

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

DEXCOM, INC.	)	
Petitioner,	)	
	)	Case No.:
vs.	)	IPR 2023-01251
	)	
ABBOTT DIABETES CARE INC.,	)	
Patent owner.	)	
_____	)	

DEPOSITION OF BRIAN D. GROSS

Portland, Oregon

Thursday, October 10, 2024; 9:03 a.m.

TAKEN IN BEHALF OF THE PATENT OWNER

REPORTED BY:

Victoria A. Guerrero, CSR, RDR, RMR, CRR

Job No. 20870

Pages 1 through 147

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Dexcom, Inc. v. Abbott Diabetes Care Inc.
IPR2023-01251

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD
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4 DEXCOM, INC.)
5 Petitioner,)
6 vs.) Case No.:
7 ABBOTT DIABETES CARE INC.,) IPR 2023-01251
8 Patent owner.)
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16 BE IT REMEMBERED that, pursuant to Rules of the
17 United States Patent and Trademark Office, the
18 deposition of BRIAN D. GROSS was taken before
19 Victoria A. Guerrero, Oregon Certified Shorthand
20 Reporter, Registered Diplomate Reporter, Registered
21 Merit Reporter, and Certified Realtime Reporter, on
22 Thursday, October 10, 2024, commencing at the hour
23 of 9:03 a.m., in the conference room of the law firm
24 of Klarquist Sparkman LLP, in the City of Portland,
25 County of Multnomah, State of Oregon.

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

2
3 FOR THE PATENT OWNER:

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21 * * *

1 INDEX TO EXAMINATION

2 WITNESS: BRIAN D. GROSS

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7	By Mr. Hansen		125	8

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10 EXHIBITS11 (No new exhibits offered.)
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15 TRANSCRIPT MARKED

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1 Thursday, October 10, 2024; 9:03 a.m.

2 Portland, Oregon

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4 Whereupon, BRIAN D. GROSS, having first
5 been sworn by the Oregon Certified
6 Shorthand Reporter, testified under oath as
7 follows:

8
9 EXAMINATION

10
11 BY MR. CARROZZA:

12 Q Good morning, Mr. Gross.

13 A Good morning.

14 Q Can you please state and spell your full
15 name for the record?

16 A Certainly. Brian, B-r-i-a-n, D, as in
17 David, Gross, G-r-o-s-s.

18 Q And you're represented by an attorney
19 today?

20 A I am.

21 Q Is that Mr. Mason?

22 A It is.

23 Q And you understand that you're under oath
24 today?

25 A I do.

1 Q Now, do you understand that as I ask
2 questions if Mr. Mason objects to one of my
3 questions that you have an obligation to answer
4 unless he specifically instructs you not to answer;
5 is that your understanding?

6 A It is.

7 Q And are you on any medication that would
8 inhibit your ability to recall information?

9 A No. However, my ears are plugged up so I
10 am having trouble hearing. Clearly I may ask you to
11 repeat.

12 Q That's fine. Thank you for letting me know
13 and I'll try to speak up.

14 Is there any reason you cannot testify
15 accurately and truthfully today?

16 A There is not.

17 Q Great. So we'll try to take breaks about
18 every hour. If you need a break, just speak up.
19 Sound good?

20 A Sounds good. Thank you.

21 Q Now, you've submitted two declarations in
22 this case so far, correct?

23 A I've submitted three. There's my first
24 declaration, declaration covering claims 13 and 29,
25 and this response declaration.

1 Q Okay. Thanks for clarifying. So just for
2 the record, Mr. Gross is referring to different IPR
3 in which claims 13 and 29 are at issue. And he's
4 referring to IPR 2024-00521. That's a separate
5 case. Now, I see you brought some materials with
6 you. May I take a look?

7 A You certainly may. You'll find this binder
8 is what I had in front of me at the first
9 deposition. I'm sorry. This is the one and that is
10 the materials that are contained in my reply
11 declaration.

12 Q So you have one binder that is marked,
13 "Reply Declaration of Brian D. Gross," and it
14 contains all of the exhibits that were submitted
15 with your reply declaration which was Exhibit 1057;
16 do I have that right?

17 A It contains most of the materials.

18 Q Okay. And are there any markings or any
19 notes or any highlights or any changes on the
20 documents?

21 A Not that I'm aware of.

22 Q I guess for the record, why don't I just
23 read the exhibit numbers that are part of this
24 binder. We have Exhibit 1057, Exhibit 1041,
25 Exhibit 1044, Exhibit 1052, Exhibit 1053,

1 Exhibit 1054, Exhibit 1055, Exhibit 1058,
2 Exhibit 1059, Exhibit 1063, Exhibit 1065,
3 Exhibit 2012, Exhibit 2013, Exhibit 2015,
4 Exhibit 2018, and Exhibit 2027.

5 Now, you have a second binder that is
6 titled, "Declaration of Brian D. Gross." And do the
7 documents in this binder have any markings or any
8 highlights or any other changes to them as far as
9 you're aware?

10 A Not that I'm aware.

11 Q And was this the actual binder you had with
12 you during the last deposition?

13 A I can't tell for sure, but it sure looks
14 like it.

15 Q We'll just go through to be sure.

16 So in the second binder we have
17 Exhibit 1008, Exhibit 1009, Exhibit 1001, Exhibit
18 1011, Exhibit 1012, Exhibit 1014, Exhibit 1015,
19 Exhibit 1017, Exhibit 1019, Exhibit 1020,
20 Exhibit 1022, Exhibit 1023, Exhibit 1025,
21 Exhibit 1026, Exhibit 1027, Exhibit 1028,
22 Exhibit 1029, Exhibit 1030, Exhibit 1031,
23 Exhibit 1032, Exhibit 1033, Exhibit 1035,
24 Exhibit 1036, Exhibit 1037, Exhibit 1038,
25 Exhibit 1039, Exhibit 1040, Exhibit 1042,

1 Exhibit 1043, Exhibit 1045, and Exhibit 1046.

2 And then inside the pocket of the second
3 binder is also -- this has an exhibit number. It's
4 a list of the challenge claims that has an exhibit
5 number that's not coming to mind at the moment.

6 A It's an echo of what's in my report, just
7 the organization of the claims.

8 Q Yeah. It was filed as an exhibit. I just
9 don't remember the exhibit number. Okay.

10 A Great. Thank you.

11 Q So Exhibit 1057 is your reply declaration
12 that was submitted with DexCom's reply brief, right?

13 A It is the response to the reports from
14 Drs. Wright and Striegel that I signed September 6.

15 Q The title of Exhibit 1057 is "Reply
16 Declaration of Brian D. Gross," is that right?

17 A Yeah. That's on the title page.

18 Q And then let's flip to the last page which
19 is page 59 and you mentioned a moment ago that you
20 had signed this. Is that your signature on page 59?

21 A It is.

22 Q Did you affix your signature to this page?
23 Did you personally affix your signature?

24 A I did.

25 Q And you signed this on September 6?

1 A I did.

2 Q Of 2024?

3 A Of 2024, yes.

4 Q Do you recall where you were when you
5 signed it?

6 A I was working from my home office in
7 Massachusetts.

8 Q Since signing Exhibit 1057 on September 6,
9 have you reviewed your declaration?

10 A I have reviewed my reply declaration in the
11 few days leading up to this meeting.

12 Q And aside from that, did you review it at
13 any other times?

14 A Between September 6 and now?

15 Q Yes.

16 A With the exception of in preparation for
17 this meeting, no.

18 Q Did you notice any mistakes?

19 A Did I notice any mistakes? In this
20 document, none come to mind.

21 Q Did you draft Exhibit 1057?

22 A I participated in the creation of this
23 document, yes.

24 Q Participated in what way?

25 A I edited and reviewed and provided feedback

1 and input into the document.

2 Q And who did you work with?

3 A I worked with members who are in this room,
4 Andy and Tucker, and Amy from Klarquist.

5 Q Did you work with anyone else in preparing
6 Exhibit 1057?

7 A I did not.

8 Q You mentioned that you edited the draft.
9 Who prepared the first draft?

10 MR. MASON: Objection. Form. And caution
11 the witness not to reveal any privileged
12 information.

13 THE WITNESS: Yeah. I participated
14 actively in the preparation of this report.

15 BY MR. CARROZZA:

16 Q And who prepared the first draft?

17 A Again, I prepared and provided draft edits
18 along the way.

19 Q So the fact that you're not answering the
20 question, is it safe to assume that you did not
21 prepare the first draft?

22 MR. MASON: Objection. Form.

23 THE WITNESS: That's not what I said.

24 What I said was I prepared --

25 MR. MASON: I'll give the same

1 instruction. Please let me get my objections
2 in.

3 THE WITNESS: Sorry. Sorry.

4 MR. MASON: Objection to form and same
5 instruction.

6 THE WITNESS: So your question?

7 BY MR. CARROZZA:

8 Q Is it safe to assume that you did not
9 prepare the first draft?

10 MR. MASON: Objection. Form. Same
11 instruction.

12 THE WITNESS: I actively participated in
13 the drafting of this document. I provided
14 direct edits and direct content.

15 BY MR. CARROZZA:

16 Q All right. That's not answering the
17 question I'm asking, though. So I'm going to ask
18 just one more time.

19 Did you prepare the first draft of
20 Exhibit 1057?

21 MR. MASON: Objection. Form and same
22 instruction.

23 THE WITNESS: I believe I've answered your
24 question.

25 ///

1 BY MR. CARROZZA:

2 Q That's not the case under any
3 interpretation of my question.

4 MR. MASON: Objection. Form.

5 BY MR. CARROZZA:

6 Q So let's go through this one more time.
7 Did someone else prepare the first draft of
8 Exhibit 1057 besides yourself?

9 MR. MASON: Objection. Form. Same
10 instruction.

11 THE WITNESS: Again, I participated
12 actively in the drafts which resulted in this
13 report.

14 BY MR. CARROZZA:

15 Q When did you make your first round of edits
16 in this draft?

17 MR. MASON: Objection. Form.

18 MR. HANSEN: Same instruction.

19 THE WITNESS: I don't have that date at
20 the top of my mind.

21 BY MR. CARROZZA:

22 Q Can you give me a ballpark estimate?

23 MR. MASON: Objection. Form. Same
24 instruction.

25 THE WITNESS: I believe the work started

1 in late summer of this year.

2 BY MR. CARROZZA:

3 Q When you started your edits, what was the
4 state of the document when you first looked at it?

5 MR. MASON: Objection. Form. Same
6 instruction.

7 THE WITNESS: I'm not sure what you mean
8 by the state of the document.

9 BY MR. CARROZZA:

10 Q What don't you understand about that?

11 A It was an electronic document and it
12 contained -- yeah. It was an electronic document
13 that was -- that I worked from.

14 Q And was there content in that electronic
15 document?

16 MR. MASON: Objection. Form.

17 Mike, you're getting into the
18 mechanics of how Mr. Gross drafted this
19 declaration.

20 MR. CARROZZA: And you can make your
21 objection.

22 MR. MASON: Which is privileged.

23 MR. CARROZZA: You can't make speaking
24 objections.

25 MR. MASON: I'm not making a speaking

1 objection. You're going into privileged
2 materials.

3 MR. CARROZZA: You've made your objection.

4 MR. MASON: I'm going to instruct the
5 witness not to divulge any privileged
6 information regarding what was the content of
7 drafts exchanged with counsel.

8 You were inquiring about drafts
9 between counsel that were exchanged between
10 counsel and the witness. I'm instructing the
11 witness to not divulge any work product,
12 privileged information.

13 BY MR. CARROZZA:

14 Q So for the record, you received the first
15 draft of Exhibit 1057, correct?

16 MR. MASON: Objection. Form. Same
17 instruction.

18 THE WITNESS: I don't believe that's
19 accurate.

20 BY MR. CARROZZA:

21 Q Did content exist in Exhibit 1057 before
22 you looked at it?

23 MR. MASON: Objection. Form. Same
24 instruction. I'm going to instruct the witness
25 not to testify on the contents of drafts

1 exchanged between counsel and the witness.

2 THE WITNESS: Yeah, I don't understand
3 what you're asking. The document starts from a
4 default template, an electronic template. And
5 an exchange of material was provided by myself
6 and by other counsel members.

7 BY MR. CARROZZA:

8 Q Did any version or draft exist before you
9 looked at it for the first time?

10 MR. MASON: Objection. Form. I will
11 instruct the witness not to testify on the
12 contents of drafts exchanged --

13 THE WITNESS: I actively participated in
14 the content and the creation of this document.
15 And it is a complete reply to my opinions on
16 the subject material, with the exception of how
17 and where I reserved to provide for the comment
18 on this material.

19 Specifically paragraph 8 of my reply
20 declaration describes -- excuse me, 7,
21 describes, I reserve the right to revise,
22 supplement and/or amend my opinions based on
23 new information or further development in these
24 or related proceedings.

25 However, section 1 describes material

1 that I provided in my report.

2 BY MR. CARROZZA:

3 Q Can you just mark the transcript? And
4 we're going to move on.

5 Let's turn to page 6 of Exhibit 1057.

6 A Page 6?

7 Q Yes. There's a table that begins on
8 page 6, it has a list of exhibits; do you see that?

9 A I do. It continues on to page 7 and then
10 on to page 8.

11 Q And these are some additional documents
12 that you considered in preparing Exhibit 1057?

13 A These are the documents that I considered.

14 Q Exhibit 1053 is the deposition transcript
15 of Dr. Wright. Did you review that exhibit?

16 A I did.

17 Q Did you review it in full?

18 A I read the document in its entirety.

19 Q And Exhibit 1054 is the deposition
20 transcript of Dr. Striegel; did you review that
21 document?

22 A I did.

23 Q In its entirety?

24 A Yes.

25 Q Exhibit 1057 is the declaration of

1 Dr. Ahmann. Did you review that document?

2 A I don't have 1057 listed.

3 Q Did I misspeak? I'm sorry. I misspoke.

4 Withdrawn.

5 Exhibit 1055 is the declaration of

6 Dr. Ahmann. Did you review that document?

7 A I did.

8 Q Did you review any drafts of Dr. Ahmann's
9 declaration?

10 A No. I reviewed his declaration at the end
11 of August when it was signed.

12 Q Just the one that's dated August 30th,
13 that's Exhibit 1055?

14 A 1055 dated August 30, correct.

15 Q In your first declaration, Exhibit 1008,
16 you also had a list of materials considered.

17 A Yes. In 1008 starting on page 11 I have a
18 list of exhibits which carried on to page 12, 13,
19 and the top of page 14.

20 Q Now, when you prepared your first
21 declaration, did you have copies of those exhibits?

22 MR. MASON: Objection. Scope.

23 THE WITNESS: Did I have copies of the
24 contents of the exhibits?

25 ///

1 BY MR. CARROZZA:

2 Q Yes. I mean, you have a lot of materials
3 listed, but had you actually reviewed those
4 documents that were listed in your first
5 declaration?

6 MR. MASON: Objection. Form. Scope.

7 THE WITNESS: So in my original
8 declaration, section 3 talks about the scope of
9 the opinion I rendered and it does specifically
10 say in the review of publications
11 20089/0085768 Patel 2012, FAQs of benefits,
12 fact sheets, and sensor features of user guide
13 for the Medtronic MiniMed Paradigm REAL-Time
14 system archive of the Medtronic Diabetes
15 website in October 2007, Exhibit 1011, Paradigm
16 REAL-time.

17 BY MR. CARROZZA:

18 Q Mr. Gross, I'm just going to interrupt you
19 for a second. Maybe you misunderstood or I asked a
20 bad question. Let me start over.

21 What I'm asking is when you prepared your
22 first declaration which is Exhibit 1008, did you
23 have copies of the materials listed in your table?

24 MR. MASON: Objection. Form. Scope.

25 THE WITNESS: As I declared in paragraph

1 Exhibit 10, in preparation to the declaration I
2 reviewed the materials that are listed in the
3 list of exhibits.

4 BY MR. CARROZZA:

5 Q So when you rendered your original
6 opinions, you had reviewed all the documents listed
7 in 1008, right?

8 MR. MASON: Same objections.

9 THE WITNESS: Yes, as stated in my report.

10 BY MR. CARROZZA:

11 Q Okay. So just to clarify, specifically you
12 had reviewed Exhibit 1011 in preparing your original
13 declaration, right?

14 A Exhibit 1011 is the material for the
15 MiniMed Paradigm?

16 Q If that's what's listed in your table and
17 if you wouldn't mind keeping it open.

18 A Yes. Let me pull this out. Yes, I have
19 reviewed this material, Exhibit 1011, as part of my
20 original declaration.

21 Q And you had also reviewed Exhibit 1012
22 before you finalized your original declaration?

23 A Yes. I reviewed Exhibit 1012 as I prepared
24 my original declaration.

25 Q You also reviewed Exhibit 1015 prior to

1 finalizing your original declaration?

2 A 1015 which is Patel 2008, yes, I reviewed
3 that patent publication as part of my preparation
4 for the original report.

5 Q You had also reviewed Exhibit 1017 prior to
6 finalizing your original declaration?

7 A Exhibit 1017, Causey. Yes, I reviewed
8 patent 6,641,533 B2 in preparation of my original
9 report.

10 Q You had also reviewed Exhibit 1019 prior to
11 finalizing your original declaration?

12 A Exhibit 1019, Mastrototaro patent
13 publication 2006/0202859 A1, yes, I reviewed this
14 document as I prepared my original report.

