

Page 1

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

SPECTRUM SOLUTIONS LLC,)
 Petitioner)
 vs.) IPR2022-01347
 DNA GENOTEK INC.,) US Patent No.
 Patent Owner.) 11,002,646
 _____)

VIDEO DEPOSITION OF STEVEN WERELEY
JULY 19, 2023
SAN DIEGO, CALIFORNIA

Reported by
Cynthia J. Vega, RMR, RDR, CSR 6640, CCRR 95

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Page 3

1 The video deposition of Steven Wereley, a
2 Witness herein, taken on behalf of Petitioner, on
3 Wednesday, July 19, 2023, before Cynthia J. Vega,
4 CSR 6640, beginning at the hour of 9:06 a.m., at
5 12531 High Bluff Drive, Suite 100, in the City of
6 San Diego, County of San Diego, State of California.

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Page 4

1 INDEX

2 WITNESS

3 Steven Wereley

4

5 EXAMINATION

PAGE

6 By Mr. Jennings

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11 NO EXHIBITS OFFERED

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1 SAN DIEGO, CALIFORNIA

2 WEDNESDAY, JULY 19, 2023, 9:06 A.M.

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4 THE VIDEOGRAPHER: This is file number 1 of
5 the videotaped deposition of Steven Wereley, taken
6 by Joe Jennings for Petitioner Spectrum Solutions
7 LLC, in the matter of Spectrum Solutions LLC versus
8 DNA Genotek Inc., in the US Patent and Trademark
9 Office. Case Number IPR2022-01347.

10 This deposition is being held at 12531 High
11 Bluff Drive, Suite 100, San Diego, California 92130,
12 on July 19, 2023. The time on the video screen is
13 9:07 a.m. Pacific Time.

14 My name is Paul Edwards. I'm the legal
15 videographer from Digital Evidence Group.

16 The court reporter is Cindy Vega in
17 association with Digital Evidence Group.

18 Will counsel please introduce yourselves
19 for the record.

20 MR. JENNINGS: Joe Jennings of Knobbe
21 Martens for the petitioner.

22 MR. HILLIER: Drew Hillier on behalf of

Page 6

1 DNA Genotek Inc., the patent owner.

2 THE VIDEOGRAPHER: Would the court reporter
3 please swear in the witness.

4 STEVEN WERELEY,
5 Witness herein, being first duly sworn, testifies as
6 follows:

7

8 EXAMINATION

9 BY MR. JENNINGS:

10 Q. Good morning, Dr. Wereley.

11 A. Good morning.

12 Q. How are you today?

13 A. I'm well, thanks.

14 Q. Great. Any reason you cannot testify
15 truthfully and accurately today?

16 A. No, there is not.

17 Q. You've had a chance to prepare for today's
18 deposition?

19 A. Yes, I have.

20 Q. And read through the declaration that you
21 provided in this matter?

22 A. Yes.

1 Q. And it appears that you brought a copy of
2 that with you?

3 A. Yes, I have.

4 Q. And that's in the binder before you?

5 A. That's correct.

6 Q. That's Exhibit 2013?

7 A. Yes, it is.

8 Q. Do you have anything else in that binder?

9 A. Yes, I do.

10 Q. What do you have in there?

11 A. There is a copy of the '646 patent. There
12 is a copy of the Plante publication. And there is a
13 copy of the Cho publication.

14 Q. Okay. Just so we're clear for the record,
15 I brought copies of those documents as well. But
16 I'm perfectly fine if you want to refer to the ones
17 that you have in your binder. Is that your
18 preference?

19 A. It doesn't matter to me. I just wanted to
20 make sure they were in front of me.

21 Q. Okay. So the '646 patent is Exhibit 1001
22 in this proceeding that you have?

1 A. Yes, it is.

2 Q. Okay. And are you fine if we use the
3 terminology '646 patent in referring to Exhibit 1001
4 in today's deposition?

5 A. Yes.

6 Q. And you also mentioned that you have a copy
7 of the Plante publication in your binder?

8 A. Yes, I do.

9 Q. And for the record is that Exhibit 1003 in
10 this proceeding?

11 A. Yes, it is.

12 Q. Okay. And are you fine if we refer to
13 Exhibit 1003 as Plante in today's deposition?

14 A. Yes.

15 Q. Okay. And the other document that you said
16 you had in your binder is the publication to Cho,
17 and that's Exhibit 1004 in this proceeding; is that
18 correct?

19 A. Yes, it is.

20 Q. Are you fine if we refer to Exhibit 1004 as
21 Cho --

22 A. Yes.

1 Q. -- in today's deposition?

2 A. Yes.

3 Q. Great. Okay.

4 MR. HILLIER: Joe, if you have copies of
5 those, do you mind if I get them?

6 MR. JENNINGS: Oh, sure. Let's see. Okay.
7 There is --

8 MR. HILLIER: Thank you.

9 MR. JENNINGS: -- Cho.

10 There is Plante. I'm happy to lighten my
11 load and take less documents with me when I leave.

12 There is the '646. And there is a copy of
13 the declaration.

14 BY MR. JENNINGS:

15 Q. Okay. Let's turn to your declaration,
16 Dr. Wereley, and in particular your CV that's
17 appended to the end of that.

18 A. Okay.

19 Q. And on the bottom of page 1 of your CV,
20 which is Appendix A to Exhibit 2013, you state
21 "Expert witness services for fluid mechanics,
22 microfluidics, biofluid mechanics, MEMS, bio-MEMS,

1 and oil spill issues" in your active consulting
2 areas section of your CV; correct?

3 A. Yes, that's correct.

4 Q. And so you hold yourself out as an expert
5 in those fields; is that correct?

6 A. Yes, I do.

7 Q. You don't hold yourself out as an expert in
8 the field of consumer behavior; correct?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: I do not.

11 BY MR. JENNINGS:

12 Q. And you don't hold yourself out as an
13 expert in the field of psychology; correct?

14 A. No, I'm not an expert in psychology.

15 Q. And you're also not an expert in the field
16 of consumer behavior; correct?

17 MR. HILLIER: Objection to form.

18 THE WITNESS: I think you asked that
19 question and I answered. I'm not an expert in
20 consumer behavior.

21 BY MR. JENNINGS:

22 Q. Have you ever developed consumer products?

1 MR. HILLIER: Objection to form.

2 THE WITNESS: So I've operated two
3 companies and we've developed products that we have
4 sold to others, and those others are usually in the
5 research space. So those -- I mean, those others
6 are consumers of our products. I'm not sure if
7 you're talking about more generally. Yeah, so I
8 have sold products to other people, and those are
9 the consumers of our products.

10 BY MR. JENNINGS:

11 Q. Research organizations?

12 A. Yes.

13 MR. HILLIER: Objection to form.

14 THE WITNESS: That's correct.

15 BY MR. JENNINGS:

16 Q. You haven't developed products that are
17 sold to unskilled consumers in the general
18 marketplace, though; correct?

19 MR. HILLIER: Objection to form.

20 THE WITNESS: I have not.

21 BY MR. JENNINGS:

22 Q. I'm going to place before you a document

1 which has previously been marked as Exhibit 1005,
2 which is US Patent Number 7,464,811 to Patterson,
3 et al.

4 MR. HILLIER: Mr. Jennings, do you have a
5 copy for me?

6 MR. JENNINGS: Sure.

7 MR. HILLIER: Thank you.

8 BY MR. JENNINGS:

9 Q. Do you recognize Exhibit 1005 as one of the
10 patents you considered in preparing your declaration
11 in this matter?

12 A. Yes, I do.

13 Q. And how much time did you spend reviewing
14 the patent to Patterson?

15 MR. HILLIER: Objection to form.
16 You can answer.

17 THE WITNESS: Something on the order of
18 hours.

19 BY MR. JENNINGS:

20 Q. And why did you review it?

21 A. It was on the list of documents that
22 Mr. Leinsing considered in his report.

1 Q. And you refer to Patterson in paragraph 15
2 of your declaration as one of the things that you
3 considered; correct?

4 A. Yes. That's correct.

5 Q. And then after -- and you said you reviewed
6 it for -- on the order of hours; is that correct?

7 A. Yeah. I can't recall exactly. I didn't
8 log the time that I spent on this particular patent.

9 Q. Okay. And that was before you provided
10 your declaration; correct?

11 A. Yes.

12 Q. And then after reviewing it for whatever
13 time, hours, that you've reviewed prior to the
14 declaration, you did not provide any opinion
15 concerning Patterson in your declaration; correct?

16 A. Yes. That's correct. I'm not offering an
17 opinion on Patterson today.

18 Q. And you didn't in your declaration you
19 submitted in this action; correct?

20 A. That's correct.

21 Q. I want to ask you a few questions about the
22 Cho reference that you have in your binder there.

1 A. Yes.

2 Q. You agree that Cho describes that his
3 container is applicable to a variety of industrial
4 applications, including chemicals and medicines;
5 correct?

6 MR. HILLIER: Objection to form.
7 You can answer.

8 THE WITNESS: Yes. That statement
9 appears -- does appear in Cho's publication.

10 BY MR. JENNINGS:

11 Q. So you agree with my statement that Cho
12 describes that his container is applicable to a
13 variety of industrial applications, including
14 chemicals and medicines; correct?

15 A. Yes.

16 MR. HILLIER: Objection to form.
17 Dr. Wereley, just give me time to object.

18 BY MR. JENNINGS:

19 Q. And one of skill in the art would expect
20 that a container useful for storing medicines would
21 not leak. Do you agree with that?

22 A. I think there are -- Cho's device --

1 described devices are quite complicated, and the
2 issue of leaking could come up in different
3 contexts. In particular he has -- he describes an
4 additive chamber and a bottle, two different
5 volumes. And my opinion is that one can be sealed
6 and the other cannot.

7 Q. So getting back to my question. Would one
8 of skill in the art considering a container that is
9 described as useful for medicines expect that that
10 container would not leak?

11 MR. HILLIER: Objection to form.

12 THE WITNESS: I think its context
13 dependent.

14 BY MR. JENNINGS:

15 Q. So it's your opinion that even though Cho
16 describes his container as applicable to use with
17 chemicals and medicines, it's your opinion that the
18 container would leak; is that correct?

19 MR. HILLIER: Objection to form.

20 THE WITNESS: I think that depending on the
21 application, it may not be necessary for both
22 chambers not to leak.

1 BY MR. JENNINGS:

2 Q. And if I get this correct, it's your
3 opinion that the additive storage compartment would
4 not leak but the bottle would in Cho; is that
5 correct?

6 MR. HILLIER: Objection to form.

7 THE WITNESS: So the additive vessel in Cho
8 is described in a manner that I think could be
9 sealed and not leak. The bottle portion -- or the
10 interaction between the cap and the bottle portion
11 of the description I think would leak as I've
12 detailed in my report.

13 BY MR. JENNINGS:

14 Q. Do you agree that it would be generally
15 important that a container for storing chemicals
16 does not leak?

17 MR. HILLIER: Objection to form.

18 THE WITNESS: So Cho doesn't describe
19 storage of the mixture. Cho describes the necessity
20 of mixing two different materials together, but he
21 doesn't describe the subsequent storage of those
22 two -- the mixture, subsequent storage of the

1 mixture.

2 BY MR. JENNINGS:

3 Q. So getting back to my question. Do you
4 agree that it would be generally important that a
5 container that stores chemicals does not leak?

6 MR. HILLIER: Objection to form.

7 THE WITNESS: So Cho doesn't describe
8 storage of the mixture. Cho describes storing the
9 ingredients and a mechanism for mixing those
10 ingredients, but not storing the mixture in a
11 water -- in a fluid-tight sense.

12 BY MR. JENNINGS:

13 Q. So do you understand Cho describes storing
14 the ingredients separate in a fluid-tight manner
15 such that they don't leak?

16 A. So Cho discusses storing the additive,
17 which could be a powder or a liquid, in the additive
18 chamber. And my understanding of that is that it
19 could be leak -- watertight, liquid tight. Cho has,
20 for example, a open port, 632A, and describes some
21 mechanism, some means by which the additive would be
22 added through that port, 632A, and then subsequently

1 sealed.

2 He doesn't describe in detail how those --
3 how the sealing process would work. So I can't be
4 positive that that would be watertight, fluid tight,
5 but that's -- my assumption is that it could be
6 fluid tight.

7 Q. So one basis for your opinion that one of
8 skill in the art would not use Cho's cap having an
9 annular valve in Plante's sample collection device
10 is your belief that there is no seal between Cho's
11 cap and container; is that correct?

12 MR. HILLIER: Objection to form.

13 THE WITNESS: So what I say is Cho does not
14 teach a fluid-tight interaction between the cap and
15 the bottle.

16 BY MR. JENNINGS:

17 Q. So can you answer my question. So one
18 basis for your opinion that one of skill in the art
19 would not use Cho's cap having an annular valve in
20 Plante's sample collection device is your belief
21 that there is no seal shown between Cho's cap and
22 the container; is that correct?

1 MR. HILLIER: Objection to form. Asked and
2 answered.

3 THE WITNESS: Those aren't the words that I
4 used. So the words that I use in my report, Cho
5 does not teach a fluid-tight interaction. I'm not
6 sure what you mean when you're referring to a seal,
7 but when I look at -- consider Cho, I don't see a --
8 the ability for the cap to be applied to the bottle
9 in a fluid-tight manner.

10 BY MR. JENNINGS:

11 Q. Okay. And that belief is one of the bases
12 for your opinion that one of skill in the art would
13 not use Cho's cap in Plante's sample collection
14 device; is that correct?

15 MR. HILLIER: Objection to form.

16 THE WITNESS: That's part of my discussion
17 in my report that Cho and Plante are not analogous
18 art. So Plante teaches that the sample, once it's
19 deposited in the specimen container, can be sealed
20 into the -- into the device in a leak-tight manner.

21 Cho does not teach that. So this -- you
22 know, that's part of my argument for why a POSA

1 would not substitute Cho's cap for Plante's cap.

2 BY MR. JENNINGS:

3 Q. So one basis for your argument as you say
4 for why a person of skill in the art would not use
5 Cho's cap in Plante's device is the lack of a
6 fluid-tight interaction between the cap in Cho and
7 the container; is that correct?

8 A. That's correct.

9 Q. And would you agree that that was an
10 important basis for your opinion in this case?

11 MR. HILLIER: Objection to form.

12 You can answer.

13 THE WITNESS: So I put it in my report
14 because I believed it was a factor. And whether --
15 the weight of that factor relative to other factors,
16 I wouldn't want to say, but it was important enough
17 to appear in my report.

18 BY MR. JENNINGS:

19 Q. Now, if Cho did describe a device that
20 provided a fluid-tight interaction between a cap and
21 the container, you would have to reevaluate your
22 opinion in this matter. Do you agree?

1 A. So your hypothetical is Cho updates this
2 publication and resubmits it or something?

3 Q. No. If -- your belief that there is not a
4 fluid-type interaction between Cho's cap and
5 container, if that were incorrect, you would have to
6 reevaluate your opinion in this case; correct?

7 MR. HILLIER: Objection to form.

8 THE WITNESS: Yeah. That hypothetical, I
9 mean, if I had missed that in the description of
10 Cho's -- if I missed that in Cho's publication, I
11 guess I'm not sure how I would have come to realize
12 that Cho did describe a leak-tight interaction. I
13 mean, I don't understand.

14 Either, you know, I would have written an
15 opinion based on a faulty conclusion or I would
16 have -- I don't know -- overlooked something. I'm
17 not sure that I can answer that question.

18 BY MR. JENNINGS:

19 Q. Well, if Cho did describe a fluid-tight
20 interaction between the cap and container, do you
21 agree that you would have to reevaluate your opinion
22 regarding whether a person of skill in the art would

1 combine Cho's cap with Plante's sample collection
2 device?

