your
11:26:47 21 knowledge, would have been in the baby section, but
11:26:49 22 Ddrops would have been in the vitamin section, is
11:26:53 23 that right?

11:26:53 24 A That is right because Mommy's Bliss is --
11:26:57 25 their core product is gripe water. So all of the

11:27:01 1 Mommy's Bliss products tend to kind of congregate
11:27:04 2 around wherever their gripe water is how I see it as
11:27:09 3 a marketer.

11:27:10 4 Q And it's been the case for a long time,
11:27:15 5 until recently, that Mommy's Bliss had a set of
11:27:19 6 baby-oriented products beyond the vitamin D drop
11:27:24 7 product, right?

11:27:25 8 A Uh-huh.

11:27:25 9 Q And it wasn't until very recently that
11:27:28 10 Ddrops had any other product besides its vitamin D
11:27:32 11 product?

11:27:32 12 A Yeah. Our vitamin D is our lead product,
11:27:35 13 correct.

11:27:36 14 Q So up until very recently, Ddrops was only
11:27:41 15 selling vitamin products, right?

11:27:43 16 A Up until last few years, yes.

11:27:46 17 Q So Mommy's Bliss had gripe water as their
11:27:56 18 main product, right?

11:27:57 19 A Yes, they did.

11:27:58 20 Q This year, Ddrops for the first time began
11:28:05 21 selling other products for babies besides vitamin D,
11:28:09 22 right?

11:28:10 23 A Yes, we did.

11:28:11 24 Q What are those products?

11:28:14 25 A We have a product for tummy relief. We have

11:28:21 1 a teething product. We have a cough-type product
11:28:31 2 that comes to mind. I think I got them all. Some
11:28:43 3 are in some markets and not in others.

11:28:49 4 Q I'm going to drop into chat Exhibit 1032.
11:28:49 5 (Exhibit 1032 marked for
11:28:49 6 identification.)

11:29:13 7 THE WITNESS: Nothing here yet.

11:29:14 8 BY MR. CONRAD:

11:29:14 9 Q It should be there now. Exhibit 1032 is a
11:29:30 10 printout from yesterday from Amazon of the Ddrops
11:29:39 11 Baby Tummy Relief product page. Do you see that?

11:29:42 12 A Correct.

11:29:42 13 Q And this Tummy Relief product you're
11:29:48 14 referring to, that's gripe water, right?

11:29:51 15 A It is actually a really innovative take on
11:29:56 16 gripe water.

11:29:57 17 Q What do you mean by that?

11:29:58 18 A Well, if you look at the product features,
11:30:01 19 advantages and benefits compared to gripe water's,
11:30:07 20 it's unique in the sense that it's very, very low
11:30:15 21 volume. It doesn't have any of the challenges that
11:30:24 22 gripe waters traditionally have in terms of being
11:30:26 23 high-volume products. So it's a big -- it's a big
11:30:32 24 advance compared to what's gone on in that industry
11:30:35 25 for years is how I see it.

11:30:37 1 Q What do you mean by high volume and low
11:30:40 2 volume?

11:30:41 3 A Well, traditional gripe water is usually
11:30:48 4 dispensed with either a bulb dropper or with a spoon
11:30:51 5 or whatever, whereas our product, as you can see
11:30:54 6 from the way we describe it here, is just a drop.
11:30:59 7 Just one drop.

11:31:02 8 Q Could you go down to the -- just a moment --
11:31:19 9 page 3 of 9 of Exhibit 1032?

11:31:22 10 A Three, yeah, okay.

11:31:24 11 Q In the product details at the bottom there
11:31:27 12 it says, "Date first available: January 222, 2024"?

11:31:34 13 A Yes.

11:31:34 14 Q And so that's approximately when Ddrops
11:31:38 15 first released this gripe water product, right?

11:31:41 16 A Correct, yeah.

11:31:42 17 Q And I see above that there are other
11:31:45 18 products. There's the baby teething drops and the
11:31:50 19 baby cough spray product?

11:31:52 20 A And then our Baby Ddrops vitamin D, correct.

11:31:57 21 Q And those first two products, the teething
11:32:00 22 and the cough syrup, they were launched about the
11:32:03 23 same time as the gripe water earlier this year,
11:32:05 24 right?

11:32:06 25 A Yes.

11:32:06 1 Q So prior to that date, Ddrops didn't have

11:32:09 2 any other non-vitamin products, right?

11:32:12 3 A No, not in Canada or the U.S.

11:32:24 4 MR. CONRAD: Let's take a break.

11:32:26 5 (Short recess.)

11:43:39 6 BY MR. CONRAD:

11:44:23 7 Q Let's go back to Exhibit 1032, which is the

11:44:27 8 Tummy Relief Liquid Drops Amazon page we were

11:44:30 9 talking about.

11:44:31 10 A Yep.

11:44:32 11 Q On that page on the left side, there is an

11:44:37 12 image where it says, "Just one drop can be licked

11:44:41 13 off a clean surface such as a clean spoon."

11:44:45 14 Do you see that?

11:44:46 15 A Hang on. Let me find that. On the top

11:44:49 16 page, the very first page?

11:44:51 17 Q Yes.

11:45:04 18 A Where did you find that, David? I'm sorry.

11:45:06 19 Q On Exhibit page 1 of Exhibit 1032, the

11:45:11 20 Amazon page, on the left side there is a large

11:45:16 21 image.

11:45:16 22 A On the left side -- yes, yeah, just one drop

11:45:20 23 can be licked off a clean surface such as a clean

11:45:24 24 spoon. Okay, yeah.

11:45:25 25 Q That is one way that Ddrops instructs its

11:45:34 1 customers to administer Tummy Relief Liquid Drops,

11:45:39 2 right?

11:45:39 3 A Specifically Tummy Relief Liquid Drops, yes.

11:45:43 4 That is something that we are showing as a way to

11:45:48 5 deliver the product, the tummy relief product in

11:45:52 6 that image, yes.

11:45:53 7 Q Let's go to -- actually let's turn to a

11:46:14 8 different subject. Let's go back to the market

11:46:22 9 share drop that you identified in 2020.

11:46:28 10 A What page was that again?

11:46:30 11 Q This was your declaration. You were

11:46:33 12 discussing a change in the market share in 2020.

11:46:41 13 You were describing that in paragraph 79.

11:46:50 14 A Paragraph 79. "However, the U.S. growth

11:47:11 15 changed. In 2021, Ddrops' previous market gains

11:47:14 16 dropped by nearly half of its previous gains, Ddrops

11:47:18 17 making up just 16 percent of the infant vitamin D

11:47:21 18 market. See Exhibit S." Yes.

11:47:24 19 Q Apologies. Where are you right now?

11:47:28 20 A Page 24, paragraph 79.

11:47:35 21 Q Okay. Good. Has Ddrops had any trouble

11:47:52 22 maintaining its distribution in U.S. retail stores?

11:47:59 23 A What do you mean by trouble, David?

11:48:01 24 Q Well, let me back up a little bit.

11:48:05 25 So in order to make sales of Baby Ddrops,

11:48:13 1 because Ddrops is not a direct-to-consumer sales
11:48:18 2 organization, it needs to be in stock with retailers
11:48:23 3 who sell the product in its stores, either brick and
11:48:27 4 mortar or virtual, right?

11:48:28 5 A Uh-huh.

11:48:29 6 Q That's correct?

11:48:30 7 A Yes. Yeah, that is correct.

11:48:32 8 Q Okay. So let's talk about brick and mortar.

11:48:37 9 A major chain, such as Target, would need to stock
11:48:46 10 Baby Ddrops in shelves on its stores and also maybe
11:48:51 11 warehouse some of the Ddrops product to restock the
11:48:54 12 shelving, right?

11:48:56 13 A On shelves, online, and in warehouse,
11:48:59 14 correct, yeah.

11:49:00 15 Q And it may be the case that for a major
11:49:05 16 retailer like Target that a product that's on the
11:49:07 17 shelf in some stores is not on the shelf in all the
11:49:10 18 stores, right?

11:49:11 19 A That can happen, yes.

11:49:13 20 Q So that would be an example of what
11:49:18 21 distribution is for a product company where as much
11:49:23 22 as it wants to sell its product to a consumer, it
11:49:26 23 can't make a sale unless that consumer can get to
11:49:29 24 the product on a shelf or in stock in an online
11:49:35 25 store, right?

11:49:36 1 A That's reasonable, yes.

11:49:38 2 Q All right. Has Ddrops at any point lost any
11:49:45 3 distribution in any of its major retailers?

11:49:50 4 A At any point -- well, in the past when we
11:49:59 5 had, for instance, say a matter with Walgreens, we
11:50:06 6 lost distribution soon after that matter. And then
11:50:15 7 we've sort of come back here and there. So yeah,
11:50:20 8 that's the one that comes to mind.

11:50:23 9 Q What about any of the other key retail
11:50:28 10 accounts like Walmart or Target or Amazon?

11:50:32 11 A No, we've been steady on Amazon. Target,
11:50:36 12 we've maintained a presence in Target for years now.
11:50:42 13 Walmart has been -- has been good to us. We've been
11:50:49 14 maintaining good sales there.

11:50:53 15 Q Well, let's talk about the -- let's talk
11:50:56 16 about the brick and mortar stores first.

11:51:01 17 So is Ddrops -- has it always been on
11:51:06 18 shelves in every Target store?

11:51:11 19 A Every? I know when we started, we started
11:51:19 20 with the -- like the largest 2,000 stores. This is
11:51:24 21 many, many years ago. And then over time, as they
11:51:28 22 saw the product doing well, they expanded
11:51:31 23 distribution. I believe current day, if I'm not
11:51:36 24 mistaken, we have full distribution at Target in the
11:51:40 25 vitamin set.