15 Q And you also reviewed Exhibit 1023 prior to
16 finalizing your original declaration?

17 A Exhibit 1023, Shahmirian, patent
18 publication, US 2004/0122353 A1. Yes, I reviewed
19 this document in preparation of my original report.

20 Q You also reviewed Exhibit 1026 prior to
21 finalizing your original declaration?

22 A 1026, style patent application, US
23 2004/0193025 A1, yes, I reviewed this document in
24 preparation of my initial report.

25 Q You had also reviewed Exhibit 1027 prior to

1 finalizing your original declaration?

2 A Exhibit 1027. This is an article on
3 biosensors and bioelectronics by Cloelle (phonetic),
4 et al. Yes, I reviewed this document in preparation
5 for my original report.

6 Q You had also reviewed Exhibit 1028 prior to
7 finalizing your original declaration?

8 A 1028, In Vivo Calibration of Subcutaneous
9 Glucose Sensor for Determination of Subcutaneous
10 Glucose Kinetics, by Velho, published in HAL Open
11 Science; yes, I reviewed this document in
12 preparation for my report. My original report.

13 Q Also reviewed Exhibit 1029 prior to
14 finalizing your original declaration?

15 A The MiniMed continuous glucose monitoring
16 system by John Mastrototaro, as published in
17 Diabetes Technology and Therapeutics dated 2000. So
18 yes, this document I reviewed in preparation of my
19 report.

20 Q You had also reviewed Exhibit 1030 prior to
21 finalizing your original declaration?

22 A Exhibit 1030 is Mastrototaro patent, US
23 6,424,847 B1. Yes, I reviewed this document in
24 preparation of my original report.

25 Q You also reviewed Exhibit 1033 prior to

1 finalizing your original declaration?

2 A Exhibit 1033, Delays in minimally invasive
3 continuous glucose monitoring devices: A review of
4 current technology, Keenan, et al., as published in
5 the Journal of Diabetes Science and Technology.

6 Yes, I reviewed this document in
7 preparation for my report.

8 Q You also reviewed Exhibit 1042 prior to
9 finalizing your original declaration?

10 A 1042 is an excerpt from the Scientists and
11 Engineering Guide to Digital Signal Processing by
12 Steve Smith, copyright 1997 to '99. Yes, I recall
13 this excerpt in preparation for my original report.

14 Q You had reviewed Exhibit 1046 prior to
15 finalizing your original declaration?

16 A Exhibit 1046, Continuous Glucose
17 Monitoring: The future of diabetes by Berg, et al.,
18 as published in Diabetes Spectrum. Yes, I reviewed
19 this document in preparation for my original report.

20 Q Now, when you reviewed those documents in
21 preparing your original declaration, do you recall
22 whether there was any information you didn't
23 understand about them?

24 MR. MASON: Objection. Form. Scope.

25 THE WITNESS: So I understood the material

1 content as provided by the authors and the
2 context in which they were reporting their
3 findings.

4 BY MR. CARROZZA:

5 Q Since preparing your original declaration,
6 did you learn anything new from those documents that
7 you didn't previously know?

8 MR. MASON: Objection. Form.

9 THE WITNESS: I'd have to recall if any
10 new enlightenments came since the original
11 report. I don't believe there's any
12 information that is in those documents that
13 isn't contained in my opinions in the first
14 report and referenced in my second. So nothing
15 comes to mind as new revelations.

16 BY MR. CARROZZA:

17 Q Thank you. Mr. Gross, do you know who
18 Dr. Andrew Ahmann is?

19 A I only know of Dr. Ahmann based on the
20 report that I've read from him.

21 Q Have you ever spoken with Dr. Ahmann?

22 A No.

23 Q Have you ever met Dr. Ahmann?

24 A Not that I'm aware of, no.

25 Q What do you know of Dr. Ahmann?

1 A So I know of Dr. Ahmann, what he's
2 presented in his opinion report referenced in
3 Exhibit 1055. He is a well-known expert in the use
4 of continuous glucose monitoring and its use from
5 its inception in the late '90s through current day.
6 He's also professor of practice. He's director of
7 diabetes services at Oregon Health and Sciences
8 University. He's a coauthor of the Star 3 report,
9 which is a very interesting and good summary of
10 clinical use of CGMs and the benefit to patients
11 with the use of clinical data such as the glucose.

12 Q And how do you know those things about
13 Dr. Ahmann?

14 A I've read them in his report starting on
15 paragraph 4 through his statement of scope of work
16 ending in paragraph 8.

17 Q But you've never spoken with him to confirm
18 whether any of that's accurate, right?

19 A I've never spoken with him, no.

20 Q Did you do any independent research to
21 confirm any of the information you just said about
22 Dr. Ahmann?

23 MR. MASON: Objection. Form.

24 THE WITNESS: I reviewed his document and
25 his signed declaration.

1 BY MR. CARROZZA:

2 Q So you didn't perform any independent
3 research to confirm that the information you just
4 said about him was correct, right?

5 MR. MASON: Objection. Form.

6 THE WITNESS: Unaware of any independent
7 research that I've done other than read his
8 report.

9 BY MR. CARROZZA:

10 Q And so when you prepared your first
11 declaration you hadn't spoken with Dr. Ahmann in
12 preparing that declaration, right?

13 A I never discussed anything with Dr. Ahmann
14 personally or via correspondence.

15 Q So besides information you read in his
16 declaration, you have no independent knowledge of
17 Dr. Ahmann's practice or experience or expertise,
18 right?

19 A No, other than the material he's provided
20 in his report including his CV at the end of the
21 report.

22 Q Have you ever emailed with Dr. Ahmann?

23 A I've stated I've got no connection, no
24 communication.

25 Q I just want to clarify because we talked

1 about talking and meeting, but I want to make sure
2 you also didn't communicate via email.

3 A I've had no communication with Dr. Ahmann
4 other than reading his report.

5 Q Understand. Thank you.

6 But you mention that you did review
7 Dr. Ahmann's declaration before you finalized your
8 declaration, right?

9 A I did.

10 Q All right. Some of the opinions in your
11 declaration relate to a product called the Medtronic
12 Paradigm REAL-time insulin pump, right?

13 A Both my primary -- the first report and my
14 reply declaration have that as a reference, yes.

15 Q And that was an actual product that
16 Medtronic offered as far as you know, right?

17 MR. MASON: Objection. Form.

18 THE WITNESS: Yes. Medtronic MiniMed and
19 the technology that is described in
20 Exhibit 1011 was a commercially available
21 product starting in the late '90s through --
22 I'm not sure when it was removed from market,
23 but certainly through 2009.

24 BY MR. CARROZZA:

25 Q So you mentioned a moment ago it's

1 described in Exhibit 1011?

2 MR. MASON: Objection. Form.

3 THE WITNESS: The Paradigm MiniMed.

4 BY MR. CARROZZA:

5 Q Insulin pump?

6 A 1011 -- I want to be careful that we're
7 being sure of what it's describing. So 1011 is the
8 MiniMed Paradigm REAL-Time system and it's got
9 references to the pump, its accessories, its
10 functionality, but also to other components within
11 the MiniMed technology family.

12 Q And so that document, Exhibit 1011, that's
13 describing a physical product, I guess? The point
14 I'm trying to get at, the document you're relying on
15 in this IPR Exhibit 1011, that is describing a
16 physical product that existed in the market at some
17 point, right?

18 MR. MASON: Objection. Form.

19 THE WITNESS: Yes. It describes a family
20 of products available from Medtronic from
21 apparently the late '90s through -- certainly
22 through 2009.

23 BY MR. CARROZZA:

24 Q And one of those products was the Paradigm
25 REAL-time insulin pump, right?

1 A Yes. The descriptions for the products can
2 be found on page 23 of Exhibit 1011. It includes
3 continuous glucose monitoring system, realtime
4 transmitter, Paradigm 522/722 insulin pump, and
5 software.

6 Q And so your understanding of the -- well,
7 let me rephrase this question.

8 Other than the exhibits in this IPR, do you
9 have knowledge of the Paradigm insulin product
10 itself outside of what's been submitted in this IPR?

11 A So I have knowledge of the patent
12 publications and grants for the Medtronic family of
13 products as referenced in several of the other
14 exhibits that I included in my report. And in there
15 they described in more detail other elements of how
16 the Paradigm system worked.

17 Q Sure. Thank you.

18 And so outside of the documents that are in
19 this IPR, do you have any other knowledge, have you
20 acquired any other knowledge about the Paradigm
21 physical product? Sorry. Let me rephrase. I just
22 want to make sure that this transcript is clear.

23 In some of the papers the parties have
24 referred to the document, Exhibit 1011, as the
25 Paradigm. But the Paradigm was also a commercial

1 product. And so my question -- I'm just trying to
2 understand, just to make the transcript clear what
3 we're talking about here, so let me just ask the
4 question one more time.

5 Besides the documents that are of record in
6 this IPR, did you acquire any knowledge about the
7 physical commercial product called the Paradigm
8 REAL-time insulin pump?

9 A Yes. In my reply declaration I also
10 reviewed the Medtronic clearances, the PMA
11 clearances that included the Paradigm REAL-time, the
12 Guardian and elements that were also contained under
13 their PMA number 980022, and many of the supplements
14 that that PMA had had.

15 And in those documents are additional
16 regulatory components of how the Paradigm was used
17 and what some of the cautions and hazards and
18 warnings were associated with that.

19 Q Okay.

20 A As well as establish the date of when those
21 features were available for sale, at least in the
22 United States, and other countries that recognized
23 510K where PMA has their clearance approval paths.

24 Q And are those documents referenced in your
25 reply declaration?

1 A Yes. Specifically Exhibit 1041, 1058, 1059
2 are those elements that were relevant for my reply
3 declaration.

4 Q Okay. Have you reviewed any source code
5 that was on the Paradigm insulin pump commercial
6 product?

7 A I have not.

8 Q Have you reviewed any internal Medtronic
9 documents that describe the function, structure and
10 operation of the physical product?

11 A Other than the materials presented in my
12 report, no.

13 Q So Mr. Gross, did you do anything to
14 prepare for testifying at today's deposition?

15 A Other than review the material from my
16 reply declaration and original report and come out
17 to the West Coast, that's the preparation, reviewing
18 material.

19 Q Did you meet with counsel to prepare for
20 today's deposition?

21 A There have been a few meetings either via
22 Zoom or in person leading up to this meeting.

23 Q How many Zoom meetings did you have to
24 prepare for today's deposition?

25 A I'm thinking maybe one or two.

1 Q And who was on those Zoom meetings?

2 A Counsel who is in this room and one
3 additional counsel that's not here today.

4 Q Do you know that person's name?

5 A Amy.

6 Q And how many in-person meetings did you
7 have to prepare for today's deposition?

8 A Just one yesterday when I arrived from the
9 East Coast.

10 Q About how long did you meet for?

11 A I'd say for most part of the day.

12 Q Did you meet here at Klarquist's office?

13 A I did.

14 Q And who was with you during that
15 preparation?

16 A Counsel in this room, Andy and Tucker.

17 Q Have you spoken with anyone from DexCom
18 since -- let me withdraw that and start over.

19 Do you recall your first deposition was on
20 May 2nd, 2024?

21 A Sounds close. I can confirm. Give me a
22 moment. Looks like May 2, 2024. Yeah, May 2nd,
23 2024.

24 Q And so since that deposition, have you
25 spoken with anyone at DexCom about the subject

1 matter involved in this IPR?

2 A No, I have not.

3 Q Have you spoken with anyone at Medtronic
4 about the subject matter involved here?

5 A I have not.

6 Q Did you review any documents that are not
7 part of the record here to prepare for today's
8 deposition that you can recall?

9 A No. The preparation was in review of the
10 material and the exhibits that are contained in the
11 reply declaration.

12 Q We've been going for about an hour. Why
13 don't we take a short break here before we start on
14 the next set of questions.

15 A Sure.

16 MR. MASON: Off the record.

17 MR. CARROZZA: Yeah.

18 (Off record from 9:53 a.m. to 10:03 a.m.)

19 BY MR. CARROZZA:

20 Q Mr. Gross, did you speak with any of your
21 attorneys during the break about the substance of
22 your testimony so far?

23 A Not about substance, no.

24 Q Did you speak to them about anything
25 related to this IPR?

1 A No.

2 Q Let's talk about the Paradigm REAL-time
3 insulin pump. The system included the transmitter
4 and the insulin pump, right?

5 MR. MASON: Objection. Form.

6 THE WITNESS: So the Paradigm system
7 included sensors, transmitter, insulin pumps of
8 a variety of sizes and functions, accessories,
9 software.

10 BY MR. CARROZZA:

11 Q Now, the transmitter is the component in
12 the system that is transmitting data, glucose data
13 to the insulin pump?

14 MR. MASON: Objection. Form.

15 THE WITNESS: In the Paradigm REAL-Time
16 system, the transmitter was sending glucose
17 data to the insulin pump.

18 BY MR. CARROZZA:

19 Q Now, that glucose data could be displayed
20 on the insulin pump screen, right?

21 A Correct. That is one of the key features
22 of that system at the time.

23 Q And that glucose data could also be
24 downloaded to a computer later on, right?

25 A That was a feature that was supported, yes.

1 Q Whatever data is being either displayed or
2 downloaded later, that's all coming from the same
3 transmitter, is the point I'm trying to ask.

4 MR. MASON: Objection. Form.

5 THE WITNESS: I didn't hear the last half
6 of that question. I'm sorry.

7 BY MR. CARROZZA:

8 Q So the data that's either being displayed
9 on the insulin pump or downloaded to a computer,
10 that data is all generating from the same
11 transmitter and sensor?

12 MR. MASON: Objection. Form.

13 THE WITNESS: From my understanding of
14 what the document shared, it doesn't
15 necessarily need to be the same sensor. And
16 there are cases where you would need to change
17 the transmitter as well. The user instructions
18 provided recommendations on how to manage that
19 within the daily operations of the system.

20 BY MR. CARROZZA:

21 Q Now, when the glucose data is being
22 transmitted to the insulin pump, the insulin pump is
23 going to have a memory that stores that data in the
24 pump, right?

25 MR. MASON: Objection. Form.

1 BY MR. CARROZZA:

2 Q That was not asked in a very clear way so
3 let me start that over.

4 The insulin pump had memory to store data,
5 right?

6 MR. MASON: Objection. Form.

7 THE WITNESS: So as described in the
8 instructions for use, the key glucose data
9 feature was essentially a realtime glucose
10 trend that's illustrated on page 64 of
11 Exhibit 1011. And in that reference you can
12 see that there are two views of that area,
13 3-hour view and a 24-hour view of the discrete
14 values as represented on the screen.

15 But there's also other data there
16 such as bolus information, there may be events.

17 BY MR. CARROZZA:

18 Q Mr. Gross, I'm sorry to interrupt, but
19 you're not answering my question. Maybe I asked it
20 wrong or you misunderstood.

21 I just asked did the insulin pump have
22 memory?

23 MR. MASON: Objection. Form.

24 THE WITNESS: Did the insulin pump have
25 memory? There would have had to have been

1 memory on the insulin pump in order to display
2 the glucose values and associated metadata as
3 demonstrated in these elements, yes.

4 BY MR. CARROZZA:

5 Q And in fact, Exhibit 1011 says the insulin
6 pump stored the last 90 days of memory -- excuse
7 me -- stored the last 90 days of data.

8 MR. MASON: Objection. Form.

9 THE WITNESS: Do you have a reference
10 where I said that?

11 BY MR. CARROZZA:

12 Q Go to Exhibit 1011, page 7. And there's
13 frequently asked question about how much data.

14 A Yes.

15 Q I just want to make sure we're on the same
16 page here, stored the last 90 days of data.

17 A So in the FAQs on page 7, understanding the
18 insulin pump heading, there is an entry that says,
19 How much continuous glucose monitoring, CGH, system
20 data can the insulin pump store?

21 And the answer is the insulin pump stores
22 the last 90 days of CGM system data which can be
23 downloaded for historical analysis. That's the
24 reference you're referring to.

25 Q Yes. Now, when it says the last 90 days,

1 that would mean it's on a rolling basis, right?

2 MR. MASON: Objection. Form. Scope.

3 THE WITNESS: They don't describe how the
4 memory is purged. However, I think a POSITA
5 would have recognized that it has to be on a
6 FIFO rolling basis.

7 BY MR. CARROZZA:

8 Q When you say FIFO?

9 A First in, first out.

10 Q To store that 90 days of data, the type of
11 memory would be non-volatile, right?

12 Wouldn't that be a reasonable presumption?

13 MR. MASON: Objection. Form.

14 THE WITNESS: Yeah. That's consistent
15 with my reply declaration that in order to
16 preserve it across battery changes, it would
17 have to be preserved in non-volatile memory.

18 BY MR. CARROZZA:

19 Q Even though the system stored 90 days of
20 data, it only displayed up to the most recent 24
21 hours on the screen, right?

22 MR. MASON: Objection. Form.

23 THE WITNESS: That's not accurate. What
24 is displayed on the 24 or 3 hours display is
25 the discrete CGM data points that it receives

1 from the sensor. The remaining data is --
2 appears to be min/max and average data.

3 BY MR. CARROZZA:

4 Q I'm sorry?

5 A The user -- the user experience in the
6 insulin pump is to review their data up to the
7 amount that the pump holds. But if you don't view
8 the discrete data in the graphical trends, what
9 you're looking at is basically min/max or
10 manipulated data for daily summaries.

11 There's no indication that the user could
12 look at each discrete glucose data point on the
13 insulin pump if it wasn't demonstrated or it wasn't
14 rendered in the 24- or 3-hour graph trends.

