

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

EXTREMITY MEDICAL, LLC, a New
Jersey limited liability
company,

Plaintiff,

vs.

FUSION ORTHOPEDICS, LLC, a
Delaware corporation,

Defendants.

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DEPOSITION VIA ZOOM OF
LEONEL DOMINGUEZ

June 7, 2023

9:05 a.m.

Extremity Medical, LLC
EXHIBIT 2016
Fusion Orthopedics v. Extremity Medical
Case IPR2023-00894

Reported by Jovanna Roman, RPR
AZ Certified Reporter No. 50725
Esquire Deposition Solutions
Job No. J9771189

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Mr. Samuel Rocereta

I N D E X

WITNESS: PAGE

LEONEL DOMINGUEZ

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E X H I B I T S

NUMBER	DESCRIPTION	PAGE
Exhibit 11	Declaration of Leonel Dominguez	11
Exhibit 1	United States Patent 166	14
Exhibit 12	Expert Declaration	74
Exhibit 20	United States Patent 447	128
Exhibit 8	US Patent Application Chang	192

DEPOSITION VIA ZOOM OF LEONEL DOMINGUEZ

JUNE 7, 2023, 9:05 A.M.

THE COURT REPORTER: Mr. Dominguez, would you raise your right hand.

THE WITNESS: (Complies.)

THE COURT REPORTER: Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth today?

THE WITNESS: I do.

THE COURT REPORTER: Thank you.

LEONEL DOMINGUEZ

Having been first duly sworn by the Certified Court Reporter, was examined and testified as follows:

EXAMINATION

BY MR. LINDENBAUM:

Q. Good morning, Mr. Dominguez.

A. Hi, Mr. Lindenbaum.

Q. Could you please state your full name for the record.

A. Leonel Dominguez.

Q. All right. My name is David Lindenbaum. I represent Extremity Medical and I will be taking your deposition today. You have been administered an oath and

1 pursuant to that oath you are obligated to tell the truth
2 during this deposition. Do you understand?

3 A. Yes, sir.

4 Q. Are you taking any medications today that will
5 prevent you from understanding my questions or answering
6 my questions fully and truthfully?

7 I'm not sure --

8 THE COURT REPORTER: We're losing audio
9 here.

10 MR. LINDENBAUM: Why don't we go off the
11 record.

12 (A break in the deposition occurs.)

13 MR. LINDENBAUM: Let's go back on the record
14 then. Just for the record, I just want to note that also
15 attending the deposition it seems that Mr. Sam Rocereta is
16 also joining us for the deposition.

17 BY MR. LINDENBAUM:

18 Q. So let me ask my question again, Mr. Dominguez, I
19 asked before. Are you taking any medication today that
20 will prevent you from understanding my questions or
21 answering my questions fully and truthfully?

22 A. No, Mr. Lindenbaum. No medications.

23 Q. Okay. Have you ever been deposed before?

24 A. No, I have not.

25 Q. All right. So just want to go over some ground

1 rules before we jump into the substantive questions. I'll
2 be asking questions. My questions and your answers will
3 be recorded by the court reporter who is joining us
4 remotely today. The court reporter will be recording
5 everything that's said so we need to make sure that we
6 talk one person at a time so the court reporter can get
7 both my questions and your answers. Do you understand?

8 A. Yes.

9 Q. Okay. Also I need you to give verbal answers to
10 the questions so that the court reporter can record them
11 so if I ask a question and you shake your head or nod, I
12 will ask you to answer the question verbally, okay?

13 A. Yes.

14 Q. If I ask a question that you do not understand,
15 please let me know and I will try to clarify, okay?

16 A. Okay.

17 Q. Also this is not intended to be a marathon
18 session. If you need a break at any time, please let me
19 know, but if there is a question pending I might ask you
20 to answer the question before we take the break. Do you
21 understand?

22 A. Understood.

23 Q. All right. Do you understand that you're not
24 supposed to communicate with your attorneys about the
25 substance of your testimony while I'm asking questions

1 today?

2 A. Yes. That's what I understand. Yes.

3 Q. Okay. And that includes during breaks until my
4 questioning is completed, do you understand?

5 A. Yes, I do.

6 Q. All right. I understand that the exhibits that
7 we sent by mail were received. Do you have those in front
8 of you?

9 A. Yes, I do.

10 Q. Okay. Do you have any other papers in front of
11 you?

12 A. No, I do not.

13 Q. Okay. All right. Did you do anything to prepare
14 for the deposition?

15 A. Yes. Certainly read through the exhibits,
16 particularly patent 166. I re-read my expert witness
17 declaration and I've re-read the IPR. Those are the
18 primary exhibits that I focussed on in the last 24,
19 48 hours.

20 Q. Okay. And when you said you re-read the IPR, do
21 you mean your declaration you submitted for the IPR?

22 A. The -- my expert witness declaration.

23 Q. Okay.

24 A. That document.

25 Q. Okay. Did you review anything else related to

1 the IPR?

2 A. Well, the -- as I understand it, the IPR itself
3 is another document so I did look through that as well.

4 Q. Okay. Anything else?

5 A. For the most part I glanced over the -- you know
6 cursory overview of all the other eight -- seven or eight
7 exhibits. There's quite a bit of material there,
8 including obviously patent 166 was very important for me
9 to review that carefully, and any of the other exhibits I
10 took a good hard look at them to just get familiar with
11 the structure of those exhibits.

12 Q. All right. When you say the exhibits, do you
13 mean the exhibits to the IPR petition?

14 A. No. The exhibits that I have in front of me,
15 which are labeled Plaintiff's Exhibits 1 through 11.

16 Q. Okay.

17 A. Those are the documents that were received from
18 you. Those are the exhibits that I glanced through.

19 Q. Okay. So you're referring to the exhibits to
20 Extremity Medical's claim construction brief, is that
21 right?

22 A. Yeah.

23 Q. Okay. Did you speak to anyone to prepare for the
24 deposition?

25 A. Yes. I spoke with counsel Corby yesterday when

1 I --

2 MR. VOWELL: Let me caution the witness not
3 to disclose any substance of the communications that we
4 had, but you can answer the question about the basic
5 facts.

6 THE WITNESS: Counsel Corby I spoke with him
7 about what was going to happen --

8 MR. VOWELL: Again, I caution the witness
9 not to disclose the substance of what we discussed so,
10 David, maybe you want to ask a different question.

11 BY MR. LINDENBAUM:

12 Q. My question was did you speak with anyone to
13 prepare for the deposition?

14 A. Yes.

15 Q. Okay. Who did you speak with?

16 A. Counsel Corby.

17 Q. Okay. Anyone else?

18 A. No.

19 Q. Okay.

20 A. He's the primary person.

21 Q. Okay. Was there a secondary person that you
22 spoke to?

23 A. Well, while here I certainly met with a few of
24 the people here at Fusion Orthopedics yesterday for the
25 first time.

1 Q. All right. And did you discuss with them the
2 testimony you may give today at your deposition?

3 A. No.

4 Q. All right. Did you discuss with them anything
5 about this case?

6 A. Not specific to any one thing, but just in
7 general.

8 Q. In general, what did you discuss?

9 A. Just the discussion was surrounding patent 166
10 yesterday.

11 Q. Okay. What about -- what did you discuss about
12 patent 166?

13 MR. VOWELL: Let me caution the witness not
14 to disclose the substance of any communications that you
15 had with counsel in preparation for your deposition. You
16 can answer otherwise.

17 THE WITNESS: I -- I re-read the
18 specifications to 166. I reviewed the diagram,
19 particularly Figure 18 in 166, and I reviewed the claims
20 to 166.

21 BY MR. LINDENBAUM:

22 Q. Okay. And what about patent 166 did you discuss
23 with people at Fusion?

24 MR. VOWELL: Object and say that that calls
25 for attorney/client conversation. To the extent he

1 discussed anything about the patent with anybody else at
2 Fusion, I was present so I think it's privileged and it
3 was at my direction and in connection with preparation for
4 the deposition.

5 MR. LINDENBAUM: Okay. Are you --

6 MR. VOWELL: I'm instructing the witness not
7 to answer.

8 BY MR. LINDENBAUM:

9 Q. Got it. Okay. And, Mr. Dominguez, are you
10 following -- Mr. Vowell's advice not to answer the
11 question?

12 A. Yes, I am.

13 Q. Okay. Other than discussions you had yesterday
14 regarding the 166 patent, have you discussed the 166
15 patent with anyone else other than counsel?

16 A. No, I have not.

17 Q. Okay. All right. I'd like you to turn to what's
18 been marked as Plaintiff's Exhibit 11, which should be
19 your declaration submitted in support of Fusion's
20 responsive claim construction brief for the 166 patent.

21 (Deposition Exhibit No. 11 marked for
22 identification.)

23 THE WITNESS: Yes, I have that in front of
24 me.

25 BY MR. LINDENBAUM:

1 Q. Okay. Great. Are you familiar with this
2 document?

3 A. Yes.

4 Q. Okay. Who drafted this declaration?

5 A. This declaration was drafted by me, specifically
6 all the technical areas of this document was drafted by me
7 and with -- so I would say yes, it was primarily all
8 drafted by me. You know counsel did provide some guidance
9 with respect to what's included in the declaration, such
10 as table of contents information, you know, definition of
11 personal -- a person skilled -- of ordinary skill in the
12 art --

13 THE COURT REPORTER: I'm sorry,
14 Mr. Dominguez. Can you restate that, table of contents
15 information, definition of personal and then repeat.

16 THE WITNESS: Person of -- there's a table
17 of contents, section two, person of ordinary skill in the
18 art. I had communications with counsel Corby about how to
19 define that, how to define person of ordinary skill in the
20 art so we -- we both drafted that section together, but
21 the rest of the -- the rest of the document I pretty much
22 did on my own based on personal experience and expertise.

23 BY MR. LINDENBAUM:

24 Q. Okay. I'm going to share my screen, if I can
25 here.

1 On the screen now you should see what is the
2 last page of the declaration, page 20. Do you see that?

3 A. Yes, I do.

4 Q. Okay. And you'll see there's a paragraph that
5 starts with: I hereby declare under penalty of perjury.
6 Do you see that paragraph?

7 A. Yes, I do.

8 Q. Am I correct that counsel drafted that paragraph?

9 A. Yes.

10 Q. Okay. And I see that the -- there's an
11 electronic signature here with your name. Do you see
12 that?

13 A. Yes, I do.

14 Q. Did you enter your signature here?

15 A. Yes.

16 Q. Okay. And that was -- was that on or about
17 May 12th, 2023?

18 A. Yes, sir.

19 Q. All right. I will refer to this document during
20 the day today during the deposition as your declaration,
21 okay?

22 A. Okay.

23 Q. All right. I'm also going to ask you to -- if
24 you could look at Plaintiff's Exhibit 1. Just so we have
25 this in front of you I will pull it up also.

1 (Deposition Exhibit No. 1 marked for
2 identification.)

3 Are you familiar with this document?

4 A. Yes, I am.

5 Q. Okay. And this is U.S. Patent No. 11,298,166;
6 correct?

7 A. Correct.

8 Q. And in your declaration you refer to this
9 document as the 166 patent; correct?

10 A. Correct.

11 Q. All right. Okay. So I'd like you to turn back
12 to your declaration, which was Plaintiff's Exhibit 11.
13 And I'd like you to turn specifically to the background
14 section, which I believe spans pages 1 through 4, and I'd
15 like to ask you some questions about those -- that portion
16 of your declaration.

17 A. Okay.

18 Q. All right. If we turn to paragraph 5 actually,
19 if you can just read that to yourself and let me know when
20 you've read it.

21 A. I've read it.

22 Q. Okay. And actually before I even go further, I
23 note that attached as an exhibit to your declaration is
24 your CV so I understand that there's more information
25 about your background in that document in case you need to

1 refer to that to answer the questions I have about your
2 background, okay?

3 A. Okay.

4 Q. So I understand actually from your CV that you
5 were employed at Smith & Nephew for about two years, is
6 that right?

7 A. That's correct.

8 Q. Okay. And were you a senior product development
9 engineer during that entire time?

10 A. Yes, I was.

11 Q. All right. And if you look just at paragraphs 6
12 through 9, my question is in the -- for the experience
13 that's described in those paragraphs, paragraphs 6
14 through 9, do those all relate to your time at Smith &
15 Nephew?

16 A. Yes, they do.

17 Q. Okay. And what experience, if any, did you have
18 during that time designing or developing implanted
19 assemblies for fusion of bones?

20 A. For the entire two years while at Smith & Nephew
21 Richards, I worked in the orthopedic trauma department
22 which involved -- which involved designing internal
23 fixation and external fixation for the repair of fractured
24 bones of the body.

25 Q. Okay. And what percentage would you say was

1 internal fixation?

2 A. I would say it was 50/50, both internal and
3 external.

4 Q. All right. Did you design or develop any
5 intramedullary fixation assemblies?

6 A. Yes, I did.

7 Q. Okay. And what percentage of your time was
8 worked on intramedullary fixation assemblies?

9 A. Probably about a quarter of -- half of the time
10 that I was working on internal fixation, I would say a
11 quarter of that was working with intramedullary nail
12 fixation.

13 Q. Okay. All right. If we turn to paragraph 10 of
14 your declaration, I see that it states you were
15 director -- excuse me. You were director of engineering
16 at a company called Medtronic-Xomed or Xomed Surgical
17 Products, is that right?

18 A. Yes. Medtronic-Xomed Surgical Products.

19 Q. Sorry. Xomed.

20 A. Xomed.

21 Q. Yes. And were you employed at Medtronic-Xomed
22 for about four years?

23 A. Actually longer than that. Let me refer to my CV
24 for the dates that I was employed there.

25 I was employed as -- when I came into

1 Medtronic-Xomed -- when I came into Xomed, it was actually
2 Xomed Surgical Products in 1995 through 1998 so for a
3 period of three years I was section manager of the R&D
4 department. Then I got promoted in 1998 through -- and
5 served as director of R&D for Medtronic-Xomed when
6 Medtronic purchased or acquired Xomed Surgical Products
7 and brought them into the full so during 1998 through 2002
8 I served as director of R&D for the combined
9 Medtronic-Xomed Surgical Products company.

10 Q. Thank you.

11 And during your time at -- during that time
12 from 1995 through 2002, what experience did you have
13 designing and developing implanted assemblies for fusion
14 of bones?

15 A. Medtronic-Xomed is an ear, nose and throat
16 company and they have very miniature implants and external
17 fixation devices that attach to the skull for
18 neurosurgery, neurosurgical procedures so I was intimately
19 aware and designed products that affixed to bones
20 externally and also implants that went into the body
21 particularly around the nerve -- I'm sorry. Around the
22 brain, brainstem area for head and neck surgery.

23 Q. Okay. So am I correct that you didn't have any
24 experience during that time designing or developing
25 assemblies for fusion of bones, is that right?

1 A. Fusion was -- the fusion was not the primary
2 product line for Medtronic-Xomed.

3 Q. So am I correct that during your time at -- from
4 1995 to 2002 you didn't have any experience designing and
5 developing assemblies for fusion of bones; correct?

6 A. For direct fusion of bones, no. For attachment
7 to bones, yes.

8 Q. Would that have been external attachment?

9 A. That would have been one of the patents that I
10 developed while there at Medtronic-Xomed was an external
11 attachment to the skull.

12 Q. Okay.

13 A. To allow meshing of device during surgery.
14 That's probably the most precise example I can give you of
15 attaching to bone.

16 Q. Okay. So -- so am I correct that you didn't have
17 any other experience dealing with products that attached
18 to bone, is that right?

19 A. Other than that, that was the primary product
20 that attached to bone.

21 Q. Okay. And you also didn't have any experience
22 with intramedullary fixation assemblies during that time;
23 is that correct?

24 A. Not in the head and neck area of the products
25 that Medtronic-Xomed designed and developed.

1 Q. What about in any area?

2 A. Can you repeat that again?

3 Q. Yes. You didn't have any experience with
4 intramedullary fixation assemblies during the time, and
5 this would be the time spanning from 1995 to 2002;
6 correct?

7 A. Yes. That would be an accurate statement.

8 Q. Okay. And if we turn to -- I guess I'm now at
9 paragraph 15. No, let me back up. I'm sorry. Excuse me.

10 When I'm looking at paragraphs 10 to 14
11 again, am I correct that the experience described in --
12 all the experience described from paragraphs 10 to 14
13 relate to your time at Medtronic-Xomed?

14 A. Yes.

15 Q. Okay. All right. Can you please turn to
16 paragraph 15 of your declaration.

17 A. Yes. I'm there.

18 Q. Okay. Says you -- you worked at a company called
19 Mekanika, Inc., is that right?

20 A. It's pronounced Mekanika.

21 Q. Mekanika. Excuse me. Okay. And -- and did you
22 work at Mekanika for about one-and-a-half years?

23 A. Approximately, yes.

24 Q. All right. And what experience did you have
25 during that time designing and developing implanted

1 assemblies for fusion of bones?

2 A. While at Mekanika, that is an orthopedic spine
3 company and we had products in design that related to
4 pedicle screws in particular, screws that went into the
5 vertebral body of the spine for the function of creating a
6 fusion across two or more vertebra of the spine.

7 Q. Okay. Did all of your experience at Mekanika
8 relate to spinal orthopedics?

9 A. Yes, it did.

10 Q. Did any of that experience relate to
11 intramedullary fixations?

12 A. They relate to intraosseous fixation which is
13 screws going into bone.

14 Q. Okay. Did it relate to intramedullary fixation?

15 A. No.

16 Q. If we turn to paragraph 16 of your declaration, I
17 understand you were next vice president of product design
18 and development at U.S. Spine, LLC, is that right?

19 A. Correct.

20 Q. And you were at U.S. Spine for about two years;
21 correct?

22 A. Correct.

23 Q. And were you vice president of product design and
24 development during that entire time?

25 A. Yes, I was.

1 Q. All right. And during that time what experience
2 did you have designing or developing implanted assemblies
3 for fusion of bones?

4 A. Once more, U.S. Spine was also a spinal
5 orthopedic company and products related to pedicle screw
6 fixation, fusion of the vertebral bodies, reduction of
7 fractures within fractured vertebral bodies so they
8 involved bone screws and attachment to bone using bone
9 screws and other assemblies that created a reduction of
10 fractured bones to create for fusion.

11 Q. Okay. Did your experience relate to
12 intramedullary fixation?

13 A. We did not have any intramedullary fixation
14 device that -- at that company. They were all
15 intraosseous fixation screws.

16 Q. So your experience did not relate to
17 intramedullary fixation; correct?

18 A. Correct.

19 Q. Do paragraphs 17 and 18 also relate to your
20 experience while you worked at U.S. Spine?

21 A. Yes, sir.

22 Q. Okay. And then I see in paragraph 19, it states
23 you were vice president of research and development for
24 Scient'x USA, right?

25 A. Correct.

1 Q. And were you there for about two years?

2 A. Approximately.

3 Q. And what experience did you have during that time
4 designing or developing implanted assemblies for fusion of
5 bones?

6 A. Scient'x USA was a -- is a spinal orthopedic
7 device company involved in the fusion of bones in the
8 cervical lumbar region of the body. The fixation devices
9 used are intraosseous bone fixation devices that press
10 into bone and result in fixation, stable fixation to allow
11 fusion to occur.

12 Q. Okay. Do you have any experience during that
13 time with intramedullary fixation?

14 A. No. We had no intramedullary fixation devices.

15 Q. The devices that Scient'x had, were they internal
16 or external fixation devices?

17 A. Internal.

18 Q. And for U.S. Spine, were their devices internal
19 or external fixation?

20 A. Internal.

21 Q. And for Mekanika, were they internal or external
22 fixation?

23 A. Internal.

24 Q. All right. If you turn to paragraph 20. The
25 paragraph states that: Over the past 15 years, I have

1 served as president for Duraspine Medical Technologies,
2 LLC; correct?

3 A. That's correct.

4 Q. And are you currently president for Duraspine
5 Medical Technologies, LLC?

6 A. Yes.

7 Q. And over the past 15 years, what experience have
8 you had designing or developing implanted assemblies for
9 fusion of bones?

10 A. Many. During those -- during the past -- since
11 2007, so almost 18 years now -- I'm sorry. Almost
12 16 years now, I have worked alongside numerous companies,
13 spine and orthopedic companies, some are in the spine
14 area, some are in the foot and ankle area, some are in the
15 ENT area, some are in the OB/GYN area so I have a lot of
16 experience based on my client's needs to design internal
17 implants, fixation devices for fusion and so forth.

18 Q. Okay. What kinds of devices have you worked on
19 related to fusion of bones for the OB/GYN space?

20 A. In the OB/GYN space there is an intrauterine
21 device for contraception.

22 Q. And that involved fusion of bones?

23 A. No, that did not involve fusion of bones. That's
24 purely a different part of the anatomy, a different part
25 of the -- my skill set in other areas other than just

1 bone.

2 Q. Okay. So what experience have you had designing
3 or developing implanted assemblies for fusion of bones?

4 A. I have recently -- I can say I am currently
5 working on the design of an ankle fusion nail --

6 MR. VOWELL: Let me just object here to say
7 that I'd like to mark this portion of the transcript
8 highly confidential because it's related to ongoing work I
9 believe.

10 THE WITNESS: Yeah. I mean, I do have NDAs,
11 non-disclosure agreements, with all of my clients and I
12 have well over 40 clients over the past 15 years that I
13 have worked with personally. Some of them may be
14 surgeons, some of them are startup companies, some of them
15 are midsize companies, so I do have, you know, clients'
16 confidential information that I do not like to disclose to
17 anyone, but I have worked with -- for some of my clients I
18 can say that I have worked in areas related to bone
19 fusion, intramedullary nails, small bone attachments and
20 anchoring of internal fixation devices for their -- to
21 meet their particular needs.

22 BY MR. LINDENBAUM:

23 Q. Okay. Do you consider any of the testimony you
24 have given so far to be confidential?

25 A. Not until -- not unless I'm asked to go into

1 specifics, which I cannot, so at this point I'm still very
2 general in nature.

3 Q. Okay. All right. Yeah, I'm just asking you
4 generally, not to go into details of specific devices, but
5 just generally your experience working and designing,
6 developing implanted assemblies for fusion of bone.

7 So I understand you're working on an ankle
8 fusion nail. Is there any other products you can tell me
9 about that relate to fusion of bones?

10 A. Plates. I have worked on plates and small --
11 small screws that attach through plates to -- to attach --
12 that then attaches to bone behind it.

13 So plate -- you know plate fixation, bone
14 screw fixation in areas of the foot and ankle, also in the
15 areas of the spine, also in areas of the wrist, you know,
16 the bones in the hand. Those have been the three primary
17 areas where I developed screw fixation and assemblies of
18 bone screws and plates used for fracture fixation and
19 fusion.

20 Q. Over the past 15 years that you've served as
21 president for Duraspine Medical Technologies, formerly
22 known as Hyperjax Biomedical Consulting, what percentage
23 of your time have you -- have you worked on implanted
24 assemblies for fusion of bones?

25 A. Gosh. It's got to be well over 90 percent, all

1 that I do. With the exception of the period that I was
2 working on OB/GYN device that is not related to bone
3 fusion, I would say well over 90 percent of my work is all
4 related to orthopedics and the -- the internal fixation of
5 orthopedic devices that result in fusion of bones or
6 reduction of bones or correction of deformities of bones
7 in those -- in all those areas of orthopedics.

8 Q. And what percentage would you say was -- I guess
9 of that 90 percent, what percentage was -- relates to
10 internal fixation?

11 A. 90 percent.

12 Q. Okay. And what percentage of that related to
13 intramedullary fixation?

14 A. 10 to 15 percent.

15 Q. And do you recall which bones were targeted for
16 the intramedullary fixation?

17 A. Calcaneus, talus, tibia.

18 THE COURT REPORTER: I'm sorry. I missed
19 the first, Mr. Dominguez. Can you repeat that.

20 THE WITNESS: Calcaneus. The bones of
21 the -- the bones of the foot, the calcaneus, talus, tibia.

22 BY MR. LINDENBAUM:

23 Q. Okay.

24 A. The tibia itself, the femur, the humerus so
25 primarily the long bones of the body and the foot bones of

1 the body.

2 Q. All right. Of the assemblies you worked on, have
3 any of them been released to market?

4 A. Oh, yes, sir.

5 Q. Can you -- can you tell me which ones?

6 A. Well, while at Smith & Nephew Richards, Smith &
7 Nephew was considered -- in 1992, Smith & Nephew was
8 probably considered one of the top five trauma orthopedic
9 companies in the world. They had a prolific -- their
10 market -- they had a very large market share of the
11 intramedullary nail market in the world. Based in
12 Memphis, working alongside the University of Tennessee's
13 Campbell Clinic. Some very prestigious orthopedic
14 surgeons and residents come out of that school.

15 And, for example, we had a product line
16 called the Russell-Taylor tibia nail and that was probably
17 the number one best seller nail in the market maybe next
18 to Zimmer, and those surgeons were living in Memphis and
19 we worked alongside with them to perfect that system which
20 consisted of an intramedullary nail for the tibia. We had
21 one also for the femur and all of the associated hardware
22 and instrumentation that went along with it for the
23 surgeon to perform the procedure.

24 So that -- that nail is still -- it's now
25 called a TriGen nail, but it is still considered the gold

1 standard, if you will, in the industry for
2 intramedullary -- for the use of intramedullary fixation
3 of long bone.

4 Q. And what was your role in working on that?

5 A. I worked with the implant and also developed some
6 instruments to go along with it to target the screws in
7 the nail when it was implanted.

8 Q. And what do you mean when you say you worked with
9 the implant?

10 A. I worked -- I literally had the models, had the
11 drawings, had the specifications, made changes to the
12 specifications, had it remanufactured to my
13 specifications. So in the development of and the
14 perfection of that nail, there's also -- there's always a
15 continuous improvement that takes place with implants to
16 keep -- to continue to make them better and so we may have
17 added some additional lengths of screws, we may have made
18 the implant a little longer, but it was a continuous
19 process of improvement of that device in the marketplace
20 and as an engineer that was my -- that was my role was to
21 continue to improve that product.

22 Q. Okay. So you were not the original designer of
23 the nail. You were -- you were improving on the design
24 that already existed; correct?

