UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DR. REDDY'S LABORATORIES S.A. AND

DR. REDDY'S LABORATORIES, INC.,

Petitioners,

vs.

EYE THERAPIES, LLC,

Patent Owner.

Case No. IPR2024-00563

U.S. Patent No. 11,596,600

Case No. IPR2024-00467

U.S. Patent No. 11,833,245

DEPOSITION OF ANTHONY M. MASZTAK

FRIDAY, APRIL 4, 2025

Video-recorded deposition of ANTHONY M. MASZTAK, taken remotely, before Patricia R. Frank, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public in and for the Commonwealth of Pennsylvania, commencing at 9:01 a.m. EST, on Friday, April 4, 2025.

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(All parties appearing remotely)

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(REPORTER'S NOTE: All quotations from exhibits are reflected in the manner in which they were read into the record and do not necessarily denote an exact quote from the document.)

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THE VIDEOGRAPHER: We are now on the record. Here begins Volume 1, Clip 1, in the video deposition of Anthony Masztak taken in the matter of Dr. Reddy's Laboratories S.A. and Dr. Reddy's Laboratories, Inc., Petitioners, versus Eye Therapies, LLC IPR in the U.S. Patent and Trademark Office, Case Number IPR 2024-00467 and IPR 2024-00563.

Today's date is April 4, 2025. The time on the video monitor is 9:01 a.m. This deposition is being held remotely. The court reporter is Patty Frank on behalf of Henderson Legal Services. The video camera operator is April Carter on behalf of Henderson Legal Services.

Will counsel please introduce themselves and state whom they represent beginning with the parties noticing the deposition.

MR. O'QUINN: My name is Ryan O'Quinn from Finnegan LLP representing the patent owner, Eye Therapies, as well as Bausch & Lomb. Also with me today from Finnegan is Shannon Patrick.

MS. CIPRIANO: I am Linnea Cipriano from Goodwin. I'm representing the Dr. Reddy's petitioners and the witness.

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ANTHONY M. MASZTAK,

having been duly sworn, was examined and testified as follows:

BY MR. O'QUINN:

Q. Good morning, sir.

A. Good morning.

Q. Could you please state your name and business address for the record.

A. Anthony Masztak, and business address is 420 Fort Duquesne Boulevard, Pittsburgh, Pennsylvania, 15222.

Q. Have you been deposed before, Mr. Masztak?

A. I have.

Q. Approximately how many times?

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A. I think it's about six times, I think. I'd have to look at my list to confirm, but I think it's about six.

Q. Have you been deposed or otherwise given testimony before in an inter partes review proceeding like these before the U.S. Patent Office Patent Trial and Appeal Board?

A. I have not in an IPR. I've worked on numerous engagements related to IPRs where another individual at Gleason IP would have given the testimony, but I've been -- not been deposed in an IPR proceeding previously.

Q. Fair enough. So let's do a couple of ground rules before we get started. I'm sure your counsel has gone through these. But you understand that the testimony you're giving today is under oath just like you were in a courtroom, right?

A. Correct.

Q. And do you understand that the

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testimony you're providing today is cross-examination that can be submitted to the Patent Trial and Appeal Board?

A. I do.

Q. I plan to take a break roughly once an hour, but you're welcome to take a break at other times if you need it. I just ask that you answer any question that is pending before the break. Is that fair?

A. That is.

Q. If you answer one of the questions that I ask today, I will assume that you understood that question. Is that fair?

A. That is.

Q. Now, Ms. Cipriano may object from time to time today, but unless you are specifically instructed by her not to answer a particular question, you'll need to answer each question you are asked. Is that fair?

A. Yes.

Q. Is there any reason, medical or

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otherwise, that you can't give complete, accurate, and truthful answers to my questions today?

A. There is not.

Q. Where do you work, Mr. Masztak?

A. Gleason IP.

Q. And what's your job title at Gleason?

A. I'm a managing director and a co-leader of the intellectual property practice.

MR. O'QUINN: Let's go ahead and introduce our first exhibit. I'm going to introduce as Masztak Exhibit 1 Exhibit 1203 from IPR 2024-467. I'll move it over into the public folder. It looks like I can't do that, but the file name --

THE VIDEOGRAPHER: I can do it. Yes, go ahead. File name I was going to ask.

MR. O'QUINN: File name is "245 Exhibit 1203" is how it begins.

THE VIDEOGRAPHER: All right. Stand by.

(Exhibit 1 marked for identification.)

BY MR. O'QUINN:

Q. This proceeding involves U.S. Patent No. 11,833,245.

Do you see that, Mr. Masztak?

A. I do.

Q. And is this your declaration for IPR 2024-467?

A. It is, yes.

Q. And for all of our exhibits today, you should have access to the documents yourself if you want to download them and review them further, but we'll also go through them on the screen.

Do you have any documents in front of you right now?

A. I do have a clean copy of the document on the screen, the '245 patent declaration, and the '600 patent declaration of my own, as well as Mr. Jarosz' declaration

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for the '245 patent and the '600 patent, all clean copies.

Q. Okay. Feel free to use those as well if it makes it easier.

Is this your report -- I already asked you that. Sorry.

MR. O'QUINN: Can we go to PDF page 59, please. Let's see. The pagination must have gotten lost. One second.

THE VIDEOGRAPHER: Sorry. Maybe that's not actually the 59 you meant.

MR. O'QUINN: Yes. Let's look at page 51. It's PDF page 61. Thank you. That one right there. That one right there.

BY MR. O'QUINN:

Q. Is that your signature, Mr. Masztak?

A. That is.

Q. And it's dated March 31, 2025, correct?

A. That is correct.

MR. O'QUINN: I'd like to go

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ahead and introduce as Masztak Exhibit 2 the document with the file name "Exhibit 3005," please.

(Exhibit 2 marked for identification.)

BY MR. O'QUINN:

Q. This is from the 467 IPR proceeding and it's Exhibit 3005 in that proceeding.

Do you understand, Mr. Masztak, that you're appearing as a substitute for Mr. Ivan Hofmann in these proceedings?

A. I do.

Q. If we go to page 2 of this document, about five lines down there's a sentence that begins "Mr. Masztak, who worked with Mr. Hofmann on his analysis of the issues in these proceedings, has agreed to adopt the opinions set forth in Mr. Hofmann's declarations and sit for deposition."

Do you see that?

A. I do.

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Q. And that's a true statement to your understanding?

A. That is.

Q. What does "worked with Mr. Hofmann" mean in this context?

A. I was the lead managing director on these engagements for the '245 and the '600 patent where Mr. Hofmann was the testifying witness originally on the case.

Q. And so in agreeing to adopt his opinions, there is no difference between the opinions you're presenting in these proceedings and the opinions that Mr. Hofmann presented?

A. That is correct. Outside wrong qualifications.

Q. Understood.

MR. O'QUINN: We can put that aside. I'd like to pull as Exhibit 3 to the deposition the document with file name "245 Exhibit 1162," please.

(Exhibit 3 marked for identification.)

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BY MR. O'QUINN:

Q. This is Exhibit 1162 from the 467 IPR proceeding, which is the February 25, 2025 Expert Declaration of Ivan T. Hofmann in Support of Petitioners' Reply. And have you seen this document before, Mr. Masztak?

A. I have.

Q. Is this declaration of Mr. Hofmann in fact identical in every way to your declaration, Exhibit 1, except for your name and your qualifications replacing those of Mr. Hofmann?

A. Yes, except for certain sentences that were phrased in Ivan's first person that we did slightly change I remember on the one footnote; but, substance, all of the information is identical.

Q. Did you have a role in preparing Mr. Hofmann's February 25 declaration, Exhibit 3 here?

A. Yes. I was the lead managing

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director on the case. I worked on the engagement, drafting the declaration in conjunction with Mr. Hofmann in forming the opinions that are included in that declaration as well as my declaration.

Q. Were you the primary drafter of both declarations?

A. I was.

MR. O'QUINN: If we could switch back to Exhibit 1, which is Mr. Masztak's declaration. If we could just go down a page from where we are right now.

BY MR. O'QUINN:

Q. This is Appendix 1 of your declaration for the '245 patent, Mr. Masztak.

Do you see that?

A. I do.

Q. Did you prepare Appendix 1 yourself?

A. Me in conjunction with my team that worked on the engagement.

Q. Have you personally reviewed

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each and every document listed in Appendix 1?
A. I believe I have. If I didn't, my team directly did, but I believe I've reviewed these documents, yes.
Q. In their entireties?
A. Myself or my team would have, yes.
Q. What was the process involved in preparing your declaration in the '245 patent case, Exhibit 1?
A. Preparing the initial opinions which were included in the Hofmann declaration or those that are included in my declaration that was issued on March 31?
Q. The latter.
A. So we started with the Hofmann declaration and made certain adjustments as needed with the qualifications section, reviewing to make sure there was no other terminology pronouns really that mattered. In conjunction with that, billing rates were adjusted for my rate as opposed to

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Mr. Hofmann's rate.
Q. Did you speak with Mr. Hofmann in the course of preparing your declaration?
A. I did not.
Q. Do you know approximately when you learned that you were going to be submitting a declaration in this matter?
A. It would have been about a week or so, week and a half before -- about a week, probably, before submitting the declaration.
Q. Is there anything in this declaration that you do disagree with Mr. Hofmann on that you are adopting regardless?
A. There is not.
MR. O'QUINN: Okay. We can put that aside for the moment. We'll come back to it frequently.
I'd like to introduce as Masztak Exhibit 4 the document with the file name "245 Exhibit 1202," please.

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(Exhibit 4 marked for identification.)
THE VIDEOGRAPHER: One moment on the shared page. It's in the shared folder, though.
BY MR. O'QUINN:
Q. And, Mr. Masztak, is this your curriculum vitae?
A. It appears to be, yes.
Q. And this is from -- this is the Exhibit 1202 from the 467 IPR proceeding which was submitted with your declaration. Feel free to download it, review it if you need to, but is this CV as it was submitted complete and accurate as of today?
A. I do not have anything in my download -- able to be downloaded box just so you're aware.
Q. Okay. I'm not sure why that is the case but --
MS. CIPRIANO: I think if you refresh the page.

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MR. O'QUINN: Yeah, that may do it.
THE WITNESS: Okay.
MR. O'QUINN: Thank you.
THE WITNESS: Yep. Thank you.
BY MR. O'QUINN:
Q. So if you want to open Exhibit 1202, the file name, that's the document we're looking at if you want to look at it separately.
A. This is my current CV and list of experience.
Q. Is there anything that should be added or taken off of this CV?
A. No.
Q. You have no publications, correct?
A. That is correct.
Q. You have never taught in a university or academic setting, correct?
A. Not in a university setting. I have provided CPE to a number of law firms

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and organizations at various times in my career.