15 Q The Paradigm insulin pump displayed up to
16 the most recent 24 hours of glucose data in the
17 trend graph, right?

18 MR. MASON: Objection. Form.

19 THE WITNESS: That was the key benefit
20 that the system was promoting, is that the
21 trend data and trend graphed information was so
22 critical for the patient to make better
23 decisions about their diabetes management that
24 they made the promise that they were going to
25 give the last 3 and the last 24 hours of CGM

1 data to the user.

2 BY MR. CARROZZA:

3 Q So I know the system had to have at least
4 some type of memory that stored 90 days of data.

5 Would the system also have RAM for
6 displaying what's on the screen?

7 MR. MASON: Objection. Form.

8 THE WITNESS: So a POSITA would know that
9 in order to interact with the display there
10 needs to be what's considered a display buffer
11 which is where you acquire the data, manipulate
12 the data for display, and then put it to the
13 display buffer in basically pixel, what pixels
14 are on and off, intensity, and color. And then
15 that display buffer would be used to show the
16 actual data on the screen to the user.

17 BY MR. CARROZZA:

18 Q So let's talk about that in a little more
19 detail. The display buffer would have information
20 that tells which pixels to illuminate; is that what
21 I understood you to say?

22 A Typically that's how a display buffer is
23 used.

24 Q And would the system consume energy by
25 turning on a pixel versus not illuminating a pixel?

1 MR. MASON: Objection. Form.

2 THE WITNESS: So certain display
3 technologies consume very little energy whether
4 the pixel is on or off.

5 BY MR. CARROZZA:

6 Q I understood that it used little energy,
7 but the question is would the system use more energy
8 to display a pixel or to illuminate a pixel than not
9 illuminate a pixel?

10 MR. MASON: Objection. Form.

11 THE WITNESS: Would a display use more
12 energy to illuminate a pixel versus not
13 illuminate a pixel?

14 BY MR. CARROZZA:

15 Q Yes.

16 A Again, that's a hypothetical I haven't
17 opined. There are some display technologies that
18 actively consume energy to not display pixels.

19 Q So in the 2007 time frame when the Paradigm
20 documents are dated that you rely on, in that
21 technology, in your experience as a system designer
22 as you say in your reply declaration, in your
23 expertise, would a system typically use more energy
24 to illuminate a pixel on the screen than not?

25 MR. MASON: Objection. Form.

1 THE WITNESS: Again, these are examples
2 where the opposite is true.

3 BY MR. CARROZZA:

4 Q Right. And so the question is, would some
5 systems have used more energy to display a pixel
6 than not?

7 MR. MASON: Objection. Form.

8 BY MR. CARROZZA:

9 Q It's a straightforward question.

10 A I understand the question. The challenge I
11 have is there's no indication on the Paradigm
12 documentation of battery life being impacted,
13 whether display is active or not. It gives you
14 nominal battery life. And I'm aware of other
15 displays that were available in this time period
16 that consume more energy to have the pixel off
17 rather than on.

18 Q So we don't know is the point, right?

19 MR. MASON: Objection.

20 BY MR. CARROZZA:

21 Q We don't know from the materials in
22 Exhibit 1011 exactly what the display technology was
23 in the physical Paradigm system?

24 A That's a safe assumption. We know it's
25 LCD-based, but we don't know resolution, we don't

1 know power consumption, we don't know pixel depth
2 and density. That information is not in the
3 documents here.

4 Q So it's possible that the display was the
5 time that used more energy to show a pixel than not
6 to show a pixel? That's certainly a possibility?

7 MR. MASON: Objection. Form.

8 THE WITNESS: It's equally a possibility
9 that it wasn't, so I'm not sure how to answer
10 your question.

11 BY MR. CARROZZA:

12 Q I think you did.

13 Now, do you have an understanding of how a
14 system -- an embedded system like the Paradigm pump
15 would translate a glucose value into pixel
16 information?

17 MR. MASON: Objection. Form.

18 THE WITNESS: I have a working
19 understanding of how micro controllers would
20 interact with the memory to gather the data,
21 manipulate the data, and then send it to a
22 display -- a display asset.

23 BY MR. CARROZZA:

24 Q So how does that work in, let's say, for
25 example, the non-volatile memory has a data value of

1 75 milligrams per deciliter. How does that value
2 get translated into pixel information on the screen?
3 In your experience.

4 MR. MASON: Objection. Form.

5 THE WITNESS: It can be done a variety of
6 ways. Typically the POSITA would want to do it
7 in the simplest way possible, because simple is
8 easy to implement, test, model, and sustain,
9 maintain over the life of the medical product.

10 At a higher level -- at the highest
11 level, based on in Paradigm's case, the user
12 would gesture, I want to see that data. The
13 micro controller would fetch the data out of
14 long-term memory with the other metadata that
15 is described in the image on page 66 -- excuse
16 me, not 66. On page 64 which includes bolus
17 information, date and time information, and
18 potentially alert conditions that occurred in
19 that time range, the last 3 hours or 24 hours.

20 The microprocessor would make any
21 calculations necessary if, for example, trend
22 and severe trend markings were not stored at
23 the time the glucose value was received. And
24 then would take that information and convert it
25 into either a library call or a binary call and

1 put that into the display buffer and then
2 trigger the display to display that information
3 at the highest level.

4 BY MR. CARROZZA:

5 Q Thank you. That is helpful.

6 Now, let's say the insulin pump was out of
7 range from the transmitter for a period of two
8 hours. Actually, withdraw. Let me back up for a
9 second.

10 The Paradigm pump was worn on the user's
11 body, right?

12 MR. MASON: Objection. Form.

13 THE WITNESS: The insulin pump typically
14 was affixed to a belt or some part of clothing.
15 The inject port was actually worn on the body,
16 as best I can tell from the --

17 BY MR. CARROZZA:

18 Q So I guess the part I'm having trouble
19 understanding, maybe you can explain this. How
20 could the insulin pump be out of range from the
21 transmitter in the first place if they're both on
22 the user's body? Or within the average size of a
23 human, assuming there's maybe a 2 or 3 foot distance
24 at most between the two, how would you end up out of
25 range?

1 MR. MASON: Objection. Form. Scope.

2 THE WITNESS: So a POSITA reading document
3 15011 would recognize there's specific
4 conditions when the transmitter would have data
5 but not be able to send it to the receiver or
6 the insulin pump.

7 Specifically, on page 7 they describe
8 a question, can I swim or bathe while wearing
9 the MiniMed Paradigm insulin pump? The
10 answer's no. So you can't go swimming with the
11 insulin pump. But the question about can I
12 swim with the glucose sensor, the answer is
13 yes, it's watertight, water resistant. So I
14 can actually swim with the sensor and
15 transmitter on my body leaving the pump on
16 shore. So there's no glucose data that's being
17 sent to the insulin pump in that scenario.

18 When I get out of the pool or out of
19 the water and dry myself off, the next thing I
20 want to know is what's my glucose value during
21 my swim? And in that case the Paradigm
22 REAL-Time system promises the user you can get
23 up to 48 minutes -- excuse me, 40 minutes of
24 that data back into the pump.

25 So it makes sense that the user would

1 be able to retrieve the glucose that was
2 acquired by the sensor and transmitter while
3 they were swimming, have that repopulated in
4 the pump, and now I can interrogate the pump
5 and find out what my glucose behaviors were
6 during that activity.

7 That's the POSITA's impression of
8 what these FAQs would apply. So there's at
9 least one example where the transmitter is not
10 within range of the receiver.

11 BY MR. CARROZZA:

12 Q All right. Let's go with that. Let's
13 assume the person goes swimming for two hours and
14 they come back in range. What would their -- and
15 they come back in range, the transmitter's now
16 talking to the pump again, it sends realtime data
17 and then the eight previous ones is what you say in
18 your report, right? It sends realtime data and the
19 eight most recent glucose values?

20 MR. MASON: Objection. Form.

21 THE WITNESS: I'm sorry. Can you repeat
22 your question?

23 BY MR. CARROZZA:

24 Q Sure. Let's start over. A person is
25 swimming for two hours, having a great day at the

1 beach with their family, and they decide I've had
2 enough in the water. So they go and they get near
3 their insulin pump again, they hook it up to their
4 body, now the pump and the transmitter are back in
5 range.

6 And the transmitter, according to your
7 interpretation materials, would translate the
8 realtime data and then the eight most recent glucose
9 values after that, right? Forty minutes of data.

10 Isn't that your interpretation of
11 materials?

12 MR. MASON: Objection. Form.

13 THE WITNESS: I'm not sure what you mean
14 by the "realtime data."

15 BY MR. CARROZZA:

16 Q Well, the most current glucose valuing plus
17 the eight previous ones, isn't that what you say in
18 your report?

19 MR. MASON: Objection. Form.

20 THE WITNESS: So in my report what I
21 describe is that the Paradigm literature says
22 that it can store up to 40 minutes of glucose
23 data in the transmitter. And when the
24 transmitter and receiver reconnect, those 40
25 minutes' worth of data would be repopulated

1 within the insulin pump.

2 BY MR. CARROZZA:

3 Q So the 40 minutes of data, and let's just
4 make sure we're on the same page, would include
5 what, the current glucose value plus the previous
6 seven that followed that?

7 MR. MASON: Objection. Form.

8 THE WITNESS: So given that the Paradigm
9 transmitter was holding on to the last eight
10 measurements, there would be at most eight
11 measurements.

12 BY MR. CARROZZA:

13 Q Okay. So it would be the most current
14 glucose value plus the seven most recent that
15 follows that, right?

16 MR. MASON: Objection. Form.

17 BY MR. CARROZZA:

18 Q I'm just trying make sure we're talking on
19 the same page here. There's no trick here.

20 A I understand. I understand. I think
21 that's a fair representation of the data that would
22 be repopulated in the insulin pump for display.

23 Q Now, so the person's out of range for two
24 hours. When they come back in range the pump sends
25 the most recent 40 minutes of data.

1 What would the pump display show?

2 MR. MASON: Objection. Form.

3 THE WITNESS: So if the user hasn't
4 gestured the pump, it would show its home
5 screen.

6 BY MR. CARROZZA:

7 Q And now they want to see their trend graphs
8 and they go to the trend graph and press it, they're
9 looking at a 3-hour trend graph, say.

10 What would the trend graph show?

11 A So I would expect --

12 MR. MASON: Objection. Form.

13 THE WITNESS: I would expect, based on the
14 experience that's described in 1011, they would
15 see 2 hours of data, a 20-minute gap of data,
16 and then 40 minutes of data leading up to
17 realtime.

18 BY MR. CARROZZA:

19 Q And let's make sure we're talking. So when
20 you say two hours of data, is that two hours
21 starting from the left hand, meaning the oldest two
22 hours of data?

23 Can we do this? Can you describe that one
24 more time but using the orientation of the screen?
25 Are we talking about the left hand which would be

1 the oldest three hours versus the right-hand side of
2 the screen that would be the most current? I just
3 want to understand we're talking the same.

4 MR. MASON: Objection. Form.

5 THE WITNESS: So the expectation based on
6 what the Paradigm documentation describes is
7 you would see from left to right two hours of
8 data from before the insulin pump was removed
9 from range, assuming the person went right into
10 the water. So let's assume for the moment that
11 they swam for, I guess, the 40 minutes or the
12 hour. You said an hour? What was your
13 scenario?

14 BY MR. CARROZZA:

15 Q No. The scenario, the person was swimming
16 for two hours.

17 A Two hours.

18 Q They were swimming for two hours, they come
19 back in range, they get the last 40 minutes of data.
20 And the question is what is now shown on the display
21 in the trend graph?

22 MR. MASON: Objection. Form.

23 THE WITNESS: So if I understand your
24 question correctly, based on what the Paradigm
25 user documentation describes, I would expect to

1 see the most recent data point on the far right
2 of the screen, 40 minutes of data, and then a
3 gap persisting from when the transmitter didn't
4 have memory to store the glucose values, all
5 the way back to the last glucose value that the
6 transmitter sent to the insulin pump prior to
7 the separation from radio distance. Does
8 that --

9 BY MR. CARROZZA:

10 Q Yeah. I think we're on the same page, but
11 let me make sure I have this.

12 So it sounds like it would be from right to
13 left, you would have the most current glucose
14 value -- or you would have 40 minutes of the most
15 recent glucose data, a data gap for an hour and 20
16 minutes, and then one hour of data that was from
17 before they went swimming; are we on the same page?

18 MR. MASON: Objection. Form.

19 THE WITNESS: Again, within the
20 assumptions that the radio communication ceased
21 to exist at that moment, the radio reception
22 commenced at that moment, that may be a
23 reasonable representation in the user's mind of
24 what to expect.

25 ///

1 BY MR. CARROZZA:

2 Q Yeah. I'm not worried about getting down
3 to the exact minute. I'm just trying to understand
4 what the display would show.

5 When the display buffer now is taking the
6 data from the non-volatile memory to show the trend
7 graph on the display, the absence of data is what's
8 showing up as that one hour and 20-minute data gap,
9 right?

10 MR. MASON: Objection. Form.

11 THE WITNESS: I'm not sure that's what a
12 POSITA would infer, given the insulin pump
13 would be initiating an error condition that it
14 can't talk to the radio at that period of time.
15 So as the user traverses the trend line, there
16 would be data, but it would say something like
17 weak radio or weak transmitter or indicate to
18 the user that there's been nothing obtained
19 from the transmitter at that point in time.

20 So there's data, but it's not
21 necessarily a full CGM measurement.

22 BY MR. CARROZZA:

23 Q I didn't follow that. What data?

24 MR. MASON: Objection. Form.

25 ///

1 BY MR. CARROZZA:

2 Q If the pump is out of range for two hours
3 and only 40 minutes can be transmitted or recovered,
4 what data is shown for that hour and 20 minutes
5 during the data gap?

6 MR. MASON: Objection. Form.

7 THE WITNESS: So a POSITA reading the weak
8 signal condition on page 73 of 1055 would see
9 that the weak signal alert can be present when
10 the pump and transmitter can't communicate.

11 BY MR. CARROZZA:

12 Q Okay. Now I understand.

13 A So let me finish. So it's likely that as
14 you traverse the glucose trend graph, that that's
15 what you would tell the user when you get to that
16 time when the pump was expecting a glucose value.

17 Q So there's data, but the data's about the
18 error message, there's no glucose data; do we have
19 that right? Did I understand your testimony right?

20 A That would be I think how a POSITA would
21 review what is being described and would have
22 implemented.

23 Q I misunderstood. I thought you were saying
24 there would be glucose data. You're just saying
25 data?

1 A Specifically, there's absence of glucose
2 data, but there is data about that measurement
3 point.

4 Q Now because the long-term or non-volatile
5 memory is on a FIFO basis, it would make sense to
6 have some sort of a -- like, I'm envisioning this as
7 being like a rolling pointer. Where as data's being
8 received from the transmitter, it's being put into a
9 data cell. And that pointer keeps going. And if
10 there's no data coming in for a period of time,
11 there's going to be an absence of data. And when
12 the data comes back in after reconnecting, the data
13 will start to go back into long-term.

14 So in other words, what I'm asking is,
15 would it be your interpretation or reasonable
16 interpretation that as the data's being received
17 from the transmitter, it's being stored in the
18 non-volatile memory. If it doesn't exist, the
19 non-volatile memory will just keep ticking away
20 until it does exist again and then it will plug in
21 the data?

22 MR. MASON: Objection. Form.

23 BY MR. CARROZZA:

24 Q Again, I'm just asking if that is your
25 understanding or does that make sense?

1 MR. MASON: Objection. Form.

2 THE WITNESS: So there are many ways to
3 manage a FIFO buffer. There are many ways to
4 model data within long-term or non-volatile
5 memory. It's equally possible that the memory
6 was constructed that for the glucose data there
7 was dedicated memory positions for each of the
8 24-hour data points.

9 So it is equally possible that a
10 POSITA would have had a reservation spot in
11 memory where whenever you go for that three
12 hours, this is the chunk of data you read from.
13 Whenever you go for 24 hours, this is the chunk
14 of data you read from.

15 So the direct answer to your question
16 is no, that's not the only way that a POSITA
17 may have implemented that type of system.

18 BY MR. CARROZZA:

19 Q Okay. Few follow-ups. Just to clarify, I
20 didn't say it was the only way. I was asking if
21 that was a possible or reasonable way.

22 MR. MASON: Objection form.

23 THE WITNESS: It is at least a possible
24 way.

25 ///

1 BY MR. CARROZZA:

2 Q Okay. And I think there might be a slight
3 misunderstanding, so I want to make sure we're on
4 the same page.

5 When the non-volatile memory is storing
6 data received from the transmitter, it would seem
7 like a practical way to do that is the data comes in
8 from the transmitter and then it's just plugged into
9 the next open memory cell according to the FIFO
10 scheme, right?

11 Isn't that how a FIFO buffer works?

12 MR. MASON: Objection. Form.

13 THE WITNESS: I'm not sure if your
14 representation is accurate to how that would
15 have been coded. But again, looking from a
16 POSITA reading the documentation, it's -- in my
17 opinion it's clear that the data would have
18 been available.

19 And whatever the algorithm was to
20 pull data out of memory to display on the graph
21 would have worked the same way whether there
22 was gap data or data present. That would have
23 been one of the efficiencies that one would
24 have built into the system.

25 So how the memory was being managed,

1 whether there was a hypothetical memory daemon
2 that was looking for data more than 24 hours
3 and pulling it out of memory and throwing it
4 away to make room for new measurements or
5 whether there was a mechanism for cleanup or
6 dedicated memory partitions, there are a
7 multitude of ways the system could have been
8 implemented.