25 A. That is correct. That design was formulated by

1 doctors Russell and Taylor several years before I got to
2 Smith & Nephew.

3 Q. Hence the name of the product?

4 A. Yes. Hence the name of the product,
5 Russell-Taylor.

6 Q. Gotcha. Have you worked on any other products
7 that have been released to market?

8 A. Yes. Well, even back then in 1992 while at Smith
9 & Nephew, I worked on a -- on an ankle fusion device. It
10 pre-existed prior to my arrival at Smith & Nephew. It
11 was -- actually it was an external triangular shaped
12 device called the Calandruccio clamp and this was a device
13 that created a triangular shape on both the medial and
14 lateral aspects of the foot and pins would be inserted
15 through -- the subcutaneous pins would be inserted through
16 the tibia, through the talus and a compression would be
17 applied to this outer frame which created a fusion of the
18 ankle.

19 I worked personally with Dr. Calandruccio,
20 who is the founder of that device, and when he created
21 that device that device was made entirely out of stainless
22 steel and under his guidance and learning I designed -- I
23 re-designed that device so that it would be radiopaque to
24 the x-ray.

25 So in other words, the doctors wanted to be

1 able to see that a fusion had actually occurred and when
2 you have so much stainless steel across that joint, the
3 stainless steel blocks the x-ray image at the fusion site
4 and so by converting and changing materials from stainless
5 steel over to a radio plastic -- a plastic material that
6 is radiopaque, the surgeons were able to then now use a
7 similar device and be able to see through on x-ray the
8 fusion because the materials were transparent and did not
9 block or obscure the fusion so I worked with
10 Dr. Calandruccio on that project as a senior engineer at
11 Smith & Nephew Richards to perfect and further refine the
12 design that had pre-existed.

13 Q. Can you spell Dr. Calandruccio's name. I think
14 we're going to need that spelled out for the record.

15 A. I hope he's still alive. He was pretty elderly
16 when I was working with him. I don't think he's still
17 around with us, but his name is spelled
18 C-A-L-A-N-D-R-U-C-C-I-O. We always referred to him as
19 Dr. Cal because it was such a long Italian name.

20 Q. And you said the product was the Calandruccio
21 nail -- clamp.

22 A. The Calandruccio clamp.

23 Q. Yes. Got it.

24 A. Calandruccio clamp for arthrodesis.

25 Q. Arthrodesis; correct?

1 A. Arthrodesis, yes. It's referred to as a tri
2 fusion so it's a tibia, talus, calcaneus so it's a TTC
3 fusion.

4 Q. Is that an external fixation device?

5 A. This is an external fixation device that utilized
6 transfixion bone pins that went through the skin, in
7 through the bone, in one side of the bone and out the
8 other so the pins were considered the implant, if you
9 will. They went inside the body, but they entered and
10 exited the skin on both sides of the foot and then the
11 clamps themselves attach to the ends of these pins and
12 then it would be compressed externally with -- with a
13 drive mechanism that compressed the whole assembly so the
14 pins were under a load, under a compressive load on either
15 side of the fusion site.

16 Q. Have you worked on any other products that were
17 released that were implanted assemblies for bone fusion --
18 for fusion of bones?

19 A. I have probably over my career working with the
20 various spine orthopedic companies, I've probably designed
21 well over 20 or 25 pedicle screw systems and these are all
22 different size screws, both fixed and polyaxial that
23 attach to bone, particularly the pedicles of the vertebral
24 body on which rods are then attached over those all
25 internal and they result in fixation once everything is

1 locked down so I would say I've probably designed well
2 over 20 to 25 different pedicle screw systems.

3 I have designed and patented several
4 cervical plates used in the cervical part of the neck to
5 create fusion across multiple vertebral bodies of the
6 neck. I've worked with plates that are applied both
7 anteriorly in the lumbar region connecting two bones
8 together to produce a fusion.

9 So plates in both the lumbar, plates in the
10 neck, in the cervical region. Pedicle screws in the
11 lumbar, at least 20 or 25 different systems, and these all
12 have a varied array of sizes of lengths and diameters with
13 multiple attachments sometimes in the nature of --
14 typically we have 20 to 30 different attachments that
15 attach onto the screws with different types of geometries.

16 In the first posterior cervical area, I've
17 designed miniature screws and plates that attach on the
18 backside of the neck at the base of the skull, screws --
19 plates that attach to the base of the skull as well
20 that -- that attach then to the remaining screws that go
21 into the neck region. So when it comes to those -- those
22 are all primarily fusion devices that relate to screws and
23 plates.

24 I've also designed intrabody devices that go
25 in between the bone that promote fusion, sort of like a

1 plug, if you will, or a cage. We refer to them as cages
2 and those are used in conjunction with pedicle screws in
3 order to create fusion of the vertebral body.

4 I've designed intramedullary nails used in
5 the foot that are used with their instrumentation that
6 result in the ability to introduce the nail into a drilled
7 hole that go through the bones of the foot and into the
8 tibia and then with screws that traverse the nail that
9 capture the nail in the tibia captures through use of bone
10 screws, through use of bone screws that captures the nails
11 in the calcaneus and in the talus to secure that
12 intramedullary nail to the bone as a result leading to
13 fusion of the ankle.

14 Q. The last one that you mentioned, the nails used
15 in the foot. When did you design that?

16 A. That has been over the past two years.

17 Q. And did that result in a product that was
18 released to market?

19 A. No, not yet.

20 Q. Do you know if that product has been used in any
21 surgical procedures?

22 A. Yes.

23 Q. And were the procedures successful?

24 A. Yes.

25 Q. One moment. Can you tell me more about the

1 configuration of that nail that you just described with
2 the screws that traverse the nail.

3 A. Certainly. It resembles what you would
4 anticipate as an intramedullary nail, multiple lengths,
5 multiple diameters to fit the anatomy as selected by the
6 surgeon and the patient anatomy so there's a multitude of
7 different lengths of nails, different diameters of nails.

8 There's also bone screws. Some of them are
9 fully threaded from head to tip, but with a head. Some of
10 them are what we call a headless threaded screw, which
11 is -- has a taper towards the head, but it's threaded and
12 it continues on to the very tip as a full threaded -- full
13 thread screw, but those are two different distinct screws
14 that are part of the system.

15 The surgeon will elect the diameter and the
16 length of the nail to place through, you know, a small
17 incision in the skin, locate the direction of where the
18 hole in the nail is, and then using a series of drill
19 guides that are attached to the foot they -- he targets a
20 drill. First, a predrill hole in the bone and then he
21 may -- and then choose to insert the screw through that
22 predrilled hole that will blindly, essentially blindly,
23 pass the screw through the bone, through the nail, through
24 the other side of the bone and out the other side of the
25 bone and secure that bone screw and lock the nail in

1 place.

2 He will have then targeted drill guides that
3 target screws in the hind foot, in the calcaneus area.
4 Again, the screws have trajectories. Some of them are at
5 an angle that -- that cross into the backside of the
6 calcaneus towards the -- towards the front of the foot or
7 towards the front of the calcaneus and captures the nail
8 with an oblique screw trajectory and then he has also a
9 third screw that he can position that is perpendicular to
10 the nail and captures into the talus to secure the nail to
11 bone, the calcaneus, the talus and the tibia. So he's
12 working with about three screws all coming in from
13 different directions along the side of the nail to secure
14 that nail across the fusion site of the talus, tibia, and
15 calcaneus. That's a TTC fusion.

16 So to elaborate, it is a full system. It
17 isn't just nails. It includes implants. It includes
18 screws. It includes instrumentation. It includes drills,
19 drill bits, drill guides, wires, K-wires, all of the
20 necessary tools needed to perform the entire procedure
21 from start to finish.

22 Q. And the bones you mentioned, the talus, the tibia
23 and the calcaneus, those are in the foot; correct?

24 A. Correct.

25 Q. So this nail and screw system is intended to be

1 used in the foot; correct?

2 A. Correct.

3 Q. Can it be used in any other part of the body?

4 A. The nails that Smith & Nephew have, for example
5 in the tibia, are very similar in nature in terms of the
6 overall features of -- of -- have all the similar features
7 of an intramedullary nail.

8 In the case of a tibial nail, those are
9 inserted up on the -- on the upper side of the tibia right
10 where your knee is so they go into that direction down
11 towards your foot so the orientation of the nail is
12 inserted from a different orientation. In an ankle fusion
13 nail, the nail is inserted from your heel up through the
14 bone and into your tibia from a retrograde position.
15 Rather than from top to bottom, it's going from bottom up.

16 Q. So let me ask my question again. Can the nail
17 that you described that you designed be used in any other
18 part of the body besides the foot?

19 A. No. It is specific to the foot and ankle.

20 Q. Okay. And I think you said that one of the
21 screws is inserted at an oblique trajectory. What does
22 that mean?

23 A. That means that it is introduced -- it is
24 introduced at an angle relative to the axis of the nail.

25 Q. Okay. And what angle would that be?

1 MR. VOWELL: Object to form. You can
2 answer.

3 THE WITNESS: Approximately 20 to
4 30 degrees.

5 BY MR. LINDENBAUM:

6 Q. And when you say approximately 20 to 30 degrees,
7 what would that depend on then?

8 MR. VOWELL: Object to form. You can
9 answer.

10 THE WITNESS: There is a little bit of
11 variability that the surgeon can choose when targeting
12 that particular screw, which is targeted at an oblique
13 angle. So the drill guide puts them in the position of
14 that exact trajectory that lines up with the holes and the
15 nail. So when he inserts -- when he does his drilling and
16 he does his -- when he selects the long screw that goes
17 through there, that screw will be targeted to ride through
18 the axis -- that core axis in the nail at that angle of 20
19 to 30 degrees so that it will actually -- the nail -- the
20 screw will actually find its hole and pass through the
21 nail without any type of interference, obstruction so that
22 is -- that angle is really derived from the anatomy of the
23 bone itself in the calcaneus.

24 The calcaneus is a fairly large bone and,
25 you know, your heel is a fairly large bone and when they

1 want to try to fixate -- they want to grab as much bone
2 for a fixation as possible to secure that nail in position
3 so they usually using a larger screw -- a longer screw and
4 a larger threaded screw and they put it in in an oblique
5 angle in order to create the biomechanical forces that
6 will capture that nail in a large section of bone through
7 the longest portion of the calcaneus so they have a long
8 length that they can actually drill into.

9 Some of the other areas, like for example
10 the tibia, the bones there are a lot smaller. They're
11 rounder and the screws are shorter and they're -- they're
12 designed to basically lock the nail at a 90-degree or
13 perpendicular angle to the nail so that the screws are
14 coming in, you know, perpendicular to the axis of the nail
15 so that is a different angle in which those screws are
16 inserted versus the screws that are inserted in the
17 calcaneus.

18 BY MR. LINDENBAUM:

19 Q. So in terms of the surgeon being able to choose
20 the oblique angle at which to insert the screw between
21 approximately 20 and 30 degrees, is the nail hole through
22 which that screw is intended to be inserted designed to
23 allow the surgeon to choose an angle between approximately
24 20 and 30 degrees?

25 MR. VOWELL: Object to form.

1 THE WITNESS: The -- the angle is
2 pre-determined and manufactured at a specific angle of
3 20 to -- I don't recall exactly if it's 20 or 30, but it's
4 in that range and, again, it's driven by the anatomy of
5 the bone in the calcaneus for that angle to be selected.
6 There's nothing magic about it. It's just basically
7 driven by the space and the anatomy of the calcaneus bone
8 geometry, but the surgeon uses the largest and strongest
9 screw that he can use or she can use to insert that
10 angulated bone screw through the nail to -- that results
11 in the most stable fixation of the nail to bone as
12 possible.

13 The other screws that he is targeting in the
14 tibia and, you know, locking -- are primarily locking
15 screws to prevent expulsion of the nail and to prevent
16 rotation of the nail once it's inside the intramedullary
17 canal so some screws serve as anchoring devices through to
18 capture the nail. Other screws serve as antirotational,
19 antitorque devices or antiexpulsion devices so the
20 combination of three screws.

21 In this particular design we use three
22 screws. Other designs may use more or maybe even just two
23 screws, but in our particular design we use three screws
24 for that intended purpose.

25 BY MR. LINDENBAUM:

1 Q. Okay. I just want to focus on the screw that you
2 mentioned is inserted at oblique trajectory. Can we focus
3 on that screw?

4 A. Sure.

5 MR. VOWELL: Object to form. And, counsel,
6 let me just -- let me just make sure the record is clear
7 here. Are you asking him about the products he worked on
8 or are you asking him about the claims or the claim
9 language? I just want to make sure the record is clear
10 for the witness.

11 MR. LINDENBAUM: Thank you, Mr. Vowell.

12 BY MR. LINDENBAUM:

13 Q. Mr. Dominguez, that screw that we were just
14 referring to, the oblique -- can we refer to that as the
15 oblique screw?

16 A. Yes.

17 Q. Okay. Now, that screw you said that the surgeon
18 can choose at what angle to insert it between
19 approximately 20 degrees and 30 degrees; is that correct?

20 MR. VOWELL: Object to form. You can
21 answer.

22 THE WITNESS: Let me rephrase what I said.
23 The surgeon is -- the hole -- the trajectory of the hole
24 in the nail in that intramedullary nail for the ankle is
25 at already a pre-determined angle. Let's call it

1 30 degrees for sake of conversation. It's 30 degrees.

2 The targeting drill guides match that 30
3 degree so when the surgeon applies the -- the targeting
4 frame around the foot that allows him to target that
5 oblique screw, he has got a drill guide that is already
6 matched and made it to the angle on that nail to be
7 30 degrees so he will normally pass a wire through to make
8 sure that everything is on target in case something is off
9 with the way that he mounted the foot frame or something
10 moved for any particular reason so they would normally
11 take the safe route of passing a K-wire, a very thin
12 K-wire, through to make sure that it's targeted in the
13 right direction and it comes out the other side of the
14 nail and entering into the calcaneus to a certain depth.

15 He then uses that K-wire to measure the
16 length of the screw that he is going to select that will
17 basically reach from one end to the other of that K-wire.
18 He then removes the K-wire and inserts his fully threaded
19 screw in through that space so everything is already
20 pre-determined, pre-guided by the use of the frame that
21 matches to the hole in the nail and it's a fixed hole.
22 There is -- he doesn't have the ability to wiggle the
23 screw to get 20 degrees out of it. He's going to get 30
24 pretty much -- 30 every time because everything is being
25 targeted at that particular angle.

1 BY MR. LINDENBAUM:

2 Q. So -- so I believe you testified earlier that the
3 surgeon has some choice in terms of the angle. Are you
4 now testifying that there is no choice, that he cannot
5 choose any range of angles when he inserts the oblique
6 screw; is that correct?

7 MR. VOWELL: Object to form.

8 THE WITNESS: The final placement of that
9 oblique screw will be dependent upon how far the surgeon
10 inserts the intramedullary nail into the calcaneus. If
11 you leave the end of the nail superficial or if he imbeds
12 the nail into the calcaneus a few more meters, that will
13 determine the position of where that oblique hole will lie
14 relative to the calcaneus bone, but the whole idea behind
15 the surgery is because it's -- you're trying to make the
16 surgery as less open as possible using instrumentation to
17 take x-rays while he's performing the surgery. He's
18 targeting K-wires which will then allow him to target the
19 screw to go in at a fixed angle so I may have misspoke
20 earlier. It is a fixed angle in which the nail has been
21 designed to be. And our particular nail is at 30 degrees.
22 Other nails can have different specifications and can have
23 different angles.

24 BY MR. LINDENBAUM:

25 Q. Okay. So I don't know if I got an answer to my

1 question. So my question was, would that nail you've been
2 describing, the oblique screw, are you now testifying that
3 a surgeon cannot choose any range of angles for that
4 screw, he has to use the angle -- one specific angle for
5 which the nail is designed for; is that correct?

6 MR. VOWELL: Object to form.

7 THE WITNESS: I would say yes.

8 BY MR. LINDENBAUM:

9 Q. Okay. Have you ever designed or worked on a nail
10 that would allow a screw to be inserted through it at a
11 range of angles?

12 MR. VOWELL: Object to form.

13 THE WITNESS: Yes. Some -- yes, I have.

14 BY MR. LINDENBAUM:

15 Q. What would be an example?

16 A. An example would be rather than having a fixed
17 hole in the nail at a particular fixed trajectory, that
18 the nail would have a slot or slotted hole. With a
19 slotted hole the surgeon can select which end of the slot
20 he wishes to position the screw through to allow some
21 axial motion. He may elect to choose to enter the screw
22 at the top slot and exit towards the bottom slot on the
23 other side of the nail to create some angulation at his
24 choosing. So when you use a slot rather than a fixed hole
25 in a nail, that gives the surgeon a little more

1 flexibility as to the actual position trajectory of a bone
2 screw entering the nail.

3 Q. In terms of the nail we were discussing just
4 moments ago with the oblique screw, when -- when that nail
5 is implanted is it designed to -- well, there's a leading
6 edge and a -- and a trailing edge when it's inserted;
7 correct?

8 There's a portion of the nail that's
9 intended to be inserted first into the bone; correct?

10 MR. VOWELL: Object to form.

11 THE WITNESS: Correct.

12 BY MR. LINDENBAUM:

13 Q. And do you typically refer to that leading edge
14 with any, you know, name?

15 A. Usually it's referred to as -- it depends -- in
16 regards to a nail, an ankle nail specifically because it's
17 inserted basically away from the body, the tip of the nail
18 that is inserted first that end is called the proximal end
19 and the end of the nail that is towards the heel of the
20 bone or the calcaneus that's the -- the last piece that
21 goes into the bone that end is called a distal end.

22 So we use the words proximal/distal, but in
23 layman's terms oftentimes it's referred to as the -- the
24 part that enters first is called the, you know, the
25 insertion end or the entry end of the nail or the tip of

1 the nail and the -- the other end that gets introduced
2 last is called a terminal end of the nail.

3 Q. The nail we were talking about earlier with the
4 oblique screw, when it is inserted does the distal end
5 reside at the surface of the bone?

6 MR. VOWELL: Object to form.

7 THE WITNESS: No. That's the proximal end.

8 BY MR. LINDENBAUM:

9 Q. Sorry. I thought you said the leading edge is
10 the proximal end. Let me -- so -- so there's the
11 insertion end and that's called the head end I guess of
12 that nail. When that nail is inserted, is the head end
13 does it reside at the surface of the bone?

14 A. Repeat again. I couldn't quite hear your
15 description.

16 Q. When that nail is inserted, right, the end that's
17 not the insertion end, the other end. Let's call it the
18 head end, for example. Does the head end reside at the
19 surface of the bone?

20 A. Yes, as close to or just below the surface of the
21 bone.

22 MR. VOWELL: David.

23 MR. LINDENBAUM: Yeah.

24 MR. VOWELL: We have been going for about an
25 hour. Would now be a good time for a break? It sounded

1 like you were kind of at a pause so.

2 MR. LINDENBAUM: Sure. If Mr. Dominguez
3 would like a break or if you'd like a break, Mr. Vowell,
4 we can certainly take a break. Why don't we say --
5 actually it is lunchtime here at my end here. Can we take
6 maybe a 20-minute break?

7 MR. VOWELL: That would be fine. What I'll
8 probably do, just so you know kind of configuration here,
9 so I've essentially called in on my cell phone so I'm
10 going to hang up my cell phone and then I'll call back in
11 and in terms of -- I assume with the court reporter
12 that's -- that won't cause any problems and Mr. Dominguez
13 can leave his -- can he leave the Zoom call and dial back
14 in?

15 MR. LINDENBAUM: Sure.

16 MR. VOWELL: We'll do that in 20 minutes.

17 (A break in the deposition occurs.)

18 BY MR. LINDENBAUM:

19 Q. Mr. Dominguez, just one point before we continue.
20 I note that your counsel earlier indicated that some
21 topics that we discussed up until now might include
22 confidential information because of NDAs you have signed
23 or because it involved recent work you've done.

24 I don't intend to ask you any further
25 questions regarding those topics, but so the record is

1 clear, please let me know if any testimony you give from
2 here forward you consider to be confidential, okay?

3 A. Okay.

4 Q. And I will endeavor to ask you later in the
5 deposition to confirm that at least the remainder of the
6 transcript from this deposition does not include
7 confidential information, okay?

8 A. Okay.

9 Q. In your experience, are there any books or
10 reference materials that you have consulted when designing
11 orthopedic implants?

12 A. Yes. There are -- most of the books that I refer
13 to are what I would -- it's a book called the Machinery's
14 Handbook and that is an engineering, slash, manufacturing
15 handbook that provides specifications for common thread
16 sizes, common fasteners, methods of manufacturing,
17 tolerances surrounding threads, and all sorts of hardware
18 that relate back to the creation of bone screws and
19 plates.

20 I also often refer to material books that
21 give me properties of the metals and alloys that I am
22 using in the design of a product. I very much always tend
23 to also look at surgical techniques that the doctor is
24 using or discuss with the surgeon what is his method of
25 actually implanting the device so I'm familiar with the

1 technique that he prefers to use when designing
2 instruments and the implant.

3 So there's a plethora of references,
4 technical references, anatomical references such as, you
5 know, bone structure, size, density. I sometimes use
6 x-rays to see how the implant fits postoperatively in a
7 patient and the doctor confirms that he's very satisfied
8 with the location of the device so those are all
9 references that I use to do my work.

10 Q. Okay. I think you mentioned two books. Did you
11 say the title of one of the books was the Machinery
12 Handbook, is that right?

13 A. Machinery's Handbook.

14 Q. Machineries, plural?

15 A. R, apostrophe, S. R-Y, apostrophe, S.
16 Machinery's.

17 Q. Machinery's Handbook.

18 A. Machinery's Handbook, but it is a -- they've got
19 many versions from Volume I. I think they may be up to
20 Volume XXX at this point. I've got one of the volumes
21 I've used and it's just a reference book.

22 Q. Did you use that book while you were in school or
23 did you find it after you graduated from school?

24 A. Actually, I started using that book when I was at
25 Smith & Nephew 31 years ago. I still have the same book.

1 Q. Was it recommended to you by someone at Smith &
2 Nephew?

3 A. Yeah, engineers typically use that as a
4 reference.

5 Q. Would you say that a person of skill in the art
6 would be familiar with that book?

7 A. I would say so, yes.

8 Q. Okay. And I believe you said there was another
9 book that concerned materials, is that right?

10 A. Yeah. In today's age, I usually just go online
11 and there are some materials or resources online where if
12 you wanted to know what the properties of titanium alloy
13 is for example, you can just Google titanium alloy and
14 you'll get two dozen references that give you properties
15 of titanium alloy, including, you know, material data
16 sheets for that specific alloy type. So there's a lot of
17 literature online these days that you can get information
18 about material and material property.

19 Q. Okay. So other than the Machinery's Handbook,
20 are there any other books that you consult for your design
21 work?

22 A. Yes. When creating I -- I consult often with a
23 Geometric Dimensioning and Tolerance handbook, which is a
24 handbook that is used in the creation of manufacturing
25 drawings for the manufacture of a device that gives the --

1 gives the machinist the ability to know what -- how
2 straight something should be, how large the diameter, the
3 tolerance of the part should be, the, you know, physical
4 characteristics of the shape of the device so that they
5 know to be within tolerance.

6 So that's called -- we call it short GD&T,
7 Geometric Dimension and Tolerancing, GD&T, and it's a
8 handbook that's been around forever and many versions of
9 it, but it basically gives the basic principles of how to
10 properly dimension specifications on an engineering
11 drawing.

12 Q. Okay. And was that a book you used in school or
13 was it something you found when you started working in the
14 industry?

15 A. I used that primarily in -- I took a course
16 offered by a professional that does that for a living and
17 they gave us a course on how to apply that -- those
18 formulary to a drawing. Then they gave us handbooks at
19 that course and I've used it ever since. I took that
20 course when I was probably at Smith & Nephew or at
21 Medtronic-Xomed 20, 30 to 35 years ago.

22 Q. Okay. Would you assume that a person skilled in
23 the art would be familiar with that book as well?

24 A. Maybe to a lesser degree than the Machinery's
25 Handbook, but, yes, if they're an engineer and they've

1 been in the field working for five years I would say they
2 probably run into that book.

3 Q. All right. And are there any other books that
4 you consult when doing your design work?

5 A. No. That would be -- those would be the two
6 primary books.

7 Q. Okay. Did you refer to any of those books when
8 preparing your declaration for this case?

9 A. No, I have not. I did not.

10 Q. Have you been named as an author on any published
11 papers?

12 A. I'm trying to think back. Not that I can think
13 of.

14 Q. Okay. Have you been named as an author on any
15 books?

16 A. Not that I can think of.

17 Q. All right. I'd like you to turn back to
18 Exhibit 11, which is your declaration, and if you could
19 please turn to paragraph 22, which is on page 5 I believe.

20 A. Okay.

21 Q. And I believe that that paragraph discusses the
22 materials you reviewed for this declaration, is that
23 right?

24 A. Correct.

25 Q. Okay. And it's not listed here, but I understand

1 you reviewed Extremity Medical's opening claim
2 construction brief; correct?

3 A. Yes. I believe I have.

4 Q. Right. I think we might have discussed that
5 earlier in the deposition today and you also reviewed the
6 exhibits that were attached to that brief; correct?

7 A. Yes.

8 Q. Okay. Just so I'm clear, other than those
9 materials, those documents and the information that is
10 identified in paragraph 22, did you review anything else
11 in preparation -- when you prepared your declaration?

12 A. In preparing my declaration, I may have reviewed
13 some of the other prior art cited in my declaration.

14 Q. And what prior art would that have been?

15 A. That would have been the Orbay prior art, the
16 Chang, the Cognet, the Simon, the Leu, the -- I forget the
17 fellow's name. The --

18 Q. Ferrante?

19 A. Pardon.

20 Q. Brumfield?

21 A. Brumfield. Yes, Brumfield.

22 Q. Okay.

23 A. And there's one that started with an M. I forget
24 the name of that one.

25 Q. There's one -- sorry.

1 A. Yeah, so you -- yeah, I think you've captured --
2 you've captured most of them.

3 Q. Okay. And to be clear, you reviewed those prior
4 references for the declaration for this case, right?

5 A. Yes.

6 MR. VOWELL: Let me clarify. Just to be
7 clear that there's the declaration from -- we're talking
8 about today, that we're here to talk about today. Then
9 there's the declaration that was prepared in connection
10 with the IPR that relates to those prior references so I
11 just want to make sure the question is clear.