3 A. So I would certainly have to remove, for
4 instance, the paragraph that says Cho does not teach
5 a fluid-tight interaction between its cap and
6 bottle. However, Cho is still not analogous art as
7 I detail in my report. Cho anticipates or suggests
8 that his bottle is for containing and storing two
9 different materials in two separate spaces of the
10 bottle and then mixing those two materials.

11 Cho does not -- and Cho -- as you read
12 earlier, Cho suggests that the applications for this
13 technology are the quote that you read, industrial
14 and chemical -- no -- industrial and medicine. So
15 while medicine sounds like a biomedical application,
16 it's different from a sample collection device.

17 Q. Okay. So you were talking about what Cho
18 describes there. Let me ask you a few questions
19 about that.

20 You agree that Cho discloses a bottle that
21 contains two kinds of materials separately in two
22 spaces in the bottle. Do you agree?

1 MR. HILLIER: Objection. Objection to
2 form.

3 THE WITNESS: So Cho does discuss a bottle
4 in which it can contain two kinds of materials in
5 two separate spaces in the bottle and the ability to
6 allow those separate spaces to communicate with each
7 other as necessary so that the two materials can be
8 mixed to be used.

9 BY MR. JENNINGS:

10 Q. Okay. You anticipated my next question.

11 Do you agree that the Cho bottle allows
12 those two materials stored in the bottle to be
13 mixed?

14 A. I would disagree with the term "stored in
15 the bottle." The -- so I believe -- my conclusion
16 is that the additive chamber can be stored -- the
17 additive placed in the additive chamber can be
18 placed there in a leak-tight manner, but not the
19 material in the bottle. So I would take issue with
20 the characterization of storing two materials in the
21 bottle.

22 But the question -- you know, to further

1 answer your question, Cho does discuss mixing or
2 adding the material in the additive chamber into the
3 material that's in the bottle chamber, allowing the
4 mixing of those two so that they can be used.

5 Q. Okay. Okay. Cho describes containing a
6 material he refers to as an additive in the additive
7 storage space of the cap; is that correct?

8 A. Yes.

9 Q. And another material is contained within
10 the bottle; correct?

11 MR. HILLIER: Objection to form.

12 THE WITNESS: Potentially another material.
13 The bottle could be empty or the bottle could
14 contain the same material in the additive chamber.
15 I don't know why anybody would want to do that, but
16 you could do that.

17 BY MR. JENNINGS:

18 Q. Did you read the abstract in Cho?

19 A. Yes, I did.

20 Q. And in the abstract, Cho states, "The
21 bottle saves resources and prevents deterioration in
22 the properties in the material and additive."

1 Do you see that?

2 A. I do.

3 Q. Okay. And so the material is in the
4 bottle; correct?

5 MR. HILLIER: Objection to form.

6 THE WITNESS: So reading Cho's abstract, he
7 starts out describing two kinds of materials, and
8 then subsequently refers to one of those materials
9 as the additive. So in my reading of the abstract,
10 what he subsequently then refers to as the material
11 is a material that's in -- well, is the remaining
12 material that's not the additive. So that is the
13 portion of the material that's in the bottle.

14 BY MR. JENNINGS:

15 Q. And Cho says the bottle that's described in
16 the patent prevents deterioration in that material
17 that's contained in the bottle; correct?

18 MR. HILLIER: Objection to form.

19 THE WITNESS: So Cho does say, "The bottle
20 saves resources and prevents deterioration in the
21 properties in the material and the additive." So
22 subject to the assumption that the bottle contains

1 the material, then he is asserting that his bottle
2 prevents deterioration of the material in the
3 bottle.

4 BY MR. JENNINGS:

5 Q. And he says it prevents deterioration in
6 both the material and the bottle and the additive in
7 the cap; correct?

8 A. I don't see that. Properties -- "the
9 bottle saves resources and prevents deterioration in
10 the properties in the material and the additive."

11 Q. So it's preventing deterioration of both
12 the material, which is in the bottle, and the
13 additive, which is in the cap; correct?

14 A. That is what Cho is asserting. I don't
15 believe he's asserting that correctly.

16 Q. So you disagree with the -- that statement
17 in Cho. Is that your opinion?

18 MR. HILLIER: Objection to form.

19 THE WITNESS: Yes, I do.

20 BY MR. JENNINGS:

21 Q. And if the bottle was not sealed, the
22 material in the bottle would deteriorate. Do you

1 agree?

2 MR. HILLIER: Objection to form.

3 THE WITNESS: So it would depend on the
4 material.

5 BY MR. JENNINGS:

6 Q. But it certainly could deteriorate if it
7 wasn't sealed; correct?

8 MR. HILLIER: Objection to form.

9 THE WITNESS: So we -- I guess, you know,
10 it's a hypothetical. So depends on the material in
11 the bottle. Even if a bottle is sealed, like for
12 instance the milk in your fridge, the milk in the
13 fridge will degrade over time.

14 So, you know, I'm not sure that -- my
15 opinion is that Cho is incorrectly asserting that
16 the material in the bottle is sealed in a
17 liquid-tight manner.

18 BY MR. JENNINGS:

19 Q. Turn your attention to page 1 of Cho.

20 A. And these are in the native page numbers?

21 Q. You know, there is a bunch of page numbers
22 on this thing.

1 A. Yeah. I think the native ones are above
2 the --

3 Q. And that's what I'm talking about.

4 A. Okay.

5 Q. The native one is page 1, and in the
6 exhibit I think it has page 3.

7 A. I see that.

8 Q. Do you see that?

9 And I'd like to turn your attention to the
10 section titled "Disclosure of the Invention." Do
11 you see that?

12 A. I do.

13 Q. And you read that?

14 A. Yes, I have.

15 Q. Okay. How much time did you spend reading
16 the Cho patent publication?

17 A. That's really hard to say. I referred to
18 it a lot. So, again, something -- something like
19 hours, right. I really would be hard pressed to
20 ballpark an exact amount of time. Five minutes
21 here, five minutes there, half hour here, half hour
22 there, so...

1 Q. So you read it before you provided your
2 declaration in this matter; correct?

3 A. Yes, I did.

4 Q. Okay. And you read it after that in
5 preparing for today's deposition?

6 A. Yes, I did.

7 Q. Okay. In the first paragraph of the
8 disclosure of the invention, Cho states, "An object
9 of the present invention is to provide a bottle
10 which stores two kinds of materials separately in a
11 bottle when the bottle is distributed on the
12 market." Do you see that?

13 A. I do.

14 Q. Okay. So Cho does describe that an object
15 of his invention described in this patent
16 publication is to store two kinds of materials
17 separately in a bottle; correct?

18 A. He does say that.

19 Q. Okay. And he says that that object of the
20 invention to store those materials separately in a
21 bottle is when the bottle is distributed on the
22 market; correct?

1 A. Yes. He does say that.

2 Q. So if a bottle is stored in two materials
3 that was suitable for distribution on the market,
4 one of skill in the art would expect the bottle to
5 be sealed; correct?

6 MR. HILLIER: Objection to form.

7 THE WITNESS: I could see different
8 scenarios in which Cho could be correctly asserting
9 that his bottle stores materials. For instance,
10 the material in the bottle could be a solid that
11 doesn't need to be sealed. Again, it could be a
12 powder or something. It doesn't need to be sealed
13 against -- doesn't need to be sealed in a
14 fluid-tight manner.

15 And then the second point I would make on
16 this is just because he asserts that, that's the
17 purpose of the invention, doesn't mean that the
18 invention practices that, what he asserts.

19 BY MR. JENNINGS:

20 Q. But you agree that he does assert that it's
21 an object of the disclosure -- the disclosed
22 invention to provide a bottle which stores two kinds

1 of materials separately when the bottle is
2 distributed on the market?

3 MR. HILLIER: Objection to form.

4 THE WITNESS: He does say that, yes. I
5 agree he says that. That's his goal.

6 BY MR. JENNINGS:

7 Q. Okay. And you disagree that -- is it your
8 opinion that you disagree with whether the invention
9 he describes in his patent publication actually
10 achieves that object?

11 MR. HILLIER: Objection to form.

12 THE WITNESS: So in my examination of this
13 piece of Cho's PCT publication, I haven't seen -- or
14 I haven't concluded -- I've concluded that he
15 couldn't -- that the cap does not interact with the
16 bottle in a fluid-tight manner. So he doesn't say
17 in this paragraph that we've been discussing
18 whether -- what the material that's stored in the
19 bottle is a liquid or a powder or a solid. So I'm
20 not sure what -- I'm not sure what he's asserting
21 here or that he's asserting it correctly.

22 BY MR. JENNINGS:

1 Q. Now, if you were told that a bottle is
2 suitable for storing two separate materials and
3 being distributed on the market, would you expect
4 that that bottle sealed those materials?

5 MR. HILLIER: Objection to form.

6 THE WITNESS: I think it is common practice
7 that materials that are distributed on the market
8 are sealed.

9 BY MR. JENNINGS:

10 Q. And Cho never says that the cap in his
11 invention does not seal the bottle; correct?

12 MR. HILLIER: Objection to form.

13 THE WITNESS: So I don't recall reading
14 that Cho said, you know, words to that effect, that
15 the cap does not seal the bottle.

16 BY MR. JENNINGS:

17 Q. And the term distributing on the market,
18 would one of skill in the art understand that that
19 includes transporting the bottle that contains these
20 two materials in separate spaces?

21 MR. HILLIER: Objection to form.

22 THE WITNESS: When I read this sentence in

1 Cho that we've been discussing, when the bottle is
2 distributed on the market, I interpret that phrase
3 to mean -- or the typical use scenario is that
4 something is manufactured somewhere and put in the
5 bottle and then transported to the place where it is
6 sold.

7 BY MR. JENNINGS:

8 Q. Okay. So distributing on the market in
9 common understanding would include transporting a
10 product to stores or other businesses that are going
11 to sell the product to consumers or other customers;
12 correct?

13 MR. HILLIER: Objection to form.

14 THE WITNESS: I think that's a typical step
15 in the manufacture and sale of many products.

16 BY MR. JENNINGS:

17 Q. And that's a fair understanding of the term
18 distributing on the market. Would you agree with
19 that?

20 MR. HILLIER: Objection to form.

21 THE WITNESS: Yes. When I read that
22 particular sentence, that is the interpretation that

1 I take, that something is manufactured somewhere and
2 placed in the bottle, and then it's transported to
3 where it's -- the material is sold.

4 BY MR. JENNINGS:

5 Q. Okay. Going back to the section of Cho
6 titled "Disclosure of the Invention," and the second
7 paragraph there.

8 A. Okay.

9 Q. Cho states, quote, "Another object of the
10 present invention is to provide a bottle which can
11 mix two materials together at an exact mixture ratio
12 using only a simple action," end quote. Do you see
13 that?

14 A. I do.

15 Q. So do you agree that one of skill in the
16 art would understand that the volume of the additive
17 storage space would be adjusted based upon the
18 volume of the bottle to provide a desired mixture
19 ratio for the additive in the contents of the
20 bottle?

21 MR. HILLIER: Objection to form.

22 THE WITNESS: In this hypothetical, I'd

1 have to put myself into the mind of somebody
2 distributing this bottle. So I could see, for
3 instance, that you could add more or less of the
4 additive to a common-sized or a fixed-sized additive
5 compartment. You wouldn't necessarily have to
6 change the size of the additive compartment unless
7 you wanted more volume than the additive compartment
8 could accommodate.

9 BY MR. JENNINGS:

10 Q. So one of skill in the art would
11 understand, however, that Cho's -- the volume of
12 Cho's additive space could be adjusted consistent
13 with the invention described in Cho; correct?

14 MR. HILLIER: Objection to form.

15 THE WITNESS: So one of skill in the art
16 would recognize that the additive storage container,
17 the size or the volume of the additive storage
18 container could be changed to accommodate some
19 operation so holding some material.

20 BY MR. JENNINGS:

21 Q. Okay. So you agree that one of skill in
22 the art reading Cho would know how to make a device

1 that provided one volume of additive and an equal
2 volume in the bottle; correct?

3 MR. HILLIER: Objection to form.

4 THE WITNESS: I think one of skill in the
5 art -- one of skill in the art recognize that the
6 additive chamber could be adjusted, the volume of
7 the bottle could be adjusted as well, so I'm not
8 sure. Your statement was the two -- you'd have
9 the same volume in the additive chamber and the
10 bottle.

11 So one of skill in the art would recognize
12 that you could add more or less fluid to the bottle,
13 material to the bottle to match the amount of
14 material in the additive chamber.

15 BY MR. JENNINGS:

16 Q. And one of skill in the art would know how
17 to make a device as described in Cho where the
18 volume of the additive space was equal to the volume
19 of the bottle; correct?

20 MR. HILLIER: Objection to form.

21 BY MR. JENNINGS:

22 Q. Strike that. Let me ask.

1 A. Okay.

2 Q. Cho describes that his device can be used
3 for a variety of mixing ratios between the additive
4 and the material in the bottle; correct?

5 A. He says, for example, at the bottom of
6 page 1, a bottle can mix two materials together
7 at an exact mixture ratio using only a simple
8 action. So Cho anticipates that the bottle would be
9 loaded with the additive, and you would be adding
10 all of the additive to whatever is in the bottle.
11 The user can't adjust the ratio. The distributor --
12 whoever filled the additive chamber controls the
13 ratio.

14 Q. And one of skill in the art would know that
15 the volume of the additive could be varied as well
16 as the volume of the bottle, depending upon the
17 mixture ratio that was desired; correct?

18 MR. HILLIER: Objection to form.

19 THE WITNESS: So the additive compartment
20 could be more or less filled and adjust the ratio in
21 that way.

22 BY MR. JENNINGS:

1 Q. And the volume of the additive compartment
2 could be adjusted to accommodate mixing in various
3 ratios as Cho describes; correct?

4 MR. HILLIER: Objection to form.

5 THE WITNESS: One of skill in the art would
6 recognize that you could change the volume of the
7 additive compartment.

8 BY MR. JENNINGS:

9 Q. Turn your attention to your declaration,
10 paragraph 77.

11 A. Okay.

12 Q. In the last sentence of that paragraph you
13 say, quote, "Cho is designed for immediate
14 consumption"; correct?

15 A. Yes. I say that.

16 Q. And you drop a footnote there.

17 A. Yes.

18 Q. And does that footnote provide the support
19 for the statement in paragraph 77 that Cho is
20 designed for immediate consumption?

21 A. Yes, it does.

22 Q. Let's go through what you quote there in

1 your footnote. This is from Cho, correct, this
2 quote?

3 A. Yes, it is.

4 Q. Okay. And the first sentence says, "It is,
5 however, often necessary to mix two kinds of
6 different materials together in a variety of
7 industrial fields"; correct?

8 A. Yes.

9 Q. That does not say immediate consumption;
10 correct?

11 A. It does not.

12 Q. You agree that's a broad statement
13 regarding the applicability of the invention
14 described in Cho?

15 MR. HILLIER: Objection to form.

16 THE WITNESS: It's more a characterization
17 of operations that you might -- one might need to do
18 in a variety of industrial fields.

19 BY MR. JENNINGS:

20 Q. You agree that that sentence does not
21 provide support for your statement that Cho is
22 designed for immediate consumption?

1 MR. HILLIER: Objection to form.

2 THE WITNESS: That sentence does not say
3 immediate consumption, does not support that
4 statement that I made.

5 ///

6 BY MR. JENNINGS:

7 Q. And the second sentence starts off with
8 "For example." Do you see that?

9 A. I do.

10 Q. And it refers to a particular example;
11 right?

12 MR. HILLIER: Objection to form.

13 THE WITNESS: It mentions a coffee-based
14 beverage.

15 BY MR. JENNINGS:

16 Q. May be mixed with sugar or cream powder
17 therein?

18 MR. HILLIER: Objection to form.

19 THE WITNESS: It does.

20 BY MR. JENNINGS:

21 Q. Okay. And so is it based upon that
22 particular example that you draw the conclusion that

1 says Cho is designed for immediate consumption?