Q. And just for the record, what does CPE stand for?

A. That's continuing professional education.

Q. Have you held any university appointments?

A. I have not.

Q. You are a certified public accountant, correct?

A. That is correct.

Q. And is that in the state of Pennsylvania?

A. Yes.

Q. Any other states?

A. No.

Q. Is that certification current?

A. Yes.

Q. Has your certification as a CPA ever lapsed or been suspended?

A. No.

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Q. You have a bachelor's degree in business administration with a concentration in accounting from Duquesne, correct?

A. That is correct.

Q. Is that your only educational degree from a university post high school?

A. That is correct.

Q. You have some other certifications that are listed here in this exhibit, correct?

A. Yes.

Q. You're not a scientist; is that fair?

A. I am not.

Q. You do not consider yourself a person of ordinary skill in the science that is at issue in these proceedings; would you agree?

A. I am not.

Q. You're not a medical doctor, correct?

A. Correct.

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Q. You're not an optometrist, correct?

A. Correct.

Q. You've never treated any patients in your professional career, correct?

A. That is correct.

Q. Have you ever worked at a pharmaceutical company?

A. I have not.

Q. Do you consider yourself an expert in advertising, promotion, or marketing?

A. Not in those fields. I work with that information frequently dealing with pharmaceutical economics and the issues of commercial success and nexus, but I would not consider an expert in marketing.

Q. You've never worked on a marketing campaign yourself for any product, correct?

A. That is correct.

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Q. Do you consider yourself a drug formulator?

A. I am not.

Q. Could we go to page 2 of this document.

So the first two-thirds or so of this page, this is the sum total of your personal testifying experience to date; is that correct?

A. That's correct.

Q. And so let's just go through these quickly.

The Ingenus Pharmaceuticals versus Nexus Pharmaceuticals case, that's the Northern District of Illinois, correct?

A. Yes.

Q. What was the -- I'm not asking for any confidential information. What was your role in that case?

A. It related to the drug aprepitant -- or, I'm sorry -- the cyclophosphamide and related to commercial

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success and nexus.

Q. The second case there is Heron Therapeutics, Inc. versus Fresenius Kabi USA, District of Delaware. Again, not revealing confidential information, what was your role in that case?

A. That related to the product aprepitant and was related to commercial success and nexus.

Q. And is -- the other Heron matter listed forth there, is that the same proceeding?

A. That is.

Q. Okay. How about the Galderma versus TCD -- or, sorry -- Galderma versus Lupin case, District of Delaware, what was your role there?

A. That related to preliminary injunction proceedings in the product doxycycline.

Q. Is the Ingenus case, the first listed case, resolved?

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A. It currently is not.

Q. Has it gone to trial yet?

A. It has not.

Q. When do you expect it to go to trial, if you know?

A. It's currently scheduled for June of 2025.

Q. The Heron case has gone to trial, correct, as indicated here?

A. That is correct.

Q. What was the outcome of that case?

MS. CIPRIANO: Objection. Relevance.

THE WITNESS: I would have to pull the opinion. I know it is currently on appeal and the outcome was in favor of Heron; but the details of the decision, I would have to refresh my recollection on exactly what the decision was in favor of Heron.

BY MR. O'QUINN:

Q. Has the Galderma versus Lupin

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case listed here been resolved?

A. That -- the preliminary injunction proceeding part of it was, yes.

Q. What was the outcome of that?

A. There was not a preliminary injunction put in place.

Q. There are a couple of other engagements listed here. None of those are pharmaceutical patent cases, correct?

A. That is correct.

Q. Below this list of proceedings, the next heading says "Intellectual Property Cases" -- excuse me -- "in which Mr. Masztak Led the Engagement."

Do you see that?

A. I do.

Q. Can you explain for the record what "led the engagements" means?

A. For these engagements, I was the managing director that was in control of the engagement, managing the arguments, the documents, the drafting of the reports in the

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matter, in conjunction with the testifying expert in the case, which was not myself in those cases.

Q. Would you say your role was pretty consistent in each of those engagements, or did it differ from case to case?

A. It was fairly consistent as the main contact person with counsel and in developing the opinions for the cases in conjunction with the testifying expert.

Q. Are you providing any technical opinions whatsoever in the IPR proceedings we're here for today?

A. Can you -- what do you mean by "technical opinions"?

Q. Are you opining at all about any of the science involved in these IPRs?

A. I am not.

Q. Is it safe to say anywhere there is technical or scientific information or opinions in your report you are solely

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relying on another expert?
A. I would think that's probably a reasonable opinion related to the opinions of Dr. Galanis or Dr. Laskar in the -- that are referenced in my declarations.
Q. Since you became the testifying expert in these proceedings, have you spoken with Dr. Galanis?
A. I have not.
Q. Did you speak with Dr. Galanis before then?
A. I did not.
Q. Since you became the testifying expert in these proceedings, have you spoken with Dr. Laskar?
A. I have not.
Q. Did you speak with Dr. Laskar before then?
A. I did not.
Q. Do you know whether Mr. Hofmann spoke directly with either expert?
A. I do not believe he did.

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Q. Did you review drafts of Dr. Galanis' declarations in this matter?
A. I did not.
Q. Do you know if Dr. Hofmann did -- sorry -- Mr. Hofmann?
A. I do not believe he did.
Q. Did you review drafts of Dr. Laskar's declarations in this matter?
A. I did not.
Q. Do you know if Dr. Hofmann did?
A. I do not believe he did.
Q. Did you or Dr. Hofmann submit any questions for Dr. Galanis?
A. Submit questions to who?
Q. Did you or Mr. Hofmann have any technical questions for Dr. Galanis that you asked counsel to pass to Dr. Galanis?
A. I don't believe we did, no.
Q. And same question for Dr. Laskar. Did you or Mr. Hofmann have any technical questions for Dr. Laskar that you asked counsel to pass on to him?

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A. I don't believe so.
Q. Let's look back at your CV now on the screen. If we go to PDF page 4, please. Sorry. The same document that was on the screen previously. Thank you. Okay. That's great.
The fifth case down on this page is Allergan Sales, LLC and Allergan, Inc. versus Sandoz, Inc. and Alcon Laboratories, Inc. in the United States District Court for the District of New Jersey.
Do you see that?
A. I do.
Q. And that case related to brimonidine tartrate-timolol maleate, correct?
A. That is correct.
Q. The trade name for that drug is Alphagan, correct?
A. I believe that was related to Combigan.

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Q. Combigan. Thank you.
Did you assist Mr. Hofmann on that case or another expert at Gleason?
A. That was Mr. Hofmann.
Q. And you represented Sandoz and Alcon in that matter?
A. I would have to go double-check. I know we represented Alcon. I don't remember if it was a joint defense group with both of them or not.
Q. And you led the engagement in this case, the Allergan/Alcon case, correct?
A. That is correct.
Q. Do you believe your experience leading the engagement in that case makes you an expert in products containing brimonidine tartrate as an active ingredient?
MS. CIPRIANO: Objection. Relevance.
THE WITNESS: I don't believe I've thought about it in that way of being an expert in a specific compound. I work on a

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number of cases with a variety of compounds and indications in different -- in the pharmaceutical industry and consider myself an expert in pharmaceutical economics and understanding the economics of pharmaceutical products.

BY MR. O'QUINN:

Q. Are you an expert in the pharmaceutical economics of products that contain brimonidine?

A. I don't know that I've ever thought of it in that manner. I have worked on cases, as we're looking at here, that -- for a product that contained brimonidine, as well as the current matters at hand in the IPRs for the '600 patent and the '245 patent, and I previously worked on the IPR related to the '742 patent as well.

Q. You understand that brimonidine tartrate is the active ingredient in Bausch & Lomb's Lumify product which is at the base of these proceedings?

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A. I understand that brimonidine is contained in the Lumify product.

Q. Do you consider Combigan and Lumify to be part of the same marketplace?

MS. CIPRIANO: Objection. Outside the scope of the declaration.

THE WITNESS: I would not consider them as part of that. They both contain brimonidine, but I believe they are used for different indications. If you have the label for Combigan -- I haven't looked at that case since 2021 -- I could -- we could look at that and see, but I'm not sure as I sit here right now that those would be direct competitors, so to speak.

BY MR. O'QUINN:

Q. Sitting here today, do you recall what concentration the brimonidine tartrate solution in Combigan was?

MS. CIPRIANO: Objection. Outside the scope.

THE WITNESS: I do not recall

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as we sit here today.

BY MR. O'QUINN:

Q. Is it fair to say that the majority of the time when you're involved in a pharmaceutical litigation you're being retained on behalf of generic pharmaceutical companies?

A. I don't -- I mean, it depends. I haven't categorized it in that manner. We have been retained by patent owners and by patent challengers throughout time. There may be -- I look at the list, there's maybe more on the side of patent challengers, but we've worked for both parties.

Q. And I guess the reason I'm asking is the way the CV is presented it's not clear what party you represented in each engagement, and so I just wanted to try to clear up if you were typically on the generic side or the brand side in cases like these.

A. I'm sorry. Was that a question? Can you repeat that? I thought it

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was a statement but --

Q. Well, I'm just saying, the way the CV is presented, it is not clear what party you were representing in each of these engagements, and so I just wanted to ask you again, do you believe you're typically on the generic side or the brand side in the litigations that you manage or testify in?

A. I mean, brand and generic is a little difficult now the way the mergers and everyone has come together. I kind of -- I view it more as patent owner or patent challenger at times. I think there's more times we're probably on the side of patent challenger, but we have been retained by both patent owners as well as patent challengers throughout time.

Q. In district court litigation, the patent challengers are typically generic drug companies; would you agree?

MS. CIPRIANO: Objection. Scope.

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THE WITNESS: It depends how you define a generic drug company, because all companies now seem to have brand arms, generic arms. Lots of mergers and acquisitions have occurred over time.
BY MR. O'QUINN:
Q. Approximately how many times have you worked with the Goodwin Procter law firm?
A. Over a hand -- I'd say a handful of times over my -- I think I'm coming up on 18 years working at Gleason now. They're one of the firms we work with, but we work with a lot of law firms.
Q. You yourself are not an attorney, correct?
A. I am not.
Q. You have never attended law school, correct?
A. That is correct.
Q. You're not a patent agent, correct?

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A. That is correct.
Q. Are you an inventor yourself on any patents or patent applications?
A. I am not.
Q. You have not analyzed which patents cover the Lumify product; is that fair?
A. I have not analyzed that from a technical perspective, no.
Q. Fair to say you don't have an opinion as to which claims of any particular patent cover the Lumify product, right?
A. I do not have a direct opinion on the technical nature of which claims cover Lumify.
MR. O'QUINN: We can put that document down. I'd like to introduce a new exhibit which will be Masztak Exhibit 5, and the file name there that I want to use is "Exhibit 1001 (245 Patent)."
(Exhibit 5 marked for identification.)