12 THE WITNESS: Yes. For my declaration in
13 this Exhibit 11, I specifically reviewed patent 166 in
14 detail and the -- towards the end of this document there
15 are two cited references of Chang and Orbay, which I have
16 reviewed. I don't believe I introduced any other prior
17 art publications in this -- in this -- in my declaration.

18 BY MR. LINDENBAUM:

19 Q. Okay. A declaration for this case; correct?

20 A. Yes.

21 Q. So if you turn to paragraph 23 of Plaintiff's
22 Exhibit 11, your declaration for this case, which I
23 believe is on pages 5 through 6.

24 A. Yes.

25 Q. If you could just read that to yourself, please.

1 A. Okay.

2 Q. All right. Have you ever attended law school?

3 A. No, sir.

4 Q. Have you taken any legal courses?

5 A. No, sir.

6 Q. Have you taken any courses in patent law?

7 A. I have been exposed to courses in patent law when
8 it comes to preparation of what you would call litigation
9 of patent law, the creation of patents. I've been exposed
10 over the years because I have -- so I am an inventor I
11 have dialogue considerably with other patent attorneys so
12 I have an overall appreciation for claim, claim
13 construction, independent, dependent claims,
14 specifications, diagrams, figures, things in general
15 nature like that.

16 Q. Have you taken any courses in patent law?

17 A. No.

18 Q. Okay. Have you ever been employed as an examiner
19 at the U.S. Patent Office?

20 A. No, sir.

21 Q. Have you ever worked for the U.S. Patent Office
22 in any capacity?

23 A. No.

24 Q. Have you drafted any patent applications?

25 A. I would say yes to that.

1 Q. How many have you drafted?

2 A. Only a couple where I -- when I say -- when you
3 say drafted, I'm going to preface that by saying I wrote
4 the front end of the patent, such as discovery and
5 specifications and introduced figures. I didn't get too
6 involved in the claim construction, although I got counsel
7 to provide guidance towards claim construction.

8 Q. Have you ever drafted any claims?

9 A. No, not that I can think of. Reviewed many, but
10 not drafted them from scratch.

11 Q. Okay. Have you ever drafted any patent
12 applications for which you were not the inventor?

13 A. Yeah. I would say yes. I've reviewed patent
14 applications where I was not the inventor where I may have
15 been perhaps involved in the project.

16 Q. Have you -- you believe you drafted those patent
17 applications?

18 A. No, no. I may have reviewed those patent
19 applications on behalf of a client, on behalf of a client.

20 Q. Okay. You, yourself, have been named as an
21 inventor on patents and patent applications; correct?

22 A. Yes.

23 Q. Okay. And have you drafted portions of any of
24 those patents or patent applications?

25 A. Yes.

1 Q. Okay. And if you were to review those patents
2 and patent applications, would you be able to tell which
3 portions you drafted?

4 MR. VOWELL: Object to form.

5 THE WITNESS: Probably not. It's been a
6 long time so I would have to -- probably not.

7 BY MR. LINDENBAUM:

8 Q. All right. Have you ever provided any expert
9 opinions concerning any patents other than the 166 patent?

10 A. No.

11 Q. All right. If you turn back to your declaration,
12 Plaintiff's Exhibit 11. If you turn to paragraph 21,
13 which I believe is on pages 4 to 5. Let me know when
14 you're there.

15 A. Yes.

16 Q. You'll see that paragraph 21 begins with a
17 statement: I am an inventor on the following patents and
18 patent applications. Do you see that?

19 A. Yes, I do.

20 Q. And that statement is followed by a list of I
21 believe 11 patents and patent applications. Similar list
22 is included with your CV, which is attached as Exhibit A
23 to your declaration?

24 A. Yes.

25 Q. Is the list on pages 4 to 5 of your declaration a

1 comprehensive list of the patents and patent applications
2 on which you were named as an inventor?

3 A. Yes. I believe so.

4 Q. So are you aware of any other patents or patent
5 applications on which you were named as an inventor?

6 A. No, not beyond these that are here.

7 Q. Were these patents and patent applications
8 prosecuted by a patent attorney or patent agent?

9 A. Yes.

10 Q. And you reviewed at least some of these patent
11 applications before they were filed; correct?

12 A. I'm pretty sure I reviewed each and every one of
13 them.

14 Q. All right. Will you turn to paragraph 27 of your
15 declaration, which is on page 6. Let me know when you're
16 there.

17 A. I'm there.

18 Q. All right. Paragraph 27 says: The
19 sophistication of the technology in the 166 patent is
20 relatively common and is use-specific to certain types of
21 small bone surgeries and types of fractures. Do you see
22 that?

23 A. Yes, I do.

24 Q. What do you mean by the sophistication of the
25 technology is relatively common?

1 A. Well, relatively speaking, it is a three-member
2 assembly. From a mechanical standpoint that's fairly
3 simple, if you will. Don't mean to demean the inventor --

4 THE COURT REPORTER: I'm sorry.
5 Mr. Dominguez.

6 THE WITNESS: Yes.

7 THE COURT REPORTER: I'm sorry. From my end
8 you're cutting in a little bit in and out, but if you can
9 repeat. It is a three-member assembly. From a mechanical
10 standpoint that's fairly simple, if you will.

11 THE WITNESS: Yeah, it's a three-member
12 assembly. From a mechanical standpoint it's fairly simple
13 in its construction esturvation and unlike other devices
14 that require -- that have many more components and require
15 many more parts for assembly, for example.

16 BY MR. LINDENBAUM:

17 Q. Have you ever designed a device like the devices
18 claimed in the 166 patent?

19 MR. VOWELL: Object to form.

20 THE WITNESS: Well, to some degree the ankle
21 fusion nail that I've been presently been working on the
22 last several years has several -- you know has things that
23 are related to this. It's got screws. It's got an
24 intramedullary nail as elements to the design so I'm
25 familiar with the 166 patent from that perspective. It's

1 engaging two screws inside an intramedullary nail so it's
2 simple and clean in its design and it serves a particular
3 purpose.

4 BY MR. LINDENBAUM:

5 Q. And in that same paragraph, what did you mean by
6 the sophistication of the technology in the 166 patent is
7 use-specific to certain types of small bone surgeries and
8 types of fractures?

9 MR. VOWELL: Object to form.

10 THE WITNESS: Yes. I mean, the design
11 itself as its -- and the specifications described in
12 patent 166 pertain to the use of devices like this in the
13 foot and ankle space, the smaller bone -- the bones of the
14 foot. I believe it also referred to possibly using this
15 device in the wrist, small bones of the wrist. So overall
16 the use of such devices that provide compression are used
17 to fixate small bones. We wouldn't want to use something
18 like this in a tibia or a femur, which is a much larger
19 bone that requires a lot more force to compress.

20 BY MR. LINDENBAUM:

21 Q. All right. If we turn to paragraph 28, which is
22 on pages 6 and 7. If you could read that paragraph to
23 yourself and let me know when you read it.

24 A. Yes.

25 Q. On line 3 you note that a person of skill in the

1 art would have at least five years of experience. Do you
2 see that?

3 A. I did say that, yes.

4 Q. Why -- why -- why did you think it would be five
5 years of experience?

6 A. Well, in discussion -- generally, a senior
7 engineer has -- in the medical device industry, a senior
8 engineer typically would have five years experience in
9 most companies working for a firm, but five to eight is
10 oftentimes where you get that engineer experience called
11 the senior engineer so I just went to the lower of the
12 two. Between five and eight years, I went to the lower of
13 the two and said five years is about right in terms of
14 work experience.

15 Q. So you believe a senior engineer would be a
16 person of ordinary skill in the art?

17 A. I would say so, yes.

18 Q. What is a senior engineer?

19 A. A person with about five years experience at
20 least. You can have a senior engineer that has got
21 15 years of experience, they just never got promoted in
22 their organization so it just really depends on -- some
23 engineers prefer to stay technical and don't want to go
24 into management and so they stay in a technical path and
25 they may stay 10, 15 years as a senior engineer before

1 they become maybe chief engineer, but senior engineer is
2 not condescending on the engineer. It's just a wide --
3 there's a wide range of experiences of many years that you
4 could call someone a senior engineer.

5 Q. Further along in that sentence it says -- I'm now
6 on like the fourth to fifth line where the phrase that
7 says: Correct deformities and fuse bone in small bone
8 and/or long bone fractures using internal fixation. Do
9 you see that?

10 A. Yes, I do.

11 Q. Is there any indication in the 166 patent that
12 the relative field is long bone fractures?

13 MR. VOWELL: Object to form.

14 THE WITNESS: No, not that I can remember
15 reading that the field was indicated for long bones.

16 BY MR. LINDENBAUM:

17 Q. So do you know why you included long bone
18 fractures in your definition of person of ordinary skill
19 in the art?

20 A. To continue with a broad range of experience for
21 a person who's got five years experience they may have
22 been exposed to both internal -- obviously internal
23 fixation, but both in multiple sizes of bones, small
24 bones, long bones, extremities, joints.

25 So in general terms describing a person of

1 ordinary skill that would understand this patent it could
2 include a person who has experience in long bone fixation.

3 Q. All right. If we turn to paragraph 31 of your
4 declaration, which is on page 7.

5 A. Yes.

6 Q. So you can read the whole paragraph if you'd
7 like, but I'd like you to focus on the third sentence that
8 begins with: The second, parenthetical, lower distal
9 through-hole in the nail. Do you see that?

10 A. Yes.

11 Q. And it says: The second, parenthetical, lower
12 distal through-hole in the nail allows a second bone screw
13 to pass through and serves to lock the nail, slash, screw
14 to uncompromised bone and serves to prevent unwanted axial
15 and rotational movement of the nail. Do you see that?

16 A. Yes, I do.

17 Q. Okay. What is that opinion based on? I don't
18 see anything cited. What is that opinion based on?

19 MR. VOWELL: Object to form.

20 THE WITNESS: That opinion is based on
21 intramedullary nails there's usually a lower screw that is
22 what we term the locking screw. In this case it is the
23 second screw cited here and the purpose of that screw is
24 to prevent -- is to anchor the nail or anchor the nail
25 using that second screw to bone and to anchor -- to

1 hopefully anchor it into uncompromised bone so that anchor
2 is very solid, very strong. It prevents the nail from
3 extruding up and out through the opening of the bone. It
4 also prevents the nail from turning relative to its axis.

5 So it's an antitorque and antirotational
6 lock that that screw provides so that screw provides two
7 things. It provides antirotational and -- antirotational
8 as a locking screw and it prevents expulsion or migration
9 either up and down along the axis of the nail and it
10 anchors into good solid bone that gives you a good
11 fixation.

12 BY MR. LINDENBAUM:

13 Q. But your opinion that it's a locking screw, what
14 is that based on though?

15 MR. VOWELL: Object to form, asked and
16 answered. You can answer.

17 THE WITNESS: Okay. Intramedullary nails in
18 the field, in the art, speak with many surgeons and in the
19 industry they usually refer to that distal hole, that
20 last -- the hole at the very end of the device, the --
21 what we tend to call the tip end. So the tip end we
22 discussed earlier is the end that goes in first and it
23 guides. It goes down the intramedullary canal. Well, the
24 hole that's closest to that tip is by far the farthest
25 hole to ensure the screw through in surgery because it's

1 very far away from the -- usually the attachment point,
2 which is at the very top. So that hole has to be used --
3 with the use of drill guides, that hole has to be targeted
4 in order to insert a traversing screw that they call a
5 locking screw.

6 A locking screw and intramedullary nails
7 could be optional. That's the preference of the surgeon
8 to use a locking screw and place a locking screw at the
9 distal end of the nail. That gives them stability for the
10 reasons I mentioned earlier, but if they don't want to,
11 they don't have to. It could just not be filled with a
12 screw.

13 BY MR. LINDENBAUM:

14 Q. Okay. And the prior sentence here in
15 paragraph 31 says the first bone screw serves to reduce or
16 join the bone across the fracture site, right?

17 A. Yes.

18 Q. Okay. Is it possible for this device here shown
19 on Figure 18, which is on page 8 of your declaration, the
20 following page, to use the first bone as the locking screw
21 and the second bone as the bone to reduce or join the bone
22 across the fracture?

23 A. I think that would be very specific to how --
24 what the fracture pattern is. It's specific to that
25 patient, specific to that case. If the fracture is -- if

1 the bone fracture has occurred on -- towards the terminal
2 end of the device, then that first screw would be used to
3 capture that fracture closest to the terminal end.

4 If the fracture is completely through --
5 completely, you know, through the bone where both screws
6 would actually intersect or pass through the fracture,
7 then both screws could pass through the fracture so it
8 really depends case by case, the type of fracture that the
9 surgeon is trying to fuse, and, you know, the conditions
10 of the bone and how far along that fracture line is. Is
11 it comminuted with the other multiple bone fragments
12 there, is there just one large fragment.

13 So based on the -- the anatomy presented to
14 the surgeon, he will typically then elect the type of
15 implant to use and with that the type of screws to use,
16 the length of screws to use, and how to target those
17 screws to capture the fragment, but the key point is that
18 the surgeon must capture a fragment of bone to produce
19 compression across the fractured joint.

20 Q. Okay. So -- so it's possible that both of the
21 screws shown in Figure 18, which are I believe -- well,
22 what you referred to the first and second screws, could be
23 used to reduce compression across the fracture joint;
24 correct?

25 A. It's possible.

1 Q. And it's possible that the first screw could act
2 as a locking screw and the second screw could be the one
3 that acts to reduce compression across the fracture joint;
4 correct?

5 A. Well, in terms of terminology, I think -- in
6 terms of terminology when it comes to intramedullary
7 nails, normally the distal screw is called the locking
8 screw. Just for terms sake, the distal screw is usually
9 referred to as the locking screw and the upper screw is
10 usually referred to as the compression screw across the
11 fracture.

12 An intramedullary nail, particularly in the
13 long bone, for example if you're trying to prevent a
14 fracture of the -- in the hip, that angulated screw, that
15 top angulated screw goes across the fracture and the
16 bottom distal screw just goes across pure, unfractured
17 bone so that's the locking screw.

18 Q. Okay. But in -- in let's say the assembly we're
19 looking at in Figure 18, the first screw, the top screw
20 could be -- could serve as the locking screw and the
21 bottom screw could serve as the compression screw;
22 correct?

23 A. Yes.

24 Q. Okay. And as you said, both screws could serve
25 as compression screws; correct?

1 A. Yes. Both are live screws so they certainly have
2 the threads to result in compression if you compress it
3 across the fracture.

4 Q. Locking screws are typically inserted
5 perpendicular to the nail; correct?

6 MR. VOWELL: Object to form.

7 THE WITNESS: Yes because those are the hard
8 ones to target and it's easy to target a perpendicular
9 than any angle -- than any oblique angle.

10 BY MR. LINDENBAUM:

11 Q. But a locking screw can be inserted at other
12 angles; correct?

13 A. Yes. They can.

14 Q. All right. I'd like to turn to paragraph 35 of
15 your declaration, Plaintiff's Exhibit 11, which is on
16 page 10.

17 A. Yes.

18 Q. If you could actually just read that to yourself
19 and let me know when you've read it.

20 A. Okay.

21 Q. And you'll note there's a picture that's drawn
22 below that paragraph; correct?

23 A. Correct.

24 Q. And that shows two straight intersecting lines;
25 correct?

1 A. Correct.

2 Q. In that picture, angle A would equal angle C;
3 correct?

4 A. Correct.

5 Q. And angle B would equal angle D; correct?

6 A. Correct.

7 Q. What is an acute angle?

8 A. An angle less than 90 degrees.

9 Q. What is an obtuse angle?

10 A. An obtuse angle is an angle larger than
11 90 degrees.

12 Q. Okay. And if, for example, angle C is an acute
13 angle, both of the adjacent angles, which are depicted
14 here as B and D, would be obtuse angles; correct?

15 A. That's correct.

16 Q. And the same for angle A. If angle A is acute
17 angle, angles B and D would be obtuse; correct?

18 A. Correct.

19 Q. And it would be impossible for all four of these
20 angles to be acute; correct?

21 A. For all of them to be acute?

22 Q. Yes.

23 A. Yes. If the angles -- if the two lines are
24 perpendicular to each other, then all four angles, A, B,
25 C, D, would be equal at 90 degrees.

1 Q. Right. But it would be impossible for all the
2 angles to be acute; correct?

3 A. Yes. That's impossible geometrically.

4 Q. It would be impossible for even more than two
5 angles to be acute; correct?

6 A. Yes. You only have four angles.

7 Q. Okay. If we turn to paragraph 36 of your
8 declaration.

9 MR. VOWELL: David, did you say
10 paragraph 36?

11 MR. LINDENBAUM: 36. Yes.

12 MR. VOWELL: Thank you.

13 BY MR. LINDENBAUM:

14 Q. And that's on pages 10 to 11.

15 A. Yes.

16 Q. All right. If you look at the last sentence of
17 that paragraph, let me know when you've read that.

18 A. Yes.

19 Q. Okay. The sentence says: For example, in the
20 above image angle D would be angle 1808; correct?

21 A. Yes. That's what it says, yes.

22 Q. Angle D is an obtuse angle; correct?

23 MR. VOWELL: Object to form.

24 THE WITNESS: Angle D is an obtuse angle.

25 BY MR. LINDENBAUM:

1 Q. Right. And angle 1808 is an acute angle;
2 correct?

3 MR. VOWELL: Object to form.

4 THE WITNESS: As shown, yes, in Figure 18.

5 BY MR. LINDENBAUM:

6 Q. So angle 1808 could not be angle D; correct?

7 MR. VOWELL: Object to form.

8 THE WITNESS: Angle D as shown in -- angle D
9 as described in Figure 18, angle 1808 is resembled -- is
10 resembled in that Figure 18 as an acute angle. My point
11 in that is that it is not clear in the claim which angle
12 was being referred to when you have two intersecting --
13 when you have a screw intersecting your main axis creating
14 an angle was not clear which one -- which one of the
15 angles was being defined as 1808 and -- what the angle
16 being defined as 1808 was and 1812 was.

17 BY MR. LINDENBAUM:

18 Q. Okay. Why don't we look at the 166 patent, which
19 is Exhibit 1. I'll pull that up if I can.

20 Okay. If we look at -- and you can look at
21 the paper copy you have or you can look on the screen. If
22 I'm looking at column 13, lines 47 to 50. Let me know
23 when you're able to see that.

24 A. Yes.

25 Q. Okay. So lines 47 to 50 say: It should be

1 appreciated that fixed angles 1808 and 1812 may be any
2 angle less than 90 degrees. Do you see that?

3 A. Yes.

4 Q. So angles 1808 and 1812 are acute angles;
5 correct?

6 A. Yes. If they are less than 90 degrees they would
7 be acute angles, correct.

8 Q. Okay. So we also just discussed that angle D in
9 your drawing is an obtuse angle; correct?

10 A. Yes.

11 Q. So angles 1808 and 1812 could not be angle D in
12 your drawing; correct?

13 MR. VOWELL: Object to form.

14 THE WITNESS: As written in the
15 specification that you're citing, yes. 1808 and 1812 are
16 acute angles less than 90 degrees. My language relates
17 more to the actual claim that describes those angles and
18 they're not clear and they're somewhat ambiguous as to
19 what that angle is and which angle are we talking about.

20 BY MR. LINDENBAUM:

21 Q. Okay. But I'm asking you specifically what you
22 wrote here in the last sentence of paragraph 36, which you
23 say explicitly: In the above image angle D would be angle
24 1808. And that is incorrect, right, because angle D is an
25 obtuse angle and 1808 is an acute angle so that statement

1 is incorrect; correct?

2 MR. VOWELL: Object to form.

3 THE WITNESS: You would not be incorrect if
4 angle 1808 were greater than 90 degrees.

5 BY MR. LINDENBAUM:

6 Q. Okay. So is it your understanding of the sum
7 disclosure in the specification that angle 1808 could be
8 greater than 90 degrees?

9 A. There's language in the specification that calls
10 out the angle to be about 0 to about 90, somewhere about
11 90. So it is not clear that it cannot go beyond 90, say
12 92, 93 degrees, so in that case it would be an obtuse
13 angle. So in the language and the terminology of the
14 patent, it's not clear what the specific range lies for
15 these angles.

16 Q. Okay. But if -- if angle 1808 is less than
17 90 degrees, as stated in the portion of the 166 patent
18 that we just reviewed, then it could not coincide with
19 angle D in your drawing on page 10 of your declaration;
20 correct?

21 A. It would not be an obtuse angle. It would be an
22 acute angle.

23 Q. So you agree with me?

24 MR. VOWELL: Object to form.

25 THE WITNESS: Yes.

1 BY MR. LINDENBAUM:

2 Q. If we look at Figure 18, which is on page 8 of
3 your declaration also or in the 166 patent, whichever way
4 you want to look at it. Let me know when you're looking
5 at Figure 18.

6 A. Yes.

7 Q. You have it before you?

8 A. Yes.

9 Q. Thank you. Angle 1808 in Figure 18 is between
10 the bottom of the first screw and the third member;
11 correct?

12 MR. VOWELL: Object to form.

13 THE WITNESS: I interpret 1808 to be along
14 the -- well, yes, the bottom of the top screw, the first
15 screw, and the side of the -- of the nail itself.

16 BY MR. LINDENBAUM:

17 Q. Right. Angle 1812.

18 A. Yes. 1812 is the same way. It's described to be
19 between the axis of the screw and the axis of the nail,
20 the second screw. The angle formed by those two acts as
21 intersected.

22 Q. Right. And specifically in Figure 18 it's shown
23 as between the bottom of the second screw and the third
24 member; correct?

25 A. Yes. I would like to add for the record that

1 although you're describing it going from the outer --
2 outer shaft of the second screw to the outer wall of the
3 nail, that angle creates 1812. If you use the axis of the
4 second screw and the axis of the nail that is also angle
5 1812. It's the same angle because they're -- we're still
6 talking about straight lines on the geometry.

7 Q. Understood. Thank you.

8 Referring back to paragraph 36, starting at
9 the last sentence on page 10 you state: Yet, the claims
10 themselves do not specify the particular angle. Because
11 it would not be clear to one of ordinary skill in the art
12 to tell which angle is being referenced, the claims are
13 not sufficiently definite. Do you see that?

14 A. Yes, I do.

15 Q. I'd like to show you another exhibit actually.

16 (Deposition Exhibit No. 12 marked for
17 identification.)

18 Okay. On the screen is a document that is I
19 believe the declaration that -- your declaration submitted
20 in support of an IPR petition challenging the claim for
21 the 166 patent.

22 Do you recall drafting a declaration in
23 support of an IPR petition concerning the 166 patent?

24 A. Let me take a look at that document. That is
25 Plaintiff's Exhibit 12.

1 Q. I'm sorry.

2 MR. VOWELL: Just for the record and for the
3 witness, this was not provided in advance so it's only
4 available on the screen. I do have a blank copy of it if
5 the witness would like to look at a printed out version of
6 this exhibit.

7 MR. LINDENBAUM: Sure. If the witness would
8 like to look at the full version and you have the full
9 version, then he's free to look at the document. Is
10 Mr. Dominguez going to look at the paper version?

11 MR. VOWELL: Yes. He's familiarizing
12 himself with the document.

13 MR. LINDENBAUM: Okay.

14 THE WITNESS: Yes. I'm familiar with this
15 document.

16 BY MR. LINDENBAUM:

17 Q. Okay. Get onto the record, who drafted this
18 declaration?

19 A. As I glance through the pages, I think I drafted
20 quite a bit of it as it relates to technical information
21 and review of prior patents like Cognet, Simon. I drafted
22 a good portion of this whole declaration. Counsel may
23 have added some references and other, you know,
24 publications to this, but the bulk of it, especially the
25 technical section, I drafted.

1 Q. Okay. Would you know if certain parts were
2 drafted by you as opposed to counsel?

3 A. Probably, yes.

4 Q. All right. If you turn to page 85, I'll show it
5 on the screen as well once I get down there. Yes. You'll
6 see it is -- it is signed there. Do you see that?

7 A. Yes.

8 Q. Did you insert that signature?

9 A. Yes.

10 Q. And did you do it on or about April 28, 2023?

11 A. Yes. April 28th, yes.

12 Q. Okay. I think as I mentioned earlier, I'm going
13 to refer to this declaration as your IPR declaration,
14 okay?

15 A. Okay.

16 Q. All right. So I'd like you to turn to
17 paragraph 69, which is on page 38.

18 A. Okay.

19 Q. And you'll see in the middle of that page you
20 included a figure from the Cognet reference; correct?

21 A. Yes.

22 Q. And here you identified the first angle as
23 between the bottom of what you identify as the first
24 member of Cognet and the third member of Cognet; correct?

25 MR. VOWELL: Counsel, stop you right there

1 and say that now that you are specifically asking about
2 the references and the figures from the prior references
3 in the IPR, that is outside the scope of this deposition
4 as I believe we agreed speaking between counsel beforehand
5 so --

6 MR. LINDENBAUM: Mr. Vowell --

7 THE COURT REPORTER: I'm sorry.

8 MR. LINDENBAUM: I'm sorry. Ms. Roman, did
9 you say something?

10 THE COURT REPORTER: Yes. I only got a few
11 of what Mr. Vowell was saying. Thank you.

12 MR. LINDENBAUM: Mr. Vowell, why don't you
13 repeat your objection.

14 MR. VOWELL: Yes, so let me repeat my
15 objection. So at this point the question you're asking is
16 specific to the figures and the disclosure of the prior
17 art references in the IPR and that -- because of that,
18 those questions would be outside the scope of this
19 deposition as you and I discussed previously and as the
20 e-mail records reflect. If you want to ask him questions
21 about the claim language and references to the claim
22 language here, that's fine, but specific questions about
23 what's disclosed in those references is outside the scope.