11:51:43 1 Q What about in the past, have there been any
11:51:45 2 changes to the distribution at Target?

11:51:48 3 A We did have two products in there. We did
11:51:54 4 have booster and baby. And when they rationalized
11:52:02 5 their SKU about a year and a half, two years ago,
11:52:08 6 they removed booster but kept baby. And actually
11:52:13 7 gave us -- in most stores now we have a double
11:52:16 8 presence of baby. So they exchanged the slot for
11:52:21 9 booster for two babies because baby's been doing --
11:52:26 10 you know, meets their standards to keep us -- keep
11:52:30 11 us in the set.

11:52:31 12 Q Has Ddrops maintained a presence in every
11:52:39 13 Target store through the entire time that it had an
11:52:42 14 account with Target?

11:52:46 15 A I'm always careful with words like every
11:52:49 16 because I'm not in every Target store to verify
11:52:53 17 that. But our -- my understanding is we've had a
11:53:00 18 good working relationship with Target. So I don't
11:53:05 19 recall any time having an issue with Target and
11:53:09 20 keeping our product in the set we're in.

11:53:14 21 Q Has there been any issues with warehousing
11:53:18 22 the Ddrops product at any of the major retailers?

11:53:22 23 A None that I'm aware of.

11:53:25 24 Q What about Walmart, has Ddrops had shelf
11:53:34 25 space on -- in every Walmart store in the U.S., to

11:53:39 1 your knowledge?

11:53:39 2 A Same thing. We started in the main ones and
11:53:44 3 we've since migrated to, I believe, most of them.

11:53:50 4 And on that question of supply, I know there was a
11:53:54 5 report I saw not long ago about our fill rate and
11:53:58 6 it's like 98, 99 percent. So it's nearly -- into
11:54:02 7 their -- into their system, into their warehouse.

11:54:06 8 So no issue supplying Walmart and I believe
11:54:11 9 our distribution is -- if it's not 100 percent, it's
11:54:18 10 probably pretty close to that in terms of national
11:54:22 11 distribution. But the exact number I can't speak
11:54:25 12 to.

11:54:26 13 Q And that's today, right?

11:54:28 14 A Today, yes.

11:54:29 15 Q When did the Walmart account first -- in the
11:54:33 16 U.S. first get obtained?

11:54:37 17 A About a year and a half ago; under two years
11:54:45 18 ago anyway.

11:54:45 19 Q So prior to 2022, there was no Ddrops in
11:54:52 20 Walmart in the U.S.?

11:54:55 21 A Prior to 2022, no, except for there may have
11:55:00 22 been a test store or something being done for
11:55:04 23 planogram positioning, but I can't speak to
11:55:10 24 specific. But in terms of full rollout with
11:55:14 25 Walmart, no.

11:55:14 1 Q When did Ddrops first obtain a Target
11:55:18 2 account?

11:55:19 3 A Oh, my. David, I'd have to get back to you
11:55:25 4 on the exact date of when they signed on, but I
11:55:29 5 would say it was somewhere between 2016, '15, '16
11:55:39 6 and 2018, somewhere there.

11:55:44 7 Q You said when Ddrops first launched in
11:55:51 8 Target that it wasn't all of the stores, it was a
11:55:55 9 certain number. Is that right?

11:55:57 10 A I believe if I remember correctly, we
11:56:01 11 launched — as a lot of these retailers do, they put
11:56:05 12 you online first just to gauge the product because
11:56:09 13 that's easy to do for them. It's low risk. And
11:56:12 14 then when they saw what the product was doing, they
11:56:17 15 ended up moving it to the larger format stores. So
11:56:23 16 that's where we launched. And then from there it
11:56:26 17 goes more into the rural regional Target stores.

11:56:31 18 Q When did Ddrops first get shelved in a
11:56:34 19 Target brick and mortar store?

11:56:38 20 A David, I'd have to — I'd have to research
11:56:41 21 that for you. I don't know the exact date of when
11:56:43 22 that happened. But it would have been in that time
11:56:47 23 period that I mentioned because we didn't speak to
11:56:49 24 Target prior to that. There was no exposure to
11:56:54 25 Target.

11:56:55 1 Q What was the time period you're referring to

11:56:58 2 there?

11:56:58 3 A Like let's say 2015 to 2018, somewhere

11:57:03 4 there.

11:57:06 5 Q Okay. Let's turn to paragraph 83 of your

11:57:39 6 declaration.

11:57:41 7 A Right. The one that starts "In fact, since

11:57:47 8 2016"?

11:57:48 9 Q Yes.

11:57:49 10 A Any U.S. print television and radio

11:57:52 11 advertisements?

11:57:53 12 Q Yes.

11:57:54 13 A Yes.

11:57:54 14 Q So no print, television or radio, right?

11:58:00 15 A Correct.

11:58:00 16 Q What kind of marketing budget does Ddrops

11:58:09 17 have?

11:58:11 18 A We have a significant marketing budget.

11:58:14 19 Q What channels does that marketing budget

11:58:18 20 focus its resources on?

11:58:20 21 A The focus is on our physician community,

11:58:26 22 nurses, trade shows with pediatricians, nurse

11:58:33 23 practitioners, sampling. Product sampling is quite

11:58:42 24 significant and that is directly to physicians,

11:58:49 25 nurses, hospitals in some cases.

11:58:52 1 Q Is there any sort of internet media budget
11:59:01 2 for marketing?

11:59:04 3 A There is internet media that's done kind of
11:59:08 4 globally. It's not a significant spend. It's more
11:59:16 5 of, you know, showing the features, advantages,
11:59:19 6 benefits, demonstrating the product. But that's not
11:59:24 7 how we really market this. We market in a -- just
11:59:30 8 like the product is innovative, our marketing is
11:59:32 9 very innovative. Coming from pharma, I kind of
11:59:35 10 pride myself on developing a very unique model, how
11:59:40 11 we market Ddrops. And so far it seems to have
11:59:46 12 worked.

11:59:47 13 Q And that model that you're describing,
11:59:51 14 that's a focus on getting it -- on educating
11:59:57 15 physicians and caregivers and the like to have them
12:00:01 16 promote the product for you. Is that the idea?

12:00:03 17 A Yes. It's to demonstrate, you know, how
12:00:06 18 revolutionary the product is in an otherwise stayed
12:00:14 19 area with products that, you know, really can't
12:00:17 20 compete with it. Once they use it and demonstrate
12:00:20 21 it -- we demonstrate to them, they demonstrate to
12:00:23 22 their patients, the patient benefit is so superior
12:00:29 23 compared to everything else that's out there, it's
12:00:31 24 an easy sell. There's no need to generate, you
12:00:37 25 know -- in a traditional sales marketing approach,

12:00:41 1 you know, you're going to the end customer and
12:00:43 2 everything. This is far more powerful because it's
12:00:48 3 -- you know, you're delivering a therapeutic dose of
12:00:51 4 a product with an innovative use and, you know, it's
12:00:55 5 being under the advisement of a healthcare
12:01:01 6 professional.

12:01:01 7 Q Are you familiar at all with how Mommy's
12:01:05 8 Bliss markets its products?

12:01:07 9 A I've seen their booths at some trade shows
12:01:13 10 and I've seen some of the product sampling for the
12:01:21 11 gripe water in publications. But what they do, not
12:01:29 12 -- I haven't paid much attention to Mommy's Bliss
12:01:31 13 until this episode because, quite frankly, I don't
12:01:35 14 see them as a competitor. Like the product that
12:01:38 15 they had previously, you know, we've seen a lot of
12:01:41 16 products like that come and go, so I'm not going to
12:01:44 17 get all excited about an inferior sunflower oil
12:01:48 18 product.

12:01:48 19 It's when they stepped into my space with
12:01:54 20 Ddrops and our Patented Product and its use, that's
12:02:00 21 when, you know, they became very much in my focus.

12:02:04 22 Q So I guess I'm trying to get to whether
12:02:09 23 there are differences between how the two companies
12:02:13 24 spend their marketing and advertising budget. And I
12:02:17 25 think I heard you say that, to your knowledge, MOM

12:02:20 1 does do at least print media, right?

12:02:22 2 A I've seen print media on the gripe water
12:02:25 3 product, yes.

12:02:26 4 Q And what other forms of marketing
12:02:31 5 advertising by MOM have you seen for its products?

12:02:34 6 A I've seen their trade shows, trade show
12:02:38 7 booths where they're giving out leaflets and bags
12:02:42 8 and all that kind of stuff. But oh, I think I've
12:02:48 9 seen them show up on my Instagram feed or Facebook
12:02:57 10 feed, you know, because I look -- I look for the
12:03:01 11 infant space to see what's going on. I've seen
12:03:04 12 something there from MOM.

12:03:09 13 Q So in addition to print media, MOM also does
12:03:16 14 social media marketing?

12:03:18 15 A I've seen it come up on my social media.
12:03:22 16 Whether they do it or it's some algorithm that feeds
12:03:26 17 it over to me, I have no idea about that stuff. I'm
12:03:29 18 not really present on social media. That's a
12:03:33 19 personal choice of mine. I'm -- I got enough stuff
12:03:37 20 going on. I got no time to go through feeds unless
12:03:40 21 it has to do with work.

12:03:42 22 Q I hear you. And then but what you're
12:03:48 23 referring to that you saw, that was a like an
12:03:51 24 official MOM social media account?

12:03:55 25 A David, I have no idea. Like how do you know

12:03:58 1 what's official and what's fake right now on social
12:04:02 2 media? Like somehow it gets directed to me, the odd
12:04:06 3 time I've seen it. And honestly, I don't think I've
12:04:09 4 seen it more than once or twice where it shows up.