9 And a POSITA would have implemented
10 in such a way that it would have made available
11 the last 24 hours and the last 3 hours,
12 depending what the user requested, of accurate
13 valid data. Whether it was obtained through
14 normal operation or obtained through
15 repopulation as described in the document.

16 BY MR. CARROZZA:

17 Q So you mentioned the coding. As far as the
18 coding goes, to take data from the non-volatile
19 memory, put it in a display buffer so it can be
20 displayed, would a simple routine be to, say, read
21 these 24 hours of data or these 3 hours of data?

22 MR. MASON: Objection. Form.

23 BY MR. CARROZZA:

24 Q I guess what I'm asking is this: If you
25 have consecutive memory cells and a FIFO buffer for

1 our more permanent non-volatile memory, wouldn't a
2 simple routine just be to say if you're showing
3 three hours of data, grab these -- how many data
4 points is that -- 45 data points?

5 MR. MASON: Objection. Form.

6 BY MR. CARROZZA:

7 Q Sorry. Let me rephrase that because I had
8 to do the math on the fly.

9 Wouldn't a simple implementation be if
10 you're going to show three hours of trend data on
11 the graph to have a software routine that just grabs
12 three hours of memory from the non-volatile memory?

13 MR. MASON: Objection. Form.

14 THE WITNESS: So I'm failing to understand
15 your hypothetical and how it's relevant to what
16 is taught to a POSITA from looking at the
17 documents.

18 BY MR. CARROZZA:

19 Q I'm asking from your perspective as a
20 person of skill in the art, you have a substantial
21 amount of design experience, obviously, is this a
22 way that it would be implemented?

23 And so if the non-volatile memory has three
24 hours of glucose data in consecutive memory cells,
25 wouldn't the easiest way to put that into a display

1 buffer to have a routine that just grabs that three
2 hours of data, puts it in the display buffer; isn't
3 that what you're saying the system did?

4 MR. MASON: Objection. Form.

5 THE WITNESS: No. That's not what I'm
6 saying. What I'm saying is there is a data
7 acquisition coming out of memory, there's a
8 data manipulation that needs to happen.

9 BY MR. CARROZZA:

10 Q What manipulation? Sorry. Let me stop you
11 there. What manipulation?

12 A So when you pull data out of memory, it may
13 be a hexadecimal of a data stamp or timestamp. It
14 may be an integer representing the glucose value.
15 So you need to take that memory content and
16 manipulate it into what it needs to be rendered as.

17 'Cause keep in mind, the way that the
18 Paradigm trend application worked according to the
19 documents is user could traverse the trend line and
20 the value that you see on the right side of the
21 graph would be updated with the date of the
22 observation, the value of the observation, the
23 report from the sensor, and other data such as is it
24 a single arrow trending? What direction? Double
25 arrow trend in what direction? Or is it an error

1 message?

2 So the data is more complex than pull the
3 bytes and throw it to the display. So there's a
4 computational effort to render the data and then
5 send it to the display buffer so it can be enjoyed
6 by the wearer, the human.

7 Q So it sounds like -- and I'm not trying to
8 put words in your mouth. I'm trying to understand.
9 The system would store data about the glucose data;
10 is that what you're saying?

11 Each glucose data point would have
12 information stored about it?

13 MR. MASON: Objection. Form.

14 THE WITNESS: According to what 1011
15 teaches us, that when the user traverses the
16 trend line, there's other information about the
17 actual glucose value including the time that it
18 was acquired and how it fits relative to the
19 other 20 minutes of glucose around it that
20 would have to be calculated or generated.

21 It's unclear whether that was done at
22 acquisition time or that was done at rendering
23 time. It could be either.

24 BY MR. CARROZZA:

25 Q Could each glucose data point also have a

1 flag associated with it that indicates information
2 about that particular data point?

3 MR. MASON: Objection. Form.

4 BY MR. CARROZZA:

5 Q Like the serial number of the transmitter
6 that it was received from or something?

7 MR. MASON: Same objection.

8 THE WITNESS: So it is possible, given
9 that whatever is involved on memory is
10 consumable by other clients besides the display
11 asset which that appears to be in or could be
12 useful.

13 BY MR. CARROZZA:

14 Q So if each glucose data point had a flag,
15 for example, that said realtime or backfill, that
16 would just be sort of metadata about each glucose
17 data point, right?

18 MR. MASON: Objection. Form.

19 THE WITNESS: So your question is if the
20 implementation was to flag the data as received
21 after the data creation time.

22 BY MR. CARROZZA:

23 Q Yeah.

24 A It's a hypothetical.

25 Q Sure. That would be certainly a

1 possibility. Again, we don't have the technical
2 details about it so I'm asking are these realistic
3 possibilities or a technical reason why this is not
4 possible.

5 MR. MASON: Objection. Form.

6 THE WITNESS: In my opinion, reading the
7 operational experience that's provided in 1011,
8 there's no indication that the data was tagged
9 as uploaded -- I'm sorry, repopulated or
10 received during normal operation.

11 It doesn't appear to be a flag that's
12 available in any of the Paradigm applications
13 that are described in the document. So I have
14 no reason to believe they've done that.

15 BY MR. CARROZZA:

16 Q Okay. But the system did store other types
17 of data like you mentioned, error conditions, about
18 each data point, the time stamps, right? That was
19 stored for each data point?

20 A It appears that that data was available for
21 the user to review, correct.

22 Q And so the flag that I'm referring to of
23 whether the data was acquired in realtime or if it
24 was later acquired as backfill, that's certainly a
25 flag that could have been internal in the system for

1 which it's not disclosed in Exhibit 1011.

2 You would just agree that that's at least a
3 technical possibility?

4 MR. MASON: Objection. Form.

5 THE WITNESS: My statement stands.

6 There's no indication that that was happening
7 within the Paradigm REAL-Time system.

8 BY MR. CARROZZA:

9 Q Understood. But there's at least -- it's
10 not technically precluded from being the case,
11 right?

12 MR. MASON: Objection. Form.

13 BY MR. CARROZZA:

14 Q There's no technical reason -- let me
15 rephrase that question per Andy's objection.

16 There's no technical reason why each
17 glucose data point stored in the insulin pump didn't
18 also have a flag associated that indicated whether
19 it was received in realtime versus later as backfill
20 data, right?

21 MR. MASON: Same objection.

22 THE WITNESS: So in order to implement
23 that hypothetical feature, there would have had
24 to have been a reason. Because software
25 development costs money, documentation costs

1 money. And anytime you write a line of code
2 you have a risk of introducing a defect.

3 There's no indication of why that
4 would be beneficial in the documentation that
5 describes the Paradigm system in the 2000 to
6 2007 range.

7 BY MR. CARROZZA:

8 Q Let's pretend that Medtronic did have a
9 really good reason that we don't know because we're
10 not involved in the development. Let's just assume
11 there's a great reason for it.

12 Technically speaking, each glucose data
13 point stored in the non-volatile memory in the pump
14 could have a flag associated with it that indicated
15 it was received in realtime versus whether it was
16 backfill data, right?

17 MR. MASON: Objection. Form.

18 THE WITNESS: Without any reason, I can't
19 see why that would be implemented.

20 BY MR. CARROZZA:

21 Q Okay. But there's no technical reason why
22 it couldn't be?

23 A There are technical reasons. For example,
24 a limited memory in volatile memory where I need to
25 get down to which bits I'm going to save.

1 Q Which bits of what?

2 A Which bits of data.

3 Q I'm sorry. I'm not following your answer.

4 A So there are --

5 MR. MASON: Objection. Form.

6 THE WITNESS: There's a limited amount of
7 on-board memory, long-term memory. I've got to
8 store 90 days' worth of data. I may not have
9 the memory available to store that bit.

10 BY MR. CARROZZA:

11 Q What bit? I'm sorry.

12 A The bit saying that this was repopulated
13 versus this was received on time.

14 Q So you're saying that the limitation would
15 be memory to store a bit for each glucose value? I
16 want to make sure I'm understanding your answers.

17 A So your question was, is there a reason why
18 you would not do that. And my answer is yes,
19 there's at least one reason why I would not do that
20 and that is I don't have the room for it on memory.

21 I have other things that have to be stored
22 that need to be part of the redisplay feature or the
23 downstream consumer for off-load that I don't have
24 room for that.

25 Q And in your professional opinion, how much

1 memory would be occupied by a flag --

2 MR. MASON: Objection.

3 BY MR. CARROZZA:

4 Q -- that is indicating one of two values.

5 Could that be binary?

6 MR. MASON: Objection. Form.

7 THE WITNESS: It could be a binary, but it
8 would have to be linked to the observation.

9 Which means that there's another variable that
10 connects it to that element.

11 BY MR. CARROZZA:

12 Q But you're saying that there is already a
13 lot of other data about each. There's a timestamp
14 associated with each data point, right?

15 MR. MASON: Objection. Form. Scope.

16 THE WITNESS: So I'm going to refer back
17 to my comment. Your question was, is there a
18 reason why you wouldn't do that? And I'm
19 saying yes, I don't have memory.

20 BY MR. CARROZZA:

21 Q I'm sorry. So besides this idea of not
22 having enough memory to store another bit of data,
23 besides that, is there a technical reason why each
24 glucose data point in the insulin pump wouldn't have
25 a flag associated with it that tells the system this

1 data was received in realtime versus this data was
2 received later and now it's backfill data?

3 MR. MASON: Objection. Form. Scope.

4 THE WITNESS: So in addition to not
5 sufficient memory, I may be computationally
6 constrained where I can't generate that bit at
7 the time the glucose value comes in.

8 BY MR. CARROZZA:

9 Q Why wouldn't you be able to generate that
10 bit?

11 MR. MASON: Objection. Form.

12 THE WITNESS: As I said, I may be
13 computationally constrained where I don't have
14 the CPU cycles to maintain the safe operation
15 of the pump, to maintain the connectivity to
16 the sensors or sensor, and I may not have the
17 computational cycles to do the calculation of
18 did this come in on time or not.

19 There's a second reason why I may not
20 provide that feature in a system that there's
21 no evidence that it actually did that.

22 BY MR. CARROZZA:

23 Q So the system stored time stamps, it stored
24 error conditions, and it stored other data about
25 each glucose data point. But in your opinion adding

1 a flag for each data point would not be technically
2 possible?

3 MR. MASON: Objection. Form.

4 THE WITNESS: That's not my testimony.

5 That's not my testimony. My testimony is that
6 there are reasons why I would not necessarily
7 want to implement that feature.

8 BY MR. CARROZZA:

9 Q And what did you mean, by the way, about
10 computationally constrained? I didn't follow that.

11 A So micro controllers at the time may have
12 been slow clock speeds and 8-bit. As a result of
13 the trade-off between power consumption and making
14 sure that the user doesn't have to replace batteries
15 every day, compared to how much calculations or how
16 much data manipulation the microprocessor needs to
17 do.

18 So at this time it was a very delicate
19 balance to ensure that the features that you
20 delivered on these platforms had sufficient
21 computational power traded off for their power
22 consumption. So if I keep the CPU running all the
23 time, I'm going to drain the battery quickly. So
24 that's the trade-off.

25 So I may have a sweet spot where the

1 microprocessor can only do the computations I need
2 to do to support the key features at this version of
3 the release.

4 Q So when the data's being received from the
5 transmitter, how does it get into non-volatile
6 memory in the first place? What would be a typical
7 implementation of that?

8 MR. MASON: Objection to form. Scope.

9 THE WITNESS: So the Paradigm documents
10 don't describe that. But in my personal
11 professional experience, receiving data would
12 result in the radio being able to cache the
13 data until the microprocessor could read the
14 data.

15 There may be algorithms running to
16 determine if the data is useful. And if so,
17 would take the action to actually commit it to
18 long-term storage.

19 BY MR. CARROZZA:

20 Q What did you mean by if the data's useful?

21 A If it came in in the appropriate format, if
22 it is within range of the expected output from the
23 receiver.

24 Q And so how would a timestamp -- I'm sorry.

25 A As two examples. There may be other

1 reasons why I may receive a data point, but say I
2 can't use it.

3 Q How would a timestamp, for example, be
4 associated with the glucose data points?

5 MR. MASON: Objection. Form. Scope.

6 THE WITNESS: What is the context of your
7 question?

8 BY MR. CARROZZA:

9 Q Well, you said that the pump would store
10 timestamps related for each glucose data point,
11 right?

12 MR. MASON: Objection. Form.

13 BY MR. CARROZZA:

14 Q How would the two get associated?

15 MR. MASON: Objection. Form.

16 THE WITNESS: Well, there are multiple
17 ways to do that. The most likely, given that
18 the insulin pump had the local date/time, is it
19 was the source of time for the incoming
20 measurements.

21 BY MR. CARROZZA:

22 Q So as the measurement's coming in, the
23 system could just attribute a timestamp to the
24 glucose data point?

25 MR. MASON: Objection. Form.

1 BY MR. CARROZZA:

2 Q When the transmitter sends data to the pump
3 and the pump is receiving that data, it's your
4 testimony, or at least your opinion, that the local
5 time in the pump could just be associated with the
6 glucose data that just came in, right?

7 MR. MASON: Objection. Form.

8 THE WITNESS: No. I think you're
9 misinterpreting what I'm describing. The only
10 practical way to tell the user what time of day
11 this measurement came in was to use the insulin
12 pump's knowledge of date/time, which is user
13 set, to overlay the data.

14 However, the glucose data would
15 likely be coming in with an offset from either
16 the last measurement it sent or a number of
17 clock cycles that it had before it sent the
18 measurement. So there may be other information
19 besides the glucose value as a possible design
20 choice.

21 Alternatively, as part of the radio
22 communication, the transmitter may receive the
23 date/time as indicated from the insulin pump.
24 So that insulin measurement from the sensor to
25 the transmitter may actually have realtime

1 clock data in it.

2 So there are many ways that that
3 could be delivered. And it's not exclusively
4 related to what the transmitter was -- what the
5 transmitter was aware of at the time that the
6 sensor reported the glucose value.

7 BY MR. CARROZZA:

8 Q When there's backfill data, how would the
9 system know that a 40-minute data packet coming from
10 the transmitter has data spanning 40 minutes? How
11 would the insulin pump know the time associated with
12 each one of those?

13 MR. MASON: Objection. Form. Scope.

14 THE WITNESS: A POSITA has a variety of
15 ways to supplement that. I described that upon
16 association between the insulin pump and the
17 transmitter from the sensor, a synchronization
18 of time/date could be generated such that the
19 transmitter knows this represents the 288th
20 sample for today.

21 BY MR. CARROZZA:

22 Q So each -- I'm sorry.

23 A But that's not the only way it could be
24 done. Again, the key element is that when it is
25 stored in non-volatile memory, the user has the

1 ability to interrogate those data points so they
2 would have known when that particular glucose value
3 was acquired by the sensor and reported that through
4 the transmitter to the insulin pump.

5 So however that implemented, the insulin
6 pump has knowledge of when the glucose value was
7 created by the sensor.

8 Q So I want to go back to a couple of things
9 you talked about a few minutes ago. You mentioned
10 computational constraints and limited memory. And
11 what I'd like to understand about those concepts,
12 would those considerations apply to other features
13 besides just this hypothetical data flag that I
14 mentioned?

15 MR. MASON: Objection. Form. Scope.

16 THE WITNESS: Those constraints are
17 applicable for the system design.

18 BY MR. CARROZZA:

19 Q So there will be tradeoffs a system
20 designer would have to make in your opinion that are
21 computationally constrained or constrained by memory
22 as far as which data to associate with glucose data
23 or which data to save, right?

24 Is that what you're saying?

25 MR. MASON: Objection. Form. Scope.

1 THE WITNESS: So when reviewing the
2 Paradigm REAL-Time system, it's clear that the
3 key value clinically, and for the patient with
4 diabetes, is the review of their data. The
5 knowledge of that information is critical and
6 has been shown based on the review of the
7 clinical and technical articles to be of utmost
8 importance.

9 And that would have been a feature
10 that, in my opinion, would have been
11 prioritized over other features that may not
12 have value to the end user if you have to make
13 that trade-off between power, processor, cost,
14 delivery, complexity of software, documentation
15 of features, regulatory impact, et cetera, et
16 cetera, et cetera.

17 BY MR. CARROZZA:

18 Q Okay. So the concepts of limited CPU or
19 limited memory is just it applies to the entire
20 system, right? It's not something that you were
21 saying only because of the hypothetical flag that I
22 mentioned, is what I'm trying to understand.

23 MR. MASON: Objection. Form. Scope.

24 THE WITNESS: Again, as a POSITA,
25 understanding what the impact of a feature

1 request is has to be balanced across the
2 capabilities of the hardware that you're
3 running the application on. And that is, as
4 you indicated, that is a balance.

5 BY MR. CARROZZA:

6 Q You mentioned earlier about having a
7 specific place reserved in memory for each glucose
8 data point, right?

9 You said there could be a dedicated 288
10 places in memory, for example. Did I understand
11 that right?

12 MR. MASON: Objection. Form. Scope.

13 BY MR. CARROZZA:

14 Q Let me rephrase. For the 24-hour trend
15 graph there would be 288 data points spaced out
16 every five minutes, right?

17 MR. MASON: Objection. Form.

18 THE WITNESS: What I was responding to was
19 your hypothetical of is it possible to manage a
20 FIFO buffer in a particular way. I proposed an
21 alternative approach that would be viable as
22 well. So there are multiple ways to manage
23 memory and data.