24 MR. LINDENBAUM: Did you get that,
25 Ms. Roman?

1 THE COURT REPORTER: I did. Thank you.

2 MR. LINDENBAUM: Okay. Mr. Vowell, I
3 disagree. In fact, I sent you a follow-up e-mail
4 explicitly saying that we do consider the IPR petition to
5 be fair game for questioning. I sent that to you
6 yesterday and you said you understood so I disagree that
7 we agreed that anything having to do with the IPR and the
8 references cited therein are -- are relevant to the scope
9 of the deposition here.

10 Here specifically I'm questioning the
11 witness about his interpretation of the claim language as
12 applied to the references in the IPR and so it bears
13 directly on his understanding and opinions of the claim
14 terms that are at issue in claim construction and I intend
15 to continue my examination of him based on those criteria.

16 MR. VOWELL: So let me -- let me correct
17 what you just said because I am not objecting to you
18 asking him questions about the IPR petition, which is why
19 when you started along the line of questions with, you
20 know, the petition itself I didn't object to it being
21 introduced. We understand that. We agree on that. I am
22 allowing you to question the witness on the portions of
23 the IPR declaration that relate specifically to the claim
24 terms to which he has opined on in the declaration in this
25 case.

1 MR. LINDENBAUM: So if you look at the prior
2 page I'm putting up on the screen, you'll see 1(g) says:
3 Cognet discloses wherein the first angle is in the range
4 of about 0 degrees to about 90 degrees. And that is one
5 of the terms at issue in claim construction in the
6 District Court case and so his opinions here about Cognet
7 that bear directly on that claim term clearly is relevant
8 to claim construction and this deposition. How can you
9 say it is not?

10 MR. VOWELL: I disagree with that and I
11 think, you know, if we need to call -- look, if you're
12 going to try to ask him questions about how this claim
13 language applies to the prior art references, that 0 is
14 outside the scope. We specifically discussed this and you
15 know the e-mail record reflects that.

16 The e-mail you sent yesterday said that you
17 intend to ask questions related to the claim construction
18 topics addressed in his IPR declaration so I'm allowing
19 you to do that. The words that he says about, you know,
20 terminal end, et cetera, or about 0 degrees to about
21 90 degrees, I agree that those are fair game, but not
22 whether or not or how those terms are found in the prior
23 art references.

24 MR. LINDENBAUM: Why not? Why is his
25 opinion about how they're found in the references doesn't

1 bear on his opinion on the understanding and construction
2 of those terms? It is directly relevant to his opinions
3 and just because it rebuts his opinion doesn't mean it's
4 not relevant.

5 MR. VOWELL: It's his opinion as to
6 invalidity, not as to claim construction, and I believe
7 you understand that those are two separate issues;
8 correct?

9 MR. LINDENBAUM: I disagree. Claim
10 construction bears on -- invalidity is based on claim
11 construction as you know, right. You can't have
12 invalidity without claim construction, right.

13 MR. VOWELL: Agreed. But they are related
14 and again they are two separate things. They may be
15 related, but they're two separate things. Go ahead.

16 So if you have -- if you have questions
17 about the actual claim construction or, you know, how the
18 terms should be construed, you can ask those questions,
19 but not how they're applied to prior references.

20 That's -- that's what we're going to do today. So if you
21 have other questions -- and, again, I sensed where you
22 were going. I heard your first question. If you have
23 other questions, we can take them on an individual basis
24 if you want to ask them. I'm not trying to prevent you
25 from deposing the witness on any issues related to the

1 claim construction declaration or his opinions on claim
2 construction. I'm allowing you to ask those questions so
3 please -- please move on to that.

4 MR. LINDENBAUM: We have a fundamental
5 disagreement about what is relevant to claim construction.
6 If -- when he has an indefiniteness argument, which
7 obviously is invalidity, and it's based on his
8 construction and understanding of that term, obviously you
9 put indefiniteness in your claim construction brief so
10 indefiniteness has to do with claim construction clearly,
11 and so his understanding of this term and whether or not
12 it's definite is clearly relevant and whether or not --
13 and how he uses it in this IPR petition bears on his
14 understanding of that term is clearly relevant so I intend
15 to question him about that.

16 So the only question for you I guess is
17 whether or not you're going to instruct him not to answer,
18 and if you do so, then I guess you're going to have to
19 call the Court because I intend to question him about
20 this. We do not, as you know with the short time frame we
21 have, I don't have time -- I don't want to have to recall
22 him as a witness if there's a dispute about these terms
23 and so we need to resolve this now. And so I guess I need
24 to know if you're going to instruct him not to answer
25 about his understanding about how these terms specifically

1 at issue in the claim construction hearing -- I'm sorry.
2 In claim construction issues before the Court, whether or
3 not you're going to allow him to answer those questions.

4 MR. VOWELL: Okay. So the first part where
5 you said in that longwinded statement, the first part
6 where you said you intend to ask him questions about
7 indefiniteness because he put that in his declaration. I
8 agree. Ask him questions about indefiniteness.

9 As you know, indefiniteness cannot be raised
10 in an IPR. Therefore, the IPR would be relevant to the
11 definiteness issue. All right. But -- and I am going to
12 maintain my objection. I'm trying to make it very clear
13 here. Please ask him all the questions that you intend to
14 ask related to claim construction, claim construction
15 declaration, or claim construction issues for which he's
16 opined on that are in the IPR declaration. I will allow
17 those questions so please ask the questions and if there's
18 one that you -- if you're asking about Cognet and how it
19 applies to Cognet, that's a separate issue.

20 So I made myself clear. Please continue
21 with your questioning or if you decide you do not want to
22 ask any more questions, then I guess you can pass the
23 witness.

24 MR. LINDENBAUM: I intend to ask him
25 questions about Cognet. I need to know whether or not you

1 are instructing the witness not to answer. That's all I
2 need to know because then I think --

3 MR. VOWELL: Yeah. So I'll be clear. I'm
4 instructing the witness not to answer questions about how
5 the claims are applied or the claim language whether or
6 not it's found in Cognet, how it's found in Cognet, et
7 cetera, which is an invalidity analysis. I'm instructing
8 him not to answer questions about his invalidity opinion.

9 MR. LINDENBAUM: Okay. I guess -- I guess
10 the only way to do it is for me to continue asking the
11 question and see if you're going to instruct him not to
12 answer whatever question I ask. I guess that's the only
13 way to do it, right. So I'll ask him my question and then
14 you decide whether or not you want to instruct him not to
15 answer the question, okay?

16 MR. VOWELL: Okay. And then if there's a
17 long line of questions where I'm instructing him not to
18 answer and it's clear you're not going to move on, then
19 we'll address it at that point, but you can ask your
20 question and I'll see if it's related to claim
21 construction or if you are, you know, intending to ask
22 questions about his invalidity opinion so please go ahead.

23 MR. LINDENBAUM: No. I -- the way this is
24 going to happen, I'm going to ask the question. If you
25 instruct him not to answer, I think we're going to take a

1 break and call the Court. I know we are because I need to
2 know whether or not I can ask these questions.

3 MR. VOWELL: Okay. Then -- okay. Ask your
4 question because right now I've made myself very, very
5 clear and I'm happy to tell the Court that and if the
6 Court tells me otherwise fine, but I believe I'm right so.

7 BY MR. LINDENBAUM:

8 Q. All right. Mr. Dominguez.

9 A. Yes, sir.

10 Q. Okay. If we're looking at page 38 and there's a
11 figure here that depicts -- you include a figure from the
12 Cognet reference; correct?

13 A. Yes.

14 Q. Okay. And you identified the first angle as
15 between the bottom of what you identified as the first
16 member of Cognet and the third member of Cognet similar to
17 the way that we just discussed it is depicted in the 166
18 patent; correct?

19 MR. VOWELL: Counsel, I'm going to object to
20 that because now you are asking him how the claim language
21 applies to the specific figures in Cognet which is --
22 which is his invalidity opinion and, therefore, I'm going
23 to instruct the witness not to answer.

24 MR. LINDENBAUM: Okay. So, Mr. Dominguez, I
25 guess we're going to have to ask you to hold on tight

1 because I guess we have to call the Court. Hold on a
2 second.

3 Let's go off the record, Ms. Roman.

4 (A break in the deposition occurs.)

5 BY MR. LINDENBAUM:

6 Q. Mr. Dominguez, we were discussing paragraph 69 on
7 page 38 of your declaration, your IPR declaration, which
8 has been marked as Plaintiff's Exhibit 12. I will put it
9 up on the screen as well. Okay.

10 So as I noted, you included a figure from
11 the Cognet reference on page 38; correct?

12 A. That's correct. And I believe that figure is --
13 refers to paragraph 68.

14 Q. Yes. 68 of your IPR declaration. I'm sorry.
15 Did I say 69? I meant 68. You're correct. 68.

16 And here you -- in paragraph 68 and this
17 figure you identify the first angle as between the bottom
18 of what you have identified as the first member of Cognet
19 and the third member of Cognet; correct?

20 MR. VOWELL: Counsel, I'm going to object
21 now on the record. These questions related to the prior
22 references are outside the scope of this deposition and
23 will, according to the Court's instructions, allow the
24 witness to answer this question and other questions
25 related to this topic and moving forward from here on in

1 the deposition I will make a -- I will just say -- simply
2 say standing objection to refer back to this objection
3 about these questions being outside the scope. Do you
4 agree?

5 MR. LINDENBAUM: I agree. I agree that
6 your -- a standing objection will refer to the -- your
7 objection to questions about the prior art in the IPR
8 declaration.

9 MR. VOWELL: Understood.

10 BY MR. LINDENBAUM:

11 Q. Okay. Mr. Dominguez, can you answer the question
12 or do you need it repeated back?

13 A. Can you please repeat the question.

14 Q. Okay.

15 THE COURT REPORTER: I can read it back,
16 counsel.

17 MR. LINDENBAUM: Okay. Great.

18 (The requested portion of the record was
19 read by the certified stenographer.)

20 MR. VOWELL: Standing objection. You can
21 answer.

22 THE WITNESS: Yes. The angle described here
23 is the angle created or formed between the axis of the
24 nail in Cognet and the axis of its first screw at the top
25 end of the nail creating an angle as described in this

1 illustration.

2 BY MR. LINDENBAUM:

3 Q. Okay. And how did you choose that angle?

4 MR. VOWELL: Standing objection. You can
5 answer.

6 THE WITNESS: I created a template, a basic
7 template of a protractor, and using the protractor like
8 normally it is used, the axis of the protractor follows
9 the axis -- one axis of it. The 0 angle followed the axis
10 of the nail -- screw, pardon, the top screw and the other,
11 the vertical line is the axis of the nail.

12 So relatively speaking, not that it's super
13 precise, but it's approximately 25 degrees angle created
14 between the -- that interior acute angle between the first
15 screw and the nail's axis.

16 BY MR. LINDENBAUM:

17 Q. And you did not identify any other angles in this
18 figure as the first angle; correct?

19 MR. VOWELL: Same objection.

20 THE WITNESS: In this particular figure, no.
21 That's the only angle that's been identified.

22 BY MR. LINDENBAUM:

23 Q. Okay. And you did not identify any other angles
24 in Cognet as the first angle; correct?

25 MR. VOWELL: Standing objection, object to

1 form.

2 THE WITNESS: This is -- no. This is -- the
3 first angle is the angle formed between the first screw
4 and the nail. That is what we are calling the first
5 angle.

6 BY MR. LINDENBAUM:

7 Q. I'd like you to turn back to your declaration,
8 Plaintiff's Exhibit 11.

9 A. Yeah.

10 Q. And in particular I'd like you to turn to
11 paragraph 37 on page 11.

12 A. Yeah.

13 Q. And if you can read the first sentence out loud
14 for me.

15 A. The claimed ranged of about 0 degrees to about
16 90 degrees is too broad a range and encompasses a degree
17 of freedom much larger than physically possible while
18 serving as a fracture fixation device.

19 Q. Would a person of skill in the art know that?

20 MR. VOWELL: Object to form.

21 THE WITNESS: Yes. Absolutely.

22 BY MR. LINDENBAUM:

23 Q. Okay. Would a person of skill in the art know
24 what ranges are physically possible for a fracture
25 fixation device?

1 A. Yes. They will have a very good idea of what the
2 angle of the projected screw should be for that particular
3 nail and the particular fracture pattern.

4 Q. All right. If we turn to paragraph 38 of your
5 declaration, which is on page 13.

6 A. Yes.

7 Q. About five lines down you'll see a sentence that
8 begins: For a person skilled in the art. Do you see
9 that?

10 A. Yes.

11 Q. It says: For a person skilled in the art, the
12 claimed value of near 0 degrees and near 90 degrees would
13 have no practical use or significance for the device to
14 perform as intended. Do you see that?

15 A. Yes, I do.

16 Q. Is it your understanding that a claim is
17 considered indefinite if the device recited in the claim
18 would not perform as intended?

19 MR. VOWELL: Object to form, calls for legal
20 conclusion.

21 THE WITNESS: What I claim is that as the
22 claim is written, to call something near 0 degrees and
23 near 90 degrees doesn't provide a person of skill in this
24 art to fully understand how much variation there may be
25 about near 0 means in terms of the clarity of the word

1 near 0. I'm not sure if that means it could be negative 5
2 degrees, 0 degrees, positive 5 degrees or near 90 meaning
3 that it could be 80 degrees, 95 degrees. It's not really
4 specific enough for someone to draw a logical conclusion
5 that the angles that are being construed are as specified.
6 That's point number one.

7 Point number two is that even if you were to
8 be at 0 or at exactly 90 or within a few degrees of that,
9 that the device does not provide clarity as to how it
10 would actually work if those two extreme ends of that
11 angle range would be applied to the device. It would not
12 certainly provide fixation, stable fixation for fusion if
13 the screws were -- the trajectory of those screws were
14 positioned at 90 or particularly at 0.

15 BY MR. LINDENBAUM:

16 Q. So is it your opinion that whether or not a screw
17 would provide fixation bears on whether or not the claim
18 is indefinite?

19 MR. VOWELL: Object to form, calls for a
20 legal conclusion.

21 THE WITNESS: Can you repeat that a
22 different way?

23 BY MR. LINDENBAUM:

24 Q. So I'm -- the sentence I just read from your
25 paragraph 38 that discusses that a person of skill in the

1 art -- for a person skilled in the art, the claimed value
2 of near 0 degrees and near 90 degrees would have no
3 practical use or significance for the device to perform as
4 intended.

5 What I'm asking you is this question of
6 whether or not the device would perform as intended bears
7 on your opinion of whether or not the claim is indefinite?

8 MR. VOWELL: Object to form.

9 THE WITNESS: I would say yes.

10 BY MR. LINDENBAUM:

11 Q. How so?

12 MR. VOWELL: Object to form.

13 THE WITNESS: If you look at Figure 18A.

14 BY MR. LINDENBAUM:

15 Q. This is on page 12 of your declaration?

16 A. Yes.

17 Q. Okay.

18 A. So one of the things that an engineer skilled in
19 the art when designing a nail like this and is trying to
20 establish a range, let's call it 0 to 90 degrees, one of
21 the things that that engineer would do would go through
22 simulation of what these two extreme ranges represent
23 physically on the device and so they would likely position
24 a screw 90 degrees to -- orthogonal to the axis of the
25 nail. They would then position that screw coincident at

1 the 0 angle so that both the angle of -- the axis of the
2 screw is coincident with the axis of the nail. That would
3 be representative 0 degrees.

4 So in this Figure 18A, I created this
5 illustration to clarify that claim that when you use a
6 degree of 0 degrees claim for the first bore axis and
7 you -- you superimpose or line the axis of the first screw
8 on that 0-degree axis, the entire screw would be within
9 the inside of the nail. So there's no -- that screw
10 doesn't serve a purpose to capture and reduce a bone
11 fracture because it's not actually in the bone. That
12 screw is actually inside the body of the nail. That's at
13 the 0 degrees.

14 Now, you can see that even if it were 5
15 degrees or even possibly 10 degrees, the bulk or majority
16 of that nail drawn at 5 degrees, 10 degrees would still
17 lie inside the metal of the nail, the axis of the nail and
18 very little of it would protrude beyond the outside
19 surface of that nail so it would not capture or do a good
20 job whatsoever of trying to capture bone, reduce the
21 fracture and create compression.

22 So when you describe that the range of this
23 first bore axis should be anywhere between 0 and 90, or
24 approximately thereabouts, there are angles that do not
25 make any practical sense from a user standpoint of

1 actually allowing the device to do as intended and to
2 serve as a fracture fixation device so that is at the 0
3 position.

4 I then went on to show in Figure 18B that
5 top screw -- that first top screw if it were shown
6 approximately 90 degrees, and that was my intent here to
7 show that the screw -- the first screw is orthogonal to
8 the axis of the nail at 90 degrees, given the fact that we
9 know that the -- this terminal end of the nail is going to
10 be very close to the top surface of the bone. It's either
11 just below the surface of the bone or proximally at the
12 surface of the bone. The threads on screw number one will
13 be coming -- will come very close to that top surface of
14 the bone possibly, you know, rupturing that top surface of
15 the bone or not getting a really good purchase on bone
16 because the threads can actually carve out some of the
17 bone near the top surface of the bone.

18 So ideally from that standpoint, it is
19 possible that a 90 -- you can get by with a 90 degree, but
20 it's probably not very practical to insert a screw at 90
21 for this application because you are getting very close to
22 the top surface of the bone when the screw is projected at
23 90 degrees.

24 So what I am saying is that the range of 0
25 to 90 degrees is way too broad, way too wide. It is -- at

1 both extreme ends that an engineer would do my layout, as
2 I illustrated here, would realize very quickly that 0 is
3 not a possible degree, probably 5, probably not 10 either,
4 but neither is 90 or 95 or 85. It's probably going to be
5 somewhere in the middle, more of an acute angle of
6 anywhere from say 30 to 60 degrees. That would be a more
7 reasonable range for this application.

8 Q. All right. I believe you said that for Figure,
9 let's say, 18A, at 0 degrees the screw would not reduce a
10 fracture; correct?

11 A. Correct.

12 Q. Okay. Does the claim require the first screw to
13 reduce a fracture?

14 A. Well, we said earlier that that first screw could
15 be used for -- to reduce the fracture if the fracture were
16 at the top towards where that screw is or it could be the
17 bottom screw so it is certainly not serving any function
18 whatsoever if it's -- if that screw is inside the nail.

19 Q. Are you aware that some screw assemblies include
20 set screws that are --

21 A. Yes, I am.

22 Q. And those are inserted through the top; correct?

23 A. Yes. Yes.

24 Q. And they are inserted at the 0 angle you depict
25 here; correct?

1 A. Yes. But set screws are not meant to capture
2 bone. Set screws are meant to lock the -- to close the
3 open top nature of a cannulated nail, for example.

4 Q. Right. So what does it matter that the set screw
5 is not intended to reduce fractures, to capture bone I
6 think you said?

7 A. Yeah.

8 Q. Why is --

9 A. Because that's not the purpose of the set screw.
10 The purpose of the set screw is to close up the aperture
11 so that you don't get bone in grafts into that aperture.

12 Q. Okay. So why couldn't the first screw in this
13 assembly be used as a set screw?

14 MR. VOWELL: Object to form.

15 THE WITNESS: It's not described as a set
16 screw in the specifications. It's certainly not described
17 as a set screw in the claims. It's clearly a bone or lag
18 screw meant to be used in bone fracture fixation. It is
19 not serving a purpose as a set screw.

20 BY MR. LINDENBAUM:

21 Q. A claim doesn't -- the Claim 1 or 12 or any claim
22 in the patent doesn't require it to be used for fracture
23 fixation; correct?

24 A. I believe the preamble to claim one says it is an
25 assembly for fracture fixation.

1 Q. Yeah. But it doesn't say that the first screw
2 has to be used for fracture fixation; correct?

3 A. As described, it's a three-member assembly used
4 for fracture fixation so to me any one of those three
5 members could be used for fracture fixation.

6 Q. If that's the case, then why couldn't the second
7 screw be used for fracture fixation and the first screw be
8 used as a set screw?

9 A. It's not described as a set screw.

10 Q. It's not described -- it doesn't say it can't be
11 a set screw, right?

12 A. I recollect from my reading of patent 166 that
13 that screw, that first screw, was always described as a
14 screw. It's always described as a bone screw, a lag
15 screw, and it was always -- the description in the
16 specification describe it as a lag screw to capture bone
17 to assist with the fracture fixation.

18 Q. Okay. Let's look at Claim 1. I'll put it up on
19 the screen for you. Hold on one second.

20 All right. We're looking at Plaintiff's
21 Exhibit 1. There we go. And Claim 1. All right.
22 Actually, do you have the 166 patent in front of you?

23 A. Yes, I do.

24 Q. All right. I'll pull it on my screen too. If
25 you can look at Claim 1 and let me know if you think

1 there's anything in there that indicates that it could not
2 be a set screw.

3 A. Following the preamble to Claim 1, the first line
4 after the preamble describes the first member and it
5 describes all the components necessary for a bone screw.

6 Q. Yeah, but it could act as a set screw; correct?

7 A. Normally a set screw doesn't have -- has a
8 different thread pattern because it's intended to be a
9 machine screw going into -- metal going into metal so the
10 thread properties of a set screw do not -- are not a
11 cortical thread or a cancellous thread. Those are
12 properties of a lag screw.

13 Q. Does this first element here talk about a first
14 member talk about any properties of the thread, the thread
15 pattern? It does not; correct?

16 A. Correct. It does not describe a specific thread
17 pattern.

18 Q. All right. So is there anything in that element
19 that indicates that it couldn't be a set screw?

20 A. The specifications within the patent clearly in
21 multiple locations state that the screws, whether it's
22 screw number one or the second screw, they always describe
23 the screws as bone screws and lag screws having cancellous
24 thread patterns that are used for that application.

25 Typically when an engineer or someone

1 skilled in the art describes a set screw, A, a set screw
2 is usually very, very short. It's just there to close off
3 a very shallow top end of the opening to the nail. It
4 doesn't have a lot of extension or body to it. The
5 threads are typically very coarse or a machine thread that
6 is not intended -- that won't really work at all with
7 bone, doesn't compress bone. It's meant to basically be a
8 metal to metal engagement with a short stubby set screw
9 that closes off the top opening to the nail. And that's
10 certainly not described in any of the specifications. The
11 specifications really go out of the way to describe a lag
12 screw, a bone lag screw.

13 Q. Okay. I mean, you have an opinion here in your
14 declaration that a person skilled in the art wouldn't put
15 a screw in at 0 degrees as you have in Figure 18 on
16 page 12 of your declaration, and I understand if you
17 believe that the configuration as depicted here in
18 Figure 18 maybe is not your typical set screw, but there's
19 nothing preventing it from being -- would it have
20 prevented it being used as a set screw if put in at
21 0 degrees; correct?

22 MR. VOWELL: Object to form.

23 THE WITNESS: Yeah. I would say that if it
24 was the intention to make screw number one a set screw,
25 then the illustration certainly doesn't show it that way

1 or represent it that way, Figure 18.

2 BY MR. LINDENBAUM:

3 Q. Okay. But I'm talking about your Figure 18A.
4 You're saying that that is not something that -- that
5 would exist in the world of possibility, right, and I'm
6 saying that's not the case because you could have a screw
7 like that as a set screw; correct?

8 MR. VOWELL: Object to form.

9 THE WITNESS: Yes. I would say yeah, okay.
10 In theory you are correct. We can create -- we can add
11 another element, maybe a fourth -- and a fourth element to
12 this assembly. The fourth element would be a set screw.
13 After you've inserted your top screw and your bottom
14 screw, the top element -- the fourth element could be a
15 set screw that you use to close off the top of the open
16 nail so that the surfaces are nice and smooth with bone --
17 you know adjacent to the bone so you could add a fourth
18 element and call it a set screw and be done with it. You
19 can just keep the other two screws and just add a set
20 screw to the top, provided that you have a means to
21 capture that set screw in that opening at the top of the
22 nail which doesn't -- there are no indications that that
23 opening is a threaded opening. Otherwise, a set screw
24 would just fall out if you had something in there.

25 BY MR. LINDENBAUM:

1 Q. Okay. So it sounds like you're agreeing with me
2 that you could have a screw as depicted in your Figure 18A
3 at 0 degrees that would act as a set screw; correct?

4 MR. VOWELL: Object to form,
5 mischaracterizes the witness's testimony.

6 THE WITNESS: I would agree with you that
7 you could include a set screw in the opening at the top of
8 the nail at 0 degrees, but the other points that I was
9 making with Figure 18A is that at 0 degrees that's as
10 shown, but even if you had it at 5 or 10 degrees, then at
11 that point that part -- maybe partially -- partial portion
12 of that screw, number one, would project out the side of
13 the nail and not serve any true purpose for the purpose of
14 reduction in fracture fixation. It would just be
15 something that is primarily within -- that screw would be
16 primarily within the body of the nail and even at 5 or
17 10 degrees it wouldn't likely capture any fracture bone so
18 it wouldn't serve a purpose.

19 If you decided to omit it altogether and not
20 put that top nail -- or that top screw in the nail and
21 just close it off with a set screw, I guess that is
22 possible.

23 BY MR. LINDENBAUM:

24 Q. When you say it wouldn't likely capture any
25 fracture bone so it wouldn't serve as a purpose. Could it

1 capture fracture bone at those angles of 5 or 10 degrees?

2 A. Probably not because the surgeon would not want
3 to put the nail that close to a fracture to begin with.
4 He would want to be a little bit away. You want to embed
5 that nail, surround it around nice bone to be able to
6 anchor it all down and so the fracture would probably not
7 be right adjacent to the nail. It would probably be a
8 little bit far away, maybe halfway out to the length of
9 where the threads are on the screw so you want to be able
10 to project the threads of the screw and capture bone a
11 distance away from the nail and then bring that -- that
12 fracture back onto the fracture and reduce the fracture so
13 you typically won't want to put a nail right up against a
14 fracture. So at 0, 5, 10 degrees I don't believe that
15 screw would be capturing any -- would be capturing a
16 fractured bone segment.

17 Q. But a surgeon could choose to do it at that
18 angle, right?

19 You said probably, typically, but in fact a
20 surgeon could, if they wanted to, use a screw at five
21 degrees and to capture bone; correct?

22 A. At five degrees I don't believe you can really
23 capture bone because the majority of the screw would still
24 be inside the nail.