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BY MR. O'QUINN:
Q. This is U.S. Patent No. 11,833,245. Have you seen this document before, Mr. Masztak?
A. I have.
Q. Have you reviewed it?
A. I have.
Q. Would you say in its entirety top to bottom, every word?
A. I mean, generally I reviewed the document. Whether I -- there's a lot of technical nature and information throughout the document, but I've read the document.
Q. Did you analyze the claims of this patent as part of your work in this case?
A. I have reviewed and read the claims of the patent, yes.
Q. Are you opining as an expert in the interpretation of patent claims related to pharmaceutical formulations?
A. I am not interpreting the

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claims or any type of claim construction related to the claims of the '245 patent.
Q. Do you consider yourself an expert in interpreting patent claims related to clinical features of pharmaceutical formulations?
A. I do not consider myself an expert in clinical features of the patent claims. I rely on technical experts for understandings related to patent claims and potential features related to products that are claimed to embody such claims.
Q. Anywhere in your declarations where you discuss patent claims or legal standards, you were given that information by counsel, correct?
A. I would -- or I have reference and reliance on Dr. Galanis or Dr. Laskar for such technical information that may be included in the declarations.
Q. What were you asked to do in these proceedings?

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A. To review and respond to the opinions put forth by Mr. Jarosz.

Q. Is there any difference between what you were asked to do in this case and what Mr. Hofmann was asked to do in this case?

A. There is not.

MR. O'QUINN: I'd like to introduce as the next exhibit the document that begins 600 Exhibit 1203, please.

(Exhibit 6 marked for identification.)

BY MR. O'QUINN:

Q. Mr. Masztak, this is a document entitled "Expert Declaration of Anthony M. Masztak in Support of Petitioners' Reply." It's for IPR 2024-563 involving U.S. Patent No. 11,596,600.

Do you see that?

A. I do see that on the cover page here, yes.

Q. And, again, you're welcome to use the hard copy you have in front of you.

Is this your full and complete declaration for the 563 IPR proceeding?

A. I believe it is, yes.

Q. And if we could go to PDF page 60 of this document, is that your signature, Mr. Masztak? Sorry. Back where we were. Right there.

A. Yes, that is.

MR. O'QUINN: And if we could bring in now as Exhibit 7 the document that begins with the file name "600 Exhibit 1162," please.

(Exhibit 7 marked for identification.)

BY MR. O'QUINN:

Q. And this is the February 25, 2025 Expert Declaration of Ivan T. Hofmann in Support of Petitioners' Reply. I just want to ask you some of the same questions again.

Mr. Masztak, is this declaration of Mr. Hofmann identical in every way to your declaration in the same proceeding, which is Exhibit 6, except for your name, qualifications, and changing some pronouns?

A. Can you scroll down just so I can see the title of the document? Thank you.

Yes, that would be correct.

Q. Was your role in the preparation of this declaration that we're looking at now on the screen the same as your role in the preparation of Mr. Hofmann's other declaration?

A. That is correct. The other declaration being the '245 patent declaration, yes.

Q. And if we go back to your declaration now. We can take this one down. So Exhibit 6. And if we go to the next page, we have here Appendix 1 to your declaration.

Did you prepare this appendix?

A. Yes. Myself and the team that I work with on the case would have prepared it.

Q. And have you personally reviewed each and every document listed in this appendix?

A. Myself and/or the team that worked on the case, yes.

Q. When you're saying "the team," who are you referring to?

A. The primary other individual is a senior manager at Gleason IP is named Alex Dimitri, D-I-M-I-T-R-I.

Q. Do you know which documents on this appendix you reviewed versus Mr. Dimitri?

A. I believe I reviewed all of them. There's a chance there is a document that he may have reviewed that I hadn't seen or something of that nature, but the majority we have collaborated on the engagement, and I would have reviewed these documents.

Q. Were there any differences in

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how the declaration for the '600 patent proceeding came together versus the '245?

A. There -- they were put together in the same manner and in the same analysis. There were certain adjustments and differences between the two, but primarily it's under the same concept, similar to how Mr. Jarosz approached his analysis.

MR. O'QUINN: We can take that down again. The next document I'd like to look at will be Exhibit 8, and the file name is "Exhibit 1001 - U.S. Patent No. 11,596,600."

(Exhibit 8 marked for identification.)

BY MR. O'QUINN:

Q. Have you reviewed the '600 patent that we see here, Mr. Masztak?

A. I have.

Q. Did you analyze the claims of the '600 patent as part of your work in this case?

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A. I reviewed and read the claims of the '600 patent, not from a technical perspective but from the purpose of understanding the claims for this case.

Q. Is it your understanding that Dr. Reddy's has filed inter partes review or IPR petitions challenging the validity of the '245 and '600 patents?

A. My understanding, that there are certain challenged claims of each '245 and '600 patents that have been instituted based on Dr. Reddy's as the petitioner filing of these inter partes reviews.

Q. And both of those patents are assigned to Eye Therapies, LLC; is that your understanding?

A. That is my understanding, yes.

Q. And do you understand that Dr. Reddy's filed those petitions challenging the claims of those patents because Dr. Reddy's seeks to make a generic version of Bausch & Lomb's Lumify product?

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MS. CIPRIANO: Objection. Relevance. Scope.

THE WITNESS: I understand that Dr. Reddy's has rights to an ANDA related to the Lumify product.

BY MR. O'QUINN:

Q. A couple times today you've mentioned the '742 patent. Is that another Eye Therapies patent that is involved in the dispute between petitioners and patent owner?

MS. CIPRIANO: Same objections.

THE WITNESS: My understanding is the '742 patent is another patent where there was a previous IPR that was -- it was Slayback at the time would have challenge -- that's petitioner for Eye Therapies in the '742 patent was determined by the PTAB to be invalid.

MR. O'QUINN: I'd like to introduce as Exhibit 9 the document from the folder that has the file name "Exhibit 1047," please.

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(Exhibit 9 marked for identification.)

MR. O'QUINN: If you could scroll -- that should be fine.

BY MR. O'QUINN:

Q. And so this is Exhibit 1047 from the proceeding IPR 2022-142 between Slayback Pharma LLC as the petitioner, Eye Therapies, LLC as the patent owner, involving U.S. Patent No. 8,293,742, correct?

A. That is correct.

Q. Have you seen this document before, Mr. Masztak?

A. I have.

Q. And this is the Expert Declaration of Ivan T. Hofmann in Support of Petitioner's Reply.

Did you have a role in drafting this declaration?

A. I did. I was the lead managing director on the engagement to which Ivan Hofmann was the testifying expert for the

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case.
Q. Was your role in the IPR 2022-142 matter similar to your role as managing director in the two proceedings we're here for today?
A. Yes, the role was similar prior to being inserted now as the testifying expert for the '245 patent and '600 patent.
MR. O'QUINN: If we could pull in now the document beginning with file name "Exhibit 1002." This will be Exhibit 10.
(Exhibit 10 marked for identification.)
BY MR. O'QUINN:
Q. Exhibit 10 is Exhibit 1002 from the 563 IPR which is a copy of U.S. Patent No. 8,293,742.
Have you seen this patent before, Mr. Masztak?
A. I have.
Q. Have you reviewed this patent?
A. I have reviewed this patent.

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Q. Did you review this patent in preparation for today's deposition?
A. Not necessarily in preparation for the deposition today. I had reviewed it when we were compiling the declarations for the '245 and '600 over a couple months ago when we did so.
Q. And did you analyze the claims of the '742 patent as part of your work in this case?
A. I had reviewed the claims for the '742 patent.
Q. Dr. Reddy's is claiming that the '245, '600, and '742 patents are invalid as obvious, correct?
MS. CIPRIANO: Objection. Scope.
THE WITNESS: I would leave that to legal arguments. I'm not sure exactly all of their defenses related to such.
BY MR. O'QUINN:

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Q. And I think, as you testified a moment ago, the Patent Trial and Appeal Board has for now found that the claims that were challenged in the '742 patent were invalid as obvious, correct?
A. That's my understanding based on the opinion from the Patent Trial and Appeal Board.
Q. Did you review that opinion?
A. I did.
Q. And as you mentioned, you understand that decision is being appealed and is not yet final?
A. I understand it's currently under appeal, yes.
Q. Do you believe that the issue of commercial success is relevant to whether the '245, '600, and '742 patents are obvious?
MS. CIPRIANO: Objection. Calls for a legal conclusion.
THE WITNESS: I understand that the patent owners have asserted commercial

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success and nexus related to the '245 patent and '600 patent based on Mr. Jarosz' opinions, and I've rebutted those opinions in my declarations.
BY MR. O'QUINN:
Q. Your opinion in these proceedings is that the commercial performance of the Lumify product does not provide objective indicia of nonobviousness, correct?
A. The marketplace performance of Lumify does not provide objective indicia of nonobviousness of the challenged claims of the '245 patent and '600 patent.
Q. And that's because, in your view, there's no nexus between the commercial performance of Lumify and the features recited in the challenged claims, correct?
A. I've determined that there's no nexus in the marketplace performance of Lumify and the challenged claims of the '245 patent and the challenged claims of the '600

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patent.

Q. You are not opining that the sales and revenue and profit figures of Lumify indicate a lack of commercial success, right?

A. Commercial success is based on the performance of the product in conjunction with a nexus to the patent, so I've determined there's not a nexus to the challenged claims of the '245 patent and the '600 patent.

Q. But your only point of opposition to Mr. Jarosz' opinion is that there's no nexus; you're not arguing that there's not success, correct?

MS. CIPRIANO: Objection. Compound.

THE WITNESS: I disagree with Mr. Jarosz' opinions regarding nexus and the marketplace performance of Lumify and the challenged claims of the '600 patent and the challenged claims of the '245 patent.

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BY MR. O'QUINN:

Q. If the Patent Trial and Appeal Board were to find that there is in fact nexus between the commercial performance of Lumify and the features of the challenged claims, you agree that commercial success would be a factor that should then be considered by the board in these matters, correct?

MS. CIPRIANO: Objection. Incomplete hypothetical.

THE WITNESS: My analysis has determined that the marketplace performance of Lumify, there is not a nexus to the challenged claims of the '600 patent and the '245 patent. I have not seen evidence that that is the case.

BY MR. O'QUINN:

Q. I understand, and I'm asking you a slightly different question.

Would you agree that if the Patent Trial and Appeal Board disagrees with you and finds that there is in fact nexus, that commercial success should be considered in the obviousness analysis?

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MS. CIPRIANO: Objection. And incomplete hypothetical.

THE WITNESS: I think that would be a legal conclusion depending on what the Patent Trial and Appeal Board would determine from the -- their standpoint in that hypothetical situation which is counter to my analysis that there's not nexus to the challenged claims of the '600 patent and the '245 patent.

BY MR. O'QUINN:

Q. Is it your understanding that the Patent Trial and Appeal Board did not find nexus between the commercial performance of Lumify and the features of the challenged claims of the '742 patent that we have on the screen?

MS. CIPRIANO: Objection to the extent it calls for a legal conclusion.