2 A. That's part of the support for that
3 statement.

4 Q. Now, when you say Cho is designed for
5 immediate consumption, do you mean that Cho is
6 limited to a device that's used for immediate
7 consumption or just allows for immediate
8 consumption?

9 A. So as I assert in my report, Cho -- the
10 coupling between the cap, Cho's cap and Cho's
11 bottle, is not fluid tight. So the -- Cho doesn't
12 anticipate storage or transportation of the
13 material. Once the additive is added to the
14 material in the bottle, Cho doesn't anticipate
15 storage or distribution of that mixture.

16 MR. HILLIER: We've been going for about an
17 hour. Is now a good time for a break?

18 MR. JENNINGS: Not just yet.

19 MR. HILLIER: Dr. Wereley, if you would
20 like a break, we can take one, but that's your
21 decision.

22 THE WITNESS: Yeah. We can keep going.

1 BY MR. JENNINGS:

2 Q. So getting back to the second sentence in
3 your footnote, which we're going to finish up before
4 we do the break, if you don't mind, Drew.

5 MR. HILLIER: That's okay.

6 BY MR. JENNINGS:

7 Q. That doesn't suggest that chemicals would
8 be consumed at all; correct?

9 A. Consumption could mean ingestion or it
10 could mean consumption by a machine that uses that
11 material. So I'm not saying that if some dangerous
12 chemical is drunk by the person who's doing the
13 mixing, but consumption could mean use.

14 Q. Now, Cho doesn't actually use the word
15 "immediate consumption" anywhere in his patent
16 publication; correct?

17 A. I'm not sure about that particular phrase.

18 Q. Is that a phrase you came up with?

19 A. Yes. Based on the example that's given in
20 the footnote, so coffee-based beverage and then Cho
21 says similar cases. Those, you know, medicines and
22 chemicals are similar cases. So the analogy between

1 coffee and medicines and chemicals being similar
2 cases, I draw from that that he is anticipating
3 that those medicines and chemicals are used upon
4 mixing.

5 Q. Well, he's just referring in the first
6 sentence to mixing two kinds of different materials
7 together in a variety of industrial fields.

8 A. Yes.

9 Q. So I want to ask a follow-up again on this.
10 When you say Cho is designed for immediate
11 consumption, are you trying -- are you meaning that
12 Cho can only be used in the context of immediate
13 consumption or it permits immediate consumption?

14 A. So Cho certainly permits immediate
15 consumption, but the point that I'm making here is
16 that Cho's cap cannot be installed onto the bottle
17 in a fluid-tight manner. And consequently whatever
18 material is mixed in Cho's bottle, whatever the two
19 materials are that mixed in Cho's bottle, they can't
20 be stored and/or distributed unless the bottle is
21 kept upright. And even then, as you mentioned,
22 chemicals or medicines would be prone to evaporation

1 or some other degradation if the bottle is not
2 sealed.

3 Q. Okay. So if Cho's bottle contains two
4 materials, one in the bottle, one in the additive,
5 and it's distributed on the market, the material in
6 the bottle would be prone to degradation and
7 evaporation as you suggest; correct? That's your
8 opinion?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: Any material that's stored in
11 the bottle would not be stored in a fluid-tight
12 manner. So Cho doesn't assume or doesn't suggest
13 whether the material that's stored in the bottle is
14 a liquid or a solid. So it's feasible that a solid
15 wouldn't degrade if it weren't stored in a
16 fluid-tight manner.

17 ///

18 BY MR. JENNINGS:

19 Q. Well, even a solid that's not stored in a
20 fluid-tight manner would be subject to degradation
21 from oxygen in the air; correct?

22 MR. HILLIER: Objection to form.

1 THE WITNESS: So it would depend on the
2 solid that's stored in the bottle. Depends, you
3 know -- I would think in general you would want to
4 store whatever is in the bottle in a fluid-tight
5 manner.

6 BY MR. JENNINGS:

7 Q. If you were to distribute that bottle on
8 the marketplace; correct?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: So I'm not characterizing
11 what -- I'm not characterizing that as what Cho is
12 doing. I don't believe that Cho -- Cho asserts that
13 a material can be stored in the bottle, but I don't
14 believe it can be stored in the bottle in a water --
15 or in a fluid-tight manner.

16 MR. HILLIER: Okay. Let's take a break.
17 We've been going for an hour.

18 THE VIDEOGRAPHER: Counsel, go off the
19 record?

20 MR. JENNINGS: Sure.

21 THE VIDEOGRAPHER: We're going off the
22 record. The time is 10:09 a.m.

1 (Recess, 10:09 a.m. to 10:22 a.m.)

2 THE VIDEOGRAPHER: We are now back on the
3 record. The time is 10:22 a.m.

4 BY MR. JENNINGS:

5 Q. Okay. I'd like to refer your attention to
6 the Cho patent publication.

7 A. Okay.

8 Q. Exhibit 1004. And the figures in
9 particular starting at figure 43.

10 A. Okay.

11 MR. HILLIER: What page are you on?

12 MR. JENNINGS: Looks like figure 43 starts
13 on page 119.

14 BY MR. JENNINGS:

15 Q. Dr. Wereley, this is Exhibit 1004 I'm
16 referring you to.

17 A. Yes. I see that.

18 Q. Okay. And in particular figure -- starting
19 at figure 43. You have that?

20 A. Yes, I do.

21 Q. Okay. And do you understand that figures
22 43 through 45 depict what Cho describes as his 21st

1 embodiment; correct?

2 A. Yes. That's correct.

3 Q. Okay. And you understand that that's the
4 embodiment that is subject to the discussion in this
5 proceeding?

6 MR. HILLIER: Objection to form.

7 THE WITNESS: It is the embodiment that I
8 discussed in my report.

9 BY MR. JENNINGS:

10 Q. Okay. You answered it better than I asked
11 the question. Okay.

12 And so a consumer using a device as
13 depicted in the 21st embodiment would use two parts,
14 a cap and a bottle; is that correct?

15 A. So a person interacting with Cho's 21st
16 embodiment would deal with both the cap and the
17 bottle. It would screw the one relative to the
18 other. I think that's what you're asking.

19 Q. Right. Okay. And figure 45A depicts the
20 embodiment after the user has screwed the cap onto
21 the bottle and released the additive to mix with the
22 material in the bottle; correct?

1 A. Yes. That is the state that's shown in
2 figure 45A.

3 Q. And the statements shown in figure 45B is
4 after the user has removed the cap from the bottle;
5 correct?

6 MR. HILLIER: Objection.

7 THE WITNESS: So there seems to be a typo
8 in Cho. Page -- native page 50, line 26, it refers
9 to "As a result, as shown in figure 49B, the
10 additive storage container 620 rises up and is
11 removed from the bottle during its rotation." And I
12 believe that Cho means to refer to 45B in that line.

13 So in my reading of the -- of Cho, I made
14 that substitution, that that figure, 49B as in boy
15 actually referred to 45B as in boy.

16 BY MR. JENNINGS:

17 Q. And so figure 45B shows the 21st embodiment
18 after the user has removed the cap from the bottle;
19 correct?

20 A. Yes. That's correct.

21 Q. During the break, did you discuss your
22 testimony with counsel for DNA Genotek at all?

1 A. No.

2 Q. You didn't discuss anything about the
3 questions I've asked you, the answers you've given?

4 MR. HILLIER: Objection to form. Asked and
5 answered.

6 THE WITNESS: No.

7 ///

8 BY MR. JENNINGS:

9 Q. I'd like to turn your attention to the
10 Plante patent, which is Exhibit 1003. You have that
11 in your binder you brought with you today?

12 A. I do. I see that.

13 Q. Okay. Plante does not mention anything
14 about someone contaminating the device by touching
15 the film covering the preservative; correct?

16 A. So my opinions are expressed in my report.
17 However, when I read through Plante, I don't see a
18 mention of a user contacting the preservative
19 contaminating the sample.

20 Q. I'll turn your attention to your
21 declaration in this matter, Exhibit 2013 at the
22 native page 53.

1 A. Okay.

2 Q. And this is the end of paragraph 95 and
3 paragraph 96 on this page; correct?

4 A. On page 53, it does contain the end of
5 paragraph 95 and the entirety of paragraph 96.

6 Q. Okay. And at the end of paragraph 95, you
7 have a figure there; correct?

8 A. Yes, I do.

9 Q. And you're comparing one cap that is
10 disclosed in Plante to another cap that is disclosed
11 in Cho; correct?

12 A. Yes. That's what's depicted in that
13 figure.

14 Q. And each of those caps define a space to
15 hold a material in a sealed condition; correct?

16 MR. HILLIER: Objection to form.

17 You can answer.

18 THE WITNESS: Yes, they do.

19 BY MR. JENNINGS:

20 Q. And the spaces in each of those caps is a
21 cylindrical space; correct?

22 A. That's a fair description of both of those

1 volumes.

2 Q. And in your -- in your declaration,
3 paragraph 95, you state, "I scaled the threads on
4 Cho's cap to engage with the threads on Plante's
5 receiving vessel." Why did you do that?

6 A. In order to substitute Cho's cap onto
7 Plante's receiving vessel, it would be necessary for
8 those two parts to -- the size of those -- the
9 threads on those two caps to match. Or I mean
10 probably more appropriately, it would be necessary
11 for the threads on Cho's cap to match the threads on
12 Plante's receiving vessel, which are the inverse of
13 the threads on Plante's cap.

14 Q. So you did that in order to allow you to
15 physically substitute Cho's cap onto Plante's
16 device; is that correct?

17 MR. HILLIER: Objection to form.

18 THE WITNESS: So I'm illustrating the
19 procedure that a POSA in 2012 would go through when
20 thinking about substituting Cho's cap onto Plante's
21 receiving vessel and matching the size of those
22 two caps. The threads need to engage -- the threads

1 on Cho's cap would need to engage the threads on
2 Plante's receiving vessel in order for that to work.

3 BY MR. JENNINGS:

4 Q. And by "threads need to engage," you mean
5 to say that you adjusted the internal diameter of
6 the portion of each cap that's colored in blue; is
7 that correct?

8 MR. HILLIER: Objection to form.

9 THE WITNESS: So the first step in this
10 substitution -- in substituting Cho's cap onto
11 Plante's receiving vessel would be making those
12 threads match. And the one step in that process
13 would be adjusting the diameter of the threads from
14 Cho's cap to match the diameter of the threads on
15 Plante's receiving vessel.

16 ///

17 BY MR. JENNINGS:

18 Q. So to allow the substitution of the Cho cap
19 to the Plante device, you adjusted the internal
20 diameter of the cap portion that's colored in blue;
21 is that correct?

22 MR. HILLIER: Objection to form.

1 THE WITNESS: So I am illustrating the
2 first step in the process of substituting Cho's cap
3 onto Plante's receiving vessel. And I adjusted the
4 thread size or the diameter of the threads so that
5 Cho's cap would thread onto Plante's receiving
6 vessel.

7 BY MR. JENNINGS:

8 Q. Now, you didn't adjust the actual threads,
9 right, because as depicted here in your report in
10 paragraph 95, Plante's threads are much finer than
11 the threads depicted in the Cho cap that you have
12 right next to it; correct?

13 MR. HILLIER: Objection to form.

14 THE WITNESS: So the threads in these
15 sketches are schematic showing the locations of the
16 threads. There aren't descriptions of the threads
17 in either set of specifications.

18 BY MR. JENNINGS:

19 Q. Now, in these two figures that you're
20 depicting next to each other in paragraph 95, what
21 would the volume of the area for the additive in Cho
22 be as compared to the volume of the area for the

1 preservative in Plante be?

2 MR. HILLIER: Objection to form.

3 THE WITNESS: So as you mentioned, these
4 are both cylinders, which means the volume is the
5 area of the circle, the base of the cylinder. And
6 we can't see the area, but we can see the diameter
7 of these two cylinders. So the diameter in Plante's
8 case is larger, but the height is smaller relative
9 to the diameter of the cylinder -- diameter and
10 height of the cylinder in Cho's cap. So the
11 volume -- Cho's volume would be larger than Plante's
12 volume.

13 BY MR. JENNINGS:

14 Q. Do you have any estimate for approximately
15 how many times larger?

16 MR. HILLIER: Objection to form.

17 THE WITNESS: No, I do not.

18 BY MR. JENNINGS:

19 Q. Would you agree that it's approximately
20 five times larger?

21 MR. HILLIER: Objection to form. Asked and
22 answered.

1 THE WITNESS: I wouldn't want to try to
2 approximate the ratio of those two volumes sitting
3 here today, and I didn't include that in my report.

4 BY MR. JENNINGS:

5 Q. But you do agree that the volume in the Cho
6 cap that you've now scaled to substitute in the
7 Plante's device is greater than the volume in
8 Plante's cap; correct?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: So without measuring that, I
11 can't be sure about their relative volumes. I would
12 suspect that the volume in Cho is larger than the
13 volume in Plante. I couldn't ballpark how much that
14 would be or...

15 BY MR. JENNINGS:

16 Q. And you personally did the scaling of the
17 figures to line them up as depicted in paragraph 95?

18 MR. HILLIER: Objection to form.

19 THE WITNESS: I believe this figure was
20 generated by staff at Morrison & Foerster.

21 BY MR. JENNINGS:

22 Q. So you don't know what software might have

1 been used to scale the figures?

2 A. No, I do not. However, whatever software
3 you use -- you know, the choice of the software is
4 really immaterial in terms of lining these two
5 figures up. I can do it with a Xerox machine and,
6 you know, Xerox the figure out of Cho and the figure
7 out of Plante and come up with the same result.

8 Q. I will turn your attention to paragraph --
9 or page 55 of your declaration.

10 A. Okay. I see that.

11 Q. Okay. And this includes paragraph 98 and
12 two figures above.

13 A. Yes.

14 Q. And what you're doing on the figure in the
15 right is you're bodily incorporating Cho's cap onto
16 Plante's container; is that correct?

17 MR. HILLIER: Object to form.

18 THE WITNESS: I'm illustrating the process
19 that a POSA in 2012 would have used when considering
20 whether they would substitute Cho's cap onto
21 Plante's receiving vessel. That's what those two
22 figures show and the difficulties that would be

1 encountered in trying to do that.

2 BY MR. JENNINGS:

3 Q. And so you're illustrating what you say one
4 of skill in the art would have done to physically
5 incorporate Cho's cap onto Plante's container; is
6 that correct?

7 MR. HILLIER: Objection to form.

8 THE WITNESS: I am illustrating the process
9 that a POSA would go through when considering
10 whether to try to substitute Cho's cap for -- onto
11 Plante's device.

12 BY MR. JENNINGS:

13 Q. And would you agree that the volume of the
14 additive in your scaled version of Cho's cap is --
15 would take up the entire volume of the container in
16 Plante as depicted in page 55 of your report?

17 A. The -- so the volume of an object is hard
18 to infer from a cross-sectional view shown like
19 this. For instance, there is a portion near the
20 threads in Plante's receiving vessel in which the
21 sample -- or the additive chamber does not occupy.
22 And because that's at a larger diameter, it would be

1 relatively -- it would be relatively more volume
2 there than say on the center line.

3 So let's say to answer your question, I'm
4 not sure which volume would be larger, the volume in
5 the additive compartment or the volume in Plante's
6 receiving vessel, but they are -- they're
7 comparable.

8 Q. And so when you're trying to illustrate
9 here what you say a person of skill in the art would
10 do, you are maintaining as a constant the volume of
11 the additive storage space depicted in Cho's figures
12 for his 21st embodiment; is that correct?