12:04:13 5 But I don't really -- outside of what we're
12:04:23 6 doing right now, I don't spend too much time on MOM
12:04:26 7 or my competitors. When they get into something
12:04:30 8 like this, I can tell you it takes a lot of my
12:04:33 9 attention and focus. But I have a business to run
12:04:36 10 and they have a business to run. They run their
12:04:38 11 business, I run my business. That's how I
12:04:41 12 compartmentalize my life. So I don't know how to
12:04:48 13 answer your question to be honest.

12:04:49 14 Q Let's go to paragraph 102 of your
12:05:01 15 declaration.

12:05:07 16 A Page 30, 102, Because I monitor competitor
12:05:12 17 products, I learned about Mommy's Bliss vitamin D
12:05:16 18 product sometime after it started selling its
12:05:19 19 product in the United States in about 2016 or '17.
12:05:24 20 Yes, that's the -- their old inferior sunflower
12:05:32 21 product, yeah. That's been around for a long time
12:05:36 22 in the U.S.

12:05:38 23 Q How did you -- how did you come across that
12:05:42 24 product?

12:05:44 25 A Well, I have this crazy thing about me when

12:05:51 1 I am in the U.S. and I am in this business, I go to
12:05:53 2 pharmacies and retailers, mass retailers. If I was
12:05:58 3 to guess, it was probably in a Target and I saw it
12:06:01 4 because I'm curious about what competitive products
12:06:05 5 are out there.

12:06:07 6 But you know, I've seen a lot of these
12:06:10 7 similar sunflower, olive oil, corn oil products.
12:06:16 8 And at first when I started the business, I'd get
12:06:19 9 excited about every single competitor. But when I
12:06:22 10 see something like that and it's, you know, the
12:06:27 11 sunflower product and, you know, a cute story about
12:06:32 12 a mom starting it and all that, honestly I didn't --
12:06:37 13 I didn't really consider them a competitor. It's
12:06:39 14 like, yeah, nice; you know, bring more attention to
12:06:42 15 vitamin D and the area, but I'm not competing in
12:06:46 16 that space. I have a very different path for how I
12:06:50 17 want to position Ddrops and Baby Ddrops specifically
12:06:55 18 and that's with the healthcare providers. So I
12:06:59 19 didn't really pay much attention to it. I was aware
12:07:01 20 of it.

12:07:02 21 Q So you saw from the packaging in the store
12:07:08 22 that it had sunflower oil, right?

12:07:10 23 A Right.

12:07:10 24 Q Did you also see the instructions that the
12:07:14 25 sunflower oil Mommy's Bliss product had?

12:07:17 1 A Yes, I did.

12:07:18 2 Q And you were aware then that the

12:07:21 3 instructions at that time described putting a drop

12:07:25 4 of sunflower oil vitamin D on a surface?

12:07:29 5 A Yes, yeah, one drop.

12:07:32 6 Q And that didn't bother you?

12:07:33 7 A No. Honestly, sunflower oil product, I've

12:07:39 8 competed. We've successfully shut down several of

12:07:43 9 them here in Canada, different types of oil

12:07:48 10 products. It's a non -- it's a non-competitor as

12:07:53 11 far as I'm concerned. It's inferior. It stinks.

12:07:57 12 It goes rancid. It's got a color. Babies hate it.

12:08:02 13 Baby hates it. Mom hates it. Doctors hate it. Let

12:08:07 14 me them run with it. You know, the best benefit is

12:08:09 15 they're bringing attention to vitamin D with their

12:08:11 16 marketing spend. Wonderful. You know, as soon as

12:08:14 17 somebody sees that Baby Ddrops is the ultimate

12:08:19 18 vitamin D product for use with an infant, it's game

12:08:23 19 over.

12:08:24 20 Q Okay. So then you listed a couple. I just

12:08:28 21 want to make sure I understand all the complaints

12:08:32 22 you've got about it.

12:08:33 23 So a different oil like sunflower oil, what

12:08:36 24 are all the problems with -- or what would you have

12:08:40 25 expected there to be problems with Mommy's Bliss

12:08:45 1 using that oil in its vitamin D one drop product?

12:08:48 2 A Mommy's Bliss using sunflower oil in their
12:08:51 3 vitamin D?

12:08:51 4 Q Yes. Why would you criticize it? What are
12:08:54 5 the problems with it?

12:08:55 6 A As a manufacturer first, before we get into
12:08:58 7 the customer side, as a manufacturer, sunflower oil
12:09:02 8 has a propensity to go rancid very quickly. So
12:09:07 9 number 1, your shelf life is compromised from the
12:09:12 10 get-go. You cannot have a shelf stable product, you
12:09:19 11 know, that won't be susceptible to returns and all
12:09:23 12 kinds of customer charge-backs because it's gone
12:09:26 13 rancid. Okay.

12:09:28 14 Secondly, from a customer use, it is
12:09:31 15 immediately detectable. It's got a weird, stinky
12:09:36 16 smell to it. It has a color right away. It has a
12:09:44 17 greasy viscosity to it. You cannot adhere -- like
12:09:49 18 you cannot put -- I know they say one drop, but you
12:09:53 19 cannot put one drop of sunflower oil on a nipple and
12:09:56 20 expect it to cling there so that the baby latches on
12:10:01 21 and gets its feeding and its vitamin. It's not
12:10:05 22 possible. The characteristics of the oil are not
12:10:08 23 possible, so -- make it not possible.

12:10:12 24 So I would say that, you know, if -- like
12:10:20 25 why anybody would waste their time with a product

12:10:24 1 like that, I don't know. But, you know, people do
12:10:28 2 and maybe they're happy with whatever sales they get
12:10:31 3 and that's fine with them.

12:10:34 4 Q Well, let's be clear. You're not a chemist
12:10:37 5 by training, right?

12:10:38 6 A A chemist? No, no, I'm not a chemist.

12:10:41 7 Q Your background is in business and sales,
12:10:43 8 right?

12:10:43 9 A Business, sales, marketing, yes.

12:10:47 10 Q Did you ever test Mommy's Bliss when it had
12:10:54 11 the sunflower oil and see if it worked sufficient
12:10:57 12 for its purposes?

12:10:59 13 A No. I was not interested in testing it to
12:11:03 14 see if it's efficient for its purposes. I wrote the
12:11:07 15 product off. As a marketer, I'm not going to waste
12:11:11 16 time competing against a product like that. So
12:11:15 17 they're off my list. Marketing's a very focused
12:11:21 18 science/art/whatever, you know. Like you can't get
12:11:26 19 distracted. You have to stay focused on the product
12:11:31 20 and your customer.

12:11:34 21 Q I'm going to drop into the chat
12:13:08 22 Exhibit 2048.

12:13:08 23 (Document marked previously as
12:13:33 24 Exhibit 2048 was presented.)

12:13:33 25 THE WITNESS: There we go. 2048. Okay,

12:13:39 1 Exhibit 2048.

12:13:42 2 BY MR. CONRAD:

12:13:44 3 Q Do you see that?

12:13:44 4 A Yes, I do.

12:13:45 5 Q This is a screenshot that appears to be an

12:13:52 6 archived version of a web page from 2021.

12:13:56 7 A Okay.

12:13:56 8 Q April 2021. Do you see that?

12:13:59 9 A Yes, I do.

12:14:00 10 Q This is a document that Ddrops produced to

12:14:03 11 us during litigation. So it was something that it

12:14:08 12 prepared from what I could tell. Okay?

12:14:10 13 A Yeah.

12:14:10 14 Q And this is a page from mommysbliss.com, an

12:14:15 15 archived version.

12:14:17 16 A Okay.

12:14:17 17 Q You'll see down on page 3 that here it lists

12:14:33 18 what's in it, vitamin D and organic sunflower oil.

12:14:37 19 Do you see that?

12:14:37 20 A I see that, yes.

12:14:38 21 Q So this is a solution that's marketing the

12:14:43 22 sunflower oil version of the product, right?

12:14:45 23 A Correct, yes.

12:14:46 24 Q Do you see on the first page it has a couple

12:14:52 25 things about why you'll love it? On page -- the

12:14:59 1 first page about two-thirds of the way down, there's
12:15:01 2 a header "Why you'll love it"?
12:15:03 3 A Okay.
12:15:04 4 Q Do you see that?
12:15:05 5 A Yes, I do.
12:15:05 6 Q First point is USDA certified organic
12:15:12 7 vitamin D liquid Ddrops, right?
12:15:15 8 A Okay.
12:15:16 9 Q The second point is "400 IU of vitamin D per
12:15:20 10 service," right?
12:15:21 11 A Correct, yeah.
12:15:21 12 Q "Just one drop per day" is the next one?
12:15:25 13 A Yes, that's what it reads.
12:15:27 14 Q "No added sugar, no alcohol, no artificial
12:15:31 15 flavors or colors, and free of the top eight
12:15:35 16 allergens." Do you see that?
12:15:36 17 A Yes, I do, yeah.
12:15:37 18 Q And the final bullet point in that section
12:15:39 19 is "NSF certified, independently tested and
12:15:43 20 certified to meet standards for quality, safety and
12:15:46 21 label claims."
12:15:48 22 A Right, yeah. That's what it reads.
12:15:50 23 Q And all of those points that were marketing
12:15:54 24 that product don't include any particular method of
12:15:59 25 administration, right?

12:16:00 1 A Not in these points listed here, correct.

12:16:03 2 Q So the important points we see here are that

12:16:07 3 it was organic, it was the recommended dosage, it

12:16:18 4 was one drop and it didn't have stuff that people

12:16:21 5 wouldn't like, like added sugar or the like, right?

12:16:25 6 A That's what it reads, correct.