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THE WITNESS: My understanding is the Patent Trial and Appeal Board found the '742 patent invalid and, in relation to commercial success and nexus, referred to the drivers of the performance of Lumify related to low-dose brimonidine, which was known in the prior art, as well as sales and marketing efforts of Bausch & Lomb on -- for Lumify.

BY MR. O'QUINN:

Q. And so since the board did not find nexus, the board did not consider commercial success in the IPR proceeding for the '742 patent, right?

MS. CIPRIANO: Objection to the extent it misstates the record and calls for a legal conclusion.

THE WITNESS: I don't know if it's -- it's a decision by the PTAB what they did analyze and consider related to commercial success and nexus and how that plays into their full opinion. My understanding is that they determined that

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the marketplace performance of Lumify was driven by low-dose concentrations of brimonidine, which were known in the prior art, as well as the sales and marketing efforts of Bausch & Lomb related to Lumify.

BY MR. O'QUINN:

Q. Is it fair to say your opinion in these proceedings is that there is no nexus between the commercial performance of Lumify and the features of the '245 and '600 patents for the same reason that there is no nexus between Lumify and the '742 patent?

A. I don't think that is an identical comparison. I have analyzed for the two challenged claims of the '245 patent and the challenged claims of the '600 patent and determined that the marketplace performance of Lumify is not driven by the challenged claims of the '245 patent or the challenged claims of the '600 patent.

MR. O'QUINN: We've been on about an hour. Why don't we take a

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ten-minute break.

THE WITNESS: Okay.

THE VIDEOGRAPHER: Off the record at 9:57.

(Brief recess.)

THE VIDEOGRAPHER: On the record at 10:07.

MR. O'QUINN: What I'd like to do is put Masztak Exhibit 5 and Masztak Exhibit 10 side by side on the screen. It's the '245 patent and the '742 patent.

THE VIDEOGRAPHER: '245 and '742, right?

MR. O'QUINN: Correct.

THE VIDEOGRAPHER: And I'll zoom in to whichever one is being --

MR. O'QUINN: Yeah. So can we have the actual '245 patent on the left-hand side. The right-hand side is good, but the actual patent, which is Exhibit 5, please.

I'm still seeing the declaration. I want the actual patent.

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Maybe the exhibit numbers are off or something.

THE VIDEOGRAPHER: All right. So is that the 1001?

MR. O'QUINN: Yeah. This is the '600 patent, but we can go with this. We can go with this.

Okay. What I'd like to do is turn to page 22 of the '600 patent and then zoom in to claim 1, please. That's good. And then if we could go to page 20 of the '742 patent and then zoom in on claim 1 there, please.

BY MR. O'QUINN:

Q. Okay. Mr. Masztak, can you see those?

A. Yes, I can.

Q. Is claim 1 of the '600 patent identical to claim 1 of the '742 patent, Mr. Masztak?

A. The words are not identical as they're shown here. From a technical

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perspective, I would not be the one to determine if they are identical from a technical or practicing perspective, but the words as they are listed are not identical.

Q. The scope of these claims with respect to claim 1 is different, right?

MS. CIPRIANO: Objection. Calls for a legal conclusion.

THE WITNESS: I would not be the person to opine on the scope of the claims here.

BY MR. O'QUINN:

Q. You have opined, however, in these proceedings that the features recited in each of claim 1 of the '600 patent and claim 1 of the '742 patent are not novel and are found in the prior art, correct?

MS. CIPRIANO: Objection to the extent it misstates the declaration.

THE WITNESS: The declarations I've issued in this matter are not opining on the '742 patent. The declarations I've

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issued for the '600 patent relate to an understanding I have from Dr. Galanis and Dr. Laskar in this matter for certain features that are related to the information in the claims, and my analysis relates to the drivers of the marketplace performance of Lumify related to what was known in the prior art, as well as marketing, as well as additional opinions I have throughout the declaration.

BY MR. O'QUINN:

Q. Your understanding from Dr. Galanis and Dr. Laskar is that in the '600 patent an ocular drop comprising about 0.025 percent weight by volume brimonidine as the sole active ingredient wherein the ocular drop has a pH between 5.5 to 6.5 is found in the prior art?

MS. CIPRIANO: Objection to the extent it misstates the declaration.

THE WITNESS: My understanding from Drs. Galanis and Laskar relate to the

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efficacy of Lumify which is known in the prior art related to the low concentrations of brimonidine, not specifically -- I leave it to Dr. Galanis and Laskar the specifics of the terms and of the claims within this, but related to the features that Mr. Jarosz has put forth, that efficacy, safety, tolerability and such, and I have analyzed those features with my understandings from Dr. Galanis and Dr. Laskar.

BY MR. O'QUINN:

Q. You mentioned low concentrations of brimonidine. What are the bounds of "low" in that testimony?

MS. CIPRIANO: Objection. Scope.

THE WITNESS: I relied on Dr. Galanis for information related to low concentrations of brimonidine.

BY MR. O'QUINN:

Q. So sitting here today, you don't have an opinion as to what

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concentration of brimonidine tartrate would be a low concentration?

A. My understanding from Dr. Galanis is that low concentrations of brimonidine are known in the prior art, and that is what Mr. Jarosz is putting forth as the reason for efficacy, his comments related to that, and the efficacy of Lumify is driven by low concentrations of brimonidine that I relied on by Dr. Galanis.

Q. Looking at claim 1 of the '742 patent on the right side of the screen right now, claim 1 recites "wherein brimonidine is present at a concentration between about 0.001 percent weight by volume and about 0.05 percent weight by volume."

Do you see that?

A. Yes, I do.

Q. Is it your understanding that a range between 0.001 percent weight by volume and about 0.05 percent weight by volume constitute low concentrations of brimonidine?

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MS. CIPRIANO: Objection. Outside the scope of the declaration.

THE WITNESS: I don't have an opinion on a numeric range of low concentrations of brimonidine. I rely on information from Dr. Galanis and Dr. Laskar related to information for low concentrations of brimonidine.

BY MR. O'QUINN:

Q. Can you provide any definition of what constitutes a low concentration of brimonidine?

MS. CIPRIANO: Objection. Same objection.

THE WITNESS: I rely on Dr. Galanis for the understanding related to low concentrations of brimonidine as explained throughout my declaration.

BY MR. O'QUINN:

Q. So if the Patent Trial and Appeal Board does not credit Dr. Galanis' opinions relating to low concentrations of

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brimonidine, you do not have any independent opinions other than his, correct?
MS. CIPRIANO: Objection. Incomplete hypothetical.
THE WITNESS: I don't have a direct opinion on low concentrations of brimonidine. What my analysis is doing is Mr. Jarosz has discussed features of Lumify such as the efficacy, safety, and tolerability, and I have an understanding from Dr. Galanis from a technical nature that those features are known in the prior art; therefore, there's not nexus to the challenged claims of the '245 patent or the '600 patent related to the features that Mr. Jarosz has put forth, in addition to a number of other opinions I have, such as the sales and marketing that Bausch & Lomb has put forth that drive the marketplace performance of Lumify.
MR. O'QUINN: Can we take the patent on the left side down, keep the one on

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the right up, and I would like to now put up Exhibit 1001 '245 patent which was Exhibit 5 to this deposition.
THE VIDEOGRAPHER: 1001 '245 on the left side?
MR. O'QUINN: Yes, please. And if we could go to page 23 of that patent, please, and zoom in on claim 1 if we could.
BY MR. O'QUINN:
Q. Are you able to read that, Mr. Masztak?
A. I can, yes.
Q. So claim 1 of the '245 patent recites "topically administering to an eye of said human in need of said reduction of eye redness a composition in the form of an ocular drop consisting of 0.025 percent weight by volume brimonidine as the sole active ingredient, and one or more non-therapeutic components including benzalkonium chloride, wherein the ocular drop has a pH between 5.5 to 6.5, wherein the

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ocular hyperemia is reduced."
Do you see that?
A. I do.
Q. Is claim 1 of the '245 patent identical in scope to claim 1 of the '742 patent on the right side of the screen?
MS. CIPRIANO: Objection. Calls for a legal conclusion. Outside the scope of the declaration.
THE WITNESS: I'm not one to opine on the scope of the claims between the two patents. That's more of a technical question for someone else, I think, the technical nature. The words that are listed on the screen between claim 1 of the '245 patent and claim 1 of the '742 patent are not identical.
BY MR. O'QUINN:
Q. '245 patent here on the left side of the screen, claim 1 says, "consisting of 0.025 percent weight by volume brimonidine as the sole active ingredient."

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Do you see that?
A. I do.
Q. Now, claim 1 of the '742 patent on the right side of the screen says, "consisting essentially of administering brimonidine to a patient having an ocular condition, wherein brimonidine is present at a concentration between about 0.001 percent weight by volume and about 0.05 percent weight by volume."
Do you see that?
A. I do see it.
Q. Did you consider in your opinions the difference between the word -- the phrases, rather, "consisting of" and "consisting essentially of"?
A. I've not analyzed the claim language related to the specifics between this. I understand there's claim construction that has occurred, and that is more the nature of technical experts. I rely on my understandings from Dr. Galanis and

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Dr. Laskar, and my opinion relates to analyzing the marketplace performance of Lumify in the drivers of the Lumify, which I understand are known in the prior art, as well as the marketing that Bausch & Lomb has put forth for Lumify.

Q. Your opinions in this case do not address the difference between the claim phrases "consisting of" and "consisting essentially of" for the reasons you've just stated, correct?

MS. CIPRIANO: Objection to the extent it misstates the declarations.

THE WITNESS: My opinions are related to the '245 patent and the '600 patent. I do not have an opinion to analyze the '742 patent in these proceedings.

BY MR. O'QUINN:

Q. So we've compared the '245 patent claim 1 to '742 patent claim 1, and we've compared '600 patent claim 1 to '742 patent claim 1.

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Would you agree with me that claim 1 of the '245 patent and claim 1 of the '600 patent are also not identical?

A. I agree the words in claim 1 of the '245 patent and the words in claim 1 of the '600 patent are not identical.

Q. Despite the differences in those words, would you agree with me that your opinions on nexus and commercial success are identical for the '245 patent and the '600 patent?

A. My analysis and understanding is rebutting Mr. Jarosz' opinions regarding the challenged claims of the '245 patent and the challenged claims of the '600 patent. And based on my analysis, the drivers of the marketplace performance of Lumify are based on features that were known in the prior art, based on my understandings from Dr. Galanis and Dr. Laskar, as well as the significant marketing and promotion that Bausch & Lomb has put forth for Lumify.

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Q. Just to be clear, your understanding from Dr. Galanis is that 0.025 percent weight by volume brimonidine as the sole active ingredient of an ocular drop was found in the prior art?

MS. CIPRIANO: Objection to the extent it misstates the record.

THE WITNESS: I rely on my understandings from Dr. Galanis that the efficacy of Lumify is known in the prior art.