13 MR. HILLIER: Objection to form.

14 THE WITNESS: The process that I'm
15 illustrating here is one that a POSA would
16 consider -- or one of the -- a step in the process
17 that a POSA thinking about substituting Cho's cap
18 onto Plante's receiving vessel, one step in the
19 process that they would perform, which is to look at
20 Cho's cap relative to Plante's receiving vessel.
21 And the -- so the threads, I have adjusted the
22 threads on Cho's cap to match the threads on

1 Plante's receiving vessel. Then can proceed to draw
2 further conclusions about how those two parts might
3 or might not fit together.

4 BY MR. JENNINGS:

5 Q. And so that's the only adjustment you made
6 was the internal diameter of the blue-shaded cap
7 portion of Cho's 21st embodiment; correct?

8 MR. HILLIER: Objection to form.

9 You can answer.

10 THE WITNESS: The whole cap -- Cho's entire
11 cap that's shown in both of those figures has been
12 scaled by the same factor to match the scale of
13 Plante's cap. So the only change is to match the
14 scale of Cho's cap to the scale of Plante's cap,
15 matching the diameter of those threads.

16 BY MR. JENNINGS:

17 Q. And that what you say is the only change
18 you did was to illustrate a process of physically
19 incorporating Cho's cap onto Plante's container;
20 correct?

21 MR. HILLIER: Objection to form.

22 THE WITNESS: So what I'm illustrating here

1 in this figure is the first step that a POSA might
2 take, POSA in 2012 would take, when considering the
3 difficulties that they might face in trying to
4 incorporate Cho's cap to Plante's receiving vessel.

5 BY MR. JENNINGS:

6 Q. And one thing you didn't show here in this
7 step is adjusting the volume of the additive space
8 to correspond with the volume of preservative
9 depicted in Plante's device; correct?

10 A. That figure does not show changing the
11 volume of the additive space relative to other parts
12 on Cho's cap.

13 Q. And that's not something you considered;
14 correct?

15 A. So I considered the difficulties that a
16 POSA in 2012 would face when attempting to
17 substitute Cho's cap onto Plante's receiving vessel.
18 And this is illustrating the first step in that
19 process, which is to see how the parts would fit
20 together.

21 Q. And that first step of illustrating how the
22 parts fit together is how they physically fit

1 together after you've adjusted the size of the
2 threads as you say?

3 A. Yes.

4 Q. Turn your attention to page 56 of your
5 declaration.

6 A. Okay. I see that.

7 Q. Okay. And this is paragraph 99 and 100.
8 And in paragraph 99, you include a figure that has
9 Cho's cap superimposed over Plante's container;
10 correct?

11 A. Yes. The figure above paragraph 100 shows
12 the state of the device when Cho's cap would be
13 fully screwed onto Plante's receiving vessel.

14 Q. And did you create this superimposed
15 figure?

16 A. I believe this figure was created by staff
17 at Morrison & Foerster. However, I agree with it.
18 Had I done it myself, it would look the same.

19 Q. So when you're saying in your declaration
20 here, "I also created" and "I created," those are
21 mistakes; is that correct?

22 MR. HILLIER: Objection to form.

1 THE WITNESS: So I certainly wouldn't
2 characterize them as mistakes. We -- working with
3 counsel at Morrison & Foerster, we circulated --

4 MR. HILLIER: I'm just going to caution you
5 not to reveal privileged communications, but...

6 THE WITNESS: Okay. So working with
7 counsel at Morrison & Foerster, we derived -- we
8 created this figure, and I agree with the figure.

9 BY MR. JENNINGS:

10 Q. Right. But it's a simple question. You
11 say in your declaration "I created," and then you
12 just previously testified you didn't create it. And
13 I'm asking you: Is that just a mistake?

14 MR. HILLIER: Objection to form.
15 Mischaracterizes the testimony.

16 You can answer.

17 THE WITNESS: So it certainly isn't a
18 mistake. It's maybe perhaps a mischaracterization
19 of the generation of the figure. The way in which
20 I'm using this is -- the way in which I'm using
21 that, I also created the figure below, is I've
22 directed its creation or -- and I certainly agree

1 with its creation.

2 BY MR. JENNINGS:

3 Q. And so based upon this figure you reached
4 the conclusion that Cho's cap is just too big to be
5 used with Plante's device.

6 MR. HILLIER: Objection.

7 BY MR. JENNINGS:

8 Q. Is that correct?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: The conclusion that I reached
11 is more encompassing than that statement. So the
12 collection of the figures above paragraph 98 and
13 above paragraph 100 show the relative -- show
14 numerous difficulties that one would experience when
15 trying to substitute Cho's cap onto Plante's
16 receiving vessel. In particular not only would the
17 cap need to be changed -- we've been focused on the
18 cap here. Not only would the cap need to be
19 changed, but Plante's receiving vessel would also
20 need to be changed.

21 BY MR. JENNINGS:

22 Q. Because the sizes don't match?

1 A. So --

2 MR. HILLIER: Objection to form.

3 You can answer.

4 THE WITNESS: So Plante's receiving vessel
5 is -- is missing the ratchet that's used to hold the
6 additive containment vessel stationary while
7 advancing the cap. And also Plante's knife,
8 number 19 in the figure shown above, paragraph 98,
9 is another feature that would have to be removed.

10 So this illustrates a number of the
11 difficulties that a POSA in 2012 would face trying
12 to substitute Cho's cap onto Plante's receiving
13 vessel. One of those is size as you mentioned, but
14 there are others.

15 BY MR. JENNINGS:

16 Q. And the extent of that work was scaling
17 figures to superimpose over each other; correct?

18 MR. HILLIER: Objection to form.

19 THE WITNESS: I wouldn't characterize it as
20 the extent of the work. So both Cho and Plante
21 feature verbal descriptions of their inventions.
22 And so the match, it's considering the figures as

1 well as the verbal descriptions of those two
2 devices.

3 BY MR. JENNINGS:

4 Q. So in reading the description in Plante and
5 looking at the figures, in your mind, how big did
6 you envision the container in Plante to be?

7 A. So on page 4 of Plante's publication,
8 line -- or paragraph 41, the fourth line from the
9 top, it states -- it begins on the third line, "It
10 is preferably cylindrical in shape and approximately
11 1 centimeter deep."

12 So that's the only mention of size that I
13 found in Plante's publication, which would lead me
14 to conclude or to estimate the relative size of
15 other components from that size. So I can infer
16 that the cap is about 1 centimeter tall, or I read
17 from that passage that I just pointed out that
18 the cap is 1 centimeter tall. And the other
19 dimensions that we see would be scaled by that
20 1 centimeter.

21 So I think your question was what's the
22 volume of Plante's receiving vessel. And I did not

1 use that 1 centimeter cap height to estimate the
2 volume of Plante's receiving vessel.

3 Q. Do you agree that one of skill in the art
4 would understand that Plante's device as described
5 in the patent publication could be adjusted in size?

6 MR. HILLIER: Objection to form.

7 THE WITNESS: It's my understanding of
8 these figures and descriptions that they are meant
9 to be schematic and can be adjusted. The -- so one
10 of ordinary skill in the art in 2012 would have
11 understood that they could change some dimensions of
12 Plante.

13 BY MR. JENNINGS:

14 Q. And same with Cho, one of skill in the art
15 in 2012 would have understand that the size of the
16 Cho device could be adjusted in size?

17 MR. HILLIER: Objection.

18 MR. JENNINGS: Strike that. That's a bad
19 question.

20 BY MR. JENNINGS:

21 Q. So my question is: Same with Cho, one of
22 skill in the art as of 2012 would understand that

1 Cho's device could be adjusted in size?

2 MR. HILLIER: Objection to form.

3 THE WITNESS: Cho's device is a much more
4 complicated device with many parts that have to
5 interact and in particular have to interact in very
6 specific ways to render the additive compartment as
7 with a fluid-tight seal.

8 I think one of ordinary skill in the art in
9 2012 would have been faced with insurmountable
10 challenges in attempting to scale the additive --
11 attempting to change or reduce the diameter of the
12 additive compartment to fit within Plante's
13 receiving vessel.

14 BY MR. JENNINGS:

15 Q. So in answering that question, you focused
16 on the possibility of reducing the diameter of the
17 additive compartment in Cho; correct?

18 A. This whole section of my report deals with
19 substituting Plante's cap -- or Cho's cap onto
20 Plante's receiving vessel and discussion of whether
21 it's a simple substitution or not and the number of
22 changes that would be required. I don't think that

1 a POSA would have a reasonable expectation of
2 success in integrating Cho's cap onto Plante's
3 receiving vessel.

4 Q. Well, you agree that one of skill in the
5 art would readily understand that the axial length
6 of the cylindrical additive storage space could be
7 adjusted in Cho; correct?

8 MR. HILLIER: Objection to form.

9 THE WITNESS: I think it isn't as simple as
10 that. For instance, the -- there is a minimum axial
11 extent to the additive chamber. There is a minimum
12 axial extent to the whole cap, which is dictated by
13 the need for the cap to thread onto the base that
14 it's being threaded onto in a certain way in order
15 to push the plate that contains or is coupled to the
16 opening mechanism in order to push that upwards.
17 There is some minimum size required for the --
18 beyond which the cap can't be made smaller, or at
19 least shorter in an axial extent.

20 BY MR. JENNINGS:

21 Q. I think you answered a different question.
22 You said in your view there is some sort of a

1 minimum.

2 But my question is: You agree that one of
3 skill in the art would have understand -- understood
4 that the axial length of the cylindrical additive
5 storage space could be adjusted in Cho?

6 MR. HILLIER: Objection to form. Asked and
7 answered.

8 THE WITNESS: So as I described in my
9 report, a POSA would recognize that they face
10 considerable difficulties in making and adjusting
11 Cho's cap to fit onto Plante's receiving vessel.

12 BY MR. JENNINGS:

13 Q. Okay. I'm going to reask my question.

14 Do you agree that one of skill in the art
15 would have understood that the axial length of the
16 cylindrical additive storage space could be adjusted
17 in Cho?

18 MR. HILLIER: Same objections. Objection
19 to form.

20 THE WITNESS: The axial length -- so a POSA
21 in 2012 would realize that the axial length of the
22 additive compartment could be changed to some

1 extent, not any extent, could be changed to some
2 extent, period.

3 BY MR. JENNINGS:

4 Q. And that would affect the volume of the
5 additive storage space; correct?

6 MR. HILLIER: Objection to form.

7 THE WITNESS: Changing the length of the
8 cylinder that comprises the axial or the additive
9 compartment would necessarily change its volume.

10 BY MR. JENNINGS:

11 Q. Turn your attention to paragraph 91 of your
12 declaration.

13 A. Okay.

14 Q. In paragraph 91, you're referring to Plante
15 and its cap; correct?

16 A. That's correct.

17 Q. And you state -- you refer to first that
18 Plante's reservoir protrudes only slightly beyond
19 Plante's cap; correct?

20 A. Yes. I say that.

21 Q. And that reservoir is what's containing the
22 preservative solution; correct?

1 A. Yes. That's correct.

2 Q. And then you state, "This significantly
3 reduces the risk that an individual would touch the
4 film"; correct?

5 MR. HILLIER: Objection to form.

6 THE WITNESS: Yes. I state that.

7 BY MR. JENNINGS:

8 Q. And the film is the -- what covers the
9 preservative reservoir and contains that
10 preservative within the reservoir; correct?

11 A. That's correct.

12 Q. And what's the basis for your statement
13 that this significantly reduces the risk that an
14 individual would touch the film?

15 A. The basis of my conclusion there is
16 interacting with the device myself and the way that
17 it's distributed in its packaging, a user is only
18 given the opportunity to pick up the cap from the
19 side, the knurled side surfaces of the cap.

20 Q. Okay. So you didn't physically interact
21 with an actual device; correct?

22 MR. HILLIER: Objection to form.

1 THE WITNESS: I have -- I have examined
2 devices that I conclude are similar to these, to the
3 Plante publication -- to the device that's described
4 in the Plante publication which have the same sort
5 of features. And in those devices, I was more
6 likely -- or the user is directed to pick up the
7 device -- or pick up the cap from the edges of the
8 cap.

9 BY MR. JENNINGS:

10 Q. And that's as a result of the manner in
11 which those devices are packaged. Is that what you
12 said?

13 A. It's both the manner in which they're
14 packaged as well as the particular construction of
15 the cap, which has -- which is a large flat device
16 and one is -- a user would be most likely to pick it
17 up from the edges. There is no, let's say,
18 protruding handle -- handle-appearing portion like
19 there is in Cho's cap.

20 Q. So you agree that the way in which a device
21 is packaged affects how a user is going to interact
22 with the device in terms of picking it up; correct?

1 A. I think a manufacturer or distributor of an
2 object of some item can influence how a user would
3 pick up or interact with the object that they're
4 distributing in -- by controlling the way in which
5 the object is distributed to the -- or presented to
6 the user.

7 Q. And that would be known to one of skill in
8 the art as of 2012; correct?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: So one of skill in the art in
11 2012 would not necessarily have had any training in
12 packaging and related concepts, but would certainly
13 have experienced these -- the distribution of items
14 and would have some ideas about how to distribute a
15 device to encourage a person to pick it up in a
16 certain manner.

17 BY MR. JENNINGS:

18 Q. Turn your attention to page 26 of your
19 declaration.

20 A. Okay.

21 Q. And you show in your declaration there on
22 page 26, figure 1 from Plante.

1 A. That's correct.

2 Q. And that figure 1 includes a knife element
3 labeled 19; correct?

4 A. Yes, it does.

5 Q. Okay. Now, you refer to pressing fingers
6 on a variety of commercial products, but you didn't
7 press your finger or have someone press their finger
8 on anything constructed as depicted in figure 1 of
9 Plante; correct?

10 MR. HILLIER: Objection to form.

11 THE WITNESS: The tests that I performed on
12 the commercial devices that you noted, the reason
13 that I chose those devices is because they --
14 they're described similar to this device and have a
15 knife similar to this device, in fact, in a more
16 exposed location. So I felt that those tests were
17 relevant to inform my opinion of whether the knife
18 in 19 would be recognized by a POA in 2012 as being
19 a dangerous element.

20 BY MR. JENNINGS:

21 Q. But my question was: You didn't yourself
22 or have someone press their finger against a device

1 having the structure of element 19 as depicted in
2 figure 1 of Plante --

3 MR. HILLIER: Objection.

4 BY MR. JENNINGS:

5 Q. -- correct?

6 MR. HILLIER: I didn't mean to interrupt.
7 Objection. Asked and answered.

8 THE WITNESS: So I did not create this, an
9 exact duplicate of this device, and perform those
10 experiments that I detailed performing on the RE-100
11 and OG-250. I didn't perform those experiments on
12 an exact re-creation of this device.

13 BY MR. JENNINGS:

14 Q. Is it your opinion that a device
15 constructed as depicted in figure 1 of Plante would
16 have presented zero risk of injury as a result of
17 the sharpness of element 19?

18 A. So my conclusion about the -- whether the
19 knife element or the device in total is dangerous is
20 based on a -- what a reasonable expectation of how a
21 person might interact with such a device. And I
22 don't foresee any scenarios in which a person could

1 injure themselves with a device such as shown in
2 figure 1.

3 Q. Your testimony is that you don't foresee
4 any situation where an injury could occur with
5 respect to a device as depicted in figure 1 of
6 Plante?

7 MR. HILLIER: Objection to form.

8 THE WITNESS: So I believe I said
9 reasonable. So I think considering the ways that a
10 person could interact with such device, even in --
11 adverse to the instructions for use, I don't see it
12 as being at all likely that a person could injure
13 themselves with this device.

14 BY MR. JENNINGS:

15 Q. Okay. In paragraph 50, you're comparing
16 Plante's device with some device depicted in what
17 you call the '895 publication. And you say,
18 Plante's device presents less of a risk of injury.
19 Do you see that?