24 BY MR. CARROZZA:

25 Q Right. So the FIFO buffer, the

1 non-volatile memory could have a specific place in
2 memory that's dedicated to for a data point, right?
3 Like, it corresponds to a time of day. I'm trying
4 to understand your testimony, what you were trying
5 to say.

6 MR. MASON: Objection. Form. Scope.

7 THE WITNESS: Again, I was responding to a
8 list of hypotheticals of how to interact with
9 that non-volatile memory. And putting specific
10 data points in known memory locations is a
11 method, but may not be the optimum method.

12 MR. CARROZZA: I think this is a good time
13 for a break. We've been going for just about
14 an hour. It's been a little less than an hour.

15 MR. MASON: Off the record.

16 (Off record from 10:56 a.m. to 11:14 a.m.)

17 BY MR. CARROZZA:

18 Q Are you ready to begin, Mr. Gross?

19 A I am.

20 Q During the break did you speak with any of
21 your attorneys about the substance of your testimony
22 so far?

23 A No.

24 Q The Paradigm REAL-Time system, that was
25 approved by the FDA in 2006, right?

1 MR. MASON: Objection. Form. Scope.

2 THE WITNESS: The Paradigm REAL-Time
3 system was approved under FDA back in the late
4 '90s.

5 BY MR. CARROZZA:

6 Q What does Exhibit 1041 tell us?

7 A 1041 is referring to a specific
8 supplemental that was approved in 2006, but the PMA
9 had been granted before then.

10 Q But the realtime system included a CGM
11 component, right?

12 MR. MASON: Objection. Form. Scope.

13 THE WITNESS: The realtime system included
14 technology from Guardian RT, which became part
15 of the insulin pump under one of the
16 supplements.

17 BY MR. CARROZZA:

18 Q Right. So the question I'm asking is not
19 when the insulin pump itself was first approved.
20 When was the insulin pump with the CGM components
21 approved? And I believe in your declaration you say
22 2006.

23 MR. MASON: Objection. Form.

24 THE WITNESS: I apologize for the
25 confusion because the Paradigm system is a

1 family. So within it are the sensors and the
2 transmitter and the insulin pumps and whatnot.
3 Give me a minute to review, unless you know
4 where that statement came into my report.

5 BY MR. CARROZZA:

6 Q So what does paragraph 52 of your reply
7 declaration tell us?

8 A So paragraph 52 of my reply declaration.
9 So we're talking about Exhibit 1052?

10 Q Yes.

11 A I reviewed the FDA's original approval for
12 Paradigm REAL-time as a modification to the
13 Medtronic Guardian RT Continuous Glucose Monitoring
14 System ("Guardian RT") on April 7, 2006, by
15 supplemental premarket approval, PMA, No. S013 to
16 the original Medtronic CGMS PMA No. P980022.

17 Q And I'm sorry to cut you off. When I said
18 what does it tell us, I didn't mean to actually read
19 it. You mentioned April 7, 2006, in that paragraph.
20 I'm questioning what's that date? What's the
21 significance of that date?

22 MR. MASON: Objection. Form.

23 THE WITNESS: So if you look at
24 Exhibit 1041, and Exhibit 1041 is the FDA
25 premarket approval for supplement -- make sure

1 this is the right one -- yeah. This is
2 supplement 013. That's the approval date for
3 the PMA to have the insulin pump communicate to
4 the -- what was then the Guardian realtime
5 sensor.

6 And you can see the package was
7 received by FDA in October 2005. So the
8 technology and the test results needed to be
9 available as part of that supplement in 2005.
10 And the FDA decision was granted in 2006 on
11 April 7th.

12 BY MR. CARROZZA:

13 Q Okay. I think we're on the same page now.
14 That answers it.

15 A Okay.

16 Q And now Exhibit 1011, there are webpages
17 from October 2007, right? I should say the webpages
18 in Exhibit 1011 are dated October 2007.

19 A So Exhibit 1011 from my original report,
20 the date code for the web from web archive was 2007,
21 October 23rd.

22 Q All right. And so between October 23rd,
23 2007, and April 29, 2009, are you aware of any
24 changes that were made to the Paradigm REAL-Time
25 system that would be relevant to this proceeding?

1 MR. MASON: Objection. Form. Scope.

2 THE WITNESS: So according to the PMA
3 history for the Paradigm system, there were
4 close to a hundred supplements over the years.
5 So yes, there are many changes to the system.

6 BY MR. CARROZZA:

7 Q So my question was, can you describe any
8 changes to the Paradigm REAL-Time system between
9 October of 2007, April of 2009 that are relevant to
10 this proceeding?

11 MR. MASON: Objection. Form. Scope.

12 THE WITNESS: So without the ability to
13 interrogate each of the supplements, I can
14 recall that there were changes in performance,
15 changes in components, changes in instructions
16 for use. There were a lot of changes that the
17 technology had evolved over the years.

18 BY MR. CARROZZA:

19 Q And can you point to any evidence in your
20 declaration that supports your recollection?

21 MR. MASON: Objection. Form. Scope.

22 THE WITNESS: So the scope of my report
23 doesn't talk about any improvements to the
24 Paradigm system since the ability for the
25 insulin pump to redisplay repopulated data as

1 described in my original report.

2 So while there may be supplemental
3 updates that Medtronic had done over the years,
4 the key issue with the Paradigm system was it
5 was clearly a predicate and it was clearly
6 knowledge that a POSITA would have had in order
7 to deliver this functionality.

8 And again, that predates the approval
9 date of the PMA by the submission date. So in
10 2005 the organization would have had to have
11 had the finished product in hand and all test
12 results in order to submit. So earlier than
13 2005, this functionality would have been
14 available.

15 BY MR. CARROZZA:

16 Q On that last point, just to make sure I
17 understand, by the time the FDA documents were
18 submitted in 2005, the Paradigm REAL-Time system
19 must have already been tested and approved, I guess
20 is what you're saying, right?

21 MR. MASON: Objection. Form. Scope.

22 BY MR. CARROZZA:

23 Q Let me rephrase because maybe I didn't
24 understand.

25 What were you saying by the 2005 date?

1 What were you saying? I misunderstood.

2 MR. MASON: Objection to form. Scope.

3 THE WITNESS: Again, referring back to
4 Exhibit 1041, the PMA for the original Paradigm
5 system predates the supplement. This is a key
6 supplement, supplement 013, that was submitted
7 in October 2005 which, according to the
8 approval order statement, approves the
9 modification to the MMT 515/715 external
10 insulin pump and to the Guardian RT sensor to
11 enable the pump to accept data directly from
12 the sensor and enable the sensor to communicate
13 directly to the pump. The device will be
14 manufactured, Medtronic MiniMed, Northridge,
15 California.

16 So this, in my report, is what I'm
17 referring to as when the Guardian RT
18 functionality, which is the realtime glucose
19 CGM capabilities, were fused to the pump and
20 approved by FDA.

21 BY MR. CARROZZA:

22 Q So the system that's described in the 2007
23 documents is the system that was submitted to the
24 FDA by -- or the description in the system submitted
25 to the FDA by 2005?

1 MR. MASON: Objection. Form. Scope.

2 THE WITNESS: So that particular
3 supplement, supplement 013, was submitted to
4 FDA in October 2005 under the PMA that
5 Medtronic had for the Paradigm REAL-Time
6 system.

7 BY MR. CARROZZA:

8 Q So in your opinion, the Paradigm pump had
9 this data repopulation feature as of 2005?

10 MR. MASON: Objection to form. Scope.

11 THE WITNESS: No. My testimony in my
12 report is in response to Dr. Wright's
13 criticisms that he raised with regards to when
14 Paradigm REAL-time was able to display glucose
15 to the end user, and that actually is based on
16 when Guardian RT was clear to display to the
17 user which predates that by two years, as
18 evident by Exhibit 1058 which is the
19 supplemental PMA that allowed Guardian RT to
20 increase its labeling, again referencing the
21 value of the displaying capabilities for
22 glucose values.

23 So the use of that PMA supplement is
24 really in response to when that device was
25 legally marketed and available in response to

1 Dr. Wright's declaration related to adjunctive
2 and non-adjunctive uses.

3 BY MR. CARROZZA:

4 Q So when did the Paradigm REAL-Time system
5 have the data repopulation feature that you refer to
6 in your declaration?

7 MR. MASON: Objection. Form. Scope.

8 THE WITNESS: So clearly it had the
9 feature as of 2007, as indicated by
10 Exhibit 1011.

11 BY MR. CARROZZA:

12 Q And did it have it by 2005?

13 MR. MASON: Objection. Form. Scope.

14 THE WITNESS: It clearly was present on
15 market in 2007 based on that reference of 1011.

16 BY MR. CARROZZA:

17 Q But as of 2005, actually as of 2006 it was
18 clear to have the CGM component from the Guardian,
19 right?

20 MR. MASON: Objection. Form. Scope.

21 THE WITNESS: So the PMA approved the use
22 of Guardian RT technologies to communicate CGM
23 data to the pump in 2006.

24 BY MR. CARROZZA:

25 Q And would that have also included the

1 ability to, as you say, backfill 40 minutes of data?

2 MR. MASON: Objection to form. Scope.

3 THE WITNESS: What I said was in 2007 the
4 Paradigm REAL-time documentation clearly
5 provides user information about that
6 repopulation capability.

7 BY MR. CARROZZA:

8 Q Right. I'm talking about all of the FDA
9 documents you rely on to establish other facts. And
10 my question is, as of 2006 did the system have that
11 feature?

12 MR. MASON: Objection. Form. Scope.

13 THE WITNESS: I don't believe that's what
14 I said. I believe what I said was as of 2007
15 the system had that capability.

16 BY MR. CARROZZA:

17 Q Which is why I'm asking as of 2006 did they
18 have that capability based on the documents in your
19 declaration?

20 MR. MASON: Objection. Form. Scope.

21 THE WITNESS: So based on my preliminary
22 declaration, that functionality was present by
23 2007, would have had to have been implemented
24 prior to that in order for it to have been part
25 of the supplement and part of the user

1 instructions. And based on the other artifacts
2 that I have reviewed, it is my opinion that a
3 POSITA would have normally assumed that
4 functionality based on Paradigm, Causey, Patel,
5 Shahmirian, Mastrototaro -- because they're all
6 teaching the same thing -- continuous glucose
7 monitoring is important for the person with
8 diabetes. If you've got data, show it.

9 BY MR. CARROZZA:

10 Q All right. Let's switch gears a little
11 bit. You have a reply declaration binder. It
12 should have Exhibit 2012.

13 A 2012 is in my materials. I'm not sure if
14 that is in my binder. Maybe I do. Stand by. So
15 Exhibit 2012 Patent No. 9,577,934 B2.

16 Q Yes. And this is your patent, right, in
17 which you're the named inventor?

18 A Correct. This is a patent that talks about
19 optimizing physiologic monitoring based on available
20 but variable signal quality.

21 Q Do you remember talking about this patent
22 at your last deposition?

23 A I remember, yeah, reviewing this very small
24 font.

25 Q Well, unfortunately, this has been

1 reproduced in even smaller font because now it's
2 attached as an exhibit. So unfortunately the
3 document has even smaller font. But nevertheless, I
4 just want to ask a few additional questions about
5 this.

6 There is an element that's shown in
7 figure 1 that is labeled 30 and it's called a gap
8 data buffer; do you see that element?

9 MR. MASON: Objection. Form. Scope.

10 THE WITNESS: I do see a box in figure 1
11 that is called data gap -- excuse me, gap data
12 buffer, yes.

13 BY MR. CARROZZA:

14 Q What's the functionality of that component
15 in this system?

16 MR. MASON: Objection. Form. Scope.

17 THE WITNESS: So in column 4, paragraph
18 starting at 33, there's description of an
19 embodiment with a transmitter controller number
20 24 holds data packets in the output buffer 28
21 until confirmation of receipt (e.g., ACK) is
22 received. However, when confirmations are not
23 received, (e.g., no acknowledgement or NACK) or
24 received too late, e.g., latency, for the data
25 type, the data is moved to the gap buffer --

1 the gap data buffer number 30.

2 BY MR. CARROZZA:

3 Q What data is being stored in that gap data
4 buffer?

5 MR. MASON: Objection. Form. Scope.

6 BY MR. CARROZZA:

7 Q And if you said -- I'm sorry. I didn't
8 understand. I apologize.

9 MR. MASON: Objection. Form. Scope.

10 THE WITNESS: So these are data packets.
11 These could be observations or sensor reports
12 from different devices within the network to
13 the intended receivers.

14 BY MR. CARROZZA:

15 Q And the data that's being stored in that
16 element 30 is data that is not being transmitted
17 over the network for some period of time, right?

18 Do I understand the purpose of the element
19 30 correctly?

20 MR. MASON: Objection. Form. Scope.

21 THE WITNESS: So the data gap buffer is
22 the place where the data is held on to until
23 there's adequate bandwidth or radio
24 connectivity or network connectivity to the
25 target receiver.

1 BY MR. CARROZZA:

2 Q Okay. Now in figure 2 there's also an
3 element 25 that has a box -- excuse me. This is
4 figure 1.

5 A Figure 1.

6 Q Element 25, the text says other physiologic
7 device and patient data; do you see that?

8 A Yes. I see box 25 on figure 1.

9 Q Now, element 25 includes devices that
10 provide the data to be output from the processor 16
11 to the hospital network, right?

12 MR. MASON: Objection. Form. Scope.

13 THE WITNESS: The abstract clearly says
14 that when transmitting patient data over
15 hospital network, data types are prioritized
16 into data type hierarchy that is employed to
17 rank data types in order to -- excuse me -- in
18 order of criticality for transmission during
19 periods of diminished signal quality.

20 BY MR. CARROZZA:

21 Q And so the data that's coming from these
22 devices encompassed by element 25, it's that data
23 that's being stored in the data gap buffer, right?

24 MR. MASON: Objection. Form. Scope.

25 MR. CARROZZA: What's the scope objection?

1 MR. MASON: He didn't opine on any of this
2 in his reply expert declaration.

3 MR. CARROZZA: Really?

4 MR. MASON: He wasn't discussing his
5 patent. This is patent 9,577,934, which is not
6 at issue in this proceeding. It's an exhibit,
7 but he did not opine or offer any opinions in
8 his reply declaration on this particular patent
9 and you're inquiring into that. So that's the
10 scope objection.

11 MR. CARROZZA: Okay. You should re-review
12 his reply declaration, then.

13 MR. MASON: You can point him to anything
14 if you'd like.

15 MR. CARROZZA: I'm asking questions about
16 the testimony of his reply declaration.

17 BY MR. CARROZZA:

18 Q I want to make sure that we're clear on
19 this. The devices encompassed by element 25, it's
20 the data from those devices that's being stored in
21 the gap data buffer 30, right?

22 A It could be those devices.

23 Q Okay. Could a CGM be one of the element 25
24 devices?

25 MR. MASON: Objection. Form. Scope.

1 THE WITNESS: There's nothing preventing a
2 CGM device from practicing this patent.
3 Insofar as if it's operating on a contentious
4 network with a hospital environment or
5 healthcare environment.

6 BY MR. CARROZZA:

7 Q When the data's being routed through the
8 hospital -- to the hospital network, where typically
9 would that be routed to?

10 MR. MASON: Objection. Form. Scope.

11 THE WITNESS: In the construct of the
12 reply declaration, there's no discussion of
13 where CGM data propagates and how it propagates
14 other than the sensor talking to a receiver as
15 we discussed with Paradigm and as we discussed
16 with other capabilities.

17 BY MR. CARROZZA:

18 Q Yeah, I'm sorry. I'm asking specifically
19 about your patent that is Exhibit 2012.

20 A So with regards to 2012, that doesn't come
21 into my reply declaration other than it was --

22 Q Mr. Gross, did you prepare your reply
23 declaration?

24 Because I can point you to a paragraph
25 where you specifically reference this patent as

1 forming your basis as POSITA in this proceeding.
2 And it sounds as though you're surprised that this
3 is in your reply declaration.

4 MR. MASON: Objection. Form. Scope.

5 THE WITNESS: I'm confused over your
6 questioning with regards to my reply
7 declaration to the declarations of Dr. Striegel
8 and Dr. Wright.

9 BY MR. CARROZZA:

10 Q Does this patent in Exhibit 2012, is it one
11 of the reasons why you're qualified as a POSITA in
12 this proceeding?

13 A It is part of my professional experiences.

14 Q And you say in your reply declaration that
15 this patent specifically is one of the reasons why
16 you're qualified to testify as a POSITA, right?

17 A Ask the question again, please.

18 Q Can you read that back?

19 MADAM COURT REPORTER: "QUESTION: And you
20 say in your reply declaration that this patent
21 specifically is one of the reasons why you're
22 qualified to testify as a POSITA, right?"

23 THE WITNESS: So it is an example of the
24 technical understanding of how data propagates
25 through contentious networks and how important

1 it is for the data to be received by the
2 ultimate client or ultimate consuming
3 application.

4 BY MR. CARROZZA:

5 Q Right. So when the element 25 is the CGM,
6 who is the ultimate client or ultimate consuming
7 application?

8 MR. MASON: Objection. Form. Scope.

9 THE WITNESS: In the context of the
10 declarations, it would be in Paradigm's case
11 the insulin pump; in the case of Patel it's the
12 CED.