BY MR. O'QUINN:

Q. The efficacy of Lumify as a commercial product is known in the prior art? That's your understanding?

A. Based on what Dr. Galanis has put forth related to efficacy, safety, tolerability, lack of rebound hyperemia, and tachyphylaxis after repeated use, which are features that Mr. Jarosz has addressed in his declaration that I have rebutted in my declarations.

Q. What Dr. Galanis has put forth

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related to efficacy, safety, tolerability, and lack of rebound hyperemia and tachyphylaxis, those are based on the Alphagan product, not the Lumify product, correct?

MS. CIPRIANO: Objection to the extent it misstates the record.

THE WITNESS: You would have to ask Dr. Galanis the details of all of his opinions related to that. I don't want to leave out information there. I know there are multiple prior art references that he has used in his analysis that come to the conclusion that the efficacy, safety, tolerability, and the features that we are discussing of Lumify were known in the prior art; and, therefore, there's not nexus related to the challenged claims of the '600 patent or the challenged claims of the '245 patent.

BY MR. O'QUINN:

Q. I just need to make sure I'm

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clear on the understanding and the assumptions that you put into your analysis and your opinions.

Your understanding is that the efficacy, safety, tolerability, and clinical features of the 0.025 percent weight by volume brimonidine Lumify commercial products are not novel and were in the prior art; is that correct?

MS. CIPRIANO: Objection to the extent it misstates the declaration.

THE WITNESS: Those are features that Mr. Jarosz has discussed in his declaration that I have an understanding from Dr. Galanis, as well as Dr. Laskar, related to the information that was known in the prior art that drives the marketplace performance of Lumify and is unrelated to the challenged claims of the '245 patent and the challenged claims of the '600 patent.

MR. O'QUINN: All right. Let's take the exhibits down that are on the

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screen.

BY MR. O'QUINN:

Q. And if you could take, Mr. Masztak, your copy in front of you, just for ease, of the '245 patent declaration that you submitted in this case. So that should be Exhibit 1 to the deposition. We don't need to put that back up on the screen.

And I think you testified to this a few minutes ago, Mr. Masztak, but your declaration for the '245 patent and your declaration for the '600 patent are identical in all substantive ways other than the actual recitations of the patent number and the actual recitations of the claim language; is that fair?

MS. CIPRIANO: Objection to the extent it misstates the declarations.

THE WITNESS: They are not identical. They have similar opinions related to the drivers of the marketplace performance of Lumify related to what is

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known in the prior art and the marketing of that Bausch & Lomb has done for Lumify. They're similar arguments that I've opined on that drive the marketplace performance of Lumify, but there are differences throughout related to multiple citations. There's a paragraph Mr. Jarosz has in the '600 that's not in the '245. So they are not identical.

BY MR. O'QUINN:

Q. You cited to all the same evidence in terms of exhibits in both declarations, correct?

A. I cited to similar evidence. I do not believe it is all identical evidence but it's similar in nature, yes, but "identical" I think would be too strong.

Q. The exhibits have the same number across the two declarations, correct?

A. I believe they all do. I don't want to misspeak if there is an exhibit number that may be off, but I believe they have similar exhibit numbers between the two

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IPRs.

Q. So given this testimony, going forward I'm not going to distinguish, for ease of record, between your opinions for the '245 versus your opinions for the '600, and I'm going to be going off the '245 declaration, but if there are any differences in your opinions and analysis that are unique for the '600 patent, will you say so?

A. I will answer the questions related to the '245 patent, which the majority may be similar to the '600 patent, but I'm not going to be able to definitively match that up, but I understand the general concepts of the opinions are similar.

Q. What is commercial success, Mr. Masztak?

MS. CIPRIANO: Objection. Calls for a legal conclusion.

THE WITNESS: Commercial success, my understanding, based on the law, is a construct that is analyzed and put forth

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and asserted by a patent owner related to an obviousness case, and that is the concept that I'm rebutting in this case that Mr. Jarosz has put forth.

BY MR. O'QUINN:

Q. Is there a threshold for what makes a product commercially successful?

A. What do you mean by "threshold"?

Q. Is there a dollar amount that makes a product commercially successful versus unsuccessful?

A. There is not a dollar amount threshold.

Q. Can we turn to Section VI of your declaration starting at paragraph 20. Let me know when you're there.

A. I am there.

Q. Are these the definitions of "commercial success" and "nexus" that you applied in forming your opinions?

A. They are.

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Q. And you say, as you testified a moment ago, that it is my understanding that, quote, commercial success is a legal construct that has been established through case law.

Do you see that?

A. I do.

Q. What case law are you referring to?

A. This relates to the various secondary considerations of nonobviousness that have been put forth in part of the Graham factors related to commercial success as one of those components as asserted by the (audio distortion) in Mr. Jarosz' declarations.

(Court reporter clarification.)

BY MR. O'QUINN:

Q. Do you have any specific cases in mind?

MS. CIPRIANO: Objection. Calls for a legal conclusion.

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THE WITNESS: This is my understanding through legal of understanding what commercial success is. There's not a specific case law that I'm putting forth, but that commercial success is a secondary consideration of nonobviousness that has been asserted by patent owners in this case that I am rebutting.

BY MR. O'QUINN:

Q. There's no case law cited in paragraph 20 of your declaration, correct?

A. That is correct.

Q. Did you review any case law in the course of forming your opinions?

A. Over time I have reviewed case law throughout time, but recently as we did this I don't know that I would have. I have analyzed commercial success and nexus for at least the past decade.

Q. Sitting here today, can you recall any specific case that shaped your understanding of commercial success as you

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applied it in this declaration?

A. I don't think I'd point to a specific case that I would do that. It's my experience in doing this for the past more than decade at least, if not 15 years, of analyzing commercial success and nexus in the pharmaceutical industry.

Q. Looking at paragraph 21, you state, "to support a finding of nonobviousness, commercial success must be driven by and attributable to the purported merits of the patented invention."

Do you see that?

A. Yes.

Q. What is the basis for that statement?

A. That is my understanding through counsel of the concept of "nexus" as I describe it throughout this and through my experience over time of applying -- analyzing marketplace success and nexus for pharmaceutical products as well as other

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products.

Q. Do you cite anything for that proposition in paragraph 21 of your declaration?

A. I do not here.

Q. Next you say, "In other words, there must be a causal correlation, or 'nexus,' between the unique merit of the claimed invention and the success of the product."

Do you see that?

A. I do.

Q. Is it your opinion that commercial success of a product must be entirely attributable to the purported merits of the patented invention in order for there to be nexus?

MS. CIPRIANO: Objection. Calls for a legal conclusion.

THE WITNESS: Commercial success is analyzed as of the patent in the term of an obviousness inquiry, not the

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product. I refer to it more as the marketplace success of a product to distinguish the two. "Commercial success" has a unique term of art as we've been discussing here. It does not have to be the sole reason for the driver of the marketplace success of a product.

BY MR. O'QUINN:

Q. What percentage of marketplace performance of a product has to be attributable to the novel features of the claimed invention for that marketplace success to be objective indicia of nonobviousness?

MS. CIPRIANO: Objection. Calls for a legal conclusion.

THE WITNESS: There is not a percentage or amount specific that needs to be attributable to get there, which is why it is an analysis, and it's built on multiple facets of various things that are analyzed in the market in order to come to an overall

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opinion related to what drives the marketplace performance of a product.

BY MR. O'QUINN:

Q. Let's turn back to paragraph 17 of your report. And this is Section IV, Summary of Opinions.

Do you see that?

A. I do.

Q. And you've provided in paragraph 17 reasons A, B, and C, correct?

A. That is correct.

Q. Are those in ranked order or they're just all the same importance?

A. I wouldn't say there's a ranking order. It's what has accumulated into my analysis that we have listed in the summary of opinions. As its nature, summary of opinions is summary in nature and does not detail all the individual opinions that are listed throughout the declaration that get to the overall opinion that the marketplace performance of Lumify is not driven by the

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challenged claims of the '245 patent.

Q. So you don't view any one of these three factors as being critical to your opinions, correct?

A. I think they're all critical to the opinions, but it is an analysis of all of the information to come to an overall opinion of what drives the marketplace performance of Lumify.

Q. So reason A in paragraph 17 is that "The marketplace performance of Lumify is driven by features that I understand were known in the prior art."

Do you see that?

A. I do.

Q. Reason B is "The discussion of marketing efforts in the Jarosz Declaration is incomplete and misleading and the Jarosz Declaration fails to appropriately address" -- going on to the next page -- "that the marketing and promotional efforts by Bausch for Lumify also drive the

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marketplace performance of Lumify."
Did I read that correctly?
A. You did.
Q. And, finally, reason C is that "The Jarosz Declaration fails to apportion the marketplace performance of Lumify among the challenged claims of the '245 Patent and to the other Orange Book listed patents for Lumify."
Do you see that?
A. I do.
Q. And we talked about reason A, the prior art, a little bit. I'd like to talk about reasons B and C a bit.
You've advanced theories similar to reasons B and C in other cases where you have testified; would you agree?
A. I would have to definitively go back and look at those reports, but I believe that I have -- that these arguments could be, but it's facts and circumstances of the cases and specific to this Lumify is what my

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opinions are advanced in this case.
Q. One of the cases you testified in that we discussed from your CV earlier was the Heron Therapeutics case, correct?
A. Correct.
Q. And that was a District Court case that went to trial last year, right?
A. That's correct. I believe in June of last year.
Q. And you provided live testimony at trial in that case, correct?
A. That is correct.
Q. And that was a bench trial before Judge William Bryson, correct?
A. That is correct.
Q. And are you aware that Judge Bryson sits, for his day job, on the Court of Appeals for the Federal Circuit, a higher level appellate court?
A. I am aware, yes.
Q. Fair to say Judge Bryson has pretty extensive experience in patent law,

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right?
MS. CIPRIANO: Objection. Calls for speculation.
THE WITNESS: I don't have an opinion on his patent law understanding. He is a Federal Circuit judge. I am aware of that. And I testified in front of him, His Honor.
BY MR. O'QUINN:
Q. And no slight to you, but is it fair to say Judge Bryson has more experience in patent law than you do?
MS. CIPRIANO: Objection. Calls for speculation.
THE WITNESS: I am not a lawyer by trade, and I think Judge Bryson would have more legal understanding than I may.
MR. O'QUINN: I'd like to introduce as Exhibit 11 the document in the folder that has file name "Heron Therapeutics (AMM Trial Testimony)," please.
MS. CIPRIANO: For the record,

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I will lodge objections to the introduction of the exhibit based on 401, 402, 403, hearsay and scope.
MR. O'QUINN: Can we bring that exhibit up on the screen, please.
THE VIDEOGRAPHER: Which exhibit, please?
MR. O'QUINN: The exhibit that has the file name "Heron Therapeutics," H-E-R-O-N, and in the parentheses it says "AMM Trial Testimony."
(Exhibit 11 marked for identification.)
BY MR. O'QUINN:
Q. So I'll represent this is an excerpt of the publicly available transcript of Day 3 of the trial.
MR. O'QUINN: If we could put that back up, please.
THE VIDEOGRAPHER: Yep. One moment. I'm trying to move it (inaudible).
BY MR. O'QUINN:

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Q. So this was Day 3 of the bench trial, Wednesday, June 26, 2024.