12:16:26 7 Q When Mommy's Bliss changed to medium-chain

12:16:37 8 triglyceride oil, did you see a change in their

12:16:40 9 marketing to focus on the method of administration

12:16:44 10 on how to administer one drop?

12:16:47 11 A Did I see a change? Yes, there was a change

12:16:52 12 because it listed MCT oil with one drop on the

12:16:59 13 nipple in their -- on their box.

12:17:03 14 Q So the change was MCT oil for sunflower oil,

12:17:08 15 right?

12:17:08 16 A Correct, yeah.

12:17:10 17 Q You're not saying they changed the method of

12:17:13 18 administration different than what it was before,

12:17:14 19 right?

12:17:15 20 A It was the same -- I believe it was the same

12:17:18 21 method of administration, one drop. One drop

12:17:21 22 sunflower oil, right. I don't have an issue with

12:17:26 23 that. I have an issue with one drop MCT oil and

12:17:31 24 licking off a nipple.

12:17:34 25 Q But with the sunflower oil product, they

12:17:38 1 were -- they had instructions to put one drop onto a
12:17:43 2 surface of the sunflower oil, right?

12:17:46 3 MR. PALEN: Objection, assumes facts not in
12:17:48 4 evidence.

12:17:48 5 THE WITNESS: Right. To my understanding,
12:17:51 6 yes.

12:17:53 7 BY MR. CONRAD:

12:17:54 8 Q And they didn't change what to do with the
12:17:56 9 one drop --

12:17:59 10 MR. PALEN: Objection. I'm sorry.

12:18:00 11 BY MR. CONRAD:

12:18:00 12 Q -- when they switched to medium-chain
12:18:04 13 triglyceride oil, right?

12:18:05 14 MR. PALEN: Objection, calls for
12:18:08 15 speculation, assumes facts not in evidence.

12:18:10 16 THE WITNESS: They had the one drop. They
12:18:15 17 changed MCT and that's where the problem begins
12:18:24 18 because they had -- it was a copycat at that point.
12:18:28 19 It was a rip-off product of ours. It was MCT with
12:18:33 20 instructions to lick one drop off the nipple.

12:18:38 21 BY MR. CONRAD:

12:18:43 22 Q Mommy's Bliss doesn't have an instruction to
12:18:51 23 put one drop on a surface with its currently sold
12:18:55 24 product, correct?

12:18:57 25 MR. PALEN: Objection, foundation.

12:18:59 1 THE WITNESS: May I see this currently sold
12:19:02 2 product?
12:19:03 3 BY MR. CONRAD:
12:19:03 4 Q Well, have you looked at the Mommy's Bliss
12:19:07 5 product that has been sold let's say in the last
12:19:09 6 couple of months?
12:19:11 7 A I've looked at it in the last couple of
12:19:14 8 weeks actually.
12:19:14 9 Q Okay. And did you see in any of those
12:19:18 10 products an instruction to place one drop on a
12:19:20 11 surface?
12:19:22 12 A On a nipple, yes, I did.
12:19:24 13 Q And where did you see this product?
12:19:26 14 A I saw this product in Target, in Walmart, in
12:19:32 15 CVS. Where else have I seen it? Several Targets
12:19:42 16 and Walmarts actually. Oh, Rite-Aid -- no, was it
12:19:47 17 Rite-Aid? No. The retailers I named, I've seen it
12:19:53 18 there.
12:19:54 19 Q You're telling me that the Mommy's Bliss
12:20:01 20 baby vitamin D product with MCT oil is presently
12:20:08 21 being sold at Target with an instruction to put one
12:20:10 22 drop on a nipple?
12:20:11 23 A Yes.
12:20:13 24 Q I'm going to share my screen.
12:20:24 25 A Sure.

12:20:24 1 Q Do you see my screen here?

12:20:35 2 A I see your screen.

12:20:36 3 Q Okay. So I'm going to go to Target.com. Do

12:20:42 4 you see that?

12:20:42 5 A Yeah.

12:20:44 6 Q All right. In Target.com, I'm going to

12:20:47 7 search for Mommy's Bliss vitamin D. Okay?

12:20:54 8 A Yeah.

12:20:55 9 Q And some products show up and one of the top

12:21:04 10 products is Mommy's Bliss Baby Organic Vitamin D

12:21:08 11 Drops. Do you see that?

12:21:09 12 A I see that, yes.

12:21:10 13 Q And I've gone to the Mommy's Bliss Baby

12:21:16 14 Organic Vitamin D Drops page, right?

12:21:18 15 A Yeah.

12:21:19 16 Q One drop equals 400 IU is what it says?

12:21:23 17 A Right.

12:21:24 18 Q I'm going to click on an image of the carton

12:21:31 19 for the product. And can you read it?

12:21:35 20 A Sure. This image of what you clicked says,

12:21:40 21 tilt bottle and squeeze gently to disperse one drop.

12:21:45 22 May be mixed into formula, breast milk, juice or

12:21:50 23 other foods. Do not administer directly into

12:21:53 24 infant's mouth. Do not exceed recommended serving

12:21:55 25 one drop daily.

12:21:56 1 Q This does not indicate in its directions to
12:21:59 2 put one drop on a surface, right?
12:22:02 3 A This is correct.
12:22:05 4 Q This is different than what you were telling
12:22:08 5 me that Target is selling products with -- Mommy's
12:22:12 6 Bliss products with different directions than what
12:22:14 7 we just saw?
12:22:16 8 A This is absolutely different. I've never
12:22:19 9 seen this product on shelf.
12:22:21 10 Q You don't dispute that on Target.com today,
12:22:32 11 it doesn't have instructions to put one drop on a
12:22:34 12 surface of any kind, right?
12:22:36 13 A I don't read anything here that says one
12:22:41 14 drop on a surface or anything that says one drop on
12:22:46 15 a nipple.
12:22:47 16 Q What store did you say you went to to see
12:22:52 17 something different?
12:22:53 18 A Target.
12:22:55 19 Q Which one?
12:22:56 20 A In California. I'd have to go through my
12:23:02 21 notes and identify it for you.
12:23:08 22 Q Which city in California?
12:23:10 23 A It would have been in Anaheim, I believe.
12:23:14 24 Q When was this?
12:23:15 25 A This was around the 13th to 15th of March.

12:23:24 1 I need to double-check because I would have -- I'd
12:23:28 2 have to look at my photos to see because I have a
12:23:35 3 catalog of photos of offending products.
12:23:58 4 MR. CONRAD: Let's take a break.
12:23:59 5 (Short recess.)
12:36:32 6 BY MR. CONRAD:
12:36:59 7 Q I'm going to drop into the chat window
12:37:06 8 Exhibit 1034.
12:37:06 9 (Exhibit 1034 marked for
12:37:22 10 identification.)
12:37:22 11 BY MR. CONRAD:
12:37:23 12 Q Let me know when you have a chance to open
12:37:24 13 it.
12:37:25 14 A Just opening it right now. Okay, David.
12:37:36 15 It's here.
12:37:37 16 Q Exhibit 1034 is the Target page for Mommy's
12:37:44 17 Bliss Baby Organic Vitamin D Drops that we were just
12:37:46 18 looking at.
12:37:47 19 A Yep.
12:37:48 20 Q All right. I'm going to drop into chat
12:37:52 21 Exhibit 1035.
12:37:52 22 (Exhibit 1035 marked for
12:38:22 23 identification.)
12:38:22 24 THE WITNESS: 1034 and 1035. Okay. I've
12:38:28 25 got them both on my screen.

12:38:31 1 BY MR. CONRAD:

12:38:32 2 Q Exhibit 1035 is the label for Mommy's Bliss
12:38:37 3 Vitamin D Drops carton on Target.com that we were
12:38:42 4 just reviewing, right?

12:38:44 5 A Please dispense one drop -- (reading). Yes,
12:38:51 6 yes, that is the one we were reviewing, correct.

12:38:53 7 Q Okay. And this product does not infringe
12:38:57 8 the '958 patent, right?

12:38:59 9 MR. PALEN: Objection, calls for a legal
12:39:01 10 conclusion.

12:39:01 11 THE WITNESS: Yeah, I can't speak to the
12:39:06 12 legalities, but I will say there's no reference to
12:39:14 13 the nipple or clean surface or licking or sucking of
12:39:20 14 the product. I can't see from this one page what
12:39:26 15 the ingredient is.

12:39:30 16 BY MR. CONRAD:

12:39:31 17 Q Well, assume it's MCT oil.

12:39:33 18 A Okay. Assume it's MCT oil. I would say --
12:39:42 19 again, I can't speak to legalities, but it does not
12:39:46 20 have the characteristics I would normally look for
12:39:49 21 in an infringing product.

12:39:51 22 Q And even though this product -- we've
12:39:57 23 assumed it has only vitamin D and MCT oil as its
12:40:02 24 composition and it has an administration of one drop
12:40:06 25 containing 400 IU of vitamin D, right?

12:40:10 1 A That's my understanding, yes.

12:40:11 2 Q And that doesn't cause you any concern about
12:40:16 3 infringement, right?

12:40:18 4 A Those elements taken singularly, no.

12:40:24 5 Q But even together?

12:40:27 6 A So the elements together are what, MCT,
12:40:33 7 vitamin D, one drop, right?

12:40:37 8 Q And this label of Exhibit 1035.

12:40:41 9 A Label -- dispense one drop -- as it stands,
12:40:50 10 I wouldn't be worried about this product. I see no
12:40:54 11 reason to be worried about this product. But you
12:41:01 12 said this was from Target.com?

12:41:04 13 Q Yes.