13 BY MR. CARROZZA:

14 Q Mr. Gross, you don't use Exhibit 2012 to
15 form your opinions in your original declaration, do
16 you?

17 I should say, Exhibit 2012 is not prior art
18 that you're relying on in any of Gross 1, 2, or 3,
19 is it?

20 MR. MASON: Objection. Form. Scope.

21 THE WITNESS: So as we discussed at the
22 prior deposition, 2012 was work that I had
23 accomplished where the needs for downstream
24 consumer of data to get it.

25 ///

1 BY MR. CARROZZA:

2 Q Right.

3 A I'm sorry. So as we discussed at the last
4 deposition, it is part of my professional
5 experience.

6 Q Right. And so now I'm asking you
7 specifically about the system disclosed in this
8 patent, Exhibit 2012. When CGM data is being routed
9 to the hospital network, who is the ultimate client
10 or what is the ultimate consuming application?

11 MR. MASON: Objection. Form. Scope.

12 THE WITNESS: That's a hypothetical. It
13 depends. It depends on what the purpose of
14 sending the data over the hospital network is.

15 BY MR. CARROZZA:

16 Q And what's that purpose? That's what I'm
17 asking.

18 MR. MASON: Same objections.

19 THE WITNESS: So that question is answered
20 by the application by which is using this
21 technology. In the case of patient monitoring
22 devices, the consuming device was typically a
23 central server.

24 In the case where you may be using
25 hospital network for other receiving clients,

1 that's dependent on what that receiving client
2 needs.

3 BY MR. CARROZZA:

4 Q Where would the data go from the central
5 server?

6 MR. MASON: Objection. Form. Scope.

7 THE WITNESS: Which data are you referring
8 to?

9 BY MR. CARROZZA:

10 Q Well, you testified, in the case of patient
11 monitoring devices, the consuming device was
12 typically a central server. And so my question is,
13 once it gets to the central server, what is the data
14 used for?

15 Let me give an example. Is it presented to
16 a nurse's station? Is it routed to a doctor's
17 office?

18 I'm asking the question, when the data is
19 received at the central server, what is it used for?

20 MR. MASON: Objection. Form. Scope.

21 THE WITNESS: So in the system that the
22 patent was created, the patient monitoring
23 environment that in particular Phillips
24 Healthcare was involved with, the data went to
25 all of those.

1 Alarms needed to comply with IEC
2 standards and be announced to the caregiver
3 responsible for the patient in the case of a
4 lethal arrhythmia, for example. The data then
5 could be presented in graphical trends. Either
6 at the central station or at the receiving
7 device. The data can be propagated out through
8 other interfaces to populate other systems,
9 such as the electronic medical record.

10 BY MR. CARROZZA:

11 Q All right. Let's switch gears a little
12 bit. Do you know who Bruce Buckingham is?

13 A Bruce Buckingham. I believe he's an author
14 of one of the references I've cited. I can check.

15 Q He is. Exhibit, I think, 1039 and 1040.

16 A On the original reply -- or on the original
17 declaration?

18 Q Yes.

19 A 1040 Bruce Buckingham, clinical overview of
20 continuous glucose monitoring, Journal of Diabetes
21 Science and Technology? Or Bruce Buckingham,
22 realtime continuous glucose monitoring, current
23 opinion, endocrinology, diabetes and obesity.

24 Q Yeah, that Bruce Buckingham. Do you know
25 him personally?

1 A I don't believe I've met him, no.

2 Q Do you know anything about him sitting here
3 today?

4 A That I can share with you today?

5 Q I mean, without performing any additional
6 research.

7 A Based on the review of his work, I can tell
8 you he's from the Department of Pediatrics-Oncology
9 in Stanford. Stanford University. On both
10 reference to articles Exhibit 1040 and 1039. I can
11 also share that his research was sponsored by NIH
12 Children's Health.

13 Q But you don't know him personally, I guess
14 is the question. You've never met Mr. Buckingham,
15 have you?

16 A Dr. Buckingham? I don't believe I've ever
17 met him, no.

18 Q So your understanding or your appreciation
19 for his expertise is based on the literature that
20 you reviewed of his, right?

21 A So my citation to his references are
22 related to the critical utility of continuous
23 glucose monitoring and what a POSITA would have
24 experienced or would have gleaned out of the
25 readings as part of the useful information for

1 review.

2 So in the original report, I think -- I can
3 check -- references there were really on the
4 clinical importance of features that are provided by
5 CGMs.

6 Q Okay. That answers the question.

7 A I want to be completely factual here. I'm
8 going to review the original report to see how I
9 used his data.

10 Q No. My questions are whether you know him
11 personally. I'm not asking --

12 A I'm sorry. I thought you asked what use or
13 what value -- maybe I misunderstood your question.

14 Q Is your understanding of Bruce Buckingham
15 based on written materials you've reviewed, it's not
16 based on interacting with him personally, seeing him
17 present at conferences or anything like that?
18 That's what I'm asking.

19 MR. MASON: Objection to form.

20 BY MR. CARROZZA:

21 Q And sorry if that wasn't clear.

22 A I appreciate the clarification. I don't
23 have a personal relationship with Dr. Buckingham.

24 Q Thank you. Sorry. That was my question.
25 Let's turn to page 27 in your reply

1 declaration which is 1057.

2 A So page 27, paragraph 32.

3 Q Yes. And you have a table there that
4 starts on page 27 and it spans to page 31.

5 A Let me just get context. So this table
6 is -- the specific references cited in my original
7 declaration that were reported to be not available
8 to a POSITA based on my original declaration. So
9 Dr. Wright declared at deposition and transcript
10 that he disagrees with the experience of a POSITA in
11 my original declaration.

12 Q And why did you include paragraph 80 in
13 that table?

14 Dr. Wright didn't identify paragraph 80 of
15 your declaration, so why did you include
16 paragraph 80?

17 MR. MASON: Objection. Form.

18 THE WITNESS: So paragraph 80 of the
19 original declaration was, one purpose of
20 continuous glucose monitoring is to assist in
21 diabetes management, insulin dosing decisions,
22 and prevention treatment of hyper and
23 hypoglycemia by providing accurate glucose
24 concentrations and trend information in
25 realtime.

1 Paragraph 60 -- again, I want to get
2 context to your question. In order to apprise
3 the users that analyte data is missing without
4 presenting inaccurate data, POSITAs would have
5 found it obvious to display a gap to indicate
6 when analyte data is missing due to failed
7 communication, failed calibration, or another
8 condition.

9 BY MR. CARROZZA:

10 Q So Dr. Wright in his declaration did not
11 identify your paragraph 80 and I'm asking why you
12 included it if you were responding to his opinions.

13 MR. MASON: Objection to form.

14 THE WITNESS: Paragraph 80 also amplifies
15 the clinical value of why CGM data and trend
16 data was important. And the part of the
17 argument that Dr. -- or part of the opinion
18 that Dr. Wright declared was I haven't
19 disclosed where that clinical insight had come
20 from.

21 So this is a non-exhaustive mapping
22 of what was claimed in paragraph 60 and
23 paragraph 80 to what was reported as the
24 documents I reviewed with my original
25 declaration.

1 BY MR. CARROZZA:

2 Q Paragraphs 60 and 80 of your original
3 declaration relied on paragraphs 4 and 6 of
4 Exhibit 2012 which is Patel 2009.

5 A Uh-huh.

6 MR. MASON: Objection. Form.

7 BY MR. CARROZZA:

8 Q Your reply declaration on page 28 does not
9 cite the two paragraphs that you identified in your
10 original declaration and now it cites two completely
11 different paragraphs. Why?

12 MR. MASON: Objection. Form.

13 THE WITNESS: So let me make sure I
14 understand your question. Could you please
15 repeat it?

16 BY MR. CARROZZA:

17 Q Sure. Let's break it down. If you can
18 open your original declaration to paragraph 60, for
19 example.

20 A Yes.

21 Q And do you see where you cite paragraphs
22 4 and 6 of Exhibit 1012?

23 A Yeah. Also see Exhibit 1029, 1037, and
24 1040.

25 Q You cited paragraphs 4 and 6 of

1 Exhibit 1012 in your original declaration, but in
2 your reply declaration you've now changed the
3 paragraphs that you're citing.

4 MR. MASON: Objection. Form.

5 BY MR. CARROZZA:

6 Q And I'm asking why.

7 A So specifically paragraph 4 of Exhibit 1012
8 talks about a variety of implantable electrochemical
9 sensors that have been developed for detecting
10 and/or quantifying specific agents or compositions
11 in a patient's blood or interstitial fluid. For
12 example, glucose sensors being developed for
13 obtaining an injection of blood glucose level in a
14 wirelessly -- excuse me -- as an indication of blood
15 glucose levels in a diabetic patient.

16 These glucose sensors connected wired or
17 wirelessly to a blood glucose monitor can provide
18 continuous glucose readings over a period of time
19 such as three to five days. Such readings are
20 useful in monitoring and/or adjusting administration
21 of insulin to a patient.

22 Okay. The same references in
23 paragraph 60 of my original report is talking about
24 how specific -- yeah. Make sure I have the right
25 reference.

1 So again, paragraph 4 of Exhibit 1012 talks
2 about over the years body characteristics have been
3 determined by obtaining a sample of bodily fluid.
4 For example, diabetics also often test for blood
5 glucose levels. Traditionally, blood glucose
6 determinations have utilized a finger stick --
7 finger prick method using a lancet to withdraw a
8 small blood sample.

9 These systems are designed to provide data
10 at discrete points, but do not provide continuous
11 data to show variations in characteristics between
12 test times.

13 So both paragraphs I think --

14 Q I'm sorry. Can you continue reading,
15 please?

16 A These discrete measurements are capable of
17 informing a patient the state of his blood glucose
18 value at a point in time, thus the patient has
19 enough information to administer correction amounts
20 of insulin to reduce his blood glucose reading at
21 one point in time.

22 However, these discrete readings are not
23 able to provide enough information for any type of
24 automatic or semi-automatic system of administering
25 insulin based on blood glucose values.

1 Moreover, discrete blood glucose readings
2 only give a limited understanding of one's blood
3 glucose value over time and thus may not give a
4 patient a complete picture of how his/her blood
5 glucose values vary between discrete measurements.

6 Q So let's stop there. So you had originally
7 cited that paragraph in your declaration to support
8 your opinions in paragraph 60 and 80.

9 MR. MASON: Objection. Form.

10 BY MR. CARROZZA:

11 Q And you are no longer identifying that
12 paragraph as support. And I'm asking, why not?

13 MR. MASON: Objection. Form.

14 THE WITNESS: So paragraph 60 was talking
15 about the value of repopulating data in my
16 original report. And in this review, there was
17 a question of whether the references and report
18 was responsive to clinical utility.

19 So both paragraphs are relevant to
20 clinical utility. However, paragraph 5 is
21 really demonstrating the value of the CGM
22 system that paragraph 4 limits to the
23 missingness of the data that is available in
24 discrete values.

25 ///

1 BY MR. CARROZZA:

2 Q Your original declaration, though,
3 Exhibit 1008, did not identify paragraphs 5 and 40
4 from Exhibit 1012 as supporting your opinions in
5 paragraph 60 or 80, right?

6 MR. MASON: Objection. Form.

7 THE WITNESS: My declaration, 1008, from
8 beginning to end demonstrates the importance of
9 CGM data to the user. And my response
10 declaration specifically addresses where those
11 opinions have been called into question. So in
12 my response declaration I have reemphasized
13 where the clinical utility and the clinical
14 value are most relevant in the references I
15 have reviewed.

16 BY MR. CARROZZA:

17 Q Okay. Let's turn to page 31 of your reply
18 declaration.

19 A Page 31. Paragraph?

20 Q Paragraph 33. There's a table that spans
21 from page 31 to page 32 and it involves disclosure
22 from Exhibit 1063. Do you see that?

23 A Right. I'm just trying to get context to
24 the report.

25 Q Well, Exhibit 1063 was not a document you

1 relied on in rendering your opinions in your
2 original declaration. And so I'm asking, why are
3 you adding new references now?

4 MR. MASON: Objection to form.

5 THE WITNESS: I think the answer to that
6 is in reading paragraph 33. So in addition to
7 references cited in my original declaration, my
8 opinions in paragraph 60 and 80 in my original
9 declaration are supported by the original 2008
10 article authored by Harold Wolpert in the
11 paragraph below.

12 In addition, Dr. Ahmann agrees that
13 Dr. Wolpert's 2008 article, Exhibit 1063,
14 supports my conclusions, Exhibit 1055,
15 paragraph 27. Dr. Wolpert's opinions are
16 especially relevant because Dr. Wright
17 acknowledged that Dr. Wolpert is, quote,
18 knowledgeable about the use of CGM data for
19 diabetes management, referencing Exhibit 1053.

20 BY MR. CARROZZA:

21 Q I understand that you're reading from your
22 declaration --

23 A Well, I'm sorry. Ask your question.

24 Q The question is, why are you including new
25 references in a reply declaration to support

1 opinions that you rendered a year and a half
2 earlier?

3 MR. MASON: Objection. Form.

4 THE WITNESS: I think what I stated is
5 clear. That it's because Dr. Ahmann has also
6 pointed out that these references and these
7 further support evidence of what I said in my
8 original declaration.

9 And, in fact, Dr. Wright has
10 acknowledged that Dr. Wolpert's opinions are
11 relevant for the fact that you really want to
12 show as much accurate glucose to a person with
13 diabetes from a CGM in 2009. That was actually
14 verbatim out of his deposition that he clearly
15 indicated that that was important.

16 I'm sorry. That's why Wolpert comes
17 into this deposition. Dr. Wright agreed with
18 his elements. Dr. Ahmann confirms they do
19 reflect back to my original declaration.

20 And I think, as I've tabled it here,
21 there should be no question that the original
22 declaration really talks about the clinical
23 value as well as the technical obviousness of
24 what was being proposed prior to 2009.

25 ///

1 BY MR. CARROZZA:

2 Q Did you find this article that's cited as
3 Exhibit 1063 from Dr. Wolpert?

4 MR. MASON: Objection. Form.

5 THE WITNESS: I don't recall. I don't
6 recall.

7 BY MR. CARROZZA:

8 Q Where did it come from?

9 A 1063 came in in Dr. Ahmann's declaration.

10 Q And so you didn't know about the article
11 from Dr. Wolpert in Exhibit 1063 when you rendered
12 your original opinions, right?

13 MR. MASON: Objection. Form.

14 THE WITNESS: Dr. Wolpert's material was
15 not considered as part of my original
16 declaration. However, there were other
17 clinical insights gleaned from the references
18 that I did include in my original deposition.
19 And Dr. Ahmann's review of that, in addition to
20 Wolpert's review, confirmed that the
21 conclusions in my initial report are clinically
22 sound.

23 BY MR. CARROZZA:

24 Q You said Dr. Wolpert's review. Did
25 Dr. Wolpert review your declaration or did you

1 misspeak?

2 MR. MASON: Objection. Form.

3 THE WITNESS: The intention was
4 Dr. Ahmann's review of Dr. Wolpert's review or
5 Dr. Wolpert's work, specifically Exhibit 1063.
6 As far as I know, Dr. Wolpert has not reviewed
7 my declaration.

8 BY MR. CARROZZA:

9 Q That's what I wanted to clear up.

10 A Thank you.

11 MR. CARROZZA: All right. You said lunch
12 is here?

13 MR. MASON: It is here, yes.

14 MR. CARROZZA: Why don't we break now for
15 lunch.

16 MR. MASON: Off the record.

17 MR. CARROZZA: Off the record.

18 (Off record from 12:07 p.m. to 12:55 p.m.)

19 BY MR. CARROZZA:

20 Q Are you ready to resume the deposition,
21 Mr. Gross?

22 A I am.

23 Q And did you speak with your attorneys about
24 the substance of your testimony so far during the
25 break?

1 A No. Not during the break, no.

2 Q We were looking at your reply declaration,
3 Exhibit 1057, before the break. And I want to
4 continue on with -- let me just get oriented.
5 Sorry. Actually. Let's turn to the table of
6 contents. Page 2 of Exhibit 1057.

7 I just want to make sure in your reply
8 declaration there is no section of the declaration
9 that addresses any of the dependent claims, right?
10 There's no section for the dependent claims in your
11 reply declaration?

12 MR. MASON: Objection. Form.

13 THE WITNESS: So my reply declaration is
14 specifically in response to material of
15 Dr. Striegel and Dr. Wright and their opinions
16 that they represented.

17 BY MR. CARROZZA:

18 Q Now, Dr. Wright had opinions on some of the
19 dependent claims, but you don't address those
20 opinions in your reply declaration, right?

21 MR. MASON: Objection. Form.

22 THE WITNESS: So my opinions of the claims
23 in the '056 patent are unchanged from my
24 original declaration. My reply declaration
25 questions whether some of Dr. Wright's opinions

1 are clinical in nature. And in fact, there is
2 a list or partial list of some of his opinions
3 that do not appear to be clinical in nature.

4 I'll call your attention to
5 paragraph 37 in particular. Doctor writes,
6 Critiques related to the basic skills and
7 knowledge of a POSITA address concepts to me
8 that really are more to system design and not
9 clinical in nature. Examples of clinical
10 concepts known at the time, including
11 programming glucose monitoring systems, POSITA
12 skill as programming microprocessor, POSITA's
13 understanding that failure to calculate analyte
14 concentrations would cause missing analyte data
15 and lead to the inability to display this data,
16 and POSITA's recognition that failed
17 communication would cause missing data. And
18 whether a POSITA would have found it obvious to
19 display a gap to indicate when analyte data is
20 missing due to failed communication, failed
21 calibration, and other conditions.