Do you see that, Mr. Masztak?

A. I do.

Q. If we can go to PDF page 5 of this document, this is where your direct testimony begins, correct?

A. That appears to be the case. I don't have access to this right now; but based on what's on the screen, that looks correct. There it is.

Q. Yeah, you can refresh the folder and pull it down if you want to look at the whole document.

You were under oath during this testimony, correct?

A. I was.

Q. And your testimony was true and accurate in that case, correct?

A. It was.

Q. I'd like to go to PDF page 30 in this document which is, going by the

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transcript pagination, page 836. If we could -- yeah. I'd like to look starting at line 14 on the previous page.

You were asked by counsel: "You opined that Heron's marketing efforts drove the sales of Cinvanti. And generally, how has Heron's marketing impacted those sales?"

Do you see that?

A. I do see that.

Q. And your opinion was that Heron's marketing efforts were the primary driver of the sales of Cinvanti; is that correct?

MS. CIPRIANO: Objection. Relevance.

THE WITNESS: I would need to go back and look at the full testimony, and I don't know what is all available in the record, but I don't know that it is the primary driver. I would have to look at the opinions and see the full testimony related

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to that and what is available. I know this is only a redacted portion.

BY MR. O'QUINN:

Q. You opined in the Heron Therapeutics case that Heron's marketing efforts drove the sales of Cinvanti, correct?

MS. CIPRIANO: Objection. Relevance.

THE WITNESS: Yes, that is what my answer states on the page, yes.

BY MR. O'QUINN:

Q. You're opining in these proceedings that Bausch & Lomb's marketing efforts drove the sales of Lumify, correct?

A. That is one of my opinions in this case, yes.

Q. Let's go to PDF page 51 of this document. And looking down around line 20, you're asked by counsel: "I'd like to address your opinion regarding the other patents that are listed in the Orange Book that allegedly cover Cinvanti. Do you have

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an opinion regarding these other patents that are not in suit in this matter?"

Do you see that?

A. I do see that.

Q. And what you go on to say on the next page at line 25 spreading onto PDF page 53 -- so if we could scroll down to the bottom of page 52. Keep going. Other way. Other way. You are asked -- sorry. If we could go back up. Just pause right there.

You were asked at line 23 of page 858 of the transcript: "And how does this impact your opinions regarding nexus?"

And your answer, if we scroll down a little bit, not too much, you say: "So what this is, is an incomplete analysis of nexus by failing to attribute value to the other eight patents or the aprepitant compound."

Do you see that?

A. I do see that.

Q. You are offering similar

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opinions in this case regarding failure to apportion by Mr. Jarosz across the Orange Book patents of Lumify, correct?
MS. CIPRIANO: Objection. Relevance.
THE WITNESS: I have an opinion related to the Lumify matter which is very different that is -- than the matter that we are looking at on screen, aprepitant, which dealt with a chemotherapy-induced nausea and vomiting product compared to an over-the-counter eye drop that we're dealing with here, but I do have an opinion related to Mr. Jarosz' failure to analyze the other Orange Book listed patents for Lumify.
BY MR. O'QUINN:
Q. In both the Heron Therapeutics case and this case, you have offered an opinion that there was no nexus between the marketplace success of the product you are analyzing and the patents because there was a failure to apportion across other Orange Book

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patents; is that right?
MS. CIPRIANO: Objection to the extent it misstates the declaration.
THE WITNESS: There are multiple opinions and analysis that went into what I have for the '245 patent that we're talking here for Lumify. I'm getting to the conclusion that there's not nexus to the challenged claims of the '245 patent.
Similarly, in the Heron Therapeutics matter, there are multiple opinions that I'm not sure all are available or not in the redacted version -- I've not looked at that in some time, and everything else would be under a protective order -- of getting to the opinion related to no nexus to the patent at issue in that matter.
BY MR. O'QUINN:
Q. I didn't necessarily ask if that was your only opinion. I'm stating in both of those cases you have offered an opinion that one of the reasons there was no

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nexus was because of a failure to apportion across Orange Book patents, right?
MS. CIPRIANO: Objection. Relevance.
THE WITNESS: In both cases I have offered an opinion related to other Orange Book patents, as well as numerous other opinions, because a single opinion does not get you to the overall opinion. It's an aggregation of evidence and analysis -- and both cases are very different cases -- that get to an opinion, and there are lots of things I know I addressed in the Heron matter that are not being addressed in the Lumify matter, and there are things I addressed in the Lumify matter that were not addressed in the Heron matter.
BY MR. O'QUINN:
Q. Did you analyze as part of your opinions in this case whether the '245, '600, and '742 patent claims challenged in those proceedings were coextensive?

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A. I do not offer opinion regarding the coextensive or noncoextensive nature of the '742 patent, the '600 patent, or the '245 patent, and I know I've testified earlier today I do not have an opinion on the '742 patent in this matter. My opinions relate to the challenged claims of the '600 patent and the challenged claims of the '245 patent.
Q. Have you done an assessment quantitatively of what value is attributable to the '245 patent versus the '600 patent?
MS. CIPRIANO: Objection. Scope.
THE WITNESS: My analysis relates to a critique of Mr. Jarosz, who is the one that's asserting commercial success in this matter, and I am identifying extrinsic factors to the challenged claims of the '245 patent in that declaration that he has failed to consider related to other potential drivers of the performance of

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Lumify.
BY MR. O'QUINN:
Q. You have not done an independent analysis of what proportion of the marketplace performance of Lumify is attributable to the challenged claims of the '245 patent versus the challenged claims of the '600 patent, fair?
A. I am not asserting the commercial success in this matter. I am analyzing what Mr. Jarosz has put forth, and he has put forth that there are challenge -- that there's nexus, in his opinion, to the challenged claims, and I'm identifying extrinsic factors to the challenged claims of the '245 patent and may be drivers and are drivers of the marketplace performance of Lumify, and that is what I am putting out as an incomplete analysis, I believe is how we referred to it in the Summary of Opinions, that Mr. Jarosz has failed to consider.
Q. I just need to make sure I've

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got an answer to the question I'm asking.
You are asserting that Mr. Jarosz' analysis is incomplete. You have not presented what you would consider a complete analysis, right?
A. I have presented a complete analysis as a rebuttal to Mr. Jarosz' opinions related to his opinion that the marketplace success and there is nexus to the challenged claims is what Mr. Jarosz is saying. I've identified and analyzed various components that we've walked through related to what is known in the prior art, the significant marketing of Lumify, as well as other patents that Mr. Jarosz has failed to consider, to arrive at a complete analysis for my opinions that there is not nexus to the challenged claims of the '245 patent.
Q. You have asserted, as reads in C in paragraph 17 of your declaration, that one of the reasons Mr. Jarosz' opinions are faulty is that he failed to apportion the

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marketplace performance of Lumify across the Orange Book patents, correct?
A. It's a little more than that. Among the challenged claims of the '245 patent and to the other Orange Book listed patents for Lumify because in his declaration Mr. Jarosz is not specific of what claims, what challenged claims, he is addressing.
Q. You have not yourself undertaken any such apportionment, correct?
MS. CIPRIANO: Objection. Asked and answered.
THE WITNESS: I am not asserting commercial success in this matter. Our opinions relate to -- I've been asked to rebut and analyze Mr. Jarosz' declaration, and I've performed a complete analysis to arrive at my opinions that there is not nexus to the challenged claims of the '245 patent.
MR. O'QUINN: I'd like to bring in as a new exhibit the document with the file name "Heron DI193 Fof." And if we could

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put that up on the screen, please.
MS. CIPRIANO: For the record, I'll assert objections to the document under 401, 402, 403, hearsay, relevance, and scope.
(Exhibit 12 marked for identification.)
BY MR. O'QUINN:
Q. These document -- this document are the Findings of Fact and Conclusions of Law from Heron Therapeutics versus Fresenius Kabi USA, LLC, and this was filed by Judge Bryson on December 3, 2024 as Document Number 193 in the U.S. District Court for the District of Delaware, Case Number 1:22-cv-985-WCB.
This is the same Heron Therapeutics case that we just looked at the transcript of your testimony for, correct?
A. That appears to be the case, yes.
Q. Have you seen this document before?

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A. I have.
Q. Can we go to page 51 of this document.
This is where Judge Bryson is presenting his findings of fact and conclusions of law regarding commercial success, which, as we just saw, was the subject of your testimony in the Heron case, correct?
A. That is correct, yes.
Q. Judge Bryson did not agree with you that there was no nexus, correct?
MS. CIPRIANO: Objection. Relevance.
THE WITNESS: If I could have a moment to re-read the section.
MR. O'QUINN: Sure.
THE WITNESS: Okay. Can you repeat the question, please.
BY MR. O'QUINN:
Q. Judge Bryson did not agree with your opinion that there was no nexus between

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the patented features in the Heron case and the marketplace performance of Cinvanti, correct?
MS. CIPRIANO: Objection. Relevance.
THE WITNESS: In this case, as shown on the screen and on the next page, Judge Bryson lists his opinion that he did agree with part of my opinion and he did agree with part of plaintiff's opinion in this case, specifically related to the pricing and strategies that Heron put forth in this case which was my opinions regarding no nexus on that. And, on balance, it is -- you could read the last sentence -- it is in favor of Heron but only slightly.
BY MR. O'QUINN:
Q. The factor would not be considered at all if there was no nexus, correct?
MS. CIPRIANO: Objection. Calls for a legal conclusion. Relevance.