20 MR. HILLIER: Objection to form.

21 You can answer.

22 THE WITNESS: Yes, I see that.

1 BY MR. JENNINGS:

2 Q. So by "less," do you mean it still presents
3 some risk, but just less than what you perceived to
4 be for this '895 publication that you refer to?

5 MR. HILLIER: Objection to form.

6 THE WITNESS: So parsing the language in
7 paragraph 50, less could include zero. Less just
8 means smaller than, so zero is incorporated in that
9 inequality.

10 I think outside some kind of intentional
11 misuse of the device shown in figure 1, Plante's
12 figure 1, there is no reasonable expectation that a
13 person even using -- even unintentionally
14 interacting with the device incorrectly would injure
15 themselves.

16 ///

17 BY MR. JENNINGS:

18 Q. In paragraph -- or strike that.

19 Page 18 of your declaration.

20 A. Okay. I see that.

21 Q. Okay. You state, "I also commissioned
22 testing of another RE-100 by another person to

1 confirm my results."

2 Okay. What do you mean by "commissioned"?

3 A. While we're at this point, I'd like to
4 defer answering your question and point out some
5 typos in my report.

6 On page 22, paragraph 45, I refer to
7 another "I commissioned" sentence. "I commissioned
8 an individual to place their finger directly on a
9 pointed member of the RE-100 apply pressure." That
10 should read OG-250. So -- and also in the
11 subsequent sentence, it is incorrectly referred to
12 as the RE-100. Obviously from the picture it's an
13 OG-250.

14 And then on the previous page there is
15 another typo, which is the footnote, Exhibit 2015.
16 So that is the instructions for the RE-100, the
17 footnote refers to the instructions for the RE-100
18 but it should be the OG-250, which was not submitted
19 at the time but is now submitted instruction.

20 Q. Which footnote number?

21 A. That is number 22, footnote 22 on page 20.

22 Q. And that should be exhibit what?

1 A. I'm not sure of the exhibit. It's the
2 instructions for use for the OG-250 which is in the
3 record. I just don't happen to know the number
4 myself.

5 MR. HILLIER: Joe, we can get you the
6 number.

7 MR. JENNINGS: That's all right.

8 MR. HILLIER: Just a substitution.

9 BY MR. JENNINGS:

10 Q. Having read through your declaration in
11 preparation for your deposition, those are the only
12 two errors you found?

13 A. That is a fair --

14 MR. HILLIER: Objection to form.

15 You can answer.

16 THE WITNESS: Sorry.

17 That's a fair statement. I'm not saying
18 those are the only two errors there are, but those
19 are the only two that I found.

20 BY MR. JENNINGS:

21 Q. Okay. So --

22 A. Getting back to your question.

1 Q. Back to my question. Paragraph 37, I asked
2 you what do you mean by commissioned.

3 A. So as I state in paragraph 36, I tested
4 these devices that you see in the ensuing or the
5 following paragraphs, the RE-100 and the OG-250, but
6 I wanted to have photographs of those tests, and I
7 was not -- at the time I was preparing this portion
8 of the report, I did not have access to those
9 devices. So I instructed staff at Morrison &
10 Foerster to perform the same tests that I performed
11 and take photographs of the results. That's what I
12 mean when I say I commissioned.

13 Q. And who is this other person referred to in
14 paragraph 37?

15 A. My understanding is that it's Brian Kramer.

16 Q. And did you tell him how to do it?

17 A. Yes, I did.

18 Q. What did you tell him?

19 A. I asked staff at Morrison & Foerster to
20 place their finger on the knife and press firmly and
21 take photographs of the results, both the action as
22 well as the result on the digit being used.

1 Q. And is it your understanding that in each
2 instance where you said I commissioned testing by
3 another person, that that person was Brian Kramer?

4 A. That is my understanding.

5 Q. And some third person took the pictures of
6 him doing that?

7 A. I don't -- I believe that he took the
8 photos himself, yes.

9 Q. And the instruction was to press firmly; is
10 that right?

11 A. That's correct. I believe you can see on
12 page 22 as he's interacting with the OG-250, you can
13 see a discoloration of the fingernail -- of the
14 finger that he is using to press onto the knife.
15 And you can see that he is, in fact, pressing with
16 some -- I would say pressing firmly.

17 Q. And the RE-100 and OG-250 are not devices
18 made according to the Plante patent; correct?

19 MR. HILLIER: Objection to form.

20 THE WITNESS: So those two devices are not
21 made according to the patent, but they are -- have
22 similar features, in particular, the type of

1 manufacturing, plastic molding, and the description
2 of the feature matches the description of the knife
3 feature in Plante.

4 BY MR. JENNINGS:

5 Q. Those devices do not include a singular
6 knife coming to a very acute point as depicted in
7 Plante; correct?

8 MR. HILLIER: Objection to form.

9 THE WITNESS: Those devices, both of them,
10 contain I would say three knife elements, each
11 element of which has two pointed surfaces. So they
12 meet the description in Plante of a knife.

13 Plante is very -- does not describe in
14 great detail the -- what the knife is. It's
15 schematically shown as a point, but we know that
16 that's rotated. That's that dashed line that you
17 see above -- in the figure on the right above
18 paragraph 36 is an axis of rotation. So the knife
19 is somehow extended into the page to some degree.

20 So I guess I would say whether it looks
21 like a straight edge, a single straight edge or
22 multiple knives, like in the case of the RE-100 or

1 the OG-250, I believe the results of my experiments
2 are relative to or are applicable to a device
3 constructed according to the Plante publication.

4 BY MR. JENNINGS:

5 Q. Do you agree that one of skill in the art
6 in 2012 would have been motivated to minimize the
7 risk of injury for a device to be used by unskilled
8 users in collecting biological samples?

9 MR. HILLIER: Objection to form.

10 THE WITNESS: I believe that's one of the
11 principles that a POSA in 2012 would have considered
12 when designing a device, and that doesn't
13 necessarily mean eliminating all sharp elements. It
14 could mean assuring through engineering controls
15 that those sharp elements don't interact with the
16 user in a way that could injure the user.

17 BY MR. JENNINGS:

18 Q. And it could also include eliminating the
19 sharp elements themselves; correct?

20 MR. HILLIER: Objection to form.

21 THE WITNESS: One possible way of
22 eliminating the ability for a person to hurt

1 themselves on a sharp element is to eliminate the
2 sharp element.

3 MR. JENNINGS: All right. Thank you, sir.
4 That's all the questions I have.

5 THE WITNESS: Okay. Thank you.

6 THE VIDEOGRAPHER: This will now
7 conclude --

8 MR. HILLIER: We're going to take a break.

9 THE VIDEOGRAPHER: We're going off the
10 record. The time is 11:35 a.m.

11 (Recess, 11:35 a.m. to 11:58 a.m.)

12 THE VIDEOGRAPHER: We are now back on the
13 record. The time is 11:58 a.m.

14 MR. HILLIER: I don't have any questions.

15 The witness will reserve the right to read
16 and sign. Thank you.

17 THE VIDEOGRAPHER: This will now conclude
18 today's deposition of Steve Wereley. We're now
19 going off the record. The time is 11:58 a.m.
20 Pacific Time.

21 (Deposition adjourned at 11:58 a.m.)

22 * * * * *

1 CERTIFIED SHORTHAND REPORTER'S CERTIFICATE

2

3 I, Cynthia J. Vega, a Certified Shorthand
4 Reporter for the State of California, do hereby
5 certify:

6 That the witness in the foregoing
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9 herein set forth; that the testimony and proceedings
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15 I further certify that I am not of counsel
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17 foregoing proceeding and caption named or in any way
18 interested in the outcome of the cause in said
19 caption.

20 IN WITNESS WHEREOF, I have subscribed my
21 name this 24th day of July, 2023.

22 Reading and Signing was requested.

18

19

20

21

22

Cynthia J. Vega, CSR No. 6640

1 Steven Wereley, c/o

2 MORRISON & FOERSTER LLP

3 12531 High Bluff Drive, Suite 100

4 San Diego, California 92130

5

6 Case: Spectrum Solutions LLC v. DNA Genotek Inc.

7 Date of deposition: July 19, 2023

8 Deponent: Steven Wereley

9

10 Please be advised that the transcript in the above

11 referenced matter is now complete and ready for signature.

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Page 88

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13

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A				B
a.m 3:4 5:2,13	70:8	14:7 18:17	area 53:21,22	back 15:7 17:3
45:22 46:1,1,3	adjourned 84:21	20:12 21:17	54:5,6	34:5 42:2 46:2
84:10,11,11,13	adjust 37:11,20	24:1 50:17 58:3	areas 10:2	79:22 80:1
84:19,21	53:8	59:9 62:16 64:3	argument 19:22	84:12
ability 19:8 23:5	adjusted 34:17	76:21 79:15	20:3	bad 66:18
83:22	35:12 36:6,7	answered 10:19	art 14:19 15:8	ballpark 28:20
absent 86:21	38:2 52:5,19	19:2 47:10 49:5	18:8,18 19:12	55:13
abstract 24:18,20	53:3 58:21 61:1	54:22 68:21	19:18 20:4	base 54:5 68:13
25:6,9	66:5,9,16 67:1	69:7 75:7	21:22 22:6 30:4	based 21:15
access 80:8	68:7 69:5,16	answering 67:15	32:18 34:16	34:17 40:21
accommodate	adjusting 52:13	78:4	35:10,15,22	42:19 63:3
35:8,18 38:2	60:7 69:10	answers 49:3	36:5,5,11,16	75:20
accurately 6:15	adjustment 59:5	87:13,16	37:14 38:5 57:4	bases 19:11
achieves 31:10	advancing 64:7	anticipate 41:12	58:9 66:3,10,14	basis 18:7,18
acknowledge	adverse 76:11	41:14	66:22 67:8 68:5	20:3,10 71:12
87:10	advise 86:14	anticipated 23:10	69:3,14 73:8,10	71:15
action 13:19	advised 86:10	anticipates 22:7	83:5	BEAR 2:4
34:12 37:8	affect 70:4	37:8	asked 10:18 19:1	beginning 3:4
80:21	agree 14:2,11,21	anticipating 43:2	47:10 49:3,4	begins 65:9
active 10:1	16:14 17:4 20:9	anybody 24:15	54:21 69:6 75:7	behalf 2:3,11 3:2
actual 53:8 71:21	20:22 21:21	APPEAL 1:2	80:1,19	5:22
acute 82:6	22:20,22 23:11	appear 14:9	asking 47:18	behavior 10:8,16
add 35:3 36:12	27:1 30:20 31:5	20:17	62:13	10:20
added 17:22	33:18 34:15	APPEARANC...	assert 30:20 41:9	belief 18:10,20
41:13	35:21 39:12,20	2:1	asserting 26:1,14	19:11 21:3
adding 24:2 37:9	54:19 55:5	appears 7:1 14:9	26:15 27:15	believe 23:15
additive 15:4	57:13 61:17	appended 9:17	30:8 31:20,21	26:15 45:12,14
16:3,7 17:16,17	62:8,22 66:3	Appendix 9:20	asserts 30:16,18	48:12 55:19
17:21 23:16,17	68:4 69:2,14	applicability	45:12	61:16 76:8 81:7
23:17 24:2,6,6	72:20 83:5	39:13	association 5:17	81:11 83:1,10
24:14,22 25:9	air 44:21	applicable 14:3	assume 44:12	believed 20:14
25:12,21 26:6	al 12:3	14:12 15:16	assumption 18:5	better 47:10
26:10,13 34:16	Alan 2:13	83:2 86:16	25:22	beverage 40:14
34:19 35:4,4,6	allow 23:6 51:14	application 15:21	assuring 83:14	42:20
35:7,12,16,17	52:18	22:15	attached 87:15	beyond 68:18
36:1,6,9,14,18	allowed 86:16	applications 14:4	attempting 60:16	70:18
37:3,9,10,12,15	allowing 24:3	14:13 22:12	67:10,11	big 63:4 65:5
37:19 38:1,7	allows 23:11 41:7	applied 19:8	attention 27:19	binder 7:4,8,17
41:13 44:4	amount 28:20	apply 78:9	28:9 38:9 46:5	8:7,16 13:22
47:21 48:10	36:13	appropriate	49:9,20 56:8	49:11
53:21 57:14,21	analogous 19:17	87:12	61:4 70:11	bio-MEMS 9:22
58:5,11 60:7,11	22:6	appropriately	73:18	biofluid 9:22
64:6 67:6,10,12	analogy 42:22	51:10	attorney 85:11	biological 83:8
67:17 68:6,11	and/or 43:20	approximate	axial 68:5,10,12	biomedical 22:15
69:4,16,22 70:5	86:14	55:2	68:19 69:4,15	blue 52:6,20
	annular 18:9,19	approximately	69:20,21 70:8	
	answer 12:16	54:14,19 65:10	axis 82:18	

blue-shaded 59:6	C	center 58:2	14:11 15:15	64:12 67:1,3,19
Bluff 2:14 3:5	c/o 86:1	centimeter 65:11	16:4,7,18,19	68:2 69:11
5:11 86:3	California 1:14	65:16,18,20	17:7,8,13,16,19	72:19
BOARD 1:2	2:7,15 3:6 5:1	66:1	18:13 19:4,7,17	choice 56:3
bodily 56:15	5:11 85:3 86:4	certain 68:14	19:21 20:6,19	chose 74:13
bottle 15:4 16:4,9	call 76:17 86:17	73:16	21:1,12,19 22:4	Cindy 5:16
16:10 18:15	cap 16:10 18:8,11	certainly 22:3	22:6,7,11,11,12	circle 54:5
19:8 22:6,8,10	18:14,19,21	27:6 43:14 62:1	22:17,20 23:3	circulated 62:3
22:20,22 23:3,5	19:8,13 20:1,1	62:17,22 73:12	23:11 24:1,5,18	City 3:5
23:11,12,15,19	20:5,6,20 21:4	CERTIFICATE	24:20 25:15,19	clear 7:14
23:21 24:3,10	21:20 22:1,5	85:1	26:14,17 27:15	coffee 43:1
24:13,13,21	24:7 26:7,13	Certified 85:1,2	27:19 28:16	coffee-based
25:4,13,15,17	31:15 32:10,15	certify 85:3,10	29:8,14 30:8	40:13 42:20
25:19,22 26:1,3	41:10,10 43:16	challenges 67:10	32:10,14 33:1	collecting 83:8
26:6,9,12,21,22	47:14,16,20	chamber 15:4	34:5,9 35:13,22	collection 18:9,20
27:11,11,16	48:4,18 50:9,10	17:18 23:16,17	36:17 37:2,8	19:13 22:1,16
29:9,11,11,17	51:4,6,11,13,15	24:2,3,14 36:6	38:3,13,19 39:1	63:12
29:21,21 30:2,4	51:20 52:1,6,10	36:9,14 37:12	39:14,21 41:1,4	colored 52:6,20
30:9,10,22 31:1	52:14,18,20	57:21 68:11	41:5,9,11,14	combine 22:1
31:16,19 32:1,4	53:2,5,11 54:10	chambers 15:22	42:14,20 43:10	come 15:2 21:11
32:11,15,19	55:6,8 56:15,20	chance 6:17	43:12,14 44:12	56:7 86:12
33:1,5 34:2,10	57:5,10,14	change 35:6 38:6	45:11,12,12	coming 82:6
34:18,20 35:2	58:17,20,22	59:13,17 66:11	46:6,22 48:8,12	commercial 74:6
36:2,7,10,12,13	59:6,10,11,13	67:11 70:9	48:13 50:11	74:12
36:19 37:4,6,8	59:14,14,19	88:11	52:18 53:11,21	commissioned
37:10,16 41:11	60:4,12,17 61:9	changed 35:18	55:5,12 56:6	77:21 78:2,7,7
41:14 43:16,18	61:12 63:4,15	63:17,19,20	64:20 66:14,16	80:2,12 81:2
43:19,20 44:1,3	63:17,18,18	69:22 70:1	66:21 67:17	common 32:6
44:4,6,11,13	64:7,12 65:16	changes 67:22	68:7 69:5,17	33:9
45:2,4,7,13,14	65:18 66:1	87:14	Cho's 14:9,22	common-sized
47:14,17,21,22	67:19,19 68:2	changing 60:10	18:8,10,19,21	35:4
48:4,11,18	68:12,13,18	70:7	19:13 20:1,5	communicate
bottom 9:19 37:5	69:11 70:15,19	characterization	21:4,10,10 22:1	23:6
box 87:12	71:18,19 72:7,8	23:20 39:16	25:6 31:13	communications
boy 48:14,15	72:15,19	characterize 62:2	35:11,12 41:10	62:5
brandon.smith...	caps 50:14,20	64:19	41:10 43:16,18	companies 11:3
2:9	51:9,22	characterizing	43:19 44:3	comparable 58:7
break 41:17,20	caption 85:12,14	45:10,11	47:15 51:4,6,11	compared 53:22
42:4 45:16	case 5:9 20:10	Check 87:12	51:15,20 52:1	comparing 50:9
48:21 84:8	21:6 54:8 82:22	chemical 22:14	52:10,14 53:2,5	76:15
Brian 80:15 81:3	86:6 87:7 88:8	42:12	54:10,11 56:15	compartment
broad 39:12	cases 42:21,22	chemicals 14:4	56:20 57:5,10	16:3 35:5,6,7
brought 7:1,15	43:2	14:14 15:17	57:14 58:11,17	37:19 38:1,7
49:11	cause 85:13	16:15 17:5 42:7	58:20,22 59:7	58:5 67:6,12,17
bunch 27:21	caution 62:4	42:22 43:1,3,22	59:10,14,19	69:22 70:9
businesses 33:10	CCRR 1:18	Cho 7:13 8:16,21	60:4,12,17 61:9	complete 86:11
		9:9 13:22 14:2	61:12 63:4,15	87:13,15