22 BY MR. CARROZZA:

23 Q Okay. Thank you. Now, you have some
24 experience treating patients with diabetes when you
25 were serving or practicing as a paramedic, right?

1 A Yes. My experience with patients with
2 diabetes actually spans before my licensure and
3 certification.

4 For example, in the early '90s when I was
5 working at Viva Scan I was working under the auspice
6 of an endocrinologist working with patients with
7 diabetes in the goal of obtaining other glucose
8 measurement technologies, specifically those of
9 optic nature, electrochemical nature.

10 And in that environment we had people with
11 diabetes routinely in for testing, being
12 preprandial, before a meal, they would have
13 measurements through a spike in their glucose
14 resulting from eating breakfast. And then
15 ultimately follow their glucose values, making
16 optical measurements, blood glucose finger stick
17 measurements, and then whole blood measurements run
18 on an YSI analyzer which is responsible for QA,
19 quality control, sensor integrity. Those are very
20 similar technologies to the CGM data.

21 But as a paramedic I was responsible for --
22 under the standing orders that were issued by the
23 medical authorities, I was responsible for
24 administering medications as well as care to
25 patients with diabetes.

1 Q As a paramedic, what sort of symptoms are
2 you treating with diabetes?

3 A So typically, if a person with diabetes was
4 in a shock condition as a result of too much insulin
5 or in a coma condition as a result of too much
6 glucose or too high of a glucose level, the call may
7 come in as an unconscious person.

8 Typically these are life-threatening
9 conditions where there's altered consciousness
10 and/or the subject is not what -- patient is not
11 able to identify or treat themselves and advanced
12 life support was called to help them get safely
13 transported to the hospital where they would be
14 continued with the therapy to get them out of the
15 crisis.

16 Q So as the paramedic, are you actually
17 treating the patient or are you just transporting
18 them to the hospital to be treated?

19 A So administration of medications I think
20 would be considered treatment under the protocols
21 established by New York at the time I was
22 practicing.

23 Q So you were administering medications to
24 the patient --

25 A Correct.

1 Q -- and that's considered treatment. Okay.

2 Let's turn to page 51 of your reply
3 declaration, Exhibit 1057. You have an image there
4 in about the middle of the page; do you see that?

5 A With references to Exhibit 1011, page 30.

6 Q Correct.

7 A Okay. I see that.

8 Q That's a picture of the Paradigm insulin
9 pump from Exhibit 1011, right?

10 A It appears to be correct. Let me confirm
11 on the title page of Exhibit 1011 at page 30, the
12 Paradigm REAL-time sensor features user guide has a
13 picture of what could be the 522 or more likely the
14 722 insulin pump.

15 Q Why did you crop the image with a circle
16 that's appearing to be an oval that's offset? It
17 just looks like a weird cropping. I'm just
18 wondering if you're trying to accomplish something
19 with that.

20 MR. MASON: Objection. Form.

21 THE WITNESS: The original image was at an
22 unusual angle, in the document it's off angled.
23 So the oval was a reasonable frame to bring
24 that into view.

25 MR. CARROZZA: So Andy, I have no more

1 questions, but I do have a few housekeeping
2 things to talk about before we close the
3 transcript. I don't know if you're going to
4 redirect, but I have no more questions at this
5 time.

6 MR. MASON: I have no redirect. We will
7 read and sign.

8 MR. CARROZZA: So just a housekeeping item
9 before we close. Earlier Mr. Gross testified
10 that he had reviewed a draft of Dr. Ahmann's
11 declaration that's dated August 30, 2024. That
12 draft hasn't been provided to us because
13 Dr. Ahmann's declaration is dated
14 September 4th, 2024.

15 And so we're going to request that
16 draft be provided since it formed the basis of
17 Mr. Gross' opinions and we'll keep the
18 deposition open until we've had a chance to
19 review that draft to see if anything further
20 needs to be questioned about it.

21 MR. MASON: There must be some
22 misunderstanding because the witness' testimony
23 is he saw no drafts other than the signed draft
24 that was produced in this proceeding.

25 MR. CARROZZA: His testimony is that he

1 reviewed the draft dated August 30, 2024.

2 MR. MASON: His testimony was clear today
3 that he has not seen any drafts. And I can
4 represent to you here on the record that he saw
5 no copy of any declaration from Dr. Ahmann
6 other than the declaration that was signed and
7 filed.

8 MR. HANSEN: I mean, that's not what it
9 says in his declaration, that's not what he
10 testified to about today. It says in his
11 declaration that he reviewed -- it says in his
12 list of materials considered that the
13 declaration that he reviewed was dated
14 August 30, 2024. That's not the declaration
15 that's been produced to us.

16 MR. MASON: And where does it say that?

17 MR. CARROZZA: If you look at page 6 of
18 Exhibit 1057.

19 MR. MASON: Are you just referring to the
20 list of exhibits?

21 MR. CARROZZA: That he identified as
22 materials considered, yes.

23 MR. MASON: I can ask some redirect of the
24 witness to clear this up, if you'd like. He
25 did not receive any drafts of the declaration

1 prior to the signed copy. So there's nothing
2 that he received. There might be a typo on the
3 list of exhibits here.

4 MR. CARROZZA: So this is problematic
5 because you shut down so many questions when I
6 tried to ask Mr. Gross about the declarations
7 and you wouldn't allow him to answer. But now
8 you're also refusing to provide a declaration
9 that he's identified in his declaration as a
10 material considered. We tried to probe --

11 MR. MASON: I did not shut down any -- if
12 you can identify --

13 MR. CARROZZA: You did shut down the
14 questions. Go back and look at the transcript.
15 You constantly told him to not answer the
16 questions.

17 MR. MASON: I instructed him not to answer
18 with respect to his own declaration, with
19 Mr. Gross' declarations, and the drafts of
20 those declarations that he exchanged with
21 counsel. Those were my instructions not to
22 answer. I had no instructions whatsoever with
23 respect to any declarations of Dr. Ahmann.

24 MR. HANSEN: Well, according to the
25 information that we have here, there is a

1 declaration of Dr. Ahmann dated August 30th
2 that hasn't been produced. Mr. Gross relied on
3 it in forming his opinions in his reply
4 declaration.

5 MR. MASON: That is a misrepresentation.
6 That is inaccurate, Leland.

7 MR. HANSEN: How is that inaccurate? It
8 says right here in his list of materials
9 considered, declaration of Andrew Ahmann, MD,
10 dated August 30, 2024. That's exactly what it
11 says.

12 I'm not misrepresenting anything.
13 That's not the version -- we did not get that
14 declaration. Whether it's a version of the one
15 we got or whether it's a completely different
16 one.

17 MR. MASON: And I'm telling you here today
18 that Mr. Gross never received a declaration
19 that was dated August 30th, 2024.

20 MR. HANSEN: Okay. Well, that's your
21 representation here today. Don't accuse me of
22 misrepresenting something. This is based on
23 information that you provided to us.

24 MR. MASON: When he was presented with
25 Exhibit 1055 he testified today -- and the

1 actual exhibit itself, he testified today that
2 that is the only version of the declaration
3 that he saw. He testified when he was
4 presented with the actual declaration itself.

5 MR. CARROZZA: I didn't present it to him.

6 MR. MASON: That's the only version he
7 saw.

8 MR. CARROZZA: I didn't --

9 MR. MASON: He was referencing that --

10 MR. CARROZZA: He may have looked at
11 something --

12 MR. MASON: He was referencing that as you
13 were questioning him about that.

14 MR. CARROZZA: That's his prerogative, but
15 I didn't bring that exhibit into this
16 deposition.

17 MR. HANSEN: Is there an Ahmann
18 declaration, in draft or final form, dated
19 August 30, 2024?

20 MR. MASON: To my knowledge, there is not
21 a draft declaration that is dated August 30,
22 2024.

23 MR. HANSEN: Okay. I'm going to ask you
24 to verify that because I think it's highly
25 unlikely that there was not by August 30, 2024,

1 at least a draft --

2 MR. MASON: There may have been a draft,
3 but Mr. Gross never saw that. There was no
4 signed copy.

5 MR. HANSEN: That's not my question. My
6 question is, is there any Ahmann declaration in
7 draft or final form dated August 30, 2024?

8 I think, in all likelihood, there is.
9 And under the circumstances, I think we're
10 entitled to see it.

11 MR. MASON: You are not entitled to see
12 that.

13 MR. HANSEN: Yes, we are. He identified
14 it --

15 MR. MASON: Can you point me to where in
16 the record Mr. Gross indicated that he received
17 a draft of any Ahmann declaration that was
18 other than Exhibit 1055?

19 MR. HANSEN: He said that in his
20 declaration under oath. Mr. Gross said, I
21 reviewed and considered the following
22 materials. And among those following materials
23 is a declaration of Dr. Ahmann dated August 30,
24 2024.

25 MR. MASON: You're welcome to ask him if

1 that's a typo. You're welcome to ask him if
2 he's considered anything other than
3 Exhibit 1055 as was filed in this proceeding.
4 You can ask him if he's seen any other drafts
5 of the Ahmann declaration other than what was
6 filed.

7 MR. HANSEN: You know what, there is no
8 way that sitting here today without having a
9 copy of that declaration that he can testify
10 whether the one that's signed by Dr. Ahmann or
11 whether the August 30 one is the one that he
12 saw. He doesn't know what the differences
13 between the two are.

14 MR. MASON: I don't understand the import
15 of what you said. He doesn't know any
16 difference because to the extent there were any
17 earlier drafts of the Ahmann declaration,
18 Mr. Gross has not seen them.

19 MR. HANSEN: That's what you're saying.
20 We don't accept that. That's not what he said
21 here in his declaration under oath.

22 MR. MASON: Like I said, you're welcome to
23 ask -- you've left the deposition open. You're
24 welcome to ask Mr. Gross. Again, he testified
25 he was looking at Exhibit 1055, as was filed,

1 as was signed by Dr. Ahmann, and he said this
2 is the only copy of the Ahmann declaration I've
3 seen. You're welcome right now to ask him.

4 MR. HANSEN: If you want to question him,
5 go ahead and question him about it.

6

7

EXAMINATION

8

9 BY MR. MASON:

10 Q Mr. Gross, I invite you to look at
11 Exhibit 1055.

12 A I have Exhibit 1055, Declaration of Andrew
13 Ahmann, MD, in support of DexCom reply.

14 Q Can I have you turn to the last page of
15 that declaration prior to the CV which is page 74?

16 A I'm on page 74.

17 Q Do you see Dr. Ahmann's signature there?

18 A I do.

19 Q Did you see any drafts of the Ahmann
20 declaration, Exhibit 1055, other than this copy
21 here, Exhibit 1055 that was filed in this IPR?

22 A I don't believe so.

23 Q And if we turn to page 6. Can I invite you
24 to page 6 of your declaration, which is
25 Exhibit 1057?

1 A Page 6 of Exhibit 1057.

2 Q You see listed there Exhibit No. 1055?

3 A Declaration of Andrew Ahmann, MD, yes.

4 Q Now, having looked at Exhibit 1055, do you
5 recall earlier when Mr. Carrozza asked you if you
6 were aware of any errors in your declaration?

7 A Yes, I do recall.

8 Q Are you aware of any errors now?

9 A It's likely that the date of Exhibit 1055
10 in the table is incorrect, given that the version of
11 1055 that appears in the binder signed on
12 September 4 is -- appears to be the document I
13 reviewed in preparation for my reply declaration.

14 Q And why do you believe that's an error?

15 A The references I use appear to align
16 consistently with what's in the document presented
17 as 1055 dated September 4. The overall content of
18 the document and Dr. Ahmann's high level report,
19 reply comments are fully aligned with what I have in
20 my report as well.

21 Q Do you recall receiving more than one
22 version of Dr. Ahmann's declaration?

23 A No. In fact, I know I only received one
24 version. This appears to be it.

25 Q And by "it," do you mean this Exhibit 1055

1 sitting here in front of you?

2 A Correct.

3 MR. MASON: I have nothing further at this
4 time.

5 MR. HANSEN: I'm going to ask a few
6 follow-up questions.

7

8 EXAMINATION

9

10 BY MR. HANSEN:

11 Q So Mr. Gross, why do you believe that the
12 version that you have in front of you marked as 1055
13 is the version that you reviewed?

14 A In the time that you've been discussing it,
15 I've been reviewing the contents and trying to map
16 to where I cited Dr. Ahmann and the contents align,
17 number one.

18 And number two, again, in the area that
19 Dr. Ahmann provides his opinions of Dr. Wright's
20 criticisms, they are consistent with my recollection
21 that I used in my reply declaration.

22 Q Do you have a perfect recollection as you
23 sit here today, word for word, of the version of
24 Dr. Ahmann's declaration that you reviewed before
25 you signed your reply declaration?

1 A I don't think anyone has a perfect
2 recollection. What I can share is the references
3 that I pulled from Dr. Ahmann's report align with
4 the report declaration that I have in my possession
5 as 1055. And I can share that his critiques of
6 Dr. Wright's criticisms are embodied in my report as
7 referencing, and my recollection of what he provided
8 when I wrote this report.

9 Q So your testimony that 1055 is the version
10 that you reviewed, that testimony is based on
11 general similarities that seem to be consistent?

12 MR. MASON: Objection. Form.

13 THE WITNESS: Can you repeat the question,
14 please?

15 BY MR. HANSEN:

16 Q Your testimony that 1055 is the version
17 that you reviewed, that's based on general
18 similarities that you recall between that version
19 and the version that you recall reviewing?

20 MR. MASON: Objection. Form.

21 THE WITNESS: My testimony is this is the
22 version I reviewed, based on the brief time
23 I've had to re-review it since surfacing the
24 typo or the error in the date reference, and
25 comparing the references in my reply

1 declaration to the content of the report. Of
2 Dr. Ahmann's report, excuse me.

3 BY MR. HANSEN:

4 Q Mr. Gross, without looking at the
5 documents, on what date did you sign your original
6 declaration in this matter?

7 MR. MASON: Objection. Form.

8 THE WITNESS: My original declaration, I
9 would have to look to recall.

10 BY MR. HANSEN:

11 Q You don't recall what date it was?

12 A It would likely be earlier in the summer.

13 Q Can you be any more specific than that?

14 A My original declaration.

15 Q Yes.

16 A No, I can't. I'd have to look to confirm
17 the date that I signed it.

18 Q Without looking at the documents, can you
19 recall the date when you signed your reply
20 declaration, your second declaration in this matter?

21 MR. MASON: Objection. Form.

22 THE WITNESS: It was either the 7th or 8th
23 of September.

24 BY MR. HANSEN:

25 Q Okay. You have referenced in your reply

1 declaration a declaration by Dr. Striegel; is that
2 correct?

3 A A declaration from Dr. Striegel.

4 Q Without looking at the documents.

5 A I'm sorry. I need to refresh my memory.

6 Q Okay. You don't recall that your reply
7 declaration addresses a declaration from
8 Dr. Striegel?

9 MR. MASON: Objection form.

10 THE WITNESS: I know it does. I want to
11 be very clear on what the title and the
12 document exhibit reference number was.

13 BY MR. HANSEN:

14 Q I think you want to check the date and I'm
15 testing your recollection of dates. So I don't want
16 you looking at the document to refresh your memory
17 when you're asking me to trust your memory that
18 can't be refreshed on other dates. So I don't want
19 you looking at the dates.

20 I want to know, do you recall the date when
21 Dr. Striegel signed the declaration that you
22 discussed in your reply declaration?

23 MR. MASON: Objection. Form.

24 THE WITNESS: I recall the content of
25 Dr. Striegel's declaration. The actual date

1 occurred after my original report and after my
2 deposition. The actual date I would have to
3 refer back to the document to figure -- or to
4 find that date for you.

5 BY MR. HANSEN:

6 Q Okay. And you also, in your reply
7 declaration, address the declaration from
8 Dr. Wright, correct?

9 MR. MASON: Objection. Form.

10 THE WITNESS: I did include Dr. Wright's
11 declaration and his deposition in my reply
12 declaration.

13 BY MR. HANSEN:

14 Q And what was the date when Dr. Wright
15 signed his declaration?

16 MR. MASON: Objection. Form.

17 THE WITNESS: I would have to refer back
18 to the document to remember that. Or to recall
19 that.

20 BY MR. HANSEN:

21 Q And what was the date of Dr. Wright's
22 deposition that you refer to in your reply
23 declaration?

24 A Again, I would have to refer back to the
25 documents to get that detail information off of the

1 document itself.

2 Q And what was the date when Dr. Striegel was
3 deposed, the deposition that you discuss in your
4 reply declaration?

5 MR. MASON: Objection. Form.

6 THE WITNESS: I would have to refer back
7 to the document to be sure of the date that was
8 on the document itself.

9 BY MR. HANSEN:

10 Q And when did you review -- when did you
11 review the declaration of Dr. Ahmann?

12 MR. MASON: Objection. Form.

13 THE WITNESS: Prior to my completion of my
14 report.

15 BY MR. HANSEN:

16 Q Can you be more specific than that?

17 A It was days before I completed my report.

18 Q And what was the date when Dr. Ahmann
19 signed that declaration?

20 MR. MASON: Objection. Form.

21 THE WITNESS: I'm sorry. Which
22 declaration are you asking?

23 BY MR. HANSEN:

24 Q Dr. Ahmann's declaration that you address
25 in your reply, when did he sign it? Without

1 looking, when did he sign it?