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THE WITNESS: I believe it is the judge's opinion, or if it would be a jury's opinion, but the trier of fact's opinion to waive secondary considerations in a manner and it is not always a black-and-white, yes-or-no type of analysis, but that's -- from a legal perspective, that would be a better question for someone else.
BY MR. O'QUINN:
Q. Looking at the paragraph that's on the screen, about halfway down there's a sentence that says, "Weighing the competing evidence, I conclude that the commercial success of Cinvanti has been at least partly attributable to its properties compared to the competing products, but that the pricing strategies followed by Heron have had a significant role to play in giving Cinvanti as large a market share as it has."
Do you see that?
A. I do.
Q. And as you stated, Judge Bryson

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concluded that the commercial success factor favors Heron but only slightly, correct?
MS. CIPRIANO: Objection. Relevance.
THE WITNESS: That's what it states on the screen.
BY MR. O'QUINN:
Q. So the simple fact that there were other marketing and pricing factors involved in this case did not preclude Judge Bryson from finding that Cinvanti was a commercial success and that it should be factored into the obviousness calculus, correct?
MS. CIPRIANO: Objection. Calls for a legal conclusion.
THE WITNESS: I would think that's an overall opinion. I don't know how much weight Judge Bryson did or did not put on commercial success. I know this is also currently still under appeal and in the process, but I know that every factor can

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have its own weight, and I don't know what Judge Bryson's thoughts were as he factored in everything.
BY MR. O'QUINN:
Q. If Judge Bryson had credited your opinions regarding marketing and failure to apportion, he would not have considered commercial success in his analysis at all because there would be no nexus, correct?
MS. CIPRIANO: Objection. Speculation. Calls for a legal conclusion. Incomplete hypothetical.
THE WITNESS: I think -- I can't -- as I said, I don't know what Judge Bryson's mindset was or how he thought about his opinions and weighed the various factors. But as I stated earlier, there are multiple opinions throughout my testimony in the Heron matter just like there are in the Lumify matter, and these cases are very different cases that are not analogous in their features. I did have an opinion, as we said,

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for marketing and apportionment, but I had a very significant pricing strategy argument as stated that Judge Bryson did include here which is different, and that goes to the point that it's not one feature or opinion that gets to a conclusion; it's an aggregation of evidence that gets to the overall opinion.
BY MR. O'QUINN:
Q. So that's a fair point. Your pricing argument in the Heron case was what perhaps tipped the balance to slight consideration. The marketing and apportionment arguments are not mentioned here, correct?
MS. CIPRIANO: Objection. Calls for speculation and legal conclusion. Relevance.
THE WITNESS: I don't know what Judge Bryson took in or didn't. I know what I testified to at trial. I had very good interaction with Judge Bryson. I don't know

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what he did or didn't opine on. The only thing we have is the opinion that is in front of us here. I think you'd have to ask Judge Bryson to get more fulsome thought and analysis on how he came to his conclusions.
BY MR. O'QUINN:
Q. Did you cite these findings of fact in your declaration in the Lumify case?
A. No, I did not.
Q. There is no legal requirement for the apportionment theory that you argued in Heron and that you argued here, correct?
MS. CIPRIANO: Objection. Calls for a legal conclusion.
THE WITNESS: Can you explain what you mean by "legal requirement"?
BY MR. O'QUINN:
Q. You have argued that there is no nexus because Mr. Jarosz failed to apportion among the Orange Book patents for Lumify, correct?
A. That is one of my many opinions

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that are included in the declarations, yes.
Q. There is no legal requirement for Mr. Jarosz to have done so in order for there to be nexus, agreed?
MS. CIPRIANO: Objection. Calls for a legal conclusion.
THE WITNESS: I am not aware of legal requirements. That's probably a better question for somebody else. My analysis is to look at extrinsic factors and understand the drivers of the marketplace performance of Lumify, and Mr. Jarosz has asserted commercial success, and I have rebutted his assertion of that by the analysis put forth in my declaration.
BY MR. O'QUINN:
Q. If there was a legal requirement for apportioning across Orange Book patents in order for there to be a nexus or secondary considerations, Judge Bryson would not have found commercial success in favor of Heron in the Heron case, correct?

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MS. CIPRIANO: Objection. Calls for speculation. Calls for a legal conclusion.

THE WITNESS: Again, I can't opine on what Judge Bryson considered in his analysis, and the facts of the case are very different between the two. There's different patents at issue. There were different patents at issue and also covering products that these are not analogous cases to compare an argument in one versus the other. There's facts and circumstances that come into play.

BY MR. O'QUINN:

Q. Have you read petitioners' reply brief in this case?

A. I have, yes.

Q. And are you aware that there is a citation to an IPR decision in a case called Nevro relating to the apportionment?

A. If you could point me to that, I would have to look at that. I'm not sure if I've pulled the case law related to that.

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MR. O'QUINN: Well, let's go ahead and do that here. If we could bring in the Exhibit that has the file name "IPR2019-1313," please.

(Exhibit 13 marked for identification.)

BY MR. O'QUINN:

Q. So this is Paper 74 entered January 19, 2021 in the PTAB proceeding IPR2019-1313 between Nevro Corp. as the petitioner and Boston Scientific Neuromodulation Corp. as the patent owner.

MS. CIPRIANO: For the record, I'll lodge objections to this exhibit under 401, 402, 403, hearsay and relevance.

MR. O'QUINN: It's relied on as your argument. I can't see how that's a viable objection, but we'll --

MS. CIPRIANO: I can make an objection to the extent it's submitted as an exhibit in this deposition.

MR. O'QUINN: Are you waiving

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your citation to it in your brief?

MS. CIPRIANO: No. We can rely on it for its legal principles. I can object to it to the extent that Mr. Masztak doesn't have, you know, the foundation for him to testify about it.

MR. O'QUINN: Why don't we pull up -- actually, why don't we take a break, and then we'll discuss this when we get back.

THE VIDEOGRAPHER: Off the record at 11:09.

(Brief recess.)

THE VIDEOGRAPHER: On the record at 11:24.

BY MR. O'QUINN:

Q. Welcome back, Mr. Masztak.

A. Thank you.

Q. Did you discuss the substance of any of your testimony with your counsel during the break?

A. I did not, no.

Q. So before the break, we were

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talking about petitioners' reply brief and so I'd like to bring that up so we have the proper context. The exhibit I'd like to introduce is -- has the file name "2025-02-25 Paper 58." It was just put in the folder.

THE VIDEOGRAPHER: Stand by, please. I have to download it.

MR. O'QUINN: Okay.

THE VIDEOGRAPHER: It's moved to the shared folder if you'd like to bring it up there while I download it.

(Exhibit 14 marked for identification.)

BY MR. O'QUINN:

Q. So this exhibit is Paper 58 in the 467 IPR proceeding pertaining to the '245 patent, and it is Petitioners' Reply Brief dated February 25, 2025. And before the break, Mr. Masztak, you said you had reviewed this brief in preparing for your deposition?

MS. CIPRIANO: Objection to the extent it misstates the testimony.

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THE WITNESS: Yeah, I believe we did after -- that would have been after issuance of the Hofmann declaration at the time.
BY MR. O'QUINN:
Q. If we could go to PDF page 48 of this exhibit, please. There's subheading there "B" called "Lack of Nexus."
Do you see that?
A. I do.
Q. And there's two paragraphs here for this argument across this page and the next one; would you agree?
A. It appears to be, yes.
Q. And if we go back up to the beginning of the section, the brief says, "Presenting essentially the same arguments from the '742 IPR, PO again fails to establish a nexus between the claims and PO's alleged secondary considerations."
Do you see that?
A. I do.

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Q. That's consistent with your opinions that you've presented in your declaration, correct?
A. My declaration is focused on commercial success and nexus in rebuttal to Mr. Jarosz' opinions, whereas I believe this brief would be inclusive of a lot more than just what I have rebutted Mr. Jarosz in my declarations.
Q. That being said, there's two paragraphs in this brief and several dozen paragraphs in your declaration, fair?
MS. CIPRIANO: Objection to the extent it misstates the record.
THE WITNESS: Factually, there are two paragraphs that appears in this section labeled "B. Lack of Nexus," and there are multiple paragraphs in my declaration.
BY MR. O'QUINN:
Q. The last sentence in the first paragraph that's on the screen right now says, "PO fails to apportion any of Lumify's

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alleged success to the '245 patent (as opposed to the '742 patent)," and the citation there is to Mr. Hofmann's declaration, paragraphs 67 to 73.
Do you see that?
A. I do see that.
Q. And so you have the same paragraphs, 67 to 73, in your declaration for the '245 patent, correct?
A. I do, yes.
Q. And then the citation after the declaration cite is to Nevro Corp. v. Boston Sci., Scientific, Neuromodulation Corp., IPR 2019-1313, Paper 74.
Do you see that?
A. I do see that.
Q. And that was the document that we had pulled up just before the break. Do you recall?
A. I believe that is correct.
Q. Did you review the Nevro Corp. IPR Paper 74 in the course of forming your

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opinions?
MS. CIPRIANO: Objection. Scope.
THE WITNESS: I did not cite that document in forming my opinions. The opinions that I've come to are based on the exhibits that I had referenced in my Appendix 1 to which this case is not listed in Appendix 1 to my declaration.
BY MR. O'QUINN:
Q. Before the break, you provided the testimony -- and I'm going to read it -- the facts of the case are very different between the two. There's different patents at issue. There were different patents at issue and also covering products that these are not analogous cases to compare an argument in one versus the other. Do you recall that testimony?
A. I don't know word for word, but that sounds like what we had discussed before the break.

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Q. That would apply with equal force to a comparison between the Nevro case and the current proceeding that we're in, correct?

MS. CIPRIANO: Objection. Calls for a legal conclusion. Scope.

THE WITNESS: I -- as I said, the Nevro case is not listed in my appendix, and I have not come to the -- I have not looked at that in coming to my opinions in this matter.

BY MR. O'QUINN:

Q. And the Nevro case was not about pharmaceuticals; it's about medical devices, correct?

MS. CIPRIANO: Objection. Foundation. Scope.

THE WITNESS: As I had mentioned, I have not reviewed the Nevro case in forming my opinions in this matter, so I'm not sure the product, products, that are at issue in that matter.

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BY MR. O'QUINN:

Q. You're not opining that the Nevro case forms the basis of any sort of legal requirement for apportionment, correct?

MS. CIPRIANO: Objection. Scope. Foundation. Calls for a legal conclusion.

THE WITNESS: As I've mentioned, I do not cite the Nevro case in my appendix; and in coming to my conclusions, I have not cited that case in my footnotes either for the declarations for the '245 patent or the '600 patent.

MR. O'QUINN: You can take that exhibit down.

BY MR. O'QUINN:

Q. Do you know what percentage of sales of Lumify are the result of marketing and promotional efforts?

A. Can you define that a little more? I don't know off the top of my head, but there are multiple terms that you're using. I don't know what numbers you're trying to compare.

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Q. You are opining -- excuse me. You're opining in this case that a major driver, if not the major driver, of Lumify's marketplace success is Bausch & Lomb's aggressive marketing and promotion. Would you agree with that?

A. I have the opinion that marketing is a significant driver, the marketplace performance of Lumify based on various marketing strategies that Bausch & Lomb has taken.

Q. So of the revenue that Bausch & Lomb has booked for the Lumify product in the United States since it launched, what percentage of that revenue is attributable to Bausch & Lomb's marketing and promotion strategies?

A. So first can you define "revenue" as you're using it?

Q. Let's call it net sales for ease of reference.

A. Okay. And are you referring to net sales as gross sales less all discounts, rebates, chargebacks, returns, to arrive at net sales?

Q. Yes.

A. Okay.

Q. So I'll ask the question cleanly one more time.

Of the net sales, being defined as gross sales minus discounts, rebates, chargebacks, and returns, that Bausch & Lomb has booked for Lumify in the United States since that product launched, what percentage of those net sales are attributable to Bausch & Lomb's marketing and promotion strategy?