complicated 15:1 67:4	38:14,20 39:9 39:22 40:3 41:1	16:2,5 18:11,22 19:14 20:7,8	62:21	dependent 15:13
components 65:15	41:5,7,8 42:9 42:10,13,15	21:6 24:7,10 25:4,17 26:7,13	creation 62:22 63:1	depending 15:20 37:16
comprises 70:8	43:11,13,13,15	27:7 29:2,17,22	cross-sectional 57:18	depends 27:10 45:2
computerized 85:6	contacting 49:18	30:5 32:11	CSR 1:18 3:4 85:22	depict 46:22
concepts 73:12	contain 23:4 24:14 50:4	33:12 35:13	customers 33:11	depicted 47:13 50:12 53:9,11
concerning 13:15	82:10	36:2,19 37:4,17 38:3,14 39:1,7	CV 9:16,19 10:2	55:17 57:16
conclude 65:14 72:2 84:7,17	contained 24:9 25:17	39:10 42:8,16 44:7,21 45:8	cylinder 54:5,9 54:10 70:8	58:11 60:9 74:8 75:1,15 76:5,16
concluded 31:14 31:14	container 14:3,12 14:20 15:8,10	47:1,2,14,22 48:5,19,20	cylinders 54:4,7	82:6
conclusion 21:15 23:15 40:22	15:16,18 16:15 17:5 18:11,22	49:15 50:3,7,11 50:15,21 51:16	cylindrical 50:21 65:10 68:6 69:4	depicting 53:20
63:4,10 71:15 75:18	19:19 20:7,21 21:5,20 35:16	52:7,21 53:12 55:8 56:16 57:6	69:16	depicts 47:19
conclusions 59:2	35:18 48:10 56:16 57:5,15	58:12 59:7,20 60:9,14 61:10	Cynthia 1:18 3:3 85:2,22	deponent 86:8,12 86:14
condition 50:15	59:19 61:9 65:6	61:21 63:8 64:17 67:17	D	deposited 19:19
confirm 78:1	containing 22:8 24:5 70:21	68:7 70:5,15,16 70:19,22 71:1,4	D.C 1:21 87:3 88:3	deposition 1:12 3:1 5:5,10 6:18
consent 86:22	containment 64:6	71:10,11,21 72:22 73:8 74:1	dangerous 42:11 74:19 75:19	8:4,13 9:1 29:5 79:11 84:18,21
consequently 43:17	contains 22:21 25:22 32:19	74:3,9 75:5 81:11,18 82:7	dashed 82:16	85:4,4 86:7,15 87:9,11 88:10
consider 19:7 58:16	44:3 68:15 71:9	83:19 85:8 87:13,15	Date 86:7 87:9,19 87:22 88:10,22	derived 62:7
considerable 69:10	contaminating 49:14,19	correctly 26:15 30:8 31:21	day 85:16	describe 16:18,21 17:7 18:2 20:19
considered 12:10 12:22 13:3	contents 34:19	correspond 60:8 45:18 48:22	deal 47:16	21:12,19 29:14 82:13
60:13,15 83:11	context 15:12 43:12	counsel 5:18 62:3,7 85:10	deals 67:18	described 15:1,9 16:8 25:15
considering 15:8 56:19 57:9 60:2	contexts 15:3	86:14,15	decision 41:21	29:15 35:13 36:17 39:14
64:22 76:9	controlling 73:4	County 3:6	declaration 6:20 9:13,15 12:10	66:4 69:8 72:3 74:14
consistent 35:12	controls 37:12 83:14	coupled 68:15	13:2,10,14,15 13:18 29:2 38:9	describes 14:2,12 15:3,16 16:19
constant 58:10	copies 7:15 9:4	coupling 41:10	49:21 51:2 56:9 61:5,19 62:11	17:8,13,20 22:18 24:5 31:9
constructed 74:8 75:15 83:3	copy 7:1,11,12,13 8:6 9:12 12:5	court 5:16 6:2	70:12 73:19,21 77:19 79:10	37:2 38:3 46:22
construction 72:14	86:13	covering 49:15	deep 65:11	describing 25:7
consulting 10:1	Copying 86:21	covers 71:8	defer 78:4	description 16:11 21:9 50:22 65:4
consumed 42:8	Copyright 86:20	cream 40:16	define 50:14	82:1,2,12
consumer 10:8 10:16,20,22	correct 7:5 8:18 10:2,3,5,8,13	create 61:14 62:12 75:8	degradation 44:1 44:6,20	descriptions 53:16 64:21
47:12	10:16 11:14,18 13:3,4,6,10,15	created 61:16,20 61:20 62:8,11	degrade 27:13 44:15	65:1 66:8
consumers 11:6,9 11:17 33:11	13:16,19,20 14:5,14 15:18		degree 82:19	designed 38:13
consumption			depend 27:3 45:1	

38:20 39:22 41:1,4 43:10 designing 83:12 desired 34:18 37:17 detail 18:2 22:7 82:14 detailed 16:12 75:10 deteriorate 26:22 27:6 deterioration 24:21 25:16,20 26:2,5,9,11 developed 10:22 11:3,16 device 14:22 18:9 18:20 19:14,20 20:5,19 22:2,16 35:22 36:17 37:2 41:6 47:12 49:14 51:16 52:19 55:7 57:11 60:9 61:12 63:5 66:4 66:16 67:1,3,4 71:16,21 72:3,7 72:15,20,22 73:15 74:14,15 74:22 75:9,12 75:14,19,21 76:1,5,10,13,16 76:16,18 77:11 77:14 83:2,7,12 devices 15:1 65:2 72:2,5,11 74:12 74:13 80:4,9 81:17,20 82:5,9 dhillier@mofo.... 2:17 diameter 52:5,13 52:14,20 53:4 54:6,7,9,9 57:22 59:6,15 67:11,16 dictated 68:12 Diego 1:14 2:15	3:6,6 5:1,11 86:4 different 15:2,4 16:20 22:9,16 30:7 39:6 43:6 68:21 difficulties 56:22 60:3,15 63:14 64:11 69:10 digit 80:22 Digital 1:20 5:15 5:17 86:19,20 87:1 88:1 dimensions 65:19 66:11 directed 62:22 72:6 direction 85:7 directly 78:8 disagree 23:14 26:16 31:7,8 disclosed 30:21 50:10,10 discloses 22:20 disclosure 28:10 29:8 30:21 34:6 discoloration 81:13 discuss 23:3 24:1 48:21 49:2 discussed 47:8 discusses 17:16 discussing 31:17 33:1 discussion 19:16 47:4 67:20 distribute 45:7 73:14 distributed 29:11 29:21 31:2 32:3 32:7 33:2 43:20 44:5 71:17 73:5 distributing 32:17 33:8,18 35:2 73:4 distribution 30:3 41:15 73:13	distributor 37:11 73:1 DNA 1:7 5:8 6:1 48:22 86:6 87:7 88:8 document 8:15 11:22 documents 7:15 9:11 12:21 doing 42:12 45:12 56:14 81:6 Dr 6:10 9:16 14:17 41:19 46:15 draw 40:22 43:2 59:1 Drew 2:13 5:22 42:4 Drive 2:14 3:5 5:11 86:3 drop 38:16 drunk 42:12 duly 6:5 85:4 duplicate 75:9	48:17 58:12 59:7 empty 24:13 encompassing 63:11 encountered 57:1 encourage 73:15 engage 51:4,22 52:1,4 engineering 83:14 ensuing 80:4 entire 57:15 59:10 entirety 50:5 envision 65:6 equal 36:1,18 errata 86:15 87:15 88:6 errors 79:12,18 Esq 2:5,13 estimate 54:14 65:14 66:1 et 12:3 evaporation 43:22 44:7 Evidence 1:20 5:15,17 86:19 86:20 87:1 88:1 exact 28:20 34:11 37:7 75:9,12 exactly 13:7 examination 4:5 6:8 31:12 examined 72:1 87:11 example 17:20 37:5 40:8,10,22 42:19 exhibit 7:6,21 8:3 8:9,13,17,20 9:20 12:1,9 28:6 46:8,15 49:10,21 78:15 78:22 79:1 EXHIBITS 4:11 expect 14:19 15:9	30:4 32:3 expectation 68:1 75:20 77:12 experience 63:14 experienced 73:13 experiments 75:10,11 83:1 expert 9:21 10:4 10:7,13,14,15 10:19 exposed 74:16 express 86:22 expressed 49:16 extended 82:19 extent 64:16,20 68:11,12,19 70:1,1,2
F				
face 60:3,16 64:11 69:9 faced 67:9 fact 74:15 81:15 factor 20:14,15 59:12 factors 20:15 fair 33:17 50:22 79:13,17 faulty 21:15 feasible 44:14 feature 64:9,21 82:2,3 features 72:5 81:22 felt 74:16 field 10:8,13,15 fields 10:5 39:7 39:18 43:7 figure 46:9,12,18 46:19 47:19 48:2,3,9,14,17 50:7,13 55:19 56:6,6,14 60:1 60:10 61:8,11 61:15,16 62:8,8 62:19,21 63:3				

64:8 73:22 74:2 74:8 75:2,15 76:2,5 77:11,12 82:17 figures 46:8,21 53:19 55:17 56:1,5,12,22 58:11 59:11 63:12 64:17,22 65:5 66:8 file 5:4 filled 37:12,20 film 49:15 71:4,8 71:14 fine 7:16 8:2,12 8:20 finer 53:10 finger 74:7,7,22 78:8 80:20 81:14 fingernail 81:13 fingers 74:5 finish 42:3 firmly 80:20 81:9 81:16 first 6:5 29:7 39:4 43:5 52:9 53:2 60:1,18,21 70:17 fit 59:3 60:19,22 60:22 67:12 69:11 five 28:20,21 54:20 fixed-sized 35:4 flat 72:15 Floor 2:6 fluid 9:21 18:4,6 36:12 41:11 fluid-tight 17:11 17:14 18:14 19:5,9 20:6,20 21:19 22:5 30:14 31:16 43:17 44:11,16 44:20 45:4,15 67:7	fluid-type 21:4 focused 63:17 67:15 Foerster 2:12 55:20 61:17 62:3,7 80:10,19 86:2 follow-up 43:9 following 80:5 follows 6:6 footnote 38:16,18 39:1 42:3,20 78:15,17,20,21 forbidden 86:21 foregoing 85:4,7 85:12 87:11 foresee 75:22 76:3 form 10:9,17 11:1,13,19 12:15 14:6,16 15:11,19 16:6 16:17 17:6 18:12 19:1,15 20:11 21:7 23:2 24:11 25:5,18 26:18 27:2,8 30:6 31:3,11 32:5,12,21 33:13,20 34:21 35:14 36:3,20 37:18 38:4 39:15 40:1,12 40:18 44:9,22 45:9 47:6 49:4 50:16 51:17 52:8,22 53:13 54:2,16,21 55:9 55:18 56:17 57:7 58:13 59:8 59:21 61:22 62:14 63:9 64:2 64:18 66:6 67:2 68:8 69:6,19 70:6 71:5,22 73:9 74:10 76:7 76:20 77:5	79:14 81:19 82:8 83:9,20 forth 85:5 forward 86:15 found 65:13 79:12,19 fourth 65:8 fridge 27:12,13 front 7:20 fully 61:13 further 23:22 59:2 85:10 G general 11:17 45:3 generally 11:7 16:14 17:4 generated 55:20 generation 62:19 Genotek 1:7 5:8 6:1 48:22 86:6 87:7 88:8 getting 15:7 17:3 42:2 79:22 give 14:17 given 42:19 49:3 71:18 87:13,16 go 38:22 45:18 51:19 57:9 goal 31:5 going 11:22 33:10 34:5 41:16,22 42:3 45:17,21 62:4 69:13 72:21 84:8,9,19 good 6:10,11 41:17 governing 86:16 great 6:14 9:3 82:14 greater 55:7 Group 1:20 5:15 5:17 86:19,20 87:1 88:1 guess 21:11 27:9	82:20 H half 28:21,21 handle 72:18 handle-appeari... 72:18 happen 79:3 happy 9:10 hard 28:17,19 57:17 height 54:8,10 66:1 held 5:10 hesitate 86:17 High 2:14 3:5 5:10 86:3 Hillier 2:13 5:22 5:22 9:4,8 10:9 10:17 11:1,13 11:19 12:4,7,15 14:6,16 15:11 15:19 16:6,17 17:6 18:12 19:1 19:15 20:11 21:7 23:1 24:11 25:5,18 26:18 27:2,8 30:6 31:3,11 32:5,12 32:21 33:13,20 34:21 35:14 36:3,20 37:18 38:4 39:15 40:1 40:12,18 41:16 41:19 42:5 44:9 44:22 45:9,16 46:11 47:6 48:6 49:4 50:16 51:17 52:8,22 53:13 54:2,16 54:21 55:9,18 56:17 57:7 58:13 59:8,21 61:22 62:4,14 63:6,9 64:2,18 66:6,17 67:2 68:8 69:6,18	70:6 71:5,22 73:9 74:10 75:3 75:6 76:7,20 77:5 79:5,8,14 81:19 82:8 83:9 83:20 84:8,14 hold 10:4,7,12 50:15 64:5 holding 35:19 hour 3:4 28:21,21 41:17 45:17 hours 12:18 13:6 13:13 28:19 hurt 83:22 hypothetical 21:1 21:8 27:10 34:22 I ideas 73:14 illustrate 58:8 59:18 illustrates 64:10 illustrating 51:18 53:1 56:18 57:3 57:8 58:15 59:22 60:18,21 immaterial 56:4 immediate 38:13 38:20 39:9,22 40:3 41:1,5,6,7 42:15 43:10,12 43:13,14 important 16:15 17:4 20:10,16 include 33:9 55:3 61:8 77:7 82:5 83:18 includes 32:19 56:11 74:2 including 14:4,13 86:21 incorporate 57:5 60:4 incorporated 77:8 incorporating
--	---	---	--	--