2 MR. MASON: Objection. Form.

3 THE WITNESS: I believe we've established
4 it was very early September.

5 BY MR. HANSEN:

6 Q Can you be more specific than that?

7 MR. MASON: Objection. Form.

8 THE WITNESS: Again, without the pleasure
9 of reviewing the documents, I don't want to
10 hypothesize a date. I may be wrong, I may be
11 right. If I can review the document and have
12 the luxury of being accurate, I'd be very happy
13 to provide you that date.

14 BY MR. HANSEN:

15 Q Well, I am concerned about accuracy here.
16 And again, I'm concerned because you want us -- even
17 though it says in your list of materials considered
18 that you reviewed an Ahmann declaration dated
19 August 30, 2024, you're now telling us that that's a
20 mistake and that the declaration that you actually
21 reviewed was dated sometime later than that,
22 sometime in the first part of September.

23 But your testimony appears to be based on
24 the fact that you looked at the declaration and
25 realized that the one that you have in front of you

1 is dated in September and the one that you listed in
2 your list of materials considered is dated in
3 August. And it doesn't appear that you can remember
4 any of the dates of these depositions or
5 declarations, even your own declaration, with any
6 confidence or any certainty.

7 So how is it that we can trust your memory
8 that the one you reviewed months ago was dated the
9 first part of September and not August as it says in
10 your declaration?

11 MR. MASON: Objection. Form.

12 THE WITNESS: So Counselor, I would be
13 very happy to review my full report and
14 Dr. Ahmann's declaration and confirm that the
15 references in the document that I have before
16 me, which I believe is the one that I've used
17 in compiling my response declaration, is,
18 indeed, fully aligned.

19 Furthermore, I would also propose
20 that, again, the typo of the date in the list
21 of exhibits is just that. I've reviewed one
22 document from Dr. Ahmann. This appears to be
23 that document.

24 BY MR. HANSEN:

25 Q So you said that you can review them and

1 show us how they align. Why don't you do that for
2 us.

3 MR. MASON: Is there a question pending?

4 BY MR. HANSEN:

5 Q Yeah. I'd like Mr. Gross -- he said he
6 could show us how they align.

7 I want to know, Mr. Gross, how is it that
8 you claim that they align? On what basis do you
9 claim that they align?

10 A Would you like to provide a reference that
11 you would like me to investigate?

12 Q Oh. Whatever you were talking about. You
13 just said they align and that you can demonstrate
14 how they align. What was the basis of your
15 testimony?

16 I'd like you to explain the basis of your
17 testimony when you just said they align. Please
18 explain that. I'd like to see how they align.

19 MR. MASON: Objection. Form.

20 THE WITNESS: I'll first reference my
21 paragraph 27.

22 BY MR. HANSEN:

23 Q You're talking about --

24 A On my declaration, my reply declaration.

25 Q So you're referring to Exhibit 1057?

1 A Yes. Exhibit 1057. Sorry. Paragraph 27
2 talks about, at the last paragraph, on the other
3 hand, Dr. Wright opines that it would be imperative
4 that this POSITA be part of a disciplinary team.

5 28 continues, for the sake of argument --
6 if for argument's sake my own personal clinical
7 experience has made me unqualified to opine on the
8 perspective of a POSITA as Dr. Wright suggests,
9 Dr. Ahmann has confirmed my opinions that were
10 critiqued by Dr. Wright.

11 In Dr. Ahmann's declaration, Exhibit 1055,
12 paragraph 12, he states, As noted in this
13 declaration response to certain opinions presented
14 in the Wright declaration, including Dr. Wright's
15 testimony on the aspects of the declaration of
16 Mr. Gross, Exhibit 1008, "Gross declaration."

17 I do not offer opinion of the meaning of
18 '056 patent claim language, ultimate language.
19 Rather, my opponents are focused more on the
20 diagnosis, treatment and management of diabetes for
21 the period leading up to and including April 2009.

22 Going on to say, my opinions would not
23 materially differ if the alleged inventions were in
24 2010.

25 Q What paragraph are you at in the Ahmann

1 declaration?

2 A I'm on 12 where he specifically refers to
3 his scope. Focused on reviewing my original
4 declaration. He goes on to say in paragraph 24, I
5 see no issues with aspects of Mr. Gross' report that
6 Dr. Wright appears to criticize for lacking clinical
7 experience. To the extent they relate to clinical
8 treatment of diabetes, Mr. Gross' opinions are sound
9 and consistent with my own clinical experiences.

10 And that is part of the basis. He's got
11 other references in the document continuing on 25,
12 the declaration of Brian Gross signed July 24. So
13 Counsel, July 24 appears to be the date you're
14 looking for.

15 As discussed below, I agree with the
16 following statements from Mr. Gross' declaration.
17 Although, as a clinician I would prefer to use the
18 term "person with diabetes" instead of "diabetic,"
19 given the American Diabetes Association, other
20 advocacy groups, indicating that "diabetic" is a
21 noun, objectified those living with diabetes.

22 And he goes on to list the references that
23 he agrees with. Going on --

24 Q So --

25 A I'm sorry. I'm not complete.

1 Q Go ahead. Keep going.

2 A So in paragraph 32, To the extent they are
3 clinical in nature, my opinions in 60 and 80 in my
4 original declaration -- I'm now reading from my
5 reply declaration, Exhibit 1057 -- paragraph 60 and
6 80 of my original declaration are based on
7 references cited in -- continuing on page 31.
8 Dr. Ahmann agrees that my opinions are supported by
9 these originally cited references, referencing his
10 declaration at page 26.

11 And page 26 of his declaration,
12 paragraph 30, Moreover, as I've explained further
13 below, the teachings in the pre-2009 reference and
14 opinions of Mr. Gross are consistent with the
15 well-known understanding within the clinical
16 diabetes community that doctors would want PWD,
17 patients with diabetes, to have as much up-to-date
18 and accurate information as possible to avoid --
19 excuse me -- and to avoid presenting inaccurate CGM
20 data.

21 Q So --

22 A I'm sorry. I'm not done. Further
23 referencing on page 32 of my declaration, from
24 Exhibit 1057, In addition, Dr. Ahmann agrees that
25 Dr. Wolpert's 2009 article, Exhibit 1063, supports

1 my conclusions. Referencing page 27 of Dr. Ahmann's
2 declaration, which is exhibit -- Dr. Ahmann exhibit
3 is 1055.

4 And on page 27 Dr. Ahmann states, I've
5 reviewed paragraphs 42 to 61, 75 to 83, and 136 to
6 155 of Dr. Wright's declaration and disagree with
7 his opinions. And above that on the same page he's
8 referring to Wolpert's document for the same reason,
9 infrequent SMBG finger sticks might lead to adverse
10 blood glucose event. So, too, could the failure to
11 provide as much CGM data as quickly as possible to
12 the user.

13 I believe those are the references to
14 Dr. Ahmann's declaration that I use in my reply
15 declaration that align with the document that we've
16 been talking about. So I believe we have a typo on
17 when the date it was submitted.

18 Q Thank you for that. Thank you for reading
19 from both declarations. Now, let's see.

20 As I understand your testimony, your
21 testimony is that the declaration that you reviewed
22 sometime before you signed your reply declaration,
23 that your memory of that declaration is good enough
24 that you believe you can testify under oath that
25 it's the same one dated September 5th, the same

1 Ahmann declaration that you had, that you have
2 before you now, 1055; is that correct?

3 MR. MASON: Objection. Form.

4 THE WITNESS: Counsel, I have received one
5 copy of Ahmann's declaration. It appears to be
6 this one that we have been reviewing as 1055.

7 BY MR. HANSEN:

8 Q And that's based on your memory of what you
9 recall from when you reviewed it before you signed
10 your reply declaration, correct?

11 MR. MASON: Objection. Form.

12 THE WITNESS: No. It's also based on the
13 alignment of the reference -- the specific
14 references I've used in my reply declaration
15 with what is in the 1055 document that I
16 reviewed as well --

17 BY MR. HANSEN:

18 Q What paragraphs from your original
19 declaration did Dr. Ahmann address in his
20 declaration? Without looking.

21 MR. MASON: Objection to form.

22 THE WITNESS: Counselor --

23 BY MR. HANSEN:

24 Q No. I don't want you looking. I want to
25 know. Do you recall what paragraphs from your

1 original declaration Dr. Ahmann commented on in his
2 declaration?

3 MR. MASON: Objection. Form.

4 THE WITNESS: I can't answer that without
5 reviewing specifics. I would be giving you an
6 inaccurate and incomplete answer.

7 BY MR. HANSEN:

8 Q Exactly. So you can't, from memory, tell
9 me what is in the declaration that you reviewed five
10 minutes ago, let alone the declaration that you
11 reviewed weeks ago; isn't that correct?

12 MR. MASON: Objection. Form.

13 BY MR. HANSEN:

14 Q Five minutes ago you read to me from the
15 Ahmann declaration. And you read from the Ahmann
16 declaration where it specifically stated what
17 paragraphs from your original declaration he had
18 reviewed. Five minutes ago you read that to me.

19 Can you tell me now, from memory, what
20 paragraphs, what portions of your original
21 declaration Dr. Ahmann commented on?

22 MR. MASON: Objection. Form.

23 THE WITNESS: I cannot and will not
24 provide you an inaccurate answer without
25 refreshing my memory with the documents you're

1 asking me about.

2 BY MR. HANSEN:

3 Q Okay. You looked at it five minutes ago.

4 MR. MASON: Object to form.

5 BY MR. HANSEN:

6 Q Can you tell me or no?

7 A I cannot and will not --

8 MR. MASON: Objection. Form.

9 BY MR. HANSEN:

10 Q Can you tell me what specific paragraphs
11 and sections of your original declaration Dr. Ahmann
12 commented on in the declaration that you reviewed
13 before you signed your report? Weeks ago.

14 MR. MASON: Objection. Form.

15 THE WITNESS: They would be the same as
16 presented in this document in front of me.

17 BY MR. HANSEN:

18 Q How do you know?

19 MR. MASON: Objection. Form.

20 BY MR. HANSEN:

21 Q You can't remember. How do you know?

22 You can't remember what you saw five
23 minutes ago. How do you know that what you saw
24 weeks ago is the same?

25 MR. MASON: Objection. Form.

1 THE WITNESS: It is my testimony today
2 that this is the document that I reviewed.

3 BY MR. HANSEN:

4 Q Okay.

5 A There has been one document I reviewed and
6 this appears to be it.

7 Q How do you know?

8 You can't remember what you saw five
9 minutes ago. How do you know that that's the same
10 thing you saw weeks ago?

11 MR. MASON: Objection. Form.

12 THE WITNESS: The elements in this
13 document, the opinions expressed in this
14 document are consistent with what I've
15 articulated in my reply declaration.

16 BY MR. HANSEN:

17 Q Okay. So there's some general correlation
18 between your reply declaration and the Ahmann
19 declaration. Does that mean necessarily that the
20 one you have in front of you is the same one that
21 you reviewed weeks ago?

22 MR. MASON: Objection. Form.

23 THE WITNESS: I received one copy. This
24 appears to be it.

25 MR. HANSEN: Okay. We're going to renew

1 our request that, Andy, that you produce
2 whatever version of the Ahmann declaration
3 existed as of August 30, 2024.

4 MR. MASON: And we are flatly rejecting
5 any such request. Mr. Gross has testified he
6 received one copy of the declaration. I don't
7 know if there's -- we are willing to give you
8 any copies of the declaration that were sent to
9 Mr. Gross. And that's already been done
10 because it's been produced as Exhibit 1055.
11 But we --

12 MR. HANSEN: Okay. It's clear --

13 MR. MASON: That's what we would produce.
14 He's testified he's received one version. We
15 can confirm that the only version he was sent
16 was the signed version from September 4th,
17 2024, which was submitted and filed --

18 MR. HANSEN: I would agree with you that
19 he has testified under oath today that the
20 version he has in front of him is the version
21 that he saw. I agree with that.

22 The examination of him has also
23 demonstrated that his unequivocal testimony is
24 unsound, that he has no basis for it. He can't
25 remember the dates. He can't remember the

1 content. There's no way that he can testify
2 with any degree of confidence that the version
3 he has today is the same version that he
4 reviewed weeks ago.

5 And if we have to bring this to the
6 attention of the Panel, we will.

7 MR. MASON: Well, I suggest we call the
8 Panel right now. We're not going to leave this
9 deposition open and we're -- to the extent
10 there were any Ahmann declaration drafts from
11 August 30th, they're not going to be
12 produced, we're not going to agree to produce
13 that in this proceeding.

14 Mr. Gross received one copy of the
15 declaration and I don't know what will resolve
16 this issue in your mind. It sounds like maybe
17 nothing.

18 MR. HANSEN: What would resolve the issue
19 is if you would produce the version that
20 existed on August 30, 2024.

21 MR. MASON: To the extent there's a
22 version that was dated August 30, Mr. Gross
23 never saw that version.

24 MR. HANSEN: That's what you say now, but
25 I am not satisfied that that is true.

1 MR. MASON: Okay. What do you plan to do?

2 MR. HANSEN: We plan to review the
3 transcript and raise it in an appropriate
4 fashion.

5 MR. MASON: Okay.

6 MR. HANSEN: All right. We have nothing
7 further.

8 MADAM COURT REPORTER: We're adjourned?

9 MR. MASON: The deposition's closed. Yes.

10 MR. HANSEN: We don't agree that it's
11 closed.

12 MR. MASON: This deposition is over. You
13 can call the Board right now if you want to
14 leave it open. This deposition is closed.

15 MR. HANSEN: You're trying to force us to
16 call the Board without having a transcript to
17 show them what just transpired. Okay? That's
18 what you're trying to do. We're not going to
19 acquiesce to that.

20 MR. MASON: You're welcome to move the
21 Board at a later date. We're not agreeing to
22 keep this deposition open.

23 MR. HANSEN: Okay. We're not agreeing
24 that it's closed. So we can agree to disagree.

25 MR. MASON: You're allowed one day of

1 deposition, seven hours. Once it's done, once
2 we go off the record, it's closed.

3 MR. HANSEN: And in advance of that
4 deposition, you're obligated to provide to us
5 all the materials that he considered and it
6 appears that you failed to do so.

7 MR. MASON: We were in compliance with
8 that requirement. And that's a gross
9 misrepresentation.

10 MR. HANSEN: It's not a gross
11 misrepresentation.

12 MR. MASON: That's your opinion.

13 MR. HANSEN: It's not a misrepresentation.
14 It's based on information in a sworn
15 declaration from Mr. Gross.

16 MR. MASON: And he's testified today he
17 received a single copy of the Ahmann
18 declaration.

19 MR. HANSEN: Yeah.

20 MR. MASON: And that's the copy that
21 he's --

22 MR. HANSEN: And he's also testified today
23 that he can't recall with any particularity
24 when any of these declarations were signed and
25 what the content of any of these declarations

1 were. So there is no way that he can testify
2 in good faith that he -- that the declaration
3 he has before him today is the same one he saw
4 weeks ago.

5 MR. MASON: That's your opinion.

6 MR. HANSEN: It is my opinion.

7 MR. MASON: Do you have further questions
8 for the witness?

9 MR. HANSEN: I don't, but we're not
10 agreeing that the deposition is closed.

11 MR. MASON: I mean, when the deposition
12 closes, the deposition closes. Are you guys
13 going off the record? Are we done today?

14 MR. HANSEN: Sure.

15 MR. MASON: Okay. Off the record?

16 MADAM COURT REPORTER: Off the record.

17 (Proceedings adjourned at 1:43 p.m.)

18 (Signature reserved.)
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1 REPORTER'S CERTIFICATE

2 I, VICTORIA A. GUERRERO, Certified Shorthand Reporter,
3 Registered Merit Reporter, Registered Professional Reporter,
4 Certified Realtime Reporter, in and for the State of Oregon
5 do hereby certify that, pursuant to the Rules of the United
6 States Patent and Trademark Office, BRIAN D. GROSS
7 personally appeared before me at the time and place
8 mentioned in the caption herein; that the witness was by me
9 first duly sworn/affirmed under oath and examined upon oral
10 interrogatories propounded by counsel; that said
11 examination, together with the testimony of said witness,
12 was taken down by me in stenotype and transcribed through
13 computer-aided transcription; and that the foregoing
14 transcript, pages 1 through 146, review requested by the
15 witness or a party, constitutes a true record of said
16 examination of and testimony given by said witness, and of
17 all other oral proceedings had during the taking of said
18 deposition, and of the whole thereof.

19 IN WITNESS WHEREOF, I have hereunto set my hand
20 at Portland, Oregon, this Sunday, October 13, 2024.

21 
22

23 Victoria A. Guerrero, CSR, RDR, RMR, CRR
Thompson Court Reporters
24 Oregon CSR No. 14-0428 (exp. 9-30-2027)
Washington CCR No. 3293 (exp. 3-15-2025)
25 California CSR No. 8370 (exp. 3-15-2025)
Hawaii CSR No. 490 (exp. 12-31-2024)

1 CASE NAME : DEXCOM vs ABBOTT

2 DEPOSITION OF: BRIAN GROSS

3 DATE TAKEN: OCTOBER 10, 2024

4

5 This is to certify that I have read the
6 transcript of my Deposition taken in the above-entitled
7 cause and that the foregoing transcript accurately
8 states the questions asked and the answers given by me
9 as they now appear.

10 Please check one:
11 _____ I made no corrections

12 _____ Number of corrections made

13 _____
BRIAN GROSS

14 SUBSCRIBED AND SWORN TO

15 Before me this _____ day

16 of _____ A.D., 2023.

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Notary Public

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CORRECTION PAGE

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