12:41:05 14 A Okay. So can you please show me a product
12:41:08 15 from a Target shelf, like today. This was done --
12:41:13 16 when did you get this image? 3/27, so today. You
12:41:17 17 got this today from -- presumably today you got this
12:41:22 18 today from the Target website?

12:41:23 19 Q Yes, just while we were on break.

12:41:26 20 A While we were on break. You're good at
12:41:28 21 this. David, wonderful, but I have -- I don't
12:41:32 22 recall seeing this box anywhere. And for the last
12:41:38 23 several years through this infringement issue,
12:41:42 24 that's not the product that's on the shelves in the
12:41:45 25 U.S. So you know, this is all fine and wonderful,

12:41:51 1 but why are we talking about this? This is like a
12:41:58 2 -- to me, I'm looking at this. This is a product
12:42:00 3 that does not exist.

12:42:03 4 Q It's being sold on Target.com?

12:42:05 5 A No. The image is on Target.com. What is
12:42:08 6 being sold on Target.com because the way supply
12:42:11 7 chain works, we talked about it earlier, you've got
12:42:14 8 the store, you've got the warehouse. You've got a
12:42:18 9 lot of things going on. For all we know, this image
12:42:21 10 was flashed up here today and doesn't necessarily
12:42:24 11 reflect what's going out the door. Can you assure
12:42:28 12 me this is going out the door today so that I know
12:42:31 13 that this product is being sold there today? Do you
12:42:35 14 know that?

12:42:36 15 Q Okay. So I've got a question for you. Do
12:42:41 16 you know what instructions are on the physical
12:42:43 17 packaging of the Mommy's Bliss product with MCT oil?
12:42:48 18 What I mean by packaging, I mean the bottle itself,
12:42:52 19 not the carton.

12:42:54 20 A The bottle itself is a little white, plastic
12:42:59 21 bottle.

12:43:00 22 Q Correct.

12:43:00 23 A From what I recall.

12:43:02 24 Q Do you know what instructions are on that
12:43:04 25 label?

12:43:06 1 A Oh, my.

12:43:07 2 MR. PALEN: Objection, vague as to time

12:43:09 3 frame.

12:43:11 4 THE WITNESS: I can't -- I've looked at it

12:43:14 5 at some point in the past, but I can't recall right

12:43:17 6 now.

12:43:17 7 BY MR. CONRAD:

12:43:21 8 Q If the instructions on the white bottle do

12:43:28 9 not instruct a user to place one drop on a surface,

12:43:31 10 do you have any concerns about infringement just

12:43:33 11 from the white bottle alone?

12:43:35 12 MR. PALEN: Objection, calls for

12:43:37 13 speculation, calls for a legal conclusion.

12:43:41 14 THE WITNESS: You don't put a white bottle

12:43:43 15 up on a shelf in a Target store. You put the box.

12:43:47 16 BY MR. CONRAD:

12:43:47 17 Q I get that. I'm asking you a different

12:43:49 18 scenario. You've gone to Target. You find a

12:43:53 19 product, vitamin D, one drop. It's organic. You

12:43:57 20 buy it. You take it home. You open the carton.

12:44:00 21 You throw away the carton. You've got the drop --

12:44:03 22 you've got the bottle and it's got instructions on

12:44:05 23 it. Those instructions don't say to put one drop on

12:44:08 24 a surface. Do you have any problem with that

12:44:11 25 scenario?

12:44:13 1 MR. PALEN: Objection. Sorry. Objection,
12:44:17 2 calls for speculation, calls for a legal conclusion,
12:44:19 3 no foundation.

12:44:20 4 THE WITNESS: David, what do the
12:44:24 5 instructions say so I can answer.

12:44:27 6 BY MR. CONRAD:

12:44:28 7 Q Let's say that the -- you know what? Let's
12:44:33 8 go off the record for one moment. It will take me
12:44:36 9 one minute. I'll be right back.

12:44:48 10 (Short recess.)

12:45:26 11 BY MR. CONRAD:

12:45:29 12 Q The instructions on the white bottle,
12:45:32 13 separate from any carton packaging, state, "Tilt and
12:45:36 14 squeeze gently for one drop daily (400 IU). Do not
12:45:43 15 exceed. "

12:45:44 16 Do those instructions pose any problem for
12:45:47 17 you with respect to an infringing product?

12:45:50 18 A As a --

12:45:51 19 MR. PALEN: Wait. Sorry. Please let me
12:45:54 20 pose an objection. Calls for a legal conclusion, no
12:45:58 21 foundation. Go ahead.

12:46:03 22 THE WITNESS: My first answer as a
12:46:06 23 manufacturer is one would be in a real big problem
12:46:15 24 if there's a discrepancy between the label --
12:46:19 25 instructions on the product and the label

12:46:22 1 instructions on the box speaking from Canada,
12:46:27 2 regulatory; you layer into that NSF, all these
12:46:32 3 different bodies that we have checking out our
12:46:35 4 plant. There's a disconnect there between
12:46:39 5 instructions. That's a huge, huge problem. I would
12:46:44 6 have a big problem with that. As a manufacturer, I
12:46:49 7 can't -- I can't -- like I would never allow product
12:46:54 8 to leave my building if it was mislabeled this way
12:46:56 9 or inconsistently labelled with the box instructions
12:47:01 10 and the label instructions. So I'm kind of having a
12:47:04 11 hard time getting over that.

12:47:08 12 What you read me basically just speaks to
12:47:14 13 the one drop. Do I have an issue with that? It's
12:47:21 14 one drop. Fine. But there's a bigger problem here
12:47:26 15 is that you're confusing the end user and that -- in
12:47:32 16 this business, that's a -- that's a big one.

12:47:36 17 BY MR. CONRAD:

12:47:36 18 Q So my question for you is that the
12:47:40 19 directions I just read you from the bottle don't
12:47:43 20 give you any concern about infringement, right?

12:47:47 21 MR. PALEN: Same objections.

12:47:56 22 THE WITNESS: Specific to infringement?

12:47:58 23 BY MR. CONRAD:

12:47:58 24 Q Of the '958 patent?

12:48:00 25 A Of the '958 patent, there's not enough

12:48:03 1 information there to give me a concern versus the
12:48:08 2 '958 patent or the use of it.

12:48:18 3 Q And so based just on the directions on that
12:48:25 4 bottle, you don't have a suspicion of infringement
12:48:29 5 of the '958 patent, right?

12:48:31 6 MR. PALEN: Objection, calls for a legal
12:48:38 7 conclusion.

12:48:38 8 THE WITNESS: From the bottle instructions,
12:48:48 9 yeah, I cannot see a clear, direct infringement of
12:48:55 10 the use as it relates to the '958 patent.

12:49:01 11 BY MR. CONRAD:

12:49:04 12 Q Changing subjects here, I think you had --
12:49:07 13 you were talking about how your marketing focus has
12:49:12 14 been on advocating to and educating physicians and
12:49:18 15 the like, right?

12:49:19 16 A Yes.

12:49:19 17 Q Are you familiar with a Dr. Paul Horowitz?

12:49:35 18 A Paul Horowitz, oh, yes.

12:49:37 19 Q How are you familiar with him?

12:49:38 20 A Paul Horowitz was probably one of the first
12:49:45 21 U.S. physicians to come to our booth in -- I think
12:49:56 22 it was the AAP conference in San Diego or somewhere
12:50:01 23 in California. And I remember Paul, you know, being
12:50:11 24 just kind of shocked that, you know, one drop
12:50:17 25 vitamin D, no taste, no smell, applied to the

12:50:22 1 nipple, baby latches on, gets its feeding. He was
12:50:25 2 like, and that's it? And we're like, yeah, that's
12:50:29 3 it.

12:50:29 4 So I remember him being -- him being, you
12:50:36 5 know -- really reacting in a funny kind of way that
12:50:41 6 that was it. And then at the time we were selling,
12:50:49 7 we didn't have much of a retail presence. We were
12:50:52 8 selling directly to physicians that could buy small
12:50:54 9 quantities for their office use. And he became one
12:50:57 10 of like the first kind of credit card customers,
12:51:02 11 retail customers, small volumes. But he's been a
12:51:06 12 customer of Ddrops ever since and, you know, I just
12:51:15 13 think he's a good guy.

12:51:17 14 Q So he was one of the first resellers of
12:51:22 15 Ddrops, right?

12:51:24 16 A Yeah, around that time we were -- we were
12:51:27 17 selling -- like they'd have to buy a case quantity,
12:51:34 18 24 units. And we'd sell directly to the physicians
12:51:36 19 at a marginally marked up from wholesale price. And
12:51:42 20 then they would offer it to their patients because
12:51:44 21 you couldn't get the product anywhere else. We
12:51:47 22 didn't have Walmart and Target and CVS and Walgreens
12:51:52 23 back then. So the physician community, because we
12:51:56 24 had connection with them, still have connection with
12:51:58 25 them, they were a conduit to get the product -- get

12:52:02 1 the product to their patients. And a lot of them
12:52:05 2 insisted they really wanted the product. That's why
12:52:08 3 we started with that program too is we were getting
12:52:11 4 a lot of office requests for product.

12:52:17 5 Q Dr. Horowitz specifically, he still resells
12:52:22 6 Ddrops in his office?

12:52:25 7 A As far as I can recall, yes. I think he's
12:52:28 8 been a customer for many, many years.

12:52:36 9 Q What sort of volume does he have of Ddrops
12:52:42 10 sales?

12:52:42 11 A Oh, he would be -- I don't know -- maybe a
12:52:46 12 couple cases a year. I'm guessing. It's definitely
12:52:51 13 not -- it's to service his patients that require
12:52:56 14 Ddrops, whatever that number is. I don't know. But
12:53:01 15 it's nowhere near what we would sell to a Target or
12:53:05 16 a Walmart.