56:15 59:19 incorrect 21:5 incorrectly 27:15 77:14 78:11 INDEX 4:1 individual 71:3 71:14 78:8 industrial 14:3 14:13 22:13,14 39:7,18 43:7 inequality 77:9 infer 57:18 65:15 influence 73:2 inform 74:17 ingestion 42:9 ingredients 17:9 17:10,14 injure 76:1,12 77:14 83:16 injury 75:16 76:4 76:18 83:7 installed 43:16 instance 22:4 27:12 30:9 35:3 57:19 68:10 81:2 instructed 80:9 instruction 78:19 81:9 instructions 76:11 78:16,17 79:2 insurmountable 67:9 integrating 68:2 intentional 77:10 interact 31:15 67:5,5 71:20 72:21 73:3 75:21 76:10 83:15 interacting 47:15 71:16 77:14 81:12 interaction 16:10 18:14 19:5 20:6 20:20 21:4,12	21:20 22:5 interested 85:13 internal 52:5,19 59:6 interpret 33:2 interpretation 33:22 interrupt 75:6 introduce 5:18 invention 28:10 29:8,9,15,20 30:17,18,22 31:8 32:11 34:6 34:10 35:13 39:13 inventions 64:21 inverse 51:12 IPR2022-01347 1:6 5:9 Irvine 2:7 issue 15:2 23:19 issues 10:1 item 73:2 items 73:13 J J 1:18 3:3 85:2,22 Jennings 2:5 4:6 5:6,20,20 6:9 9:6,9,14 10:11 10:21 11:10,15 11:21 12:4,6,8 12:19 14:10,18 15:14 16:1,13 17:2,12 18:16 19:10 20:2,18 21:18 23:9 24:17 25:14 26:4,20 27:5,18 30:19 31:6,22 32:9,16 33:7,16 34:4 35:9,20 36:15,21 37:22 38:8 39:19 40:6 40:15,20 41:18 42:1,6 44:18 45:6,20 46:4,12	46:14 47:9 48:16 49:8 50:19 52:3,17 53:7,18 54:13 54:18 55:4,15 55:21 57:2,12 59:4,16 60:5 62:9 63:2,7,21 64:15 65:3 66:13,18,20 67:14 68:20 69:12 70:3,10 71:7 72:9 73:17 74:20 75:4,13 76:14 77:1,17 79:7,9,20 82:4 83:4,17 84:3 Joe 2:5 5:6,20 9:4 79:5 July 1:13 3:3 5:2 5:12 85:16 86:7 87:9 88:10 K keep 41:22 kept 43:21 kind 77:10 kinds 22:21 23:4 25:7 29:10,16 30:22 39:5 43:6 knife 64:7 74:2 74:15,17 75:19 80:20 81:14 82:2,6,10,12,14 82:18 knives 82:22 Knobbe 2:4 5:20 know 19:22 21:14,16 23:22 24:15 27:9,14 27:21 32:14 35:22 36:16 37:14 42:21 45:3 55:22 56:3 56:6 79:3 82:15 known 73:7 knurled 71:19	Kramer 80:15 81:3 L L.L.C 87:1 labeled 74:3 lack 20:5 language 77:6 large 72:15 larger 54:8,11,15 54:20 55:12 57:22 58:4 lead 65:13 leak 14:21 15:10 15:18,22 16:4,9 16:11,16 17:5 17:15,19 leak-tight 19:20 21:12 23:18 leaking 15:2 leave 9:11 legal 5:14 Leinsing 12:22 length 68:5 69:4 69:15,20,21 70:7 let's 9:6,15 38:22 45:16 58:3 72:17 lighten 9:10 limited 41:6 line 48:8,12 55:17 58:2 65:8,8,9 82:16 88:11 lining 56:4 liquid 17:17,19 31:19 44:14 liquid-tight 27:17 list 12:21 LLC 1:4 5:7,7 86:6 87:7 88:1 88:8 LLP 2:4,12 86:2 load 9:11 loaded 37:9 location 74:16	locations 53:15 log 13:8 look 19:7 58:19 61:18 looking 65:5 looks 46:12 82:20 lot 28:18 M M 1:21 87:2 88:2 machine 42:10 56:5 Main 2:6 maintaining 58:10 making 43:15 52:11 69:10 manner 16:8 17:14 19:9,20 23:18 27:17 30:14 31:16 43:17 44:12,16 44:20 45:5,15 72:10,13 73:16 manufacture 33:15 manufactured 33:4 34:1 manufacturer 73:1 manufacturing 82:1 marked 12:1 market 29:12,22 30:3 31:2 32:3 32:7,17 33:2,8 33:18 44:5 marketplace 11:18 45:8 Martens 2:4 5:21 match 36:13 51:9 51:11 52:12,14 58:22 59:12,13 63:22 64:22 matches 82:2 matching 51:21 59:15
---	---	--	--	--

material 23:19 24:2,3,6,9,12 24:14,22 25:3 25:10,11,12,13 25:16,21 26:1,2 26:6,10,12,22 27:4,10,16 30:10 31:18 34:3 35:19 36:13,14 37:4 41:13,14 42:11 43:18 44:5,10 44:13 45:13 47:22 50:15	15:17 42:21 43:1,3,22 meet 82:12 member 78:9 MEMS 9:22 mention 49:13,18 65:12 mentioned 8:6 43:21 54:3 64:13 mentions 40:13 microfluidics 9:22 milk 27:12,12 mind 9:5 35:1 42:4 65:5 minimize 83:6 minimum 68:10 68:11,17 69:1 minutes 28:20,21 mischaracteriz... 62:18 Mischaracterizes 62:15 missed 21:9,10 missing 64:5 mistake 62:13,18 mistakes 61:21 62:2 misuse 77:11 mix 34:11 37:6 39:5 47:21 mixed 23:8,13 40:16 43:18,19 mixing 16:20 17:9 22:10 24:1 24:4 37:3 38:2 42:13 43:4,6 mixture 16:19,22 17:1,8,10 34:11 34:18 37:7,17 41:15 molding 82:1 morning 6:10,11 Morrison 2:12 55:20 61:17 62:3,7 80:9,19	86:2 motivated 83:6 multiple 82:22 N name 5:14 85:16 87:8 88:9 named 85:12 native 27:20 28:1 28:5 48:8 49:22 near 57:19 necessarily 35:5 70:9 73:11 83:13 necessary 15:21 23:7 39:5 51:7 51:10 necessity 16:19 need 30:11,12,13 39:17 51:22 52:1,4 63:17,18 63:20 68:13 never 32:10 NOTARY 87:22 noted 74:12 87:14 noticing 86:15 noting 86:15 number 5:4,9 12:2 64:8,10 67:21 78:20,21 79:3,6 numbers 27:20 27:21 numerous 63:14 NW 1:21 87:2 88:2 O object 14:17 29:8 29:14,19 30:21 31:10 34:9 56:17 57:17 73:2,3,5 Objection 10:9 10:17 11:1,13 11:19 12:15	14:6,16 15:11 15:19 16:6,17 17:6 18:12 19:1 19:15 20:11 21:7 23:1,1 24:11 25:5,18 26:18 27:2,8 30:6 31:3,11 32:5,12,21 33:13,20 34:21 35:14 36:3,20 37:18 38:4 39:15 40:1,12 40:18 44:9,22 45:9 47:6 48:6 49:4 50:16 51:17 52:8,22 53:13 54:2,16 54:21 55:9,18 57:7 58:13 59:8 59:21 61:22 62:14 63:6,9 64:2,18 66:6,17 67:2 68:8 69:6 69:18 70:6 71:5 71:22 73:9 74:10 75:3,7 76:7,20 77:5 79:14 81:19 82:8 83:9,20 objections 69:18 Obviously 78:12 occupy 57:21 occur 76:4 OFFERED 4:11 offering 13:16 office 1:1 5:9 86:12,17 OG-250 75:11 78:10,13,18 79:2 80:5 81:12 81:17 83:1 Oh 9:6 oil 10:1 okay 7:14,21 8:2 8:12,15 9:3,6 9:15,18 13:9	19:11 22:17 23:10 24:5,5 25:3 28:4,15 29:4,7,14,19 31:7 33:8 34:5 34:8 35:21 37:1 38:11 39:4 40:21 42:5 44:3 45:16 46:5,7,10 46:18,21 47:3 47:10,11,19 49:13 50:1,6 56:10,11 61:6,7 62:6 69:13 70:13 71:20 73:20 74:5 76:15 77:20,21 78:2 79:21 84:5 OLSON 2:4 once 19:18 41:13 ones 7:16 28:1 open 17:20 opening 68:16 operated 11:2 operation 35:19 operations 39:17 opinion 13:14,17 15:5,15,17 16:3 18:7,18 19:12 20:10,22 21:6 21:15,21 26:17 27:15 31:8 44:8 74:17 75:14 opinions 49:16 opportunity 71:18 option 86:14,14 order 12:17 13:6 51:6,14 52:2 68:14,16 ordinary 66:10 67:8 organizations 11:11 original 86:15 outcome 85:13 outside 77:10
--	---	--	--	---

overlooked 21:16	parts 47:13 51:8	72:16 73:3,15	78:9 82:11	26:9
owner 1:8 2:11	59:2 60:11,19	picking 72:22	port 17:20,22	previous 78:14
6:1	60:22 67:4	picture 78:12	portion 16:9,10	previously 12:1
oxygen 44:21	passage 65:17	pictures 81:5	25:13 52:6,20	62:12
P	patent 1:1,2,7,8	piece 31:13	57:19 59:7	principles 83:11
Pacific 5:13	2:11 5:8 6:1	place 11:22 33:5	72:18 80:7	prior 13:13
84:20	7:11,21 8:3	78:8 80:20 85:5	POSA 19:22	privileged 62:5
packaged 72:11	12:2,14 13:8	placed 23:17,18	51:19 56:19	probably 51:10
72:14,21	25:16 28:16	34:2	57:9 58:15,17	procedure 51:19
packaging 71:17	29:15 31:9	Plante 7:12 8:7	60:1,2,16 64:11	86:16
73:12	42:15 46:6	8:13 9:10 19:17	68:1 69:9,20	proceed 59:1
page 4:5 9:19	49:10 66:5	19:18 49:10,13	74:18 83:11	proceeding 7:22
27:19,20,21	81:18,21	49:17 50:10	positive 18:4	8:10,17 47:5
28:5,6 37:6	patents 12:10	52:19 54:1	possibility 67:16	85:12
46:11,13 48:8,8	Patterson 12:2,14	55:13 56:7	possible 83:21	proceedings 85:5
49:22 50:3,4	13:1,15,17	57:16 64:20	Potentially 24:12	85:8
56:9 57:16 61:4	Paul 2:20 5:14	65:4,6 66:12	powder 17:17	process 18:3
65:7 73:18,22	PCT 31:13	70:14 72:3,4	30:12 31:19	52:12 53:2
77:19 78:6,14	people 11:8	73:22 74:9 75:2	40:16	56:18 57:8
78:21 81:12	perceived 77:3	75:15 76:6	practice 32:6	58:14,16,19
82:19 86:15	perfectly 7:16	81:18 82:3,7,12	practices 30:18	59:18 60:19
87:6 88:11	perform 58:19	82:13 83:3	preferably 65:10	product 33:10,11
pages 87:11	75:9,11 80:10	Plante's 18:9,20	preference 7:18	products 10:22
paragraph 13:1	performed 74:11	19:13 20:1,5	preparation	11:3,6,8,9,16
22:4 29:7 31:17	80:10	22:1 51:4,7,12	79:11	33:15 74:6
34:7 38:10,12	performing 75:10	51:13,15,20	prepare 6:17	prone 43:22 44:6
38:19 50:2,3,5	period 70:2 86:16	52:2,11,15 53:3	preparing 12:10	properties 24:22
50:5,6 51:3	permits 43:13,14	53:5,10 54:7,11	29:5 80:7	25:21 26:8,10
53:10,20 55:17	person 20:4	55:7,8 56:16,21	present 29:9	protrudes 70:18
56:8,11 61:7,8	21:22 42:12	57:5,11,20 58:5	34:10	protruding 72:18
61:11 63:12,13	47:15 58:9	58:18,20 59:1	presented 73:5	provide 13:14
64:8 65:8 70:11	73:15 75:21,22	59:13,14,19	75:16	29:9 30:22
70:14 76:15	76:10,12 77:13	60:4,9,17 61:9	presents 76:18	34:10,18 38:18
77:7,18 78:6	77:22 80:13	61:13 63:5,15	77:2	39:21
80:1,3,14 82:18	81:3,3,5 83:22	63:19 64:4,7,12	preservative	provided 6:21
paragraphs 80:5	personally 55:16	65:7,13,22 66:2	49:15,18 54:1	13:9 20:20 29:1
parsing 77:6	petitioner 1:5 2:3	66:4 67:12,19	60:8 70:22 71:9	36:1
part 19:16,22	3:2 5:6,21	67:20 68:2	71:10	psychology 10:13
41:2	photographs	69:11 70:18,19	press 74:7,7,22	10:14
particular 9:16	80:6,11,21	76:16,18 77:11	80:20 81:9,14	publication 7:12
13:8 15:3 33:22	photos 81:8	plastic 82:1	pressed 28:19	7:13 8:7,16
40:10,22 42:17	phrase 33:2	plate 68:15	pressing 74:5	14:9 21:2,10
46:9,18 63:16	42:17,18	please 5:18 6:3	81:15,16	28:16 29:16
67:5 72:14	physically 51:15	86:10,14,15,16	pressure 78:9	31:9,13 42:16
81:22	57:4 59:18	point 30:15 43:15	preventing 26:11	46:6 65:7,13
parties 85:11	60:22 71:20	78:3,4 82:6,15	prevents 24:21	66:5 72:3,4
	pick 71:18 72:6,7	pointed 65:17	25:16,20 26:2,5	76:17 77:4 83:3