25 Q. Well, depends on the length of the nail; correct?

1 A. Depends on the length and at some point if you're
2 that acute you're probably going to be interfering with
3 the lower screw.

4 Q. Well, maybe we're talking about the lower screw.
5 If we're talking about the lower screw --

6 A. I thought we were talking about the first screw.

7 Q. Well, let's -- let's talk about the lower screw.
8 Is it impossible to have a screw at five degrees and
9 capture bone?

10 A. For the lower screw, no. Either. The same --
11 the same scenario applies to the lower screw. At
12 0 degrees or 5 degrees you can see -- I think I have
13 Figure 18B. 18B shows having the second lower screw drawn
14 approximately at 0 degrees so it's basically on axis with
15 the nail.

16 And shown there, you can see that that screw
17 isn't really doing anything. It's actually -- part of it
18 is all inside the nail at 5 degrees, 10 degrees. Also not
19 projecting much engagement at that second screw into bone
20 either so the angle -- for it to be an effective device,
21 the angle needs to be within a narrower scope than 0 to
22 90. It needs to be somewhere more towards the middle of
23 that, with a little amount variation. 30 to 60 degrees is
24 probably a good starting point for the trajectory of those
25 bores, but to say that 0 degrees you can see clearly from

1 the illustration that at 0 degrees nothing much is
2 happening. All you have is a nail with no screws.

3 Q. I want to talk to you about five degrees because
4 you brought up five degrees, and I want to know if you
5 think five degrees it would be impossible to use. It
6 would not work at all. It's impossible to design it with
7 five degrees. Is that your opinion?

8 MR. VOWELL: Object to form.

9 THE WITNESS: Practically, yes. At 5
10 degrees I think it would be too shallow of an angle to
11 capture bone and it would not be an effective capture of
12 any bone at five degrees because typically you want to
13 insert your screw as close to perpendicular to the
14 fracture line as possible so that when you compress, the
15 fracture actually compresses linearly, axially towards
16 each other, and if you try to compress something at a very
17 acute angle all you're really doing is creating some
18 tilting or rotation of the bone fragment and not really
19 good perpendicular compression bone on bone.

20 So the hairline fracture you're trying to
21 close, if the hairline fracture is 90 degrees to the nail
22 you want ideally capture that as best as perpendicular to
23 that fracture line as possible and at 0, 5 degrees the --
24 you're not -- again, you're probably not going to capture
25 any bone, but if you did it would not be very effective to

1 capture it at that angle.

2 BY MR. LINDENBAUM:

3 Q. But you could capture bone; correct?

4 A. If you made it -- I guess if you made the screw
5 long enough and it stuck out from the side of the nail and
6 projected itself out at five degrees, you probably have to
7 be using a very, very long nail, which no longer, you
8 know, be used for this anatomy, this type of anatomy
9 because you probably won't have as much bone to capture
10 into at a very shallow angle at five degrees.

11 Q. But it depends on the anatomy, right? It depends
12 on the angle. It depends on the length of the screw,
13 right? All those things depend and so it's possible;
14 correct?

15 A. Yeah. I mean, it's possible, but in small bone
16 you really -- that's the nature of small bone you don't
17 have a lot of room. If it were somewhere like in the
18 pelvic or in the pelvis or pelvic crest where you have an
19 enormous amount of bone, you could traject a very shallow
20 angle screw and capture bone because you have a lot of
21 bone to work with, but in small bones typically these
22 bones are very small so you have a limitation as to the
23 length of the screws you can use practically speaking.

24 Q. Let's turn to Figure 18C on page 13 of your
25 declaration, paragraph 38, which you alluded to earlier in

1 response to a different question, but here you said you're
2 depicting the first screw at 90 degrees to the third
3 member, the third longitudinal axis; correct?

4 A. Correct.

5 Q. And is it your opinion that there's no situation
6 in which a 90-degree orientation for the first angle would
7 be clinically useful?

8 A. No. I think I just said that it's possible you
9 could use it at 90 degrees, but you certainly wouldn't --
10 if you -- depends on how close to 90 degrees you are. If
11 it's 95 to 100 degrees, it probably would start coming out
12 the tip end of that screw would start projecting out from
13 the bone because you're placing it very superficial on the
14 bone, but 90 degrees or -- 90 degrees in this -- my
15 representation of showing it at 90 degrees is just to make
16 the point that you are getting in that -- you're getting
17 outside that do no harm region that surgeons always talk
18 about.

19 So if you're getting so close to the surface
20 of the bone, you probably got too deep of a bone angle
21 here at 90 degrees and should probably be projecting that
22 a little bit lower to sink it into bone further rather
23 than having those threads potentially start to cut and
24 carve the superficial sips of the bone and at that point
25 the screw could possibly loosen, migrate or project out

1 which could cause harm to the patient.

2 So it's on the verge of being an unsafe
3 screw if it's this close to the top surface of the bone,
4 but you could -- you could put it at 90 degrees and get
5 away with it or if the surgeon is good and the anatomy is
6 right.

7 Q. Doesn't it also depend on the shape of the bone,
8 like if the bone -- like if there's more -- the surface
9 raises I guess to the right of that picture there so that
10 you're, you know, you're inserting the bone with a screw
11 and it wouldn't be close to the top surface; correct?

12 A. Yeah. If the -- if the surface of the bone has a
13 hump to it or to the right where the threads are there's
14 plenty of material underneath, there's plenty of bone
15 above that thread and usually you would want to have at
16 least twice the thickness of the thread diameter to put
17 bone around it so that it doesn't do these harmful things
18 so if the anatomy of the bone is such that there's a hump
19 to this bone or a shape to this bone where at 90 degrees
20 you're still getting good purchase in bone with bone above
21 it without the -- without possibility of it cutting bone,
22 you know, rubbing and cutting bone over time, then it
23 would be okay. It would be acceptable at 90 degrees.

24 MR. LINDENBAUM: All right. I'm actually
25 going to switch gears a little bit. This might be a good

1 time to take a break, if you'd like a break,
2 Mr. Dominguez. Otherwise I can push forward.

3 MR. VOWELL: Why don't we take a short
4 break. Timeline for us, I know that with the Court thing
5 it took a little longer, but what I think would be a good
6 idea to do is take a short break now and we're going to
7 have our lunch brought in and then we'll take maybe
8 another 30, 40 minutes, let us take like a 30-minute
9 break. How about five minutes?

10 MR. LINDENBAUM: It's 3:35 here. You want
11 to say ten minutes or so?

12 MR. VOWELL: Let's do ten.

13 MR. LINDENBAUM: Okay. See you in ten.

14 (A break in the deposition occurs.)

15 BY MR. LINDENBAUM:

16 Q. Mr. Dominguez, I'd like to turn to paragraph 39
17 of your declaration. It is Exhibit 11, which is on
18 page 14 of your declaration.

19 A. Yes.

20 Q. Okay. If you could just read that to yourself,
21 please.

22 A. Yes.

23 Q. Okay. So starting with the second sentence, it
24 says: Both claims 1 and 12 specify that the second bore
25 axis is substantially perpendicular to the third

1 longitudinal axis. Do you see that?

2 A. Yes, I do.

3 Q. And then it says: As shown in the Figure 18 from
4 the 166 patent, this would mean that the second angle
5 could not be about or near 0 degrees, but would have to at
6 least be substantially 90 degrees. Do you see that?

7 A. Yes, I do.

8 Q. Yet, the preceding claim element specifies the
9 second angle could be anywhere in that range, thus
10 contradicting the phrase substantially perpendicular and
11 rendering Claims 1 and 12 indefinite. Do you see that?

12 A. Yes, I do.

13 Q. Can you explain to me further what you mean in
14 that last sentence where it says, thus contradicting the
15 phrase substantially perpendicular.

16 MR. VOWELL: Object to form.

17 THE WITNESS: Claim 1 has two -- just
18 before -- just before claim 2 in the patent 166, there are
19 two lines and so someone skilled in the art when reading
20 this the second -- the first sentence above it says
21 wherein the second angle is in the range of about
22 0 degrees to about 90 degrees and where -- and in the
23 second line of the second claim, wherein the second bore
24 axis is substantially perpendicular to the third
25 longitudinal axis.

1 So for someone like myself reading this, I
2 would interpret that the first claim says it can be in a
3 range of 0 to 90, but then the second claim for that or
4 the subclaim within claim 1 to that also now states a new
5 angle being substantially perpendicular. So it is either
6 substantially perpendicular or it's 0 or somewhere in
7 between, but it can't be all those concurrently.

8 So that's what I meant when I say that the
9 substantial perpendicular claim makes claim 1 indefinite
10 because it's not clear and it's ambiguous as to what is
11 the actual angle that is being derived here in claim 1
12 because you have the claim 0 to 90 and now you have a
13 claim that says 90.

14 BY MR. LINDENBAUM:

15 Q. Okay. Does a substantially perpendicular angle
16 fall within the range of about 0 degrees to about
17 90 degrees?

18 MR. VOWELL: Object to form.

19 THE WITNESS: No. Not -- not in my opinion
20 because that's -- that's a very wide range to say that
21 something that's substantially perpendicular could be 0 or
22 about 0.

23 BY MR. LINDENBAUM:

24 Q. I'm not asking you substantially perpendicular is
25 about 0. I'm asking you would a substantially

1 perpendicular angle fall within the range of an angle
2 between about 0 degrees to about 90 degrees?

3 MR. VOWELL: Object to form.

4 THE WITNESS: No, sir.

5 BY MR. LINDENBAUM:

6 Q. Why?

7 A. Because you're talking two different degrees, one
8 being close to or substantially perpendicular and the
9 other one being between 0 -- somewhere between about 0 and
10 about 90. So one is a range. The first one -- when you
11 say about 0 to about 90 that is a range from about 0 to 90
12 and the second claim is stating that it's substantially
13 perpendicular so it's close to or about 90 so you can't
14 have one being described as a range and the other one
15 being described as a finite angle of substantially
16 perpendicular.

17 Q. Is a 45-degree angle between 0 and 90 degrees?

18 A. Yes, it is, sir. Yes.

19 Q. Is an 89-degree angle between 0 and 90 degrees?

20 A. Yes.

21 Q. Could an 89-degree angle be a substantially
22 perpendicular angle?

23 MR. VOWELL: Object to form.

24 THE WITNESS: I would say yes it can be.
25 It's within the tolerances of a design like this it can

1 be, yes.

2 BY MR. LINDENBAUM:

3 Q. So could a substantially perpendicular angle be
4 between 0 and 90 degrees?

5 A. No because as -- approximate -- as you get closer
6 and closer to 0, 10, 20, 30 degrees, you know in that
7 range, you're still very far away from being substantially
8 perpendicular. You're nowhere -- you're nowhere close.

9 It's a very wide range of degrees here that we're talking
10 about when you say something is near, close to
11 perpendicular and then saying that it could also be 0.

12 Q. I'm confused because I asked you just a moment
13 ago if an 89-degree angle was between 0 and 90 degrees and
14 I believe you said yes; correct?

15 A. Well, absolutely. Yes. It lies within any lower
16 limit of below 89. Anything below 89 would be inside that
17 angle, yes.

18 Q. Okay. And I believe you testified that a
19 substantially perpendicular angle could be an 89-degree
20 angle; correct?

21 A. Yes. Yeah, sure. It's close enough to
22 90 degrees that, yes, it can be.

23 Q. So if a substantially perpendicular angle could
24 be 89 degrees, if an 89-degree angle could be between 0
25 and 90 degrees, why can't a substantially perpendicular

1 angle be between 0 and 90 degrees?

2 A. Because I think you're way outside the scope of
3 what we're describing for the angles of these screws.

4 Q. I'm not talking about these screws. I'm asking
5 you just a simple question. Can a substantially
6 perpendicular angle be between 0 and 90 degrees?

7 A. Again I would say no, not within 0 or close to 0.

8 Q. I didn't say within 0. I said between 0 and
9 90 degrees. Why -- why is it that a substantially
10 perpendicular angle can be 89 degrees and an 89-degree
11 angle can be between 0 and 90 degrees, but a substantially
12 perpendicular angle can't be between 0 and 90 degrees? I
13 mean, isn't that the transitive property here? I believe
14 that's the mathematical term, right?

15 How are you saying that a substantially
16 perpendicular angle cannot be between 0 and 90 degrees?

17 A. It's not definite enough for me to say that --
18 that between -- if you're trying to say in one claim that
19 something is 90 degrees or close to being 90 degrees, call
20 it 89 degrees, and then in another -- and then state that,
21 well, okay so it's 90 degrees good, then anything between
22 0 to 90 is also good because it's inside -- it's close
23 enough to 90. That's not -- that's not how you would be
24 able to configure and convey this device to produce it in
25 a way that leads to what you're trying to accomplish in a

1 fracture fixation.

2 Q. Forget this device. I'm asking you just
3 abstractly. Could a substantially perpendicular angle be
4 between 0 and 90 degrees?

5 A. No. I still say no.

6 Q. Why?

7 A. Because if you're trying to achieve substantial
8 perpendicularity between say two axes, those axes need to
9 be pretty much 90 or very close to 90 degrees with a
10 little bit of variation. It can't then now say that
11 another axis at 0 lies perpendicular to -- to that -- it
12 is also a perpendicular axis to your -- to your device --

13 Q. That's not the question. The question isn't
14 whether or not 0 degrees is close enough to 90 degrees.
15 That seems to be what your answer is. Is that what you're
16 saying, that you're answering the question of whether or
17 not 0 degrees is sufficiently close to perpendicular? If
18 that's what you're answering, that's not my question.

19 My question is why isn't, if it's still your
20 opinion, why isn't something that's substantially
21 perpendicular -- I'm sorry. Why isn't an angle that's
22 substantially perpendicular between 0 and 90 degrees?

23 A. I would say that to use the word substantially
24 perpendicular you have to have a point of reference and
25 that's two axes so if you're trying to say that an angle

1 at 0 degrees could be perpendicular, it could -- that
2 angle at 0 degrees could be perpendicular if the other
3 angle is 90, but you need -- you need two axes to define
4 perpendicularity because one relates to the other. One
5 axis is perpendicular to the other axis so you need two
6 axes to define perpendicularity.

7 Q. Good. So if I have two axes that are
8 substantially perpendicular to each other, couldn't the
9 angle between them be somewhere between 0 and 90 degrees?
10 It would fall within that range; correct?

11 A. No because if they're substantially perpendicular
12 it's already alluded that it's 90 degrees. It's already
13 perpendicular --

14 Q. Sure.

15 A. You don't have anything -- another choice.

16 Q. It's between -- but it is between 0 and
17 90 degrees; correct? It's somewhere between there. It
18 may be close to or at 90 degrees, but between 0 and
19 90 degrees; correct?

20 A. No. Still going to be 90 degrees. You can't get
21 the entire range and still call it perpendicular.

22 Q. I didn't call the entire range perpendicular. I
23 said is an angle that is substantially perpendicular does
24 that fall within the range of 0 to 90 degrees.

25 A. I wouldn't call it 0. I wouldn't call it 10.

1 Q. I'm not calling it 10. I'm not calling it 0.
2 I'm calling it substantially perpendicular. I'm calling
3 the angle that I'm asking about the substantially
4 perpendicular angle and I'm asking whether or not that
5 could be between 0 to 90 degrees and you're telling me no.

6 I just want to be clear. You're telling me
7 that an angle that is substantially perpendicular, which
8 you testified could be 89 degrees, cannot be between 0 and
9 90 degrees. Is that your testimony?

10 A. Yes.

11 Q. Okay. And, again, why?

12 MR. VOWELL: Object to form.

13 THE WITNESS: When you claim that an angle
14 is substantially perpendicular to 90 degrees, both of
15 these axes have to be close to being orthogonal relative
16 to one another and that forms -- that creates the
17 substantial -- the perpendicularity, you know,
18 terminology. Both angles -- the angles created by these
19 two axes create a substantially -- a substantially
20 perpendicular angle, a fixed perpendicular angle of
21 90 degrees. It isn't a range between 0 and 90. It's a
22 fixed 90 degrees between two axes.

23 BY MR. LINDENBAUM:

24 Q. Agreed. The substantially perpendicular angle
25 I'm asking you about is a fixed angle. I'm asking whether

1 or not that fixed falls within the range of 0 to
2 90 degrees and your testimony is no?

3 A. As I read this claim and I read both these last
4 two claims separately, one describes a second angle in the
5 range of 0 to 90 degrees. That's clear and understood.
6 The angle has a variation between 0 and 90 degrees.

7 When I read the second claim that the second
8 bore axis is now substantially perpendicular to the third,
9 now it's defining -- it's further defining what we had
10 just said that the angle is between 0 to 90 and now to say
11 that that angle is actually substantially perpendicular,
12 meaning 90. So your -- the bias is toward saying that
13 this second bore is closer to 90, 89 degrees so it's
14 closer to a perpendicularity than it is to a range of 0 to
15 90.

16 Q. Okay. So let's say that that last element of
17 claim 1 wasn't there, right. Let me give you a
18 hypothetical, okay. And I'm looking at the second to last
19 element where it says we're in the second angle is in the
20 range of 0 degrees to about 90 degrees. Do you see that?

21 A. Yes.

22 Q. Is it your opinion that to meet that element, an
23 assembly would need to allow the second member to couple
24 to the third member at any angle between 0 and 90 degrees?

25 A. The first -- yes, the angle -- if you're claiming

1 that the range is 0 to 90, then that first angle should be
2 anywhere between 0 and 90 and that would be fine. That
3 would be within -- that's what the claim states.

4 Q. But an assembly that only allowed the second
5 angle to be let's say 45 degrees wouldn't meet that
6 limitation because it would fix it at 45, is that your
7 opinion?

8 MR. VOWELL: Object to form.

9 THE WITNESS: It would lie within. That 45
10 would lie within the 0 to 90. If it was the desired
11 expression to make it 45, it should have said 45, but it
12 is very open and broad and that's part of my -- my -- the
13 difficulty in interpreting this particular claim is that
14 the range is so broad and, as I showed earlier, at both
15 extreme ends geometrically it doesn't make physical sense.

16 BY MR. LINDENBAUM:

17 Q. Can you answer my question though? My question
18 was an assembly that has a fixed second angle at
19 45 degrees, would that meet that element, that the second
20 angle is in the range of about 0 degrees to about
21 90 degrees?

22 A. Yes. I would say yes if you -- if you want to
23 further define -- the way I interpret your question is
24 you're adding yet another claim --

25 Q. I'm not adding anything yet. I'm just asking you

1 about that limitation, right, in my hypothetical. When
2 that last element is not there, the substantial
3 perpendicular element is not there, right. I'm asking how
4 you're interpreting the one before it, right, and my
5 understanding from your earlier testimony was that maybe
6 you were saying that only -- only if the second element is
7 variable, right, that it could be -- that only a screw --
8 a nail that has a variable angle from 0 to 90 would meet
9 that element, is that what you're arguing? Is that what
10 your opinion is?

11 MR. VOWELL: Object to form.

12 THE WITNESS: No. I would argue that it
13 leads -- if you're claiming that the angle is between 0 to
14 90 and you have an angle at 45, that would meet that
15 criteria. That 45 degrees would be within 0 and 90. I
16 agree with that.

17 BY MR. LINDENBAUM:

18 Q. Okay. So if you had an angle that was
19 90 degrees, would it meet that element?

20 A. It's hard to say because you're using the word
21 about so I'm not sure if about means actually including 90
22 in the range or close to 90.

23 Q. What do you think? Do you think it includes 90?

24 A. I believe about is a little bit vague for me to
25 know that it's 90 or close -- how far away could it be

1 from 90 and still call it 90.

2 Q. I'm not saying it has to be far away at all. I'm
3 saying does 90 mean it?

4 A. Because if it's 90 and now you're saying that
5 okay although I -- the range is 0 to 90, now I'm calling
6 it 90, then you're still -- okay. You're still
7 technically inside that range.

8 Q. Okay. So would an angle that's substantially
9 perpendicular fall within that range?

10 A. Again, the interpretation of substantially has a
11 lot to be desired, but if you're calling it perpendicular
12 and you admitted the word substantially, I would say,
13 yeah, you're still perpendicular.

14 Q. So it would fall within that range; correct?

15 A. Yes.

16 Q. So if we look back at paragraph 39 of your
17 declaration, and you can read -- feel free to read the
18 whole paragraph, but the part I've been trying to ask you
19 about is the last sentence where it says -- and if you're
20 reading the paragraph I'll wait.

21 A. Go ahead.

22 Q. Yeah. Where it says: The preceding claim -- I'm
23 sorry. Yet, the preceding claim element specifies the
24 second angle could be anywhere in that range, thus
25 contradicting the phrase substantially perpendicular.

1 It actually doesn't contradict; correct? It
2 actually is -- as long as it falls within that range, it
3 wouldn't contradict; correct?

4 MR. VOWELL: Object to form.

5 THE WITNESS: I mean the use of the word
6 substantially perpendicular when it comes to the last
7 claim in one, you were prior to that you describe -- you
8 were describing it as a range from between 0 to 90 and now
9 redefining it further --

10 BY MR. LINDENBAUM:

11 Q. I wasn't describing it as a range. That's what
12 it says in the claim, doesn't it?

13 MR. VOWELL: David, I'm going to ask that
14 you let him finish his answer.

15 MR. LINDENBAUM: I'm letting him finish his
16 answer. Thank you, Mr. Vowell.

17 BY MR. LINDENBAUM:

18 Q. Go ahead, Mr. Dominguez.

19 A. So in one claim above you list that the range is
20 0 to 90 or within 0 to 90 and then in the second claim you
21 further refine that claim above by now calling it
22 substantially perpendicular so it means that everything
23 you just said above from 0 to 80 or 89 degrees didn't
24 count. It's not really what I want it to say. Now you're
25 saying it again in the second claim saying that it is now

1 substantially perpendicular.

2 So if that was the case should have said
3 that in the beginning and not made it very unclear to
4 someone reading the patent claim that you are calling two
5 different -- you have -- you're calling the range of these
6 screws in two different ways and then you're -- in the
7 last claim now you're really specifying more succinctly
8 what it is that you mean, which is substantially
9 perpendicular. So it is a bit vague and confusing when
10 you read the first claim and then you read the second
11 right after it because you keep further refining what that
12 angle is when you could have just said it's perpendicular,
13 substantially perpendicular. Why bother with the previous
14 claim.

15 BY MR. LINDENBAUM:

16 Q. That's just the way it's written though. Just
17 because it's written that way obviously -- I mean my -- my
18 question isn't -- isn't, you know, quibble with you about
19 how the claim could have been written.

20 My question is whether or not that last
21 sentence in paragraph 39 is incorrect, right, where it
22 says that the preceding claim specifies the second angle
23 could be anywhere in that range, thus contradicting the
24 phrase substantially perpendicular. It doesn't actually
25 contradict it, correct, because if it falls within the

1 range it wouldn't contradict it, right?

2 MR. VOWELL: Object to form,
3 mischaracterizes testimony.

4 THE WITNESS: I would agree that if the
5 range -- if the substantial perpendicularity definition,
6 whatever that is, falls within the near 0 and the near --
7 or at least substantially 90, if it falls between the near
8 0 -- near 0 and substantially 90, then the second claim
9 calling it substantially perpendicular would fall inside
10 that previous claim.

11 BY MR. LINDENBAUM:

12 Q. When you say claim, you mean claim limitation,
13 right?

14 A. Claim limitation.

15 Q. If it falls -- if the last claim limitation falls
16 within the claim limitation before it, it wouldn't
17 contradict; correct?

18 MR. VOWELL: Object to form,
19 mischaracterizes his testimony, asked and answered.

20 THE WITNESS: I stand by my previous
21 comment.

22 BY MR. LINDENBAUM:

23 Q. I'd like you to answer the question.

24 A. As I said before, if the substantial
25 perpendicularity -- substantial perpendicularity falls

1 within the 0 to substantial 90, then -- and that does
2 include -- substantial perpendicular is included within
3 that described range in the claim above that says it could
4 be 0 to substantially 90. So depending on the definitions
5 of what you mean by near 0 and substantially 90 and in the
6 other claim substantially perpendicular. If the
7 descriptive word that you have in front of that
8 perpendicular word, if it still falls within the scope of
9 the 0 to 90, then, yes, substantially perpendicular would
10 also be included within that term.

11 Q. Okay. So we can agree that the last element of
12 claim 1 does not necessarily contradict the second to last
13 element of claim 1; correct?

14 MR. VOWELL: Object to form,
15 mischaracterizes testimony, and asked and answered.

16 BY MR. LINDENBAUM:

17 Q. You can answer the question, Mr. Dominguez.

18 A. Yes. Provided -- provided that the substantial
19 perpendicular in the last claim falls inside the previous
20 claim of in the range of about 0 to about 90. That --
21 that's all inside that range, then substantially
22 perpendicular would lie inside the claim being made and it
23 would be -- there would not be a discrepancy, if you will.

24 Q. Okay. I'd like to turn to paragraph 40 of your
25 declaration, which is on page 14.

1 A. Yes, sir.

2 Q. Second sentence says: The term perpendicular is
3 not used in the 166 patent specification. Do you see
4 that?

5 A. Yes.

6 Q. A person skilled in the art would understand what
7 the term perpendicular means; correct?

8 A. Yes.

9 Q. Is a perpendicular angle a 90-degree angle?

10 A. Yes.

11 Q. Is it an orthogonal angle?

12 A. Yes.

13 Q. Is it a right angle?

14 A. Yes.

15 Q. Is it a normal angle?

16 MR. VOWELL: Object to form.

17 THE WITNESS: Yes.

18 BY MR. LINDENBAUM:

19 Q. All right. You state in the first sentence of
20 paragraph 40 that: The phrase substantially perpendicular
21 is also indefinite because one of ordinary skill in the
22 art would not know what the boundaries of this phrase are.
23 Correct?

24 A. Yes.

25 Q. Okay. I'd like you to turn to your IPR

1 declaration, which is Exhibit 12.

2 MR. VOWELL: David, can you put that back up
3 on the screen as well.

4 MR. LINDENBAUM: Sure will.

5 MR. LINDENBAUM: Okay. I'd like you to turn
6 to page 68. Mr. Vowell, can you see it now?

7 MR. VOWELL: Yes.

8 BY MR. LINDENBAUM:

9 Q. Okay. And I'd like you to turn to paragraph 132
10 on page 68.

11 A. Yes. I'm there.

12 Q. You see it says on paragraph 132: Simon
13 discloses the second angle to be about 90 degrees as
14 discussed above, which is substantially perpendicular. Do
15 you see that?