12:53:07 17 Q Do most of the physicians that you sell to,
12:53:17 18 are they resellers as well?

12:53:21 19 A There's a small group that are. But usually
12:53:28 20 they're typified by, you know, single practice
12:53:31 21 physician that kind of runs a little enterprise on
12:53:35 22 the side where they get products that sometimes are
12:53:38 23 hard to find and they make them available to their
12:53:42 24 community for a marginal upcharge. So it's a
12:53:49 25 win-win for them because they can demonstrate the

12:53:51 1 product and mom walks home with the product. And
12:53:55 2 they don't typically charge the kind of mark-ups
12:53:59 3 that a retailer commands. So they give the families
12:54:02 4 a bit of a break on the price.

12:54:05 5 Q Have you spoken with Dr. Horowitz in
12:54:32 6 connection with this case?

12:54:35 7 A Yes, when I learned that we might need to
12:54:44 8 speak to some physicians that have experience with
12:54:47 9 our product and I was asked if I had any doctors
12:54:52 10 that I knew of, Paul Horowitz came to my mind. I
12:54:58 11 reached out to him. I phoned him and, you know,
12:55:03 12 told him that we might need some assistance in terms
12:55:07 13 of speaking to our lawyers about a matter that we
12:55:15 14 have and would it be okay if I introduced his name
12:55:19 15 to them. And then I'm not going to be involved from
12:55:24 16 that point on. And he agreed. He said yeah, that's
12:55:27 17 fine. He goes, I'd be happy to make a connection.

12:55:32 18 Q Is Ddrops paying his invoices directly or
12:55:48 19 how is he being compensated for his work in the
12:55:51 20 case?

12:55:52 21 A Oh, boy. I know everything goes through
12:55:59 22 Alan Anderson's team and I can't recall if we're
12:56:06 23 paying directly or if we're paying Alan Anderson's
12:56:14 24 company and then they're paying him directly. I
12:56:18 25 can't --

12:56:18 1 Q So I guess what I'm trying to get at is he's
12:56:21 2 retained by Ddrops and compensated directly or
12:56:26 3 indirectly by Ddrops?

12:56:29 4 A I don't know what you mean by retained.

12:56:33 5 Q Sure. Yeah, that's a fair point. There are
12:56:37 6 some scenarios in which the lawyers choose the
12:56:47 7 experts --

12:56:48 8 A David, Matt is frozen on my screen. He
12:56:51 9 should be listening to what --

12:56:55 10 MR. CONRAD: Let's pause. Good catch.

12:56:55 11 (Short recess.)

12:57:06 12 (Technical difficulties.)

12:58:33 13 BY MR. CONRAD:

12:59:42 14 Q So one way or another, it's Ddrops that is
12:59:50 15 compensating Dr. Horowitz for his time directly or
12:59:53 16 indirectly, right?

12:59:56 17 A As part of this case, yes, I believe we are
13:00:02 18 -- we're on the hook for a lot of expenses here, so
13:00:06 19 yeah.

13:00:13 20 Q One last question. Without -- I don't want
13:00:20 21 to get privileged information from you, so I'm going
13:00:23 22 to caveat that. So I don't want you to tell me what
13:00:27 23 your doctor -- what your lawyers told you, but I
13:00:32 24 want to know what you've been aware of.

13:00:35 25 So I'll ask it this way: Prior to today,

13:00:40 1 have you been aware of -- that there were any
13:00:43 2 efforts by MOM to not have a label that instructs --
13:00:52 3 has an instruction to put one drop of the vitamin D
13:00:56 4 product on a surface?

13:01:00 5 A I had one call now almost two years ago from
13:01:05 6 the head of MOM. And she went on about all these
13:01:12 7 things she would be prepared to do and one of them
13:01:19 8 was, you know, change the product, change the label,
13:01:24 9 whatever. I vaguely remember this because A) it was
13:01:29 10 so long ago. And quite frankly, you know, the call
13:01:33 11 ended on she needed to sleep on it. And it's almost
13:01:39 12 two years now and she's had quite a sleep. I walked
13:01:43 13 away thinking this is pretty disingenuous. I don't
13:01:47 14 think this lady really wants to change labels or do
13:01:54 15 things like that. So you know, after a lot of
13:02:01 16 thinking, it's like, no, we're going to see this
13:02:06 17 through. You know, there doesn't seem to be
13:02:13 18 anything genuine there.

13:02:16 19 Q So thank you for that. So my question was a
13:02:19 20 little bit different. You mentioned one instance
13:02:22 21 where there was a suggestion of changing the label.
13:02:25 22 My question is different.

13:02:27 23 Since then, have you been made aware of any
13:02:31 24 actual efforts that MOM has undertaken to change the
13:02:35 25 label? Have you seen it?

13:02:37 1 A Actual efforts, she hasn't called me. So
13:02:41 2 I'm reading it like how would I know? From my
13:02:47 3 lawyers. I wouldn't know from her. She's never
13:02:49 4 called me. So I don't see any effort. And then to
13:02:52 5 verify it, I am in stores. I look at the product.
13:02:55 6 I don't see any change. I was just at a big trade
13:02:58 7 show and from what I could see, the product was
13:03:02 8 still on display there. So I'm not really sensing
13:03:10 9 that there has been any change to this product.
13:03:13 10 And that's punctuated by I still see the
13:03:17 11 offending copycat product on the shelves in
13:03:22 12 retailers across the United States, California, from
13:03:27 13 Florida, New York State, everywhere I've been in the
13:03:31 14 last few months I see that product. And it's the
13:03:35 15 offending product, one drop on the nipple, MCT.
13:03:39 16 It's the copycat of the Baby Ddrops product. So I
13:03:44 17 hope this answers your question, David. Have I seen
13:03:47 18 any changes? No, I haven't.
13:03:49 19 Q That's not -- that's not my question. First
13:03:53 20 off, as a manufacturer, you are aware that there are
13:03:59 21 times -- or lag times between clearing out old stock
13:04:03 22 and starting to sell new stock, right?
13:04:07 23 A In a normal business environment, yes, there
13:04:11 24 is a period of time from when the product arrives at
13:04:15 25 the dock to when it gets on the shelf.

13:04:18 1 Q And that a change in the manufacturing may
13:04:23 2 not have a result on store shelves for some time,
13:04:28 3 right?

13:04:30 4 A In a normal sense of manufacturing, it may
13:04:35 5 take some time. I don't see this matter we're in as
13:04:38 6 a normal sense.

13:04:41 7 Q Let me ask you a different question. I'm
13:04:45 8 trying to get your -- what you've been made aware
13:04:49 9 of. So you're telling me that you haven't been made
13:04:52 10 aware of through what you've seen or what you've
13:04:55 11 been told directly by MOM, and we discussed one
13:05:00 12 reason -- just now we discussed one reason why you
13:05:02 13 may not have seen any changes. My question for you
13:05:05 14 is different.

13:05:08 15 What have you been made aware of by anyone
13:05:13 16 about actual efforts to change the label? Have you
13:05:18 17 been made aware of any actual efforts, whether
13:05:20 18 you've seen it or not in person?

13:05:22 19 A Okay. Actual efforts.

13:05:24 20 MR. PALEN: Clarify that, not including
13:05:27 21 communications with counsel.

13:05:29 22 BY MR. CONRAD:

13:05:29 23 Q No. I'm trying to get his knowledge. I
13:05:31 24 don't want him to tell me what lawyers are telling
13:05:35 25 him. I want to know what he has learned by anyone.

13:05:41 1 A David, if I'm going to learn something
13:05:43 2 significant, it's owner to owner. There's been no
13:05:47 3 communication. So I've been through these kinds of
13:05:52 4 matters before and usually the other side is
13:05:58 5 communicative. There's none of that here. So...

13:06:03 6 Q I'm not trying to derail this. Maybe you've
13:06:09 7 told me and I just haven't gotten the right answer
13:06:11 8 to let me know I've been told.

13:06:13 9 A That's a problem.

13:06:15 10 Q But have you been made aware that MOM has
13:06:19 11 made a change to its manufacturing so that there is
13:06:22 12 not the instruction on the label that offends you?

13:06:28 13 A I've had no contact with MOM or their
13:06:33 14 manufacturing. I have no reason to believe that
13:06:36 15 they've made any such change. And I'm looking at
13:06:40 16 this and I don't know where this is coming from.
13:06:44 17 You told me where from the website, but...

13:06:51 18 Q So you're telling me that until today when I
13:06:53 19 showed you that Target screen -- that Target image
13:06:58 20 of the carton label on MOM's vitamin D drops, that
13:07:02 21 you've not been made aware by any means that that
13:07:09 22 label has been changed?

13:07:11 23 A I've not seen this label that you're showing
13:07:15 24 me here. I don't know where this comes from. I'm a
13:07:19 25 little surprised by it because as of a couple weeks

13:07:24 1 ago, I was in stores. I saw what I saw and it's the
13:07:29 2 same old product. And you know, I'm -- nobody from
13:07:41 3 MOM has told me. Nobody has contacted me to tell me
13:07:44 4 this and I've not seen it. So how am I supposed to
13:07:47 5 know something like that?

13:07:52 6 Q Since you last spoke with -- was it
13:07:58 7 Ms. Kaderali that you spoke with?

13:07:59 8 A Yes.

13:08:00 9 Q Have you attempted to personally contact
13:08:05 10 Mommy's Bliss?

13:08:05 11 A No.

13:08:07 12 Q And prior to today, have you never seen on
13:08:45 13 any website or anywhere else that different label
13:08:51 14 for the product?

13:08:53 15 A I think I would -- would have recalled
13:08:57 16 something like this. I don't remember seeing this.

13:09:08 17 Q I'm going to share my screen again.