purchased 86:13	28:15 32:13	48:15 78:11	resubmits 21:2	57:14 59:12
purpose 30:17	35:22 48:13	80:13	result 48:9 56:7	65:19
push 68:15,16	65:4 85:17	referring 8:3 19:6	72:10 75:16	scaling 55:16
put 20:13 33:4	ready 86:11	43:5 46:16	80:22	64:16
35:1	realize 21:11	70:14	results 78:1 80:11	scenario 33:3
Q	69:21	refers 24:6 25:8	80:21 83:1	scenarios 30:8
question 10:19	really 28:17,19	25:10 40:10	reveal 62:5	75:22
15:7 17:3 18:17	56:4	48:8 78:17	review 12:20	schematic 53:15
21:17 23:10,22	reask 69:13	regarding 21:22	86:13	66:9
24:1 47:11 58:3	reason 6:14 74:12	39:13	reviewed 13:5,13	schematically
62:10 65:21	reasonable 68:1	related 73:12	reviewing 12:13	82:15
66:19,21 67:15	75:20 76:9	relative 20:15	13:12	screen 5:12
68:21 69:2,13	77:12	47:17 54:8	right 28:19 40:11	screw 47:17
74:21 78:4	recall 13:7 32:13	55:11 58:20	47:19 53:9,12	screwed 47:20
79:22 80:1	receiving 51:5,7	60:11 63:13	56:15 62:10	61:13
questions 13:21	51:12,21 52:2	65:14 83:2	79:7 81:10	seal 18:10,21
22:18 49:3 84:4	52:11,15 53:3,5	relatively 58:1,1	82:17 84:3,15	19:6 32:11,15
84:14 86:16	56:21 57:20	released 47:21	rises 48:10	67:7
87:14,16	58:6,18,20 59:1	relevant 74:17	risk 71:3,13	sealed 15:5 16:9
quite 15:1	60:4,17 61:13	remaining 25:11	75:16 76:18	18:1 19:19
quote 22:13 34:9	63:16,19 64:4	remove 22:3	77:3 83:7	26:21 27:7,11
34:12 38:13,22	64:12 65:22	removed 48:4,11	RMR 1:18	27:16 30:5,11
39:2	66:2 67:13,20	48:18 64:9	rotated 82:16	30:12,13 32:4,8
R	68:3 69:11	render 67:6	rotation 48:11	44:2 50:15
ratchet 64:5	Recess 46:1 84:11	report 12:22	82:18	sealing 18:3
ratio 34:11,19	recognize 12:9	16:12 19:4,17	Rules 86:16	second 30:15
37:7,11,13,17	35:16 36:5,11	20:13,17 22:7	S	34:6 40:7 42:2
37:20 55:2	38:6 69:9	41:9 47:8 49:16	sale 33:15	section 10:2
ratios 37:3 38:3	recognized 74:18	53:9 55:3 57:16	sample 18:9,20	28:10 34:5
RDR 1:18	record 5:19 7:14	67:18 69:9 78:5	19:13,18 22:1	67:18
RE-100 75:10	8:9 45:19,22	80:8	22:16 49:19	see 9:6 19:7 25:1
77:22 78:9,12	46:3 79:3 84:10	reported 1:17	57:21	26:8 28:7,8,11
78:16,17 80:5	84:13,19 85:8	85:6	samples 83:8	29:12 30:7
81:17 82:22	recorded 87:14	reporter 5:16 6:2	San 1:14 2:15 3:6	34:12 35:2 40:8
re-creation 75:12	87:16	85:3	3:6 5:1,11 86:4	46:17 49:12,17
reached 63:3,10	reduce 67:11	REPORTER'S	saves 24:21 25:20	54:6,6 56:10
read 6:20 22:11	reduces 71:3,13	85:1	26:9	60:19 61:6
22:13 24:18	reducing 67:16	requested 85:17	saying 42:11	65:19 76:11,19
28:13 29:1,4	reevaluate 20:21	required 67:22	61:19 79:17	76:22 77:20
32:22 33:21	21:6,21	68:17	says 22:4 25:15	80:4 81:11,13
49:17 65:16	refer 7:16 8:12,20	research 11:5,11	26:5 29:19 31:5	81:15 82:17
78:10 79:10	13:1 46:5 48:12	reserve 84:15	32:10 37:5 39:4	seen 31:13
84:15 87:10	70:17 74:5 77:4	reservoir 70:18	41:1 42:21	selected 86:14
readily 68:5	78:6	70:21 71:9,10	scale 56:1 59:12	sell 33:11
reading 25:6,9	reference 13:22	resources 24:21	59:14,14 67:10	sense 17:11
	referenced 86:11	25:20 26:9	scaled 51:3 55:6	sentence 32:22
	referred 28:17	respect 76:5		33:22 38:12

39:4,20 40:2,7 42:2 43:6 78:7 78:11 separate 17:14 22:9 23:5,6 32:2,20 separately 22:21 29:10,17,20 31:1 services 9:21 set 53:17 85:5 shape 65:10 sharp 83:13,15 83:19 84:1,2 sharpness 75:17 sheet 86:15 87:15 88:6 shorter 68:19 Shorthand 85:1,2 show 56:22 60:6 60:10 63:13,13 73:21 showing 53:15 shown 18:21 48:1 48:3,9 57:18 59:11 64:8 76:1 77:11 82:15 shows 48:17 61:11 side 71:19,19 sign 84:16 86:12 86:13 signature 86:11 86:15 87:6,19 88:22 signed 86:15 significantly 71:2 71:13 signing 85:17 86:14 similar 42:21,22 43:1 72:2 74:14 74:15 81:22 simple 34:12 37:7 62:10 67:21 68:9 Sincerely 86:18	single 82:21 singular 82:5 sir 84:3 sitting 55:2 situation 76:4 size 35:6,17 51:8 51:21 53:4 61:1 64:13 65:12,14 65:15 66:5,15 66:16 67:1 68:17 sizes 63:22 sketches 53:15 skill 14:19 15:8 18:8,18 19:12 20:4 21:22 30:4 32:18 34:15 35:10,15,21 36:4,5,11,16 37:14 38:5 57:4 58:9 66:3,10,14 66:22 67:8 68:4 69:3,14 73:7,10 83:5 slightly 70:18 smaller 54:8 68:18 77:8 software 55:22 56:2,3 sold 11:4,8,17 33:6 34:3 solid 30:10 31:19 44:14,14,19 45:2 solution 70:22 Solutions 1:4 5:6 5:7 86:6 87:7 88:8 somebody 35:1 Sorry 79:16 sort 68:22 72:4 sounds 22:15 space 11:5 24:7 34:17 35:12 36:18 50:14,21 58:11 60:7,11 68:6 69:5,16	70:5 spaces 22:9,22 23:5,6 32:20 50:20 specific 67:6 specifications 53:17 specimen 19:19 Spectrum 1:4 5:6 5:7 86:6 87:7 88:8 spend 12:13 28:15 spent 13:8 spill 10:1 staff 55:20 61:16 80:9,19 starting 46:9,18 starts 25:7 40:7 46:12 state 3:6 9:20 48:1 51:3 61:12 70:17 71:2,6 77:21 80:3 85:3 statement 14:8 14:11 26:16 36:8 38:19 39:12,21 40:4 41:3 63:11 71:12 79:17 statements 48:3 states 1:1 24:20 29:8 34:9 65:9 stationary 64:6 stenographically 85:6 step 33:14 52:9 52:12 53:2 58:16,18 60:1,7 60:18,21 Steve 84:18 Steven 1:12 3:1 4:3 5:5 6:4 86:1 86:8 87:8 88:9 storage 16:3,19 16:21,22 17:8 24:7 34:17	35:16,17 41:12 41:15 48:10 58:11 68:6 69:5 69:16 70:5 store 29:16,20 45:4 stored 23:12,14 23:16 30:2 31:18 43:20 44:10,11,13,15 44:19 45:2,13 45:14 stores 17:5 29:10 30:9,22 33:10 storing 14:20 16:15 17:8,10 17:13,16 22:8 23:20 32:2 straight 82:21,21 Street 1:21 2:6 87:2 88:2 strike 36:22 66:18 77:18 structure 75:1 subject 25:22 44:20 47:4 submitted 13:19 78:18,19 subscribed 85:15 subsequent 16:21 16:22 78:11 subsequently 17:22 25:8,10 substitute 20:1 51:6,15 55:6 56:20 57:10 60:17 63:15 64:12 substituting 51:20 52:10 53:2 58:17 67:19 substitution 48:14 52:10,18 67:21 79:8 success 68:2 sugar 40:16	suggest 42:7 44:7 44:12 suggests 22:7,12 suitable 30:3 32:2 Suite 1:21 2:14 3:5 5:11 86:3 87:2 88:2 superimpose 64:17 superimposed 61:9,14 support 38:18 39:21 40:3 41:2 sure 7:20 9:6 11:6 12:6 19:6 21:11,17 27:14 31:20,20 36:8 42:17 45:20 55:11 58:4 79:1 surfaces 71:19 82:11 suspect 55:12 swear 6:3 sworn 6:5 85:4 T take 9:11 23:19 34:1 41:20 45:16 57:15 60:2,2 80:11,21 84:8 taken 3:2 5:5 85:5,9 talking 11:7 22:17 28:3 tall 65:16,18 teach 18:14 19:5 19:21 22:4 teaches 19:18 technology 22:13 tell 80:16,18 term 23:14 32:17 33:17 terminology 8:3 terms 56:4 72:22 tested 80:3
--	--	---	--	---

testified 62:12	85:5,9 86:16	36:8 37:6 39:5	uses 42:10	vs 1:6
testifies 6:5	times 54:15,20	43:6,18 44:3	usually 11:4	
testify 6:14	titled 28:10 34:6	47:13 51:8,9,22		W
testimony 48:22	today 6:12,15	53:19 54:7 55:2	V	waive 86:14
62:15 76:3 85:5	13:17 49:11	56:4,12,21 59:2	v 86:6 87:7 88:8	want 7:16 13:21
85:8	55:3	65:1 79:12,18	valve 18:9,19	20:16 24:15
testing 77:22	today's 6:17 8:4	79:19 81:20	varied 37:15	43:9 45:3 55:1
81:2	8:13 9:1 29:5	82:11	variety 14:3,13	wanted 7:19 35:7
tests 74:11,16	84:18	type 81:22	37:3 39:6,18	80:6
80:6,10	told 32:1	typical 33:3,14	43:7 74:6	Washington 1:21
Thank 9:8 12:7	top 65:9	typo 48:7 78:15	various 38:2	87:3 88:3
84:3,5,16	total 75:19	typos 78:5	Vega 1:18 3:3	wasn't 27:7
thanks 6:13	touch 71:3,14		5:16 85:2,22	water 17:11
thing 27:22 60:6	touching 49:14	U	verbal 64:21 65:1	45:14
things 13:2	Trademark 1:1	understand	version 57:14	watertight 17:19
think 10:18 14:22	5:8	17:13 21:13	versus 5:7	18:4
15:12,20 16:8	training 73:11	32:18 34:16	vessel 16:7 51:5,7	way 37:21 62:19
16:11 28:1,6	transcribed 85:6	35:11 46:21	51:12,21 52:2	62:20 68:14
32:6 33:14 36:4	transcript 86:10	47:3 66:4,15,22	52:11,15 53:3,6	71:16 72:20
45:3 47:18	86:12 87:11	68:5 69:3	56:21 57:20	73:4 83:16,21
65:21 67:8,22	transcription	understanding	58:6,18,20 59:1	85:12
68:9,21 73:1	85:6 87:13,15	17:18 33:9,17	60:4,17 61:13	ways 67:6 76:9
76:9 77:10	transportation	66:7 80:15 81:1	63:16,19 64:4,6	we're 7:14 42:3
thinking 51:20	41:12	81:4	64:13 65:22	45:21 78:3 84:8
58:17	transported 33:5	understood 66:11	66:2 67:13,20	84:9,18
third 65:9 81:5	34:2	69:3,15	68:3 69:11	we've 11:3 31:17
thread 53:4,5	transporting	unintentionally	video 1:12 3:1	33:1 41:16
68:13	32:19 33:9	77:13	5:12	45:17 63:17
threaded 68:14	TRIAL 1:2	UNITED 1:1	videographer	Wednesday 3:3
threads 51:3,4,9	true 85:7 87:13	unskilled 11:17	2:19 5:4,15 6:2	5:2
51:11,11,13,22	87:15	83:7	45:18,21 46:2	weight 20:15
51:22 52:1,4,12	truthfully 6:15	updates 21:1	84:6,9,12,17	Wereley 1:12 3:1
52:13,14 53:4,8	try 55:1 57:10	upright 43:21	videotaped 5:5	4:3 5:5 6:4,10
53:10,11,14,16	trying 43:11 57:1	upwards 68:16	view 57:18 68:22	9:16 14:17
53:16 57:20	58:8 60:3 63:15	use 8:2 15:16	volume 34:16,18	41:19 46:15
58:21,22,22	64:11	18:8,19 19:4,13	35:7,11,17 36:1	84:18 86:1,8
59:15 61:2	turn 9:15 27:19	20:4 33:3 42:13	36:2,6,9,18,18	87:8 88:9
three 82:10	28:9 38:9 49:9	42:14 47:13	37:15,16 38:1,6	weren't 44:15
tight 17:19 18:4,6	49:20 56:8 61:4	56:3 66:1 76:11	53:21,22 54:4	WHEREOF
41:11	70:11 73:18	79:2	54:11,11,12	85:15
time 5:12,13	two 11:2 15:4	useful 14:20 15:9	55:5,7,12,13	witness 3:2 4:2
12:13 13:8,13	16:20,22 22:8,9	user 37:11 47:20	57:13,15,17	6:3,5 9:21
14:17 27:13	22:10,21,21	48:4,18 49:18	58:1,4,4,5,10	10:10,18 11:2
28:15,20 41:17	23:4,5,7,12,20	71:17 72:6,16	60:7,8,11 65:22	11:14,20 12:17
45:22 46:3	24:4 25:7 29:10	72:21 73:2,6	66:2 70:4,9	14:8 15:12,20
78:19 80:7	29:16 30:2,22	83:16,16	volumes 15:5	16:7,18 17:7
84:10,13,19,20	32:2,20 34:11	users 83:8	51:1 55:2,11	18:13 19:3,16

20:13 21:8 23:3	21:8 28:1 41:22	66:10,15,22	56 61:4
24:12 25:6,19	Z	67:9 69:21 73:8	6
26:19 27:3,9	zero 75:16 77:7,8	73:11 74:18	6 4:6
30:7 31:4,12	0	83:6,11	620 48:10
32:6,13,22	1	2013 7:6 9:20	632A 17:20,22
33:14,21 34:22	1 5:4 9:19 27:19	49:21	646 7:11,21 8:3
35:15 36:4	28:5 37:6 65:11	2015 78:15	9:12
37:19 38:5	65:16,18,20	202 1:22 87:4	6640 1:18 3:4
39:16 40:2,13	66:1 73:22 74:2	202)-232-0646	85:22
40:19 41:22	74:8 75:2,15	86:17	7
44:10 45:1,10	76:2,5 77:11,12	202)232-0646	7,464,811 12:2
47:7 48:7 49:6	10:09 45:22 46:1	88:4	720-5100 2:16
50:18 51:18	10:22 46:1,3	2023 1:13 3:3 5:2	760-0404 2:8
52:9 53:1,14	100 2:14 3:5 5:11	5:12 85:16 86:7	77 38:10,19
54:3,17 55:1,10	61:7,11 63:13	86:20 87:9	8
55:19 56:18	86:3	88:10	812 1:21 87:2
57:8 58:14	1001 7:21 8:3	2040 2:6	88:2
59:10,22 62:1,6	1003 8:9,13 49:10	21st 46:22 47:13	858 2:16
62:17 63:10	1004 8:17,20 46:8	47:15 48:17	895 76:17 77:4
64:4,19 66:7	46:15	58:12 59:7	9
67:3 68:9 69:8	1005 12:1,9	22 78:6,21,21	9:06 3:4 5:2
69:20 70:7 71:6	11,002,646 1:8	81:12	9:07 5:13
72:1 73:10	11:35 84:10,11	232-0646 1:22	91 70:11,14
74:11 75:8 76:8	11:58 84:11,13	87:4	92130 2:15 5:11
76:22 77:6	84:19,21	24th 85:16	86:4
79:16 81:20	119 46:13	26 48:8 73:18,22	92614 2:7
82:9 83:10,21	12531 2:14 3:5	3	949 2:8
84:5,15 85:4,15	5:10 86:3	3 28:6	95 1:18 50:2,5,6
86:13 87:8,19	14th 2:6	36 80:3 82:18	51:3 53:10,20
88:9	15 13:1	37 80:1,14	55:17
word 42:14	1730 1:21 87:2	4	96 50:3,5
words 19:3,4	88:2	4 65:7	98 56:11 63:12
32:14	18 77:19	41 65:8	64:8
work 18:3 52:2	19 1:13 3:3 5:2,12	43 46:9,12,19,22	99 61:7,8
64:16,20	64:8 74:3,18	45 46:22 78:6	
working 62:2,6	75:1,17 86:7	45A 47:19 48:2	
wouldn't 20:16	87:9 88:10	45B 48:3,12,15	
35:5 44:15 55:1	2	48:17	
62:1 64:19	20 78:21	49B 48:9,14	
written 21:14	20036 1:21 87:3	5	
86:22	88:3	50 48:8 76:15	
X	2012 51:19 56:19	77:7	
Xerox 56:5,6	60:2,16 64:11	53 49:22 50:4	
Y		55 56:9 57:16	
Yeah 11:7 13:7			