16 A. Yes.

17 Q. So do you understand substantially perpendicular
18 to be about 90 degrees?

19 MR. VOWELL: Object to form and just want to
20 make sure I've got the standing objection from before
21 about prior art references and discussion about
22 invalidity. I'll keep it short from here moving forward
23 again. I'll refer to it as the standing objection. You
24 can answer.

25 BY MR. LINDENBAUM:

1 Q. You need me to repeat the question,
2 Mr. Dominguez?

3 A. Go ahead, please. Repeat the question.

4 Q. So I'm looking at paragraph 132 of your IPR
5 declaration on page 68. Do you understand substantially
6 perpendicular to be about 90 degrees?

7 MR. VOWELL: Object to form, standing
8 objection.

9 THE WITNESS: Yes.

10 BY MR. LINDENBAUM:

11 Q. Is that how a person skilled in the art would
12 understand the term substantially perpendicular?

13 MR. VOWELL: Object to form, standing
14 objection.

15 THE WITNESS: One skilled in the art would
16 not use the word substantial, substantially when referring
17 to perpendicular. It either is or isn't.

18 BY MR. LINDENBAUM:

19 Q. Why can't something be substantially
20 perpendicular?

21 MR. VOWELL: Object to form.

22 THE WITNESS: It's not very technically
23 descriptive in terms of being able to technically describe
24 the device or what you're intending to do with the term
25 substantially. It means how close would it have to be.

1 It's vague. For example, I'm just giving an example. If
2 I set a cannon at 90 degrees and I shoot off a cannonball,
3 it goes up into the sky, but if I shoot it at 89 degrees
4 they're both not going to land in the same spot.

5 BY MR. LINDENBAUM:

6 Q. Yeah, but if you shot it at 89 degrees it would
7 still be substantially perpendicular, wouldn't it be?

8 MR. VOWELL: Object to form.

9 THE WITNESS: It's all a matter of precision
10 with the specification.

11 BY MR. LINDENBAUM:

12 Q. It depends on the application, no?

13 MR. VOWELL: Object to form.

14 THE WITNESS: Not necessarily. It
15 doesn't really -- the application really has nothing to do
16 with it. It's really more about a specification in this
17 case where as in you're describing an angle perpendicular
18 and you call it 90 degrees, essentially 90 degrees. To
19 call it substantially 90 degrees means that someone
20 interpreting that would not really know how precise to 90
21 degrees is allowed. It could -- maybe 88 could be
22 allowed, but maybe not. It just doesn't really indicate
23 what is allowed or what is permissible to be called
24 substantial.

25 BY MR. LINDENBAUM:

1 Q. Does it make sense to call something
2 substantially level?

3 MR. VOWELL: Form.

4 THE WITNESS: Again, what is level to you
5 could be very different level to me, just depends on the
6 precision that you need to achieve.

7 BY MR. LINDENBAUM:

8 Q. So you don't think substantially level is a
9 very -- is a good term to use, for example, in patent
10 claims?

11 A. That's not a very good term to use in a claim
12 like that either.

13 Q. Okay. All right. I'll stop sharing for a
14 moment. I'm going to show you what I have marked as
15 Exhibit 20. I'll share my screen.

16 (Deposition Exhibit No. 20 marked for
17 identification.)

18 Mr. Dominguez, you see on your screen U.S.
19 patent number 893,447, do you see that?

20 A. Yes.

21 Q. And do you see who is named as the first inventor
22 on this patent?

23 A. I am.

24 Q. Yes. And are you familiar with this patent?

25 A. Yes. It's been a long time.

1 Q. Right. I'd like to scroll down and direct your
2 attention to claim number three here. If you could read
3 that out loud for me, please.

4 A. The device of claim two wherein the device is
5 adapted such that in the extended position the distal
6 points are substantially level with the distal end.

7 Q. So sometimes the word substantially is used in
8 patent claims; correct?

9 A. Yeah, I can see that. It is.

10 Q. Yeah. Do you think that this claim is
11 indefinite?

12 MR. VOWELL: Object to form, calls for a
13 legal conclusion.

14 THE WITNESS: In this particular
15 application, this device, as I recall, there are three
16 distal points and they basically create -- three points
17 create a surface, define a surface and these distal points
18 when they're touching a surface are substantially level at
19 points of contact. One point is not off level, if you
20 will.

21 BY MR. LINDENBAUM:

22 Q. Okay. But sometimes patent claims use the word
23 substantially to define things; correct?

24 A. Yes. Correct.

25 Q. And that's allowable; correct?

1 A. Yes. Claims are allowed, yes.

2 Thank you for pulling that up. It's been a
3 long time since I saw that patent.

4 Q. I'd like you to turn to paragraph 41 of your
5 declaration, Plaintiff's Exhibit 11.

6 A. Okay.

7 Q. And that is on pages 14 to 15 of your
8 declaration. If you could just read that to yourself.

9 A. Okay. I understand.

10 Q. Okay. My question is to a person skilled in the
11 art, what is the plain and ordinary meaning of the term
12 adjacent?

13 A. It could be -- it could mean alongside or
14 adjacent to or tangent to.

15 Q. Okay. I want you to look at the last sentence of
16 this paragraph with the sentence -- I'm sorry. The last
17 sentence in the paragraph that begins with the word
18 additionally. Do you see that?

19 A. Yes.

20 Q. Okay. So that sentence says: Additionally, it
21 is unclear if there are no threads inside the second
22 aperture, which is on the exterior surface of the third
23 member, or if there are no threads on the portion of the
24 exterior surface of the third member that is adjacent to
25 the second aperture.

1 So my question is, do you consider the
2 inside of the second aperture to be on the exterior
3 surface of the third member?

4 MR. VOWELL: Object to form.

5 THE WITNESS: No. I would -- I would
6 relate -- the aperture itself is an interior surface and
7 that interior surface -- that aperture meets at the
8 exterior surface at the exit of the hole so there is
9 clearly an exterior surface to the nail and then there's
10 an interior surface created by the bore that will receive
11 the screw so there's an exterior surface and an interior
12 surface and both surfaces are different.

13 BY MR. LINDENBAUM:

14 Q. Okay. I understand you saying now that the
15 aperture's interior, which I agree with, but I'm having a
16 little trouble understanding the sentence where it says in
17 that sentence after the word additionally, it says: It is
18 unclear if there are no threads inside the second
19 aperture, which is on the exterior surface of the third
20 member.

21 So am I misunderstanding here? Are you
22 saying in that sentence -- I read that sentence to mean
23 that you are opining that the second aperture is on the
24 exterior surface of the third member. Am I misreading
25 that?

1 A. The -- the interior aperture meets up with the
2 exterior surface at a defined -- at a defined
3 intersection, if you will, but it clearly -- there's a
4 clear interior surface and there's a clear exterior
5 surface to this and the threads that are being described
6 that there are no threads, it's unclear whether these are
7 threads that are hanging outside adjacent along the
8 surface of the nail outside the aperture or if some of
9 these threads can actually roll into the interior
10 aperture. It was not clear how these threads, A, came
11 about because there was no mention of threads being
12 anywhere in the specification.

13 Q. So in that sentence that I'm reading here at the
14 end of paragraph 41 where it says: It is unclear if there
15 are no threads inside the aperture, which is on the
16 exterior surface of the third member. When you say which
17 is, what are you referring to there?

18 A. That's -- I would agree that sentence is not
19 perfectly construed. Saying that there are no threads
20 inside the second aperture, meaning that there are no
21 threads inside the interior surface. So if we call it
22 interior surface, exterior surface, the interior surface
23 being the aperture or the hole and the exterior surface
24 being the outside surface of the nail. Both are two
25 distinct surfaces and it wasn't clear when I read this the

1 first time if the threads being described, if these
2 threads started right at the intersection of the aperture
3 with the -- if it started at the touching point between
4 the internal aperture and the external surface. At some
5 point if they were threads, they have to originate from
6 somewhere.

7 So it wasn't clear if it originated --
8 originated inside and then worked its way exterior or if
9 all the threads were described here are -- originated from
10 the -- on the exterior surface, which would make it more
11 of a nail thread versus an interior thread would be an
12 internal thread versus an external thread. So the term
13 thread it was unclear how this thread was being
14 represented.

15 Q. I have to read that. One second.

16 So you're saying that that first portion of
17 that sentence contemplates whether threads originate
18 within the aperture and then end up on the exterior
19 surface of the third member?

20 A. Yeah. So I think we could -- when you do
21 threads -- if you do a thread inside a bore, inside a hole
22 it's referred to as an internal thread. And then if you
23 do a thread that is part of an outer surface that extends
24 like a boss, like a piece of material sticking out of the
25 outer surface, then typically you would add external

1 threads to that and that will be called external thread.

2 So you have external threads and you have
3 internal threads. The internal thread -- so it's not
4 clear since you're describing threads where do these
5 threads originate from. Were they threads that originate
6 as internal threads inside the bore or are they threads
7 that would be added onto the existing outer surface of the
8 nail as external threads. So one of the projection of
9 threads outside the nail, one is an internal projection of
10 threads inside the nail through the bore.

11 Q. So -- so I guess my question is -- sorry.

12 A. Just it's not clear. The claim is just not clear
13 how are these threads defined.

14 Q. I'm just trying to figure out where you're
15 getting this boss idea where something is extending
16 outside of the hole. Like is there anything in the claim
17 that indicates to you that that is even contemplated?

18 A. Well, in order to have threads adjacent, I'm
19 using the term adjacent or next to, the outer surface of
20 the nail, that would -- one would interpret that in order
21 to have the threads adjacent to the outer surface of the
22 nail, that would mean that these threads would actually
23 have to project out from the surface of the nail as nail
24 threads, that maybe is going to be used to catch something
25 to that later on, but you're either going to have nail

1 threads being projected outside the surface of the nail or
2 you're going to have internal threads projected through
3 the bore maybe for a set screw or something, but so you're
4 either going to have internal threads or external threads.

5 Q. Okay. So -- so just returning quickly to that
6 sentence beginning with additionally where you say: It is
7 unclear if there are no threads inside the second
8 aperture, which is on the exterior surface of the third
9 member. You're referring to threads that could be
10 extending from the second aperture out into the exterior
11 surface?

12 A. Yes.

13 Q. Okay.

14 A. Or threads that could be originating from the
15 exterior surface and not involve the internal surface at
16 all, the internal aperture at all, but just a protrusion
17 coming off that external surface. That protrusion would
18 then contain threads onto itself.

19 Q. But wouldn't that be captured by the last part of
20 that sentence where it says: If there are no threads on
21 the portion of the exterior surface of the third member
22 that is adjacent to the second aperture. Would those
23 threads be captured by that as well?

24 A. I think I'm stating that more as a question. In
25 other words, I'm stating additionally it is unclear if

1 there are no threads inside the second aperture, which is
2 on the exterior surface of the third member, or if there
3 are no threads on the portion of the exterior surface of
4 the third member that is adjacent to the second aperture
5 so I think I'm -- I'm really framing it as a question
6 because it's a little confusing how these threads were
7 being defined.

8 Q. All right. If we turn to paragraph 42 on page 15
9 of your declaration.

10 MR. VOWELL: David, since you're moving on
11 to a different subject matter, is now a good time for our
12 lunch break? At this point it's 1:30 here so.

13 MR. LINDENBAUM: That works.

14 MR. VOWELL: Let's plan on coming back at --
15 local time is 1:35 roughly so probably come back at like
16 2:05, is that all right, Arizona time?

17 MR. LINDENBAUM: That's fine. Yeah.

18 (A break in the proceedings occurs.)

19 BY MR. LINDENBAUM:

20 Q. Mr. Dominguez, if you could turn to again your
21 declaration, which is Plaintiff's Exhibit 11. I'd like
22 you to turn to paragraph 42.

23 A. Okay.

24 Q. All right. And I guess let me know when you read
25 it to yourself.

1 A. Done. Yes.

2 Q. And so for claim construction, you understand
3 that the scope of the asserted claims is viewed in the
4 context of the patent specification and the file history;
5 correct?

6 A. Yes.

7 Q. That's what it says here in paragraph 42;
8 correct?

9 A. Yes.

10 Q. Okay. I just want you to turn back to
11 paragraph 34, which is on page 9.

12 A. Yes. I'm there.

13 Q. Okay. And you'll see for example, and you -- you
14 know if you feel free to read the whole paragraph. I'm
15 focussing on para -- I'm sorry. Sentence number two. It
16 says: I understand from counsel that the claims of the
17 patent must particularly point out and distinctly claim
18 the subject matter of the invention. Do you see that?

19 A. Yes.

20 Q. Okay. Do you know whether for indefiniteness the
21 claims are to be viewed in the context of the patent
22 specification and file history?

23 MR. VOWELL: Object to form.

24 THE WITNESS: For indefiniteness?

25 BY MR. LINDENBAUM:

1 Q. Yes.

2 A. Can you repeat the last part of that sentence.

3 Q. Yes. Do you know whether for -- sorry. Go
4 ahead.

5 A. No. You go ahead.

6 Q. Do you know whether for indefiniteness the claims
7 are to be viewed in the context of the patent
8 specification and file history?

9 A. What I understand about indefiniteness is that
10 the claims need to ensure that the claims are clear so if
11 someone skilled in the art could understand the boundaries
12 of the scope of the device, of the patent so to me it
13 relates to clarity and the boundaries in which the
14 device -- the claims are being made.

15 Q. Okay. My question is, do you know whether for
16 indefiniteness the claims are to be viewed in the context
17 of the patent specification and file history?

18 A. I would say yes to that.

19 Q. And you mention clarity. Do you know to what
20 extent the claims must particularly point out and
21 distinctly claim the subject matter of the invention?

22 A. It should be clear enough that someone skilled in
23 the art can interpret the claims and draw the same
24 conclusions that are being drawn in the patent.

25 Q. Do they have to be 100 percent crystal clear?

1 A. No, within reason. I think it's reasonable to
2 assume that someone skilled in the art could understand
3 the claims even though they may not have designed them
4 that way if it was up to them, but, you know, if someone
5 came up with those claims and they're understandable,
6 they're clear, they're not vague, they're -- you know they
7 could be -- certainly be used and appropriate.

8 Q. Okay. I'm just trying to figure out the standard
9 you use to determine whether or not claims are indefinite.
10 How clear did you think the claim needed to be in order to
11 be judged definite and valid?

12 MR. VOWELL: Object to form.

13 THE WITNESS: I think it goes claim to claim
14 specifically as it's being described in the patents, but,
15 you know, so I guess it's just a matter of which
16 particular claim we're discussing here as it relates to
17 being clear or unclear.

18 BY MR. LINDENBAUM:

19 Q. So in your opinion it -- the standard depends on
20 the claim?

21 MR. VOWELL: Object to form,
22 mischaracterizes his testimony.

23 THE WITNESS: No. What I'm saying is that
24 the claim needs to be clear enough so someone skilled in
25 the art can interpret that description in the claim and

1 come up with the same final -- come up with a design that
2 is basically the same as what's being claimed in the
3 patent.

4 BY MR. LINDENBAUM:

5 Q. Like to return to paragraph 44 of your
6 declaration, which is on page 16.

7 A. 44?

8 Q. Yes.

9 A. Yes. I'm there.

10 Q. The last sentence says: However, the patent
11 owner chose to use the same language first thread height
12 to refer to the height of the threads on both the first
13 member and second member which leads one of ordinary skill
14 in the art to conclude that the first and second members
15 have the same thread height. Correct?

16 A. Yes.

17 Q. Okay. If we look at claim 1 and I'll put that up
18 on the screen also. Let me get that up. Might be easier,
19 let's look at claim 12 which has similar language. All
20 right.

21 So if we look at claim 12, and do you see on
22 the first element here discusses a first member, do you
23 see that starting at -- all of 16, line 8 or 9 it says
24 first member comprises. Do you see that?

25 A. Yes.

1 Q. All right. So on about line 13 towards the
2 end -- I don't know if you can see where my mouse pointer
3 is here, but it says: Said first member further
4 comprising a first thread having a first thread height.
5 Do you see that?

6 A. Yes.

7 Q. Okay. And then if we go down to the next
8 limitation it talks about the second member; correct?

9 A. Yes.

10 Q. Okay. If we look at line -- starting around
11 line 21, it says -- the end of 20 into 21 it says: Said
12 second member further comprising a first thread having a
13 first thread height. Do you see that?

14 A. Yes.

15 Q. Okay. And it's your opinion that because it says
16 first thread height in the limitation about the first
17 member, which is about lines 14 to 15, and because it says
18 a first thread height at about line 22 for the second
19 member, that the -- those -- both the first and second
20 members have the same thread height; correct?

21 A. Yes. That was my interpretation that both
22 threads had the same thread height.

23 Q. Okay. So if we look at that term in context, the
24 first thread height, right. Immediately before that
25 phrase it says, if you read a little bit -- you know read

1 the first -- the few words before it says: The first
2 thread having the first thread height. Do you see that on
3 line 14 to 15?

4 A. Says the first member comprising a first thread
5 having a first thread height. Yes.

6 Q. Right. And similarly for the second member, if
7 we look at starting on line 20, it says: Second member
8 further comprising a first thread having a first thread
9 height. Do you see that?

10 A. Yes. Yes.

11 Q. Okay. So both limitations also recite a first
12 thread; correct?

13 A. Correct. They both cite a first thread.

14 Q. Okay. So is it your understanding that the first
15 member and the second member share the first thread?

16 A. No. I'm saying that both threads are the same as
17 described as a thread height. The thread heights of both
18 members, member one and member two, are the same since
19 they're described the first thread height.

20 Q. Understood. So you're saying that because it
21 says first thread height for the first member and first
22 thread height for the second member, it's your opinion
23 that a person skilled in the art would understand that the
24 thread height to be the same for both; correct?

25 A. Yes. Furthermore, Figure 18, the picture showing

1 screw one and screw two and specifically the thread -- the
2 thread height being shown for both screws, one and screw
3 two around the area of 1805, 1855 for the first thread
4 and -- for the first screw and 1810 and 1870 for the
5 second. Those two illustrations of those -- of that first
6 screw and second screw show that the threads are equal.
7 They're identical in shape. They have the same thread
8 height.

9 Q. Are there dimensions shown on Figure 18?

10 A. No. There are no dimensions for --

11 Q. Does the specification identify the dimensions of
12 those threads?

13 A. Well, the specification in this claim says that
14 both these screws have a thread -- a first thread height
15 so the conclusion is that both of these threads -- first
16 thread heights are the same because they're being called a
17 first thread height and visually they look as -- they look
18 as identical screws in the threads of the two screws they
19 look identical from a first thread -- from a first thread
20 height.

21 Q. Okay. So if that's the case then, if the claim
22 says that the first member has a first thread and the
23 second member has a first thread, wouldn't that have to
24 mean that they both share that first thread?

25 A. They're not joined. They're not conjoined screws

1 where the threads are just running from one screw to the
2 other.

3 Q. How do you know? How do you know? I'm saying in
4 the claim, isn't that what the claim would require under
5 your interpretation?

6 A. No because you're actually calling one as the
7 first screw and then you're calling the second as a second
8 screw so you're defining two separate screws.

9 Q. Yeah.

10 A. However, when you define the threads that are
11 being used -- applied to those two separate screws, you're
12 defining the threads to be the same.

13 Q. Well, that's my question. You're saying that
14 both of those -- that the first thread of the first member
15 is also the thread of the second member?

16 A. They're not -- they're not a common thread.

17 Q. Why not?

18 A. They're --

19 Q. Why aren't they?

20 A. Well, they're -- clearly there are two screws.
21 They're not a single screw that -- there's two screws.
22 There's a screw one and a screw two.

23 Q. Yeah.

24 A. And each screw has features on it. They both
25 have a tip. They both have a side cutting through. They

1 both have threads. They both have a shank. They both
2 have a head. They both have an aperture.

3 Q. They both have a thread height; correct?

4 A. Yes. And then you're defining a thread height
5 for screw one and you're calling it a thread height for
6 screw two so it's -- I interpreted that as saying the
7 thread heights that you're using for screws one and two
8 are the same thread heights.

9 Q. Why?

10 MR. VOWELL: Object to form, asked and
11 answered.

12 BY MR. LINDENBAUM:

13 Q. Because -- because it uses the same words, a
14 first thread height for the first member and the second
15 member?

16 A. It's describing the thread height the same
17 terminology as -- as a first thread height and the other
18 one is a first thread height. Had I -- for me to think
19 that the intention was to have a second different thread
20 height for the second screw, I would have -- I would have
21 thought to include language like either larger or smaller
22 thread height or something that makes it different and
23 distinct from the first screw or the first thread height
24 described in the first screw. Here the first thread
25 height for the first screw is described again as the first

1 thread height for the second screw.

2 Q. So because the claim doesn't give you any
3 relation between the size of the thread height for the
4 first member as opposed to the thread height for the
5 second member, that's why they're the same, is that your
6 opinion?

7 MR. VOWELL: Object to form, asked and
8 answered.

9 BY MR. LINDENBAUM:

10 Q. That's why I'm asking is that what his testimony
11 is.

12 A. For clarity, as additional clarity to this claim
13 I looked at Figure 18. I pulled out my little ruler and I
14 measured the length from head to tip of screw one, screw
15 two. I measured the diameter along the thread length at
16 1805 and 1810 and they are basically the same screw. They
17 have identical screw geometry that is no different in
18 length, diameter, thread pattern, direct tip, screw tip.
19 So basically screw one and screw two as shown in Figure 18
20 are basically a quantity of two of the same screw.

21 Q. So you're saying that even though there are no
22 dimensions listed on Figure 18, there's no dimensions
23 anywhere identified in the specification, based on your
24 ruler measurement you've determined that the first thread
25 height that's recited for the second member should have to

1 equal the first thread height for the first member, is
2 that right?

3 A. Based on Figure 18, my conclusion was that these
4 two screws are virtually identical.

5 Q. So is it just based on Figure 18, is that your
6 opinion that you're saying that it has -- it's not the
7 claim language?

8 MR. VOWELL: Object to form, asked and
9 answered, mischaracterizes his testimony.

10 THE WITNESS: I said earlier that after
11 reading claim -- this claim 12 and reading the language
12 specifically that calls for a first thread height and a
13 first thread height again for the second screw, I just
14 used the figure as confirmation that when you look at the
15 illustration used for screw one and screw two, both screws
16 look the same. They -- they on page measure the same.
17 They basically represent a quantity two of the same screw
18 given all the geometries that are shown here in this
19 illustration in Figure 18.

20 BY MR. LINDENBAUM:

21 Q. Okay. Hypothetically, hypothetically if the two
22 thread heights for screw one and screw two in Figure 18
23 were different, would that change your mind about whether
24 or not the first thread height for the first member must
25 equal the first thread height for the second member?

1 A. Yes. I would say yes. If the claim construction
2 said that screw one had a different thread height than --
3 in language than screw two, then yes it would clearly be
4 different.

5 Q. No. I'm not talking about the claim language.
6 I'm talking just Figure 18. If in Figure 18 the thread
7 height was clearly different for the second screw --

8 A. Yeah.

9 Q. -- than for the first screw, that would -- that
10 would -- you would change your opinion then, then you
11 would say, okay, the first thread height for the first
12 member could be different than the first thread height for
13 the second member, is that right?

14 A. Yes. I would say you are correct.

15 Q. Okay.

16 A. I would change my mind about that.

17 Q. Okay. And what if there was no Figure 18? What
18 if it's just you're looking at the claim and trying to
19 interpret the claim without a figure? How would you
20 interpret it?

21 A. Then I would go back to my initial interpretation
22 that both threads would be the same, both thread heights
23 are the same --

24 Q. Why?

25 A. Given -- given any other information to the

1 contrary.

2 Q. Why?

3 MR. VOWELL: Object to form, asked and
4 answered.

5 BY MR. LINDENBAUM:

6 Q. Why? Just because it uses the same -- it says a
7 first thread height and a first thread height?

8 A. Yeah, that's -- to me that's the key language
9 saying that it's a first thread height and again a first
10 thread height, but in the description of screw one you --
11 you didn't state that this is a first -- this is a first
12 and distinct screw as a first screw and then the second
13 you do call out that this is a second screw so there's
14 clearly two screws that we're talking about, but in the
15 description -- but in the description of the thread
16 height, you are clearly mentioning -- you're describing
17 both thread heights as the first thread height in both
18 screws.

19 So to me it meant that -- and it's not
20 unusual in devices like this to have both screws be the
21 same, have the same thread heights, or be part of a family
22 of screws that have the same thread heights, maybe
23 different lengths, but the thread may be the same.
24 Usually the doctor or surgeon will pre-drill these holes
25 in order to insert these screws so it makes it easier for

1 them to keep the instrumentation in order by using the
2 same -- the same drills, which would mean that they would
3 typically then call for the same thread height for both
4 the drills that they're inserting into the bone.

5 Q. Did that inform your construction of this term --
6 of these terms, first thread height how -- how screws are
7 typically used and -- and designed?

8 A. No, not necessarily. I'm just saying that as an
9 example that's a common -- a common technique that they
10 use. The screws certainly don't have to be the same. A
11 doctor can elect to use a larger screw above and a smaller
12 screw below, but that's really matter of choice. He can
13 just decide to use a -- a lag screw above and a cortical
14 screw below with a different thread pattern altogether,
15 not only thread height, but thread form.

16 But in this particular case, it was, you
17 know, clear that the claim doesn't elaborate in detail
18 about the types of thread that are being used, just that
19 the thread heights in screw one is the same as a first
20 thread height in screw two.

21 Q. Okay. And just getting back to my original
22 question, which was since the claim recites a first member
23 as having a first thread and a second member as having a
24 first thread, why doesn't that mean that the first member
25 and second member both have the same first thread?

1 MR. VOWELL: Object to form, asked and
2 answered.

3 THE WITNESS: Yeah. There are two screws,
4 each one having a thread height, but both thread heights
5 being described as being the same thread height.