13:09:41 18 A Yeah.

13:09:41 19 Q Up on screen I've pulled up the product page
13:09:59 20 from Mommy's Bliss Organic Baby Vitamin D Drops on
13:10:03 21 Amazon.

13:10:04 22 A This is current, right?

13:10:06 23 Q This is today. You're looking at the
13:10:08 24 current version of the website right now. And do
13:10:14 25 you see the image, the label?

13:10:16 1 A Yes.

13:10:16 2 Q It has directions and that's the same as
13:10:19 3 what we just saw on the Target website, right?

13:10:21 4 A No, it's not. Read it. Tilt bottle,
13:10:24 5 squeeze gently to dispense one drop. Place one drop
13:10:28 6 daily onto mother's nipple or a pacifier.

13:10:32 7 Q Okay. I see what you're saying.

13:10:34 8 A So David, I can only tell you what I'm
13:10:38 9 seeing. That one you just showed me, that's what I
13:10:41 10 saw in the stores. That's what we just saw on
13:10:49 11 Amazon that you called up, right. This here, what
13:10:54 12 is this? Is this a fancy Photoshop? I don't know.
13:10:57 13 I don't know. I've not -- I've not seen this.

13:11:01 14 Q Okay. I see what you're saying. Okay.

13:11:04 15 A So you know, offended is too strong of a
13:11:11 16 word, but I'm surprised something like this is being
13:11:13 17 shown to me here. Like if they're trying to tell us
13:11:20 18 that this is what they're doing, you think they'd
13:11:23 19 find a little more official channel to do it. But
13:11:29 20 anyway, I don't know -- you guys are the legal
13:11:32 21 experts, but I just -- I'm kind of disappointed.
13:11:41 22 Anyway.

13:11:42 23 MR. CONRAD: All right. Well, I will pass
13:11:43 24 the witness.

13:11:43 25 ///

13:11:45 1 REDIRECT EXAMINATION

13:11:45 2 BY MR. PALEN:

13:11:50 3 Q Thanks, David.

13:11:52 4 I don't have very many questions for you,

13:11:54 5 Mr. Temovsky. I know you're very busy so I want you

13:11:57 6 to get back to work. I'm going to put into chat

13:12:03 7 here what has been marked previously as Exhibit 41.

13:12:03 8 (Document marked previously as

13:12:03 9 Exhibit 2059 was presented.)

13:12:43 10 MR. PALEN: So I just put it in there.

13:12:43 11 (Stenographer clarification.)

13:13:26 12 THE WITNESS: Is that the Amazon page that

13:13:28 13 we just looked at?

13:13:28 14 BY MR. PALEN:

13:13:28 15 Q No, it's not the Amazon page, but it does

13:13:32 16 appear in another exhibit. Let's go to

13:13:44 17 Exhibit 2004. That's one that you should already

13:13:52 18 have from earlier today. And if you go to page 22.

13:14:20 19 A Just opening it up.

13:14:31 20 Q Okay. Do you have that up?

13:14:34 21 A This is Exhibit 41?

13:14:40 22 Q This is Exhibit B -- oh, yeah.

13:14:46 23 Exhibit 2004, which is your June 29, 2023

13:14:52 24 declaration.

13:14:53 25 A That's not what you uploaded though just

13:14:55 1 now, right?

13:14:56 2 Q Oh, did it come through?

13:14:59 3 A So what you've uploaded is Exhibit 2059.

13:15:08 4 Because David's last exhibit --

13:15:13 5 Q I didn't know that had gone through yet. So

13:15:15 6 this is Exhibit 41 from -- has been previously

13:15:19 7 marked as Exhibit 41 from the deposition of Medina.

13:15:25 8 Do you recognize the images in this exhibit?

13:15:27 9 A Yes, I do. These are images of our Baby

13:15:34 10 Ddrops packaging, outer box, front, top, sides,

13:15:42 11 bottom bottle, bottle and label, bottle and label.

13:15:53 12 Q Okay. Can you tell me whether or not any of

13:15:55 13 these images have been altered since their original

13:15:59 14 date?

13:16:00 15 A Since their original date? Let me see.

13:16:06 16 These look like original images of our box and

13:16:12 17 bottles.

13:16:14 18 Q And I believe in response to some prior

13:16:18 19 questioning, you were able to identify the time

13:16:22 20 period for the product that's shown here, is that

13:16:25 21 correct?

13:16:25 22 A Oh, yes. I can tell that it has a laser

13:16:32 23 printed -- at the bottom flap page 5, laser printed

13:16:37 24 U.S. patent '958. Also, the box itself -- so this

13:16:46 25 would have been done around the time -- soon after

13:16:49 1 we received the patent granted in the United States.
13:16:54 2 And this definitely is U.S. product because it says
13:16:58 3 on page 4 for U.S. sale only.

13:17:07 4 What else can I tell you about this package?
13:17:09 5 Oh, yeah, for sure this is around the time the
13:17:12 6 patent was done because we were using the patent
13:17:15 7 pending boxes. These boxes, if you go to page 6, it
13:17:19 8 says "patent pending." So we were identifying on
13:17:23 9 our product going to the U.S. for sale in the U.S.
13:17:27 10 that we had a patent pending. And it wasn't until
13:17:30 11 we received the patent that you see what you see on
13:17:34 12 page 5 which is the laser embossed patent and expiry
13:17:41 13 date. That expiry date of 2019 with our four-year
13:17:46 14 shelf life suggests to me it was -- the product was
13:17:50 15 manufactured or built, as we say, around 2015, late
13:17:55 16 2015.

13:17:56 17 Q Okay. And based on your role as
13:18:01 18 co-president of Ddrops, you are authorized to give
13:18:04 19 an opinion as to the authenticity of the packaging
13:18:08 20 shown here, is that correct?

13:18:09 21 A Yes, I feel I am authorized to do that.
13:18:14 22 Yes.

13:18:14 23 Q Your marketing -- I mean your background is
13:18:21 24 in sales and marketing, correct?

13:18:23 25 A Correct, yes.

13:18:24 1 Q You are not an attorney, correct?

13:18:27 2 A I am not an attorney, no.

13:18:28 3 Q Can you please speak to whether or not

13:18:35 4 you've had any training in patent law?

13:18:38 5 A Patent law, no. No, I do not have any

13:18:43 6 training in patent law.

13:18:44 7 Q Can you please identify whether or not you

13:18:49 8 are a named inventor on any patents?

13:18:52 9 A I am named as a co-inventor on our menthol

13:19:02 10 cold drops product patent.

13:19:04 11 Q Were you involved in the drafting of the

13:19:10 12 patent application for that patent?

13:19:12 13 A No, I was not involved in drafting it. The

13:19:19 14 -- that was left to someone else.

13:19:22 15 Q Did you have any involvement in the drafting

13:19:26 16 of the patent claims of the '958 patent?

13:19:29 17 A Absolutely not. At that point in time when

13:19:34 18 that was drafted, I was not involved in even the

13:19:37 19 product. I was not involved.

13:19:41 20 Q Do you believe that you are qualified to

13:19:43 21 give opinions regarding the scope of the '958 patent

13:19:46 22 claims?

13:19:48 23 A Not legal opinions. I'm qualified to give

13:19:53 24 marketing opinions.

13:19:54 25 Q Does Ddrops have a practice for obtaining

13:20:01 1 legal opinions regarding patent claims?

13:20:04 2 A As part of the application for our patents,
13:20:09 3 we work with legal firms, professionals that are
13:20:15 4 expert in preparing the patents, yes.

13:20:21 5 Q Mr. Conrad asked you some questions about
13:20:25 6 MOM's current marketing practices. And in your
13:20:29 7 answer, you had mentioned that you'd seen something
13:20:31 8 on social media. Can you clarify whether or not the
13:20:37 9 advertisement that you saw related to specifically
13:20:39 10 to the vitamin D drops product?

13:20:47 11 A It may have been for a different product or
13:20:52 12 for that -- the company itself. I can't recall if
13:20:57 13 it was specific to the vitamin D product. My --
13:21:04 14 yeah, I can't -- I can't recall if it was specific
13:21:08 15 to the vitamin D product. It was most likely for
13:21:11 16 one of their other products, if not their lead
13:21:14 17 product, which is gripe water.

13:21:17 18 Q Mr. Temovsky, did you recently attend an
13:21:26 19 industry trade show?

13:21:27 20 A Yes, I did.

13:21:28 21 Q Did Mommy's Bliss have a booth at that trade
13:21:35 22 show?

13:21:35 23 A Yes, they did.

13:21:36 24 Q Were you able to obtain one of their
13:21:44 25 promotional bags?

13:21:45 1 A Yes, I did.

13:21:46 2 Q Or promotional handouts?

13:21:48 3 A Yes, I did.

13:21:49 4 Q Did you review what was provided in that

13:21:53 5 promotional bag?

13:21:54 6 A I did, yes.

13:21:56 7 Q Did you see in there anything that looked

13:21:59 8 like the new instructions? Let me see if I could

13:22:07 9 find what the exhibit number is here. Exhibit 1035?

13:22:16 10 A What was the number again, Matt, 1035?

13:22:20 11 Q 1035?

13:22:21 12 A No, I did not see anything like that.

13:22:26 13 Q If I can direct you to Exhibit 2071. It

13:22:44 14 should be the very first exhibit you received this

13:22:47 15 morning.

13:22:53 16 A Okay, yeah.

13:22:54 17 Q And if you go to page 202, which you may be

13:23:03 18 at already.

13:23:06 19 A Let me just scroll down a little bit here.

13:23:10 20 202, yes.

13:23:12 21 Q Can you describe briefly what is shown here

13:23:19 22 in this exhibit?

13:23:21 23 A Okay. This is a page with two tables on it.

13:23:28 24 One is U.S. Ddrops sales and percent market change

13:23:33 25 from 2015 to 2018 showing our ex-factory dollars

13:24:16 9 So Redacted

[illegible]

13:25:32	25	A Yes. We have our analyst that pulls the raw
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13:25:37 1 data and the raw data is tabulated for us. I was
13:25:45 2 involved in formatting it into just a clear, simple
13:25:50 3 way that I wanted this to show up. And we submitted
13:25:56 4 it.

13:25:56 5 Q And so the spreadsheets that you used to
13:26:01 6 create these tables, those are documents that you
13:26:03 7 maintain in the ordinary course of your business?

13:26:06 8 A Yeah, we look at this all the time. This is
13:26:08 9 how we monitor our growth or lack of growth or any
13:26:14 10 market issues.

13:26:15 11 Q And is it fair to say that these
13:26:21 12 spreadsheets are quite voluminous?

13:26:23 13 A Oh, they're huge, the raw data we get from
13:26:27 14 Nielsen. This is why we have one of our analysts to
13:26:32 15 break it down to the relevant market, otherwise our
13:26:35 16 product is very targeted. It's very small as part
13:26:39 17 of the entire vitamin universe. So you know, you
13:26:43 18 can't look at the whole vitamin universe. You've
13:26:47 19 got to look at what's the field you're playing in.
13:26:50 20 So we specifically create our own factor market that
13:26:53 21 looks at key competitors and what our place is with
13:26:57 22 those key competitors.

13:26:59 23 Q Have you produced those original
13:27:04 24 spreadsheets to counsel, to your legal counsel?

13:27:10 25 A To which counsel?

13:27:11 1 Q To the Alan Anderson Law Firm, have you
13:27:17 2 produced those spreadsheets?

13:27:19 3 A I'm -- I've produced so much stuff for Alan
13:27:29 4 Anderson Law Firm to format in whatever legal
13:27:32 5 formats you need here. I'm thinking -- I'm thinking
13:27:40 6 it was all part of the data -- data dumps that we've
13:27:46 7 done as we go through this process.

13:27:52 8 MR. PALEN: Okay. I will represent to
13:27:53 9 counsel that the supporting spreadsheets have been
13:27:55 10 produced and the Bates numbers are DDROPS-0022433
13:28:04 11 through 0026020. So obviously I'm not going to
13:28:10 12 upload those as that's almost 4,000 pages, but I
13:28:15 13 have no further questions for the witness.

13:28:18 14 MR. CONRAD: Let's go on break. I need
13:28:21 15 about ten minutes or so for maybe a few follow-up
13:28:25 16 questions. Ten minutes break for a few follow-up
13:28:28 17 questions. And Matt, I'd like to get those Bates
13:28:32 18 numbers from you real quick if you can off record.

13:28:36 19 (Recess taken from 1:28 to 1:36 p.m.)

13:36:02 20 RECROSS EXAMINATION

13:36:05 21 BY MR. CONRAD:

13:36:29 22 Q Mr. Temovsky, you were asked about a trade
13:36:31 23 show you went to where you got a sample or a
13:36:33 24 promotional material from Mommy's Bliss. Do you
13:36:36 25 remember that?

13:36:36 1 A Yes. Yeah.

13:36:37 2 Q What was the trade show that you are
13:36:42 3 referring to there?

13:36:42 4 A It's Natural Products Expo West in Anaheim,
13:36:48 5 California.

13:36:48 6 Q And when was that trade show?

13:36:50 7 A That trade show was a couple weeks ago,
13:37:01 8 specifically the dates of like specifically the 12th
13:37:04 9 to 15th of March, 2024.

13:37:07 10 Q Okay. Thank you. Let's go back to your
13:37:12 11 declaration and the questions that counsel was just
13:37:17 12 referring to about page 202 of Exhibit 2071. This
13:37:25 13 is the market share data?

13:37:25 14 A Yep.

13:37:26 15 Q I just wanted to make sure I understand the
13:37:32 16 U.S. Ddrops market share data in the bottom table.
13:37:36 17 Okay?

13:37:36 18 A Okay.

13:37:36 19 Q When were the -- when was this data
13:37:42 20 collected for each of these years? What time frame?

13:37:46 21 A Well, let's see. I did this declaration in
13:37:54 22 February, so this would have been 2021 data,
13:38:02 23 probably towards the end of 2022 purchased from
13:38:09 24 Nielsen.

13:38:13 25 Q Maybe I'm not getting the -- maybe we're not

13:38:16 1 understanding each other. So I want to know what
13:38:23 2 these numbers represent. And how is it -- what is
13:38:28 3 your understanding of how Nielsen collects this
13:38:30 4 data?

13:38:32 5 A So Nielsen collects point of sale -- my
13:38:36 6 understanding is Nielsen collects point of sale data
13:38:40 7 from retailers. And they have a very granular
13:38:47 8 detail on what products are being scanned at
13:38:51 9 retailers' checkouts and that's how they collect the
13:38:56 10 sales data for thousands of products in the Nielsen
13:39:01 11 universe.

13:39:02 12 What we did is we purchased the vitamin set
13:39:06 13 from that and then specifically honed it down to the
13:39:10 14 vitamin market that we compete in with Baby Ddrops.
13:39:15 15 So what you see here is the Ddrops percentage share
13:39:21 16 from that factored market that we compete in. And
13:39:27 17 that factored market represents the major
13:39:31 18 significant products within the infant liquid
13:39:34 19 vitamin D space.

13:39:35 20 Q So when it says that a market share has a
13:39:45 21 certain percentage in a certain year, is that the
13:39:50 22 market share that Nielsen's reporting on January 1st
13:39:54 23 of that year or on December 31st of that year or
13:39:58 24 somewhere in between?

13:39:58 25 A We buy the annual report, so it's at the end

13:40:02 1 of the year and it's usually the 12 months rolled,
13:40:07 2 right. So 2021 wouldn't be all ready, the way I
13:40:18 3 understand it, until the end of 2021. So it would
13:40:22 4 be sometime in 2022 that you could even gain access
13:40:26 5 to that 2021 data.

13:40:28 6 Q Okay. So then the Redacted

13:40:41 9 A I'm not certain, but sounds reasonable.

13:40:44 10 Q Redacted

13:40:55 13 A Right, uh-huh.

13:40:56 14 Q Okay. Did you include in this data infant
13:41:21 15 vitamin D products that were not one drop products?

13:41:30 16 A This would include all the relevant universe
13:41:35 17 of liquid infant vitamin D products that we compete
13:41:39 18 in, so this would be D-Vi-Sol, our product, Zarbee's
13:41:47 19 product, Mommy's Bliss product. And I'm trying to
13:41:53 20 think. There may have been one or two smaller
13:41:56 21 entrants that made up that group.

13:42:02 22 Q Would it have included Wellments vitamin D
13:42:34 23 drops?

13:42:34 24 A Wellments -- Wellments is Upspring. Yes, it
13:42:40 25 may have included Upspring come to think of it, yes.

13:42:45 1 Q Do you know that for sure?

13:42:46 2 A I can't recall right now. They're a very
13:42:51 3 small player. I don't even know if they're around
13:42:54 4 anymore in this space.

13:42:56 5 Q Did it include Carson's vitamin D drops?

13:43:03 6 A I don't think so because that's not
13:43:05 7 typically a product that's tracked by Nielsen in
13:43:13 8 food mass and drug. Carson sells in mom and pop
13:43:17 9 vitamin stores and online which Nielsen doesn't have
13:43:22 10 access to anyway.

13:43:24 11 MR. CONRAD: All right. Well, I will pass
13:43:26 12 the witness.

13:43:27 13 MR. PALEN: I have nothing further.

13:43:30 14 MR. CONRAD: Thank you for your time,
13:43:32 15 Mr. Temovsky.

13:43:32 16 THE WITNESS: Thank you. Take care.

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18 (Time Noted: 1:44 p.m.)

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I, CHRIS TEMOVSKY, being first duly sworn,
on oath say that I am the deponent in the aforesaid
deposition taken on March 27, 2024; that I have read
the foregoing transcript of my deposition,
consisting of pages 1 through 142 inclusive, and
affix my signature to same.

_____ as it now appears
_____ as it now appears with corrections

CHRIS TEMOVSKY

SUBSCRIBED and sworn to
before me this _____ day of
_____, 2024.

Notary Public

1 C E R T I F I C A T E

2 I, Sandra L. Rocca, CSR, RMR, RDR, CRR, a
3 Certified Court Reporter within and for the States
4 of Illinois, Florida, Washington and Georgia, do
5 hereby certify:

6 That CHRIS TEMOVSKY, the witness whose
7 deposition is hereinbefore set forth, was duly sworn
8 by me and that such deposition is a true record of
9 the testimony given by such witness.

10 I further certify that I am not related to
11 any of the parties to this action by blood or
12 marriage; and that I am in no way interested in the
13 outcome of this matter.

14 IN WITNESS WHEREOF, I have hereunto set my
15 hand this 28th of March, 2024.

16

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19



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Sandra L. Rocca, CSR, RMR, RDR, CRR

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Illinois, D.C. and Florida Notary

1 ERRATA SHEET FOR THE TRANSCRIPT OF:

2 Case Name: MOM Enterprises vs Vieth

Dep. Date: 3/27/24

3 Deponent: CHRIS TEMOVSKY

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5 CORRECTIONS:

6

Pg.	Ln.	Now Reads	Should Read	Reason
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CHRIS TEMOVSKY

20

21 BEFORE ME THIS ___ DAY

22 OF _____, 2024.

23

24

25 (Notary Public) MY COMMISSION EXPIRES: _____