6 BY MR. LINDENBAUM:

7 Q. Where is it described as being the same thread
8 height?

9 A. When it is stated that a first member further
10 compromising a first thread having a first thread height
11 extending radially outward and then in the description of
12 the second screw it uses the same identical language
13 saying a first thread having a first thread height
14 extending radially outward.

15 Q. Right. So since it uses the same identical
16 language, a first thread having a first thread height,
17 doesn't that mean that both the first member and second
18 member share the first thread having the first thread
19 height?

20 A. No. There's no sharing because clearly at the
21 beginning of that sentence there's a first member and a
22 second member so there are two clear distinct members
23 here.

24 Q. Okay.

25 A. But each member contains the same feature as the

1 first thread height.

2 Q. Yeah, but why can't there be overlap of the
3 threads? Isn't that how you're reading the claim, the
4 language you're saying -- you have the language of first
5 thread height for first member and a first thread height
6 for the second member, and to you that means that the
7 first thread height is the same for the first member and
8 the second member so why when it says a first thread is on
9 a first member and a first thread is on the second member,
10 why aren't those the same thing? Why isn't that the same
11 thread?

12 MR. VOWELL: Object to form.

13 THE WITNESS: It's the same thread on two
14 different screws, two different discreet screws.

15 BY MR. LINDENBAUM:

16 Q. It's the same thread on the two screws?

17 A. Yes. It's the same thread height on both screws.

18 Q. No. Is it the same thread height or the same
19 thread?

20 MR. VOWELL: Object to form.

21 THE WITNESS: Well, the question -- the
22 language in the question is we're talking about the first
23 thread height.

24 BY MR. LINDENBAUM:

25 Q. Yeah.

1 A. Clearly that -- so there's a first thread height
2 extending radially outward and then again you've got a
3 first thread height extending radially outward so there
4 are many ways to describe a thread, thread height is one
5 way, which when you say thread height you're really
6 referring to thread diameter because that is the height of
7 the thread; thread height. So it's the size diameter of
8 that thread.

9 Q. In your opinion -- sorry. Go ahead.

10 A. So those appear to me when you relate the
11 language in claim 12 and the illustration Figure 18, the
12 threads look, feel, everything look the same. They're the
13 same thread apply to screw one and to screw two, the same
14 thread height.

15 Q. Okay. Do you notice how the first three
16 limitations start with the word a? It says a first
17 member, a second member and a third member, do you see
18 those?

19 A. Yes.

20 Q. All right. And do you see where following those,
21 now on the fourth, fifth and sixth -- actually in fact the
22 remaining limitations refer to -- use the word the to
23 refer to the members, right?

24 The fourth limitation says wherein the third
25 member, and then it says wherein the first member, and

1 then it says wherein the first member. Do you see those?

2 A. Yes.

3 Q. Are you aware of the claim drafting practice of
4 referring to something for the first time with the
5 indefinite article a and then later referring to the same
6 element with the definite article the?

7 MR. VOWELL: Object to form.

8 THE WITNESS: I'm no expert, but I have
9 heard -- I have heard the use of the word a and the word
10 the.

11 BY MR. LINDENBAUM:

12 Q. And what have you heard?

13 A. That normally when you use the -- the first time
14 you introduce a -- an item as a claim it's introduced as a
15 as the first time it's being introduced, you know, for the
16 first time and then the second time you mention that same
17 item then you introduce it as the word the.

18 Q. Okay. So using that understanding, and I think
19 you're correct, when -- when it talks about for the first
20 member having a first thread having a first thread height
21 and then the second member -- excuse me -- comprising --
22 sorry. Having a first thread -- I'm sorry. I'm reading
23 this wrong.

24 Second member comprising of a first thread
25 having a first thread height, doesn't that inform you that

1 the a first thread height for the first member and the a
2 first thread height for the second member are different
3 because otherwise it would have referred to the first
4 thread height for the second member?

5 A. I interpret that as the word -- using the word a
6 first thread height as referring to the first screw, it is
7 the first time you're mentioning that first thread height
8 for that first screw. And then when you're listing a
9 first thread height for the second screw, it's the first
10 time that you're mentioning that thread height on the
11 second screw, you know, as a second -- as a second -- as a
12 thread height on the second screw, but the thread -- the
13 term thread height -- first thread height is -- the word
14 first thread height is being used in both as a first
15 thread height and a first thread height is the first time
16 you're using the word thread height in screw one and screw
17 two meaning that the first thread heights are described
18 the same way for both the first screw and the second screw
19 for the first time.

20 Q. Well, it could -- for the second member it could
21 have said a first thread having the first thread height,
22 right? Then it would have been clear that it's referring
23 to the first thread height for the first member, right?

24 A. Well, you're -- the a -- the a second member,
25 meaning now that you have a -- you're describing a new

1 screw, a second screw.

2 Q. Yep.

3 A. And now you're trying to establish the features
4 on that screw for the first time and you're calling
5 everything a, not the. You haven't yet established that
6 that second screw has a thread or a thread height so
7 you're calling it now a first thread height to that -- to
8 that second screw that you're now mentioning for the first
9 time.

10 So you hadn't mentioned first thread height
11 in screw two yet. You're introducing it here as a first
12 thread height and the term first thread height is being
13 used in both the first screw and the second screw as the
14 first. That's how I kind of read that language.

15 Q. Well, there's a lot of things that are introduced
16 for the second member with the word -- the indefinite
17 article a, a first end, a second end, a shaft, a first
18 thread, and a first thread height, but in your opinion
19 just that first thread height refers up to the first
20 thread height in the first member, is that right?

21 MR. VOWELL: Object to form.

22 THE WITNESS: Well, as long as, just to be
23 consistent, if you're calling everything a for the first
24 time you describe screw a -- screw one and you're calling
25 it a for the second time -- for the first time you're

1 describing screw two and you're describing a specific
2 feature, a first thread height for screw A or screw one, a
3 first thread height for screw two, I would interpret that
4 to be the same thread height.

5 If you're calling -- let's see, something
6 else. The second member has a shaft having an external
7 surface and then in the first screw you have a first
8 member comprising the shaft so -- so those -- the shafts
9 would be also if they're being described as a first shaft
10 in screw one and a first shaft in screw two, then the
11 shafts would be the same.

12 Unlike when you say along a second
13 longitudinal axis so you have along a first longitudinal
14 axis and you have a second -- and then you say along a
15 second longitudinal axis. Those are two distinguished --
16 you're distinguishing one axis from the other. They're
17 two different axes.

18 So you're basically saying you have two
19 different screws here, two different screws. One is on
20 one axis and one is on another. They're not the same. So
21 in this case you're using a for the first time to describe
22 axis one and you're using a for the first time to describe
23 axis two, but clearly they're definitely not the same
24 because they're different axes.

25 But so for that particular feature it does

1 describe that you have two screws, but for some of the
2 other features in the screw when you're saying a first
3 member -- a first thread and then you're saying it again,
4 a first thread for the other screw, then those threads to
5 me are the same. They both extend radially outward so
6 you're describing the same geometry for that first thread.
7 That's how I interpret it.

8 BY MR. LINDENBAUM:

9 Q. All right. Let's go through the different terms
10 here that are started with an indefinite article, right.
11 A first member and the second member both comprise a first
12 end. Is the first end of the first member the same as the
13 first end of the second member?

14 A. No because you start -- I think a first member
15 and then you say the second one is a second member so you
16 clearly have two different members, but each member --
17 each member has a first elongated body and the second
18 member has a second elongated body so, again, you --
19 although you're naming the first elongated body the first
20 time, but you're calling it a first elongated body as part
21 of the first member. In the second one you've got a
22 second member and you're calling it a second elongated
23 body so you have two elongated bodies. You have on
24 one member, on member two you have a second elongated body
25 and you have another elongated body on the first screw so

1 those are different. Those are describing different
2 features of two different screws.

3 Q. Well, you could have like two curved elongated
4 bodies like each starting and end at the same end, right?

5 I'm asking you if the first end -- a first
6 end for the first member is the same as a first end for
7 the second member or are they different?

8 MR. VOWELL: Object to form, asked and
9 answered.

10 THE WITNESS: I would say a first end on one
11 member, if that's how it's being described and you're
12 referring to the same first end on the other member,
13 you're calling it the same name, a first end.

14 BY MR. LINDENBAUM:

15 Q. Okay. So you think that the first end of the
16 first member is the same as the first end of the second
17 member, is that right?

18 MR. VOWELL: Object to form.

19 THE WITNESS: Meaning the same that they
20 both have a first end when you're describing it the same
21 way, but they're not -- they're two separate -- they're
22 two separate elements.

23 BY MR. LINDENBAUM:

24 Q. Why?

25 A. Because you have two separate screws.

1 Q. Okay.

2 A. So one screw has a first end and the other screw
3 has another first end.

4 Q. Right. And one screw has a thread height and the
5 other one has a thread height; correct?

6 A. Yes.

7 Q. So they're not the same thread height; correct?

8 MR. VOWELL: Object to form,
9 mischaracterizes testimony.

10 THE WITNESS: I think we're mixing terms
11 here.

12 BY MR. LINDENBAUM:

13 Q. How so? How so? Tell me how we're mixing terms.

14 MR. VOWELL: Object to form.

15 THE WITNESS: Let's start with the first
16 screw. First member comprising a first elongated body
17 extending from a first end to a second end along a first
18 longitudinal axis. So let's take that first -- let's take
19 that first phrase and then let's repeat it again in the
20 second description. A second member comprising a second
21 elongated body.

22 So the differentiation is that, A, you have
23 now a second member, you have a second elongated body,
24 different from the first, and extending from the first end
25 to -- first end to a second end.

1 BY MR. LINDENBAUM:

2 Q. Okay.

3 A. Along a second longitudinal axis.

4 Q. Okay.

5 A. Where as in the first screw it goes from first
6 end to second end along a first longitudinal axis. So the
7 axes are different. So you're describing a starting point
8 and an end point on one axis in screw one and you're
9 describing a starting point and an end point on a second
10 axis for the second screw.

11 Q. Right. But why isn't the first end of the first
12 member the same as the first end of the second member?

13 MR. VOWELL: Object to form.

14 THE WITNESS: The claim is not specific
15 enough to be able to define whether they're the same. The
16 ends are not -- what you're saying is that they contain a
17 first end and a second end along the first axis and then
18 the other one says you have a first end and a second end
19 along a second longitudinal axis.

20 The -- the -- the ends -- you know the ends
21 are described the same, that it does have a first end and
22 it does have a second end. However, the longitudinal axis
23 that they're located on are listed differently so from
24 this interpretation, I would say what you're describing as
25 a first end on screw one and a first end on screw two

1 would be the same. They would be the same. There's a
2 first end on one screw and there's a first end on the
3 second, you know, so that's -- the first ends are being
4 described the same as well. When you look at Figure 18,
5 both ends of both screws look the same as well.

6 BY MR. LINDENBAUM:

7 Q. But they're not -- but they're not the same
8 though, right? They look the same, but they're not the
9 same, right?

10 There's a first end for the first member and
11 there's a first end for the second member, but they're not
12 the same first end; correct?

13 A. Correct. They're not the first end -- they're
14 not the same first end on both screws.

15 Q. Right. So if there's a first thread height for
16 the first member and a first thread height for the second
17 member, why do you think those are the same?

18 MR. VOWELL: Objection. Form.

19 BY MR. LINDENBAUM:

20 Q. Do you need me to repeat the question,
21 Mr. Dominguez?

22 A. No. I'm just reading the rest of the claim.

23 Q. Sorry.

24 A. That's all right.

25 So from in the first claim 12 from the point

1 that it begins with saying the next --

2 Q. I'm sorry.

3 A. Said first member -- said first member further
4 comprising a first thread having a first thread height
5 extending radially outward.

6 Q. Yeah.

7 A. The -- for screw number one and then when you
8 look at the language for screw number two, it's said
9 second member, so we're going back to referring to the
10 second screw, comprising a shaft and external surface.
11 Said second member further comprising a first thread
12 having a first thread height. So you're -- to me when I
13 read that, it describes that the first member and the
14 second member both have a first thread having a first
15 thread height so the threads are the same for -- the
16 thread height is the same for the first screw and for the
17 second screw along that member.

18 Q. Right. But why isn't -- why don't they also have
19 to share the first thread? If they both have a first
20 thread, why don't they have to share it?

21 MR. VOWELL: Objection. Form.

22 THE WITNESS: I don't know what you mean by
23 share. Can you elaborate?

24 BY MR. LINDENBAUM:

25 Q. Yeah. My understanding is you're saying that,

1 again, that the first member has a first thread height and
2 the second member has a first thread height so because
3 they both refer to a first thread height, the first thread
4 height has to be the same.

5 What I'm saying, both the first member and
6 the second member also have a first thread. It says a
7 first thread -- that the first member comprises a first
8 thread and the second member comprises a first thread. So
9 using your logic it seems they should both have to have
10 that first thread and share it. Why is that not the case?

11 MR. VOWELL: Objection. Form.

12 THE WITNESS: My interpretation of when you
13 say a first thread, that there is a thread on screw one
14 and there is a thread on screw two and these threads have
15 a first thread height and in screw one and it has a first
16 thread height in screw two so you're establishing that
17 both screws one and two have a thread. They have a
18 starting -- a first thread. There's just one thread on
19 each of these screws. They're not -- there's not starts
20 and stops to these threads. There's just one continuous
21 thread along the member here for both screws.

22 So you've defined that you started with it
23 has a first thread, not two, but just one, and you have a
24 first thread height extending radially outward so that
25 first thread has a first thread height for both screw one

1 and screw two having a first thread height extending
2 radially outward from that first thread as well.

3 So you're describing a -- that the screw has
4 a thread, has a first thread, and that these first threads
5 has a thread height, common thread height. They're both
6 the same as described in both -- from the first screw and
7 the second screw.

8 BY MR. LINDENBAUM:

9 Q. You agree with me that the first member has a
10 first thread; correct?

11 A. Yes. The first member has a first thread.

12 Q. Okay. And you agree with me that the second
13 member has a first thread; correct?

14 A. Yes.

15 Q. Okay. But you believe that the first thread of
16 the first member is separate and apart from the first
17 thread of the second member; correct?

18 A. They are two distinct threads, yes. They're two
19 separate threads being described, one on screw one and one
20 on screw two.

21 Q. Okay. Why? Why do you think that given the
22 language here that says the first member has a first
23 thread and the second member has a first thread, why do
24 you think that those are distinct first threads?

25 MR. VOWELL: Object to form.

1 THE WITNESS: I don't think I'm calling them
2 distinct. I think I'm calling them identical.

3 BY MR. LINDENBAUM:

4 Q. Are they not distinct?

5 A. Not the way they're being described. The only
6 distinction is that one thread is on one screw and the
7 other thread is on the second screw --

8 Q. So they're not -- they're not the same thread;
9 correct?

10 A. No. They are. They have the same thread
11 height --

12 Q. No, no. Are they the same thread, that's my
13 question?

14 A. No. They're not the same thread.

15 Q. Okay.

16 A. No, they're not the same -- yeah, they're not the
17 same thread.

18 Q. Right. Why aren't they the same thread?

19 MR. VOWELL: Objection. Form.

20 THE WITNESS: They're not the same thread
21 because they're on two separate elements.

22 BY MR. LINDENBAUM:

23 Q. Right. And so why isn't the first thread height
24 on the first screw, couldn't that be different than the
25 first thread height on the second screw because they're

1 different elements?

2 MR. VOWELL: Objection. Form.

3 THE WITNESS: Again, that's not the way that
4 they were described as using the term a first thread
5 height on both.

6 BY MR. LINDENBAUM:

7 Q. What do you mean -- what do you mean by that?

8 MR. VOWELL: Objection. Form.

9 THE WITNESS: I think we agree that there
10 are two screws here. Each screw has a thread that is
11 being referred to in the same terms by calling it a first
12 thread. So on both screws we're calling it a first thread
13 so it's the first time the thread is described in each of
14 these screws.

15 And then at this first thread has a first
16 thread height so, again, it's being described -- this
17 first thread is being described having a first thread
18 height for screw one and for screw two and they're being
19 described with identical language calling it a first
20 thread height on each of the screws.

21 BY MR. LINDENBAUM:

22 Q. And you said this first thread has a first
23 height. Which this first thread are you talking about?

24 MR. VOWELL: Objection. Form.

25 THE WITNESS: Just screw one and screw two.

1 So the first thread height being the -- the thread on the
2 first screw.

3 BY MR. LINDENBAUM:

4 Q. If claim 12 didn't have the language of having a
5 first thread height. Let's say that the first member has
6 a first thread and the second member has a first thread --
7 let me take it back.

8 A. Is there a question pending?

9 Q. There is not. I withdrew my question.

10 So is it your opinion that -- that the --
11 the first thread height of the first member is the same as
12 the first thread height for the second member because the
13 first thread height characterizes the first thread in each
14 case and so, therefore, it has to be the same in both?

15 MR. VOWELL: Objection. Form.

16 THE WITNESS: In short, yes. The first
17 thread height -- the first thread as described for the
18 first screw having a first thread height it's -- to me I
19 understand it that this screw has a first thread and that
20 this first thread -- and there's only one first -- there's
21 only one first thread on the first screw. In other words,
22 it's a one continuous thread running through the first
23 screw. There aren't stops and starts. There aren't
24 multiple threads that make up screw one. So there is a
25 first thread and a thread is a helical spiral cut that is

1 continuous.

2 So in that term you have a first thread and
3 you're describing that first thread having a first thread
4 height to describe the thread on screw number one. And
5 then to describe -- you're describing the same -- using
6 the same terminology for the first thread on screw two, a
7 first thread having a first thread height extending
8 radially, so on. So you're using the same exact
9 terminology the fact that you have two separate screws and
10 you have each screw contains one thread and that both of
11 these threads have a first height, have the same first
12 height.

13 BY MR. LINDENBAUM:

14 Q. I guess the part I don't understand is that
15 you're not -- you're using the same terminology when you
16 describe the first thread, right. You're saying the first
17 member has a first thread and the second member has a
18 first thread, but they're not the same thread; correct?
19 We can agree that they're not the same thread, is that
20 right?

21 A. Yeah. Those two threads are on two distinct
22 members. They're on two separate members, yes.

23 Q. Okay. And so when it says a first member having
24 a first thread and a second member having a first thread,
25 each of those first threads are not the same; correct?

1 MR. VOWELL: Objection. Form.

2 THE WITNESS: As to that point, yes.

3 They're not the same. They are two threads on screw one
4 and -- I'm sorry. One thread on screw one and one thread
5 on screw two. They are separate and distinct threads on
6 each of those screws.

7 But my point is that the description of that
8 thread, not unless you've established that there's a
9 thread on screw one and there's a thread on screw two.
10 Once you've establish that both of these elements have
11 threads, now the next line says a -- having the same
12 thread height. So this thread has a -- let me read the
13 language. A first thread having a -- so the first thread
14 has a first thread height and the first thread on element
15 number two has a first thread height. So you're
16 describing the same feature, the same first thread height
17 on two separate screws that have two separate threads so
18 the thread heights are the same.

19 BY MR. LINDENBAUM:

20 Q. I guess I still don't understand your -- why you
21 believe that if it says a first thread -- that the first
22 member has a first thread and the second member has a
23 first thread, that those can be different threads, but
24 when it says that the first member has a first thread
25 height and the second member has a first thread height

1 that those have to be the same thread heights.

2 MR. VOWELL: Objection. Form. Let me jump
3 in. Counsel, I think you've essentially asked the same
4 two questions, if I could characterize them that way,
5 about 25 times now. He's given you the same answer or the
6 same basic description I believe. I suppose it's your
7 deposition, but at some point are you planning on asking
8 him, you know, other than those two questions?

9 MR. LINDENBAUM: I disagree that I've gotten
10 an answer. I just would like -- see if I can get this
11 last answer to this question, Mr. Vowell.

12 MR. VOWELL: Okay.

13 BY MR. LINDENBAUM:

14 Q. Mr. Dominguez, do you need me to repeat the
15 question?

16 A. Yes, please.

17 Q. Okay. So can you explain to me because I still
18 don't understand why you believe that if it says a first
19 thread -- I'm sorry.

20 That the first member has a first thread and
21 the second member has a first thread, that those can be
22 different threads, but when it says that the first member
23 has a first thread height and the second member has a
24 first thread height, that you believe those have to be the
25 same thread heights?

1 MR. VOWELL: Objection. Form.

2 THE WITNESS: What I mean to say when you
3 say once screw one has a -- the first member has a first
4 thread and so there is a thread on the first member. We
5 haven't yet described that thread, but there is a first
6 thread. You've identified that there is a first thread
7 there.

8 BY MR. LINDENBAUM:

9 Q. Yep.

10 A. And the same way you've identified that there is
11 a second member that also has a first thread.

12 Q. Correct.

13 A. So both members have a first thread associated
14 with them. We haven't yet described the features of that
15 thread, but it is a thread and it is -- there's only one
16 and only -- there's only one thread on each of these
17 screws we're calling a first thread.

18 So we've established that we have a first
19 thread on screw one, we have a first thread on screw two.
20 Now we further define and they are two separate screws so,
21 you know, the elements that go into the elements of the
22 first thread are not the same elements as they are in the
23 elements of the second so they are two distinct threads,
24 but we're calling -- we're calling both of these screws as
25 having threads.

1 So now that we've established that there's a
2 first thread on the first screw and a first thread on the
3 second screw, now we're further defining these threads by
4 describing them as a first thread height exactly the same
5 way for both the first screw and the second screw.

6 So when you say there's a first thread
7 height extending radially outward, I'm establishing in my
8 mind that this first screw has a first thread height and
9 then the second screw that has a thread, you haven't
10 elaborated on what that is, also has a first thread height
11 in the same -- using the same terms as a first thread
12 height.

13 So the thread height component to me
14 indicates that both of these screws have identical thread
15 heights. The same thread heights used in screw one as
16 being used in screw two. And when I confirmed that
17 language back to Figure 18, I can practically see one of
18 ordinary skill can look at the screw one and screw two and
19 draw the conclusion that, yeah, these screws look the
20 same. From a thread height standpoint they look the same.

21 Q. So -- so based on what you just told me, right, I
22 understand you believe that for the first thread height of
23 the first member must be the same as the first height of
24 the second member because it uses the same language so I
25 guess I still don't understand why you think that a first

1 thread of the first member is a different thread than the
2 first thread of the second member in view of the fact that
3 they both use the same language. How can you explain
4 that? I'd like you to explain why that is.

5 MR. VOWELL: So, David, I'm going to
6 interrupt again and object and say, look, the question you
7 just now put on the table is the exact same question he
8 just got through answering and you keep saying, and maybe
9 the tenth time you said I still don't understand, I still
10 don't understand. I'm sorry, David. I'm sorry you don't
11 understand. He's giving you the same answer over and
12 over. If you want, he can give it one more time and then
13 we're going to take a break.

14 MR. LINDENBAUM: I'd like an answer to that
15 question. Corby, I haven't gotten an answer to that
16 question. I'd like an answer to that question. Thank
17 you.

18 Mr. Dominguez, can you answer the question?
19 Thank you, Corby. Thank you, Corby. I don't need a
20 speaking objection. Mr. Dominguez -- if you want to make
21 an objection you may, but otherwise I need an answer to my
22 question.

23 BY MR. LINDENBAUM:

24 Q. Mr. Dominguez, do you need me to repeat the
25 question now that it's been interrupted?

1 A. No. I think I've heard it enough times to know
2 what the question is.

3 Q. All right.

4 A. So let me go back to -- let me go back to the --
5 let me take us back to the square one.

6 So we've established that there is a first
7 member and there is a second member, so two separate
8 distinct members; calling one a first and calling one a
9 second. So now we have that first member has a first
10 elongated body and the second member has a second
11 elongated body so they're distinct. There's a distinction
12 between first member with a first elongated body and a
13 second member with a second elongated body so we have two
14 separate -- we're describing the start of two separate
15 screws, two separate elongated bodies.

16 Now, we get to the point in the claim where
17 we're describing how -- we're stating that there is a
18 thread on screw one when we get to that point. The first
19 member further comprising a first thread and then we're
20 saying said second member further comprising a first
21 thread. So we've established that there is a first thread
22 described in member one and in member two. They are
23 described the same way as having a first thread, but
24 when -- I interpret that as saying each one of these that
25 doesn't necessarily mean that they're both the same thread

1 at this point --

2 Q. Why not? Why? Answer why.

3 MR. VOWELL: Objection. Form. It's the
4 same question.

5 MR. LINDENBAUM: I'd like an answer to the
6 question.

7 MR. VOWELL: He was in the middle of giving
8 it to you and you interrupted asking the same question
9 again. So I'll tell you what we're going to do, right now
10 there's not a question pending --

11 MR. LINDENBAUM: There is a question
12 pending. Your objection is improper. I'd like an answer
13 to the question.

14 MR. VOWELL: I'll let him answer one more
15 time and then before you ask another question we're taking
16 a break.

17 MR. LINDENBAUM: Go ahead, Mr. Dominguez.
18 I'm sorry. We're not taking a break. I'll decide when we
19 take a break. Go ahead, Mr. Dominguez.

20 MR. VOWELL: You don't get to decide. The
21 witness gets to decide. If you want to call the judge
22 back and tell him that you can't -- that the witness can't
23 take a break --

24 MR. LINDENBAUM: The witness -- not in the
25 middle of a series of questions as we determined at the

1 beginning of the deposition, Mr. Corby -- Mr. Vowell I
2 mean.

3 Excuse me. Mr. Dominguez, can you answer
4 the question.

5 MR. VOWELL: It's the same question --

6 MR. LINDENBAUM: This is -- you are -- you
7 are giving speaking objections now, okay, which is wholly
8 improper --

9 MR. VOWELL: I'm giving the witness a chance
10 to take a break. Mr. Dominguez, would you like to take a
11 break at the conclusion of this question?

12 THE WITNESS: Yes. I'll take a break.

13 BY MR. LINDENBAUM:

14 Q. Mr. Dominguez, can you please answer the
15 question.

16 A. Okay. So we've established that we have two
17 members, a first member and a second member, and they both
18 have separate and distinct elongated bodies. Now we're
19 getting to describe that along this elongated body we have
20 threads.

21 So on the first member, said first member
22 further comprises a first thread. So this to me indicates
23 that for the first time you're indicating that this first
24 member has a thread and you're saying -- you're using the
25 same language on the second member saying that for the

1 first time now you've got the second member and there is a
2 first thread on the second member.

3 So we've established the point that screw
4 number one has a thread and screw number two has a thread
5 and you've described it as both in the same manner as
6 having a first thread.

7 Now, continuing on you've added to that
8 first thread stating that the first thread height --
9 further comprising a first thread having a first thread
10 height so this -- on screw one and now you're saying screw
11 two has a first thread height also so you're describing --
12 you're describing the same first thread height on the
13 first thread for both screw one and screw two so to me
14 that reads as if those thread heights are the same. The
15 same geometry, if you will, describing the thread height
16 for screw one as you're using the same geometry describing
17 it for screw two.

18 So the thread being the same thread -- being
19 the same thread of the same thread height, but we
20 understand that one of the threads is on screw one and one
21 of the threads is on screw two, but they're described as
22 having the same thread height.

23 Q. Mr. Dominguez --

24 MR. VOWELL: At this point we're going to
25 take a break, David, so, Ms. Roman, we would like to go

1 off the record.

2 MR. LINDENBAUM: I have one more question
3 before we go off the record.

4 BY MR. LINDENBAUM:

5 Q. Mr. Dominguez --

6 MR. VOWELL: If it's the same question I'm
7 not --

8 MR. LINDENBAUM: It is the same question,
9 Corby, because he didn't answer the question.

10 MR. VOWELL: We're going to take a break.
11 We're going off the record --

12 BY MR. LINDENBAUM:

13 Q. Excuse me. Mr. Dominguez, I'm going to ask you a
14 question. You say --

15 MR. VOWELL: There is no question pending.
16 We are going off the record --

17 MR. LINDENBAUM: We are not going off the
18 record --

19 MR. VOWELL: You can call the judge if you
20 want, but we are going off the record --

21 MR. LINDENBAUM: You are interfering with my
22 deposition, Mr. Vowell. You are -- you are --

23 MR. VOWELL: We're going off the record
24 right now, David --

25 MR. LINDENBAUM: If I have to I will go to

1 the judge, Mr. Vowell. This is totally inappropriate
2 behavior. I will ask the witness a question and I will go
3 off the record when I say we go off the record, not when
4 you say we go off the record and I have one more
5 question --

6 MR. VOWELL: When the witness wants a
7 break --

8 MR. LINDENBAUM: Before we go off the record
9 I have one more question for him --

10 MR. VOWELL: No. You had one more question
11 a minute ago and you said it's the same question and then
12 you're going to ask it again --

13 MR. LINDENBAUM: No. Unless I get an answer
14 to the question, Mr. Vowell. I'm entitled to an answer to
15 my question.

16 MR. VOWELL: And you've gotten it now many
17 times.

18 MR. LINDENBAUM: I've gotten a lot of words,
19 but no answer to my question.

20 MR. VOWELL: Mr. Dominguez just stated he's
21 getting a sore throat from answering the questions so
22 we're taking a break, David. We will be back in ten
23 minutes. We're going off the record.

24 MR. LINDENBAUM: Fine. Let's go off the
25 record. I'll see you in ten minutes.

1 (A break in the deposition occurs.)

2 BY MR. LINDENBAUM:

3 Q. Mr. Dominguez, have you gotten a glass of water
4 to address your sore throat?

5 A. Yeah, I got some lozenges.

6 Q. Good. Are you able to continue?

7 A. Yes, I am.

8 Q. Okay. Great. So I'm just going to state for the
9 record, I believe I've asked my question a number of
10 different ways and have not received an answer. I'm going
11 to try one last time and if you're unable to or have not
12 given me an answer I will move on from there, okay.

13 So my question is you stated before the
14 break, quote, so you established the point that screw
15 number one has a thread and screw number two has a thread
16 and you described it as both in the same manner as having
17 a first thread. And my question is, given that testimony
18 that you just gave, why then if both screw threads are
19 described as a first thread do you think that they are not
20 the same thread?

21 MR. VOWELL: Objection. Form.

22 THE WITNESS: Mr. Lindenbaum, can you pull
23 up the -- that claim again?

24 BY MR. LINDENBAUM:

25 Q. Sure. Can you see it?

1 A. Yes.

2 Q. All right.

3 A. So can you repeat the last sentence there of your
4 question about the first thread.

5 Q. Yes. Why if both screw threads are described as
6 a first thread do you think they are not the same thread?

7 MR. VOWELL: Objection. Form.

8 THE WITNESS: They are not the same thread
9 because one of those threads are on the first screw member
10 and the other thread is on the second screw member so they
11 are clearly you have two threads on each of those two
12 screws. You have one thread on the first screw and one
13 thread on the second screw. However, the way that the
14 threads are then further described as having a -- having a
15 first thread height for both of them would indicate that
16 the height of those threads are the same although they are
17 on two separate screws.

18 BY MR. LINDENBAUM:

19 Q. Okay. I'd like you to turn paragraph 46 of your
20 declaration, which is on page 16, and a figure that's on
21 the following page on page 17.

22 A. Yes.

23 Q. The second sentence of paragraph 46, you state
24 how a person -- one of ordinary skill in the art would
25 understand the term terminal end. Do you see that?

1 A. Refer to the end of the third elongated member?

2 Q. Yes. And then continues: That aligns closely
3 with the top surface of the bone or slightly below the
4 surface of bone, which is labeled below in Figure 18 from
5 the patent. Did I read that correctly?

6 A. Yes, sir.

7 Q. I noticed that there's nothing -- no support
8 cited for that opinion. What is the basis for that
9 opinion?

10 MR. VOWELL: Objection. Form.

11 THE WITNESS: The opinion with regards to
12 the phrase terminal end, is that what your question is?

13 BY MR. LINDENBAUM:

14 Q. The sentence that we just read that began: One
15 of ordinary skill in the art would understand this term.

16 A. Yeah, so the term -- the term in reference here
17 is the phrase terminal end in the first sentence.

18 Q. I'm sorry. My -- you're a little bit garbled
19 now.

20 A. So let's read the entire paragraph together. The
21 phrase terminal end in quotes does not appear anywhere in
22 the specification for the 166 patent, but does not need to
23 be construed or defined because one person skilled in the
24 art would understand this term. It's a very widely used
25 term. And this term -- would understand that this term to

1 refer to the end of the third elongated member that aligns
2 closely to the top surface of the bone or slightly below
3 the surface of the bone, which is labeled in Figure 18.

4 So, in other words, the terminal end someone
5 skilled in the art would understand it to be the end that
6 is circled in red in Figure 18 that represents the -- the
7 end of the -- the end of the nail and that end is -- as
8 you can see in this diagram, 1825 it's actually got a
9 tapered cut to it, an oblique cut relating to the top
10 surface of the nail and that is to -- as a terminal end
11 that is done purposefully to align, to match the curvature
12 of the bone for that particular region or to be under --
13 to be sunk into the bone a little bit, but you don't want
14 it to extend far above the surface of the bone. So the
15 terminal end is usually placed at -- the implant is
16 inserted to position the terminal end to be even or
17 adjacent to just slightly below the top of the bone.

18 So when we say terminal end, that refers to
19 all of the geometry that is inside that circle. It could
20 refer to the -- so that geometry that's inside that
21 circle.

22 Q. How would you refer to --

23 MR. VOWELL: David, real quick just for the
24 record so that the record is clear this figure that
25 Mr. Dominguez is referring to. It's a figure below

1 paragraph 46 in the declaration.

2 MR. LINDENBAUM: Yeah, I think I mentioned
3 that there was a figure below 46 on page 17. Yes.

4 BY MR. LINDENBAUM:

5 Q. Okay. Mr. Dominguez, you mentioned reference
6 number 1825 there at the top. How would you refer to that
7 portion of the -- that -- that part right there of the
8 third member?

9 A. Yeah. For this particular illustration it's very
10 specific because the fact that it doesn't show that the
11 top -- the top end -- the end of the nail is actually cut
12 at an oblique angle so the entire surface of 18 -- that
13 entire surface -- there is a surface up there. There is a
14 surface -- a flat surface on the end of the nail.

15 Now, so terminal end would represent in
16 general that entire area, but if you look specifically at
17 1825, 1825 to me represents the very peak end when looked
18 at this device from the side, from pretty much a little
19 bit more straighter than this direction, from this
20 perspective, but you can see that clearly if 1825 is the
21 highest most point I would say on the surface -- top
22 surface on the terminal end of the nail and 1850 or
23 approximately there below the head of the screw would
24 represent the lowest point on the terminal end and some of
25 that geometry is created by the cannula that the screw is

1 running through and it removes material from the terminal
2 end.

3 So the terminal end has got a really unique
4 geometry in that you've got an oblique cut, but also you
5 have a portion of the metal in the terminal end removed by
6 the aperture of the first screw. So in generally speaking
7 we want to -- the surgeon would want to submerge that area
8 below the level of the bone. He wouldn't want to expose
9 1825 above the bone and 1850 below the bone. He would
10 probably want to put the whole thing even -- on an even
11 plane with the bone or slightly below -- the entire
12 terminal end slightly below the bone.

13 Q. I'm just reading something. One moment.

14 Mr. Dominguez, I'm just going to put up the
15 patent again and just to clarify. My understanding is
16 that claims 1 and 12 do not require or mention that any
17 portion of the -- any of the members align with any top
18 surface of the bone, but tell me if I'm incorrect.

19 MR. VOWELL: Objection. Form.

20 BY MR. LINDENBAUM:

21 Q. Have you reviewed the claims, Mr. Dominguez?

22 A. Yes.

23 Q. Okay. Have you seen anything in the claims
24 referring to surface of the bone?

25 A. No and I wouldn't expect it to be in a claim

1 because that really is more description of the method for
2 the use of the device than a specific claim so I was just
3 glancing through the specification to see if there's
4 language about that.

5 Q. All right. If you could turn to paragraph 47 of
6 your declaration, page 17.

7 A. Yes.

8 Q. And in particular, the last sentence it looks
9 like you're providing another definition of terminal end
10 where it says a person of ordinary skill in the art would
11 understand at the terminal end to refer to a location near
12 the nail termination or nail head as opposed to merely
13 along the shaft at any location. Do you see that?

14 A. Yes, I do.

15 Q. So is your understanding of the term terminal end
16 incorporate both of the understandings that are recited in
17 paragraph 46 and 47 as to how a person skilled in the art
18 would view that term?

19 A. A person skilled in the art would describe the
20 nail terminal end as described here in Figure 18 with a
21 circle, but another term that they may use for it is
22 called the head, the head of the nail. So the head of the
23 nail is also again another name for terminal end or nail
24 head as opposed to the insertion end or the tip end, which
25 is normally a very narrow form, tapered kind of geometry

1 that facilitates the insertion of the nail into the
2 intramedullary canal. So as you note the terminal end or
3 sometimes called the head is the more bulbous section of
4 the nail and as shown in 18 and that is another word to
5 call terminal end is to call it the nail head.

6 Q. So -- I'm sorry. What is the nail termination
7 then?

8 MR. VOWELL: Object to form.

9 THE WITNESS: Nail termination?

10 BY MR. LINDENBAUM:

11 Q. Yes. You say that the person skilled in the art
12 would understand --

13 A. Yeah, nail termination being the end of the --
14 the end of the terminal end of the nail, if you will. So
15 the termination of the nail, that's where the nail
16 basically stops. It's where the nail is cut. That angle,
17 that oblique angle that we discussed earlier that creates
18 that oblique surface that is, quote, that is the nail
19 termination. That's where the materials end in the nail
20 in the terminal end of the nail.

21 So I think we're calling it all the same
22 thing, whether we call it a nail head or terminal end or
23 nail termination. Nail termination is more specific than
24 that. It's really the very end of the nail before there's
25 just air above it.

1 Q. So do you understand that -- so would a person of
2 ordinary skill in the art understand the terminal end to
3 be the nail termination?

4 THE COURT REPORTER: I'm sorry. I can't
5 hear you, Mr. Corby, when you just objection.

6 MR. VOWELL: I'm sorry. I'm trying to get
7 closer to the microphone. That objection was object to
8 form, mischaracterizes testimony.

9 BY MR. LINDENBAUM:

10 Q. Is the nail termination the same as the nail
11 head?

12 MR. VOWELL: Object to form,
13 mischaracterizes testimony.

14 THE WITNESS: Generally speaking, yes. The
15 terminal end of the nail can be referred to as the nail
16 termination or the nail head, but I'm using the language
17 synonymously in all accounts.

18 BY MR. LINDENBAUM:

19 Q. Well, if I'm looking at Figure 18 on page 17 of
20 your declaration and I see you circled a portion as
21 indicating where the terminal end is.

22 A. Yeah.

23 Q. And I understand that to be at the nail
24 termination; correct?

25 A. Yes.

1 Q. Now, but --

2 A. Well -- yeah. Go ahead. Yes.

3 Q. Okay. So but if in this figure what is the nail
4 head?

5 MR. VOWELL: Object to form.

6 BY MR. LINDENBAUM:

7 Q. If there is one.

8 A. In this figure, the nail head would be everything
9 inside the terminal end circled, in the terminal end
10 that's circled. That would be the nail head portion of
11 this device.

12 Q. Okay. So it wouldn't be that entire -- it looks
13 like 1815 it's pointing to a relatively larger cylindrical
14 portion at the top of the third member. It would be just
15 what you circled in red?

16 A. No. That's a good point, Mr. Lindenbaum. When
17 we look at not this specific nail, but when we look at
18 other longer intramedullary long nails for long bones, the
19 head, what he call the head of those intramedullary nails
20 are really very long and they kind of look like this shown
21 in Figure 18. They have a bulbous end that's part of --
22 that is 1815 that is the larger diameter head before it
23 transitions into a smaller diameter towards the tip end so
24 if -- we can -- I can say that 1815 and the entire surface
25 of 1815 could represent the head of the nail. That entire

1 area can be representative of the head of the nail.

2 However, specifically, the part of the
3 nail -- the terminal end part of the nail is the part of
4 the nail that is then embedded -- it's embedded into the
5 bone up to that point, up to that terminal end. So that I
6 would include the entire head of the nail, which would be
7 1815.

8 Q. I'm sorry. Just to clarify what you just said.
9 So are you saying the terminal end would include the
10 entire portion of 1815 -- surface 1815?

11 A. The terminal end would be considered part of the
12 head of the nail.

13 Q. But only the part that you circled in red on
14 page 17?

15 A. Yeah, that would be -- that's a further
16 descriptor to the head of the nail by circling that area
17 and calling it terminal end. That is the terminal end of
18 the head of the nail, if you will, to keep elaborating.

19 If we called -- if you called the head of
20 the nail everything in 1815 all the way up to say 1825,
21 that whole large, long, bulbous, larger diameter portion
22 of the nail, if we call that whole area the head of the
23 nail, then the terminal end of the head of the nail would
24 be the part circled above at the top and that would be the
25 region that is usually the nail is inserted up to that

1 region.

2 In other words, we do not want to have 1815
3 where we're pointing to 1815 to stick out above the bone
4 because that would -- that would describe the condition
5 where the majority of the head of the nail would be above
6 the bone and that would not be good, but the doctors want
7 to kind of sink everything down deep to reach the terminal
8 end of the head of the nail and then start inserting their
9 screws.

10 Q. I'm going to turn to I believe you have
11 Exhibit 8, which is the Chang reference cited in Extremity
12 Medical's brief. I can put it up on the screen. In fact,
13 I can share my screen. I can show you what I'm looking
14 at.

15 (Deposition Exhibit No. 8 marked for
16 identification.)

17 THE WITNESS: Okay.

18 BY MR. LINDENBAUM:

19 Q. So I have Figure 2 of Chang up on -- you should
20 see it on your screen. Do you see that?

21 A. Yes, I do.

22 Q. Okay. And Chang describes hole 101 and 102 in
23 its nail. Do you see those two holes?

24 A. Yes.

25 Q. Okay. Is it your opinion that screw hole 101 is

1 at the terminal end of the nail member?

2 A. Yes. That would be the terminal end for -- in
3 the head of the nail because that is a little bit larger
4 and so that is the terminal end hole. 101 is the terminal
5 end hole. Yes.

6 Q. Okay. But if I look back at your page 17 where
7 you have the Figure 18 and you circled terminal end, that
8 looks to me like you're circling the top edge of the third
9 member where as in Chang 101 does not go through the top
10 edge of that nail.

11 MR. VOWELL: Object to form.

12 THE WITNESS: So --

13 MR. VOWELL: Were you finished with your
14 question, David?

15 BY MR. LINDENBAUM:

16 Q. Yeah. You can go ahead, Mr. Dominguez.

17 A. The way that I interpret Figure 2 in Chang is
18 that if you look at the bullet 103.

19 Q. Yes.

20 A. That's referring to the very top of terminal end.
21 That would be what I would represent as the terminal end
22 of the nail.

23 Q. Okay.

24 A. Because it is the part of the nail that you want
25 to be equal with the top of the bone surface or just below

1 embedded below the top of the bone surface.

2 Q. Okay.

3 A. So screw 101 is actually a screw positioned
4 orthogonal to the axis of 104 and it's located a distance
5 below the terminal end and that's probably due to just the
6 anatomy that he's trying to fixate. The anatomy that he's
7 trying to fixate is probably located at that distance 101,
8 not exactly right at the terminal end of 103, so a lot of
9 that has to do with where is the geometry that he's trying
10 to fixate and the location of 101 for that application
11 make sense to locate it there.

12 Q. So am I correct that hole 101 shown in Figure 2
13 of Chang does not go through terminal end of number ten?

14 A. Right. Yes. It's not truly the terminal,
15 terminal end of the nail.

16 Q. Okay.

17 A. It's where it ends.

18 Q. In order to go through the terminal end it would
19 have to go through the -- where 103 is indicated in
20 Figure 2?

21 A. Yes. It would have to be located really close to
22 that Figure -- to that 103.

23 Q. Okay. All right. Can we turn to paragraph 50.
24 I'm going to stop sharing this. Paragraph 50 is on page
25 18 and you're welcome to read the whole paragraph, but the

1 sentence I'd like to ask you about is on -- is the first
2 sentence.

3 A. Okay.

4 Q. And the first sentence says -- and I'm jumping
5 toward the middle of the sentence where it says: Whereas
6 the claim language instead requires only the portion of
7 the third member called the third elongated body to extend
8 along a straight line. Do you see that?

9 A. Yes, I do.

10 Q. Okay. So then I'd like to turn to paragraph 51
11 of your declaration, which is on page 19.

12 A. Okay.

13 Q. And the last sentence of paragraph 51 says:
14 However, Figures 1 and 2 of Orbay to which Extremity
15 Medical relies on in its brief clearly show an
16 intramedullary nail 14 that extends along a straight line
17 for a portion of the nail, and then in paren, third
18 elongated body. Do you see that?

19 A. Yes. Yes.

20 Q. Okay. If we look, and I see that you've copied
21 the figures that were annotated -- the Orbay figures that
22 were annotated in Extremity Medical's brief onto page 19
23 below paragraph 51. My question is -- I understand that
24 that sentence I just read, the last sentence of
25 paragraph 51, you're stating that Orbay shows that it

1 extends along a straight line for a portion of the nail;
2 correct?

3 A. Yes.

4 Q. Okay. And which portion of the nail are you
5 referring to in let's say Figure 1?

6 A. From approximately location 44 through 34.

7 Q. Okay. And as you might have seen in the exhibits
8 that were -- other exhibits cited and attached to
9 Extremity Medical's brief that the examiner allowed the
10 claims 1 and 12, actually all the claims, even in view of
11 Orbay; correct?

12 A. Yeah, that's my understanding.

13 Q. All right. So if Orbay discloses a third
14 elongated body extending along a straight line, how do you
15 explain why the examiner did not maintain the rejection of
16 the claims in view of Orbay?

17 A. In my opinion, the -- the claim of along a
18 straight line could be defined to be within one -- from
19 one point on an axis to the other point on the same axis
20 to describe that straight line. So whether it's a member
21 or an element of that member, it just needs to be
22 clarified as to what portions of this Figure 1 is
23 considered the straight member.

24 Q. Right. So -- so do you understand that the
25 claims of the 166 patent were -- were during prosecution

1 rejected in view of Orbay?

2 A. Yes. Yes. I was aware.

3 Q. And are you aware that Extremity Medical
4 distinguished Orbay as not disclosing a third member
5 extending along a straight line from a first end to a
6 second end?

7 MR. VOWELL: Objection. Form.

8 THE WITNESS: Can you please repeat that
9 again?

10 BY MR. LINDENBAUM:

11 Q. Yeah. You know what, why don't we pull this up
12 actually. Hold on a second.

13 Actually turn back to paragraph 50 of your
14 declaration, which is on page 18. And again if you need
15 to read the whole paragraph, go ahead. I'm focussed on
16 the last sentence that begins with: Second, there would
17 be no basis.

18 A. Yeah.

19 Q. And I put on the screen the language here about a
20 third member, right? Here is claim 12. It says: A third
21 member comprising of a third elongated body extending
22 along a straight line from a first end to a second end
23 along a third longitudinal axis; correct?

24 A. Yes.

25 Q. All right. So in paragraph 50 you say there

1 would be no basis based on the Orbay reference to apply
2 the extending along a straight line language to the entire
3 third member rather than just the third elongated body;
4 correct?

5 A. Yes.

6 Q. Okay. And I understand from page 19 of your
7 declaration testimony that you just gave, that you
8 understand that the portion of Orbay shown in Figure 1
9 from 44 to about I guess you said 33 could constitute the
10 third elongated body; correct?

11 A. Approximately, yes.

12 Q. Okay. And so yet the Orbay reference was
13 distinguished during prosecution in view of this term,
14 right, a third elongated body extending along a straight
15 line or extending along a straight line really, right?

16 A. Right.

17 Q. And so if Orbay in your opinion still discloses a
18 third elongated body, how can you explain why the examiner
19 would allow the claim with that language over Orbay?

20 MR. VOWELL: Object to form, calls for a
21 legal conclusion.

22 THE WITNESS: It's hard to put my -- put
23 myself in the shoes of the patent examiner, but when it
24 comes to specifically, you know, Figure 1 it's a matter of
25 defining what we're calling the third elongated body and I

1 believe Orbay defined it to be that long straight portion
2 of the device where we described between 44 and 34
3 approximately. If you go outside that -- so that is the
4 third elongated -- that is the third elongated body that
5 is on axis that is straight.

6 MR. LINDENBAUM: All right. Okay. Just
7 going to take like a 5, 10-minute break. I think I have
8 no more questions, but just need to review and make sure I
9 haven't missed anything.

10 MR. VOWELL: Let's take ten minutes if
11 that's all right and we'll come back on.

12 MR. LINDENBAUM: Okay. Sounds good.

13 (A break in the deposition occurs.)

14 BY MR. LINDENBAUM:

15 Q. Mr. Dominguez, can you hear me?

16 A. Yes, I can.

17 Q. Okay. I just have a couple quick questions. If
18 you could turn to paragraph 31 of your declaration, which
19 is on page 7.

20 A. Yes.

21 Q. And you see that the paragraph mentions locking
22 screws, correct, and what I'm referring to is towards the
23 bottom, like the second to last sentence?

24 A. Yes.

25 Q. Okay. Locking screws are typically inserted

1 perpendicular to the nail; correct?

2 A. Yes.

3 Q. But they can be inserted at other angles;
4 correct?

5 A. Can't see why not.

6 Q. Okay. And my other question was you may recall I
7 asked you or discussed with you earlier in the deposition
8 at our first break that I intended to not question you
9 about any confidential information regarding your work
10 history or current NDAs, and I asked you if you could tell
11 me during the rest of the deposition if you believed any
12 of the testimony that you were giving was confidential. I
13 don't believe you mentioned anything was confidential. I
14 just wanted to confirm with you that it's your
15 understanding that nothing since that first break that we
16 discussed is confidential?

17 A. Yes, that is correct. That's how I interpreted
18 it.

19 MR. LINDENBAUM: Okay. Mr. Vowell, I have
20 no further questions.

21 MR. VOWELL: I have no questions for this
22 witness.

23 MR. LINDENBAUM: Mr. Dominguez, thank you
24 very much for your time. I appreciate it.

25 THE WITNESS: Thank you ver much,

1 Mr. Lindenbaum.

2 MR. VOWELL: This is Corby. I'm back. You
3 probably want to know what I want, PDF and e-tran.

4 MR. LINDENBAUM: I think she needs to know
5 whether or not you want the witness to review and sign.

6 MR. VOWELL: Oh. Yes. Thank you. Yes, we
7 would like the witness to review and sign.

8 (Deposition concludes at 4:13 p.m.)
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CERTIFICATE OF REPORTER

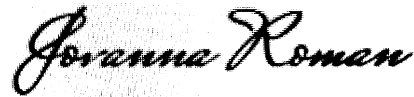
STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I, JOVANNA ROMAN, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing deposition was taken before me in the County of Maricopa, State of Arizona; that an oath or affirmation was duly administered to the witness, LEONEL DOMINGUEZ, pursuant to A.R.S. 41-324(B); that the questions propounded to the witness and the answers of the witness thereto were taken down by me in shorthand and thereafter reduced to typewriting; that the transcript is full, true, and accurate record of the proceeding, all done to the best of my skill and ability; and that the preparation, production, and distribution of the transcript and copies of the transcript comply with the Arizona Revised Statutes and ACJA 7-206(J) (1) (g) (1) and (2).

The witness herein, LEONEL DOMINGUEZ, has not waived review of the transcript for signature.

I FURTHER CERTIFY that I am in no way related to any of the parties nor am I in any way interested in the outcome hereof.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Maricopa, State of Arizona, this 9th day of June, 2023.



Jovanna Roman, RPR
Certificate No. 50725

/s/
For Esquire Deposition Solutions
Registered Reporting Firm No. R1048

DEPOSITION ERRATA SHEET

Our Assignment No. J9771189

Case Caption: EXTREMITY MEDICAL v. FUSION ORTHOPEDICS

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my deposition taken in the above-captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the _____ day of _____, 20____.

LEONEL DOMINGUEZ

DEPOSITION ERRATA SHEET

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SIGNATURE: _____ DATE: _____

LEONEL DOMINGUEZ

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SIGNATURE: _____ DATE: _____

LEONEL DOMINGUEZ