A. I don't -- I don't know if you're referring to a calculation or not from a -- when you're referring to a percentage. If we want to dig into that more, we can. But based on my analysis, Bausch & Lomb has put forth significant marketing efforts that

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I've determined drive the sales of Lumify and continue to drive the sales of Lumify as they change their marketing techniques throughout time.

Q. But you have not assigned quantitative percentages to any factor driving the marketplace performance of Lumify, fair?

A. In the analysis of looking at the drivers of the marketplace performance of Lumify, it is not one single driver as we've talked about earlier, but marketing is a significant driver of the performance of Lumify, and it's evident in what Bausch & Lomb has done to promote this as a beauty product and put forth the efforts and more recently the significant volumes of the samples that they are putting out to consumers, which is not a significant cost when you're looking financially but it is driving the performance of this product.

Q. We talked a fair amount about

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apportionment as a concept today. You have not apportioned the marketplace performance and net sales of Lumify among the various drivers that you have identified, correct?

A. I have not quantitatively apportioned a specific value related to that; and I think, as we talked about before, Mr. Jarosz is the one that's asserting the commercial success here. He's trying to demonstrate that the marketplace performance is based on challenged claims.

I've taken a look at the analysis and identified the prior art is a significant driver, the marketplace performance of Lumify, as well as the marketing that Bausch & Lomb has put forth, which is what we're discussing now, drives the marketplace performance of Lumify.

Q. You identify a branded pharmaceutical product that has attained success in the marketplace without any marketing or promotion by its brand?

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MS. CIPRIANO: Objection. Scope.

THE WITNESS: Can you explain that maybe a little differently so I understand what you're asking?

BY MR. O'QUINN:

Q. Sitting here today, can you think of any pharmaceutical product, be it prescription or over-the-counter, that has attained marketplace success without any marketing or promotion by the pharmaceutical company that owns that NDA?

A. That's, one, not the analysis that I've taken in this case. The analysis here is to look at Lumify and understand what is driving Lumify in multiple pharmaceutical companies, which I even say in the declaration put forth efforts to market and promote products, and it's an understanding of how they're doing that that drives the marketplace performance of the product; and in analyzing Lumify, those efforts are not

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related to the challenged claims of the '245 patent or the challenged claims of the '600 patent, and instead they are using significant and aggressive marketing, I think is what you had referred to before, to promote the product and drive the sales of Lumify.

Q. Virtually every pharmaceutical product that is offered in the United States has some level of marketing, promotion, and advertising behind it; would you agree?

MS. CIPRIANO: Objection. Scope.

THE WITNESS: I mean, I don't think I can agree with every product has that type of marketing and promotion. There are brand products that do typically have that promotion. Generic products are typically not promoted by the generics that are selling for AB-rated substitutable products.

If you get into a hospital setting, such as what Civanti was in the case

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we talked about before, it's not a -- it's not a lot of marketing because it is more focused on a hospital and dealing with pricing and dealing with the different formularies.

So there's a lot of factors that go in. I don't think -- I'm not comfortable saying that every product is promoted that's out there.

BY MR. O'QUINN:

Q. Let's focus just -- and that's a fair point that you've made, but let's focus on brand products.

Virtually every branded pharmaceutical product offered for sale in the United States has some level of marketing, promotion, and advertising behind it, correct?

MS. CIPRIANO: Objection. Asked and answered.

THE WITNESS: I think there's still even more caveats when you deal with

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that. Like, I don't think you can say all of them. Marketing is a significant driver of certain brand products, and a lot of brand products it is. But once a generic enters of a brand product, pharma companies typically stop promoting the product.

So even though a brand product exists, there's a lot of times you're not promoting that product still, so I don't think it's -- I think you got to look at the facts and circumstances of each case to kind of understand what we're dealing with.

BY MR. O'QUINN:

Q. You are not opining that there can never be a nexus in an analysis of commercial success when there is marketing and promotion present, correct?

A. That is not my opinion in this case at all, no.

Q. The formulation of a drug could also be a factor in sales of the drug, would you agree?

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A. Depending on the facts and circumstances of a case, I mean, there's lots of information to consider of what a driver of a product could be. As looking at Lumify, we're talking about the marketing and promotion in the various marketing kind of pop-up sales they do, all the samples they put out there, the social media presence they put. That's what's driving this product. And more recently it's been the significant level of sampling that they have done, and they also have a lot of detailing that they have done throughout time.

Q. The clinical features of a drug can be a factor in sales of a drug; would you agree?

A. As a general term, there's -- that is possible, but the facts and circumstances of the case I think are important to consider. When we're thinking of the clinical features that Mr. Jarosz has put out in the Lumify case here, I understand

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those features are known in the prior art which would not create a nexus to the challenged claims of the '600 or the challenged claims of the '245 patent.

Q. Did you review any data in forming your opinions in this case regarding how many physicians recommended Lumify to their patients?

A. I know that we -- there were two surveys that were produced in this matter, one that was done in 2020 and one that was in 2024, that references certain questions. I don't know if it was that specific type of question, but it gets optometrists' and ophthalmologists' opinions regarding drivers and information of Lumify compared to competitors, but I don't -- we'd have to -- if you have that direct question, if that's what you're pulling it from, I think it would be better to look at it to see exactly what the wording is.

Q. Did you go back and review

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those two surveys separately of each other outside of the confines of how Mr. Jarosz and Mr. Ferris presented them?

A. I've reviewed both of the surveys from 2020 and 2024 in coming to my opinions for this case.

Q. Are you disputing the data presented in those two surveys?

A. I have not disputed the data. I don't have the underlying data that Bausch would have for that, but it's -- or even the third party that Bausch retained to do the surveys. I don't have any reason to dispute the information that was included in there, but I don't have the data to analyze.

Q. Can we look at your CV again. That's the Exhibit 1202 file that we looked at this morning. If we could put that back up on the screen. Can you go to PDF page 6 of this document.

About two-thirds of the way down the page there's a case called Mylan

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Pharmaceuticals, Inc., Teva Pharmaceuticals USA, Inc. and Akorn Inc. versus Allergan, Inc. for the Patent Trial and Appeal Board, 2017, regarding cyclosporin.

Do you see that?

A. I do.

Q. And this was one of the engagements that you led, correct?

A. That is correct.

Q. And Mr. Hofmann was the testifying expert in that case?

A. He was.

Q. Did you assist in drafting any declarations Mr. Hofmann may have submitted in those proceedings?

A. I would have assisted. There was also a District Court case for cyclosporin, and I would have assisted in both those -- the declaration in the IPR as well as the reports in the District Court case.

Q. Would you have assisted with

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Mr. Hofmann's preparation in any of the depositions he may have had in those proceedings?

A. I would say I probably was. This is 2017. These are all the engagements I led. There are certain times that a depo prep session is scheduled and someone is not around so the rest of the team does it; but if my memory serves me right, I believe I assisted in his -- in the depo prep meetings. I definitely helped him in the preparation for the case.

MR. O'QUINN: I'd like to pull in as a new exhibit from the folder the file with the name "Exhibit 2084," please.

(Exhibit 15 marked for identification.)

BY MR. O'QUINN:

Q. So this exhibit is Exhibit 2084 for consolidated IPR proceedings 2016-1127 through 1132, and this is the transcript of the deposition of Ivan Hofmann in those

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proceedings from July 14, 2017.

MS. CIPRIANO: So just to clarify the record, this is not Exhibit 2084 in these proceedings, correct?

MR. O'QUINN: That's correct.

MS. CIPRIANO: Okay. So I'll lodge objections based on 401, 402, 403, and hearsay.

BY MR. O'QUINN:

Q. Would you agree these are the IPR proceedings we were just discussing that is from your CV as one of the engagements that you led?

A. I'm assuming it was pulled down correctly. I mean, that is the case caption of the engagement. But assuming that was correct, then, yes, I would agree with that.

Q. I'd like to ask you just a few questions about some of Mr. Hofmann's answers in this engagement that you led and in this proceeding that you helped him prepare for.

If we can go to page PDF

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page 18 of this transcript, please. And if we could zoom in on the bottom left, page 19 of the Minuscript here. I apologize. That's all that's available in the public record.

Looking at line 19 of page 19, Mr. Hofmann was asked: "In analyzing commercial success, sales must be considered in light of the relevant market, correct?"

And Mr. Hofmann responded: "I think that's generally so."

Do you see that?

A. I see his testimony there, yes.

Q. Do you disagree with Mr. Hofmann's answer there?

MS. CIPRIANO: Objection. Foundation.

THE WITNESS: I mean, I think asking Mr. Hofmann is the better person to ask on his own testimony. In general, I don't -- I mean, I think sales are a common metric that is analyzed in a commercial success inquiry.

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BY MR. O'QUINN:

Q. In the commercial success inquiry you undertook in this case, did you consider the sales and profits of Lumify in light of the relevant market?

A. I analyzed what Mr. Jarosz has put forth, which he describes the sales of Lumify as well as certain comparisons with Circana data that relates to comparisons to competing products.

Q. Did you attempt to define the proper relevant market yourself in this proceeding?

A. In this I don't -- I don't address the relevant market necessarily in my direct -- declaration. What Mr. Jarosz has put forth is the general market related to redness relievers, and he gives his definition of what is listed within that market.

Q. If we could go to PDF page 46, please. And we'll have to do a little bit of

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acrobatics here, but I want to look first at page 47, line 25, at the very bottom left, and then we'll have to jump up.

Line 25 says: "So the mere fact that a product is" -- let's go to the upper right -- "marketed doesn't mean that there's a lack of nexus between the commercial performance of Restasis, right?"

And Mr. Hofmann responded: "The mere fact that the marketing dollars is greater than zero does not undermine the potential for nexus."

Do you see that?

A. I see his testimony related to this, yes.

Q. And I think as you testified a few minutes ago, you would agree with Mr. Hofmann that just because marketing expenditures occur for a given drug does not mean there can't be a lack of nexus, correct?

A. In general, marketing can be -- it doesn't negate that there is or is not

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nexus related to it. It's the analysis of the facts and circumstances of a case that make it understanding what -- for instance, in this case what Lumify or Bausch has done for Lumify in the significant marketing and sampling and detailing and social media presence that they have done is the driver of the marketplace performance in that case.

I think the facts and circumstances in Restasis is a much different case related to the facts of the patents at issue, which I don't fully remember. This is I think we said 2017. I do remember that case related to primarily a blocking patent argument, which we don't have at issue in our case. So I think cases -- you need to think about facts and circumstances of each case.

Q. As a bright-line rule, however, you would agree with it, granting that the facts of certain cases may be different.

A. Bright-line rule for what, if you can explain?

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Q. There is no bright-line rule saying that just because marketing expenditures occur for a given drug nexus is negated, right?

A. There is not an ultimate rule or requirement that if you are marketing there cannot be nexus; but you have to look at the marketing, understand the patents, analyze what is happening and what the brand company is doing in order to arrive at any conclusion. You would never just look at the dollars one way or the other and come to a conclusion. You have to do an analysis of more than that.

Q. If we can go to PDF page 54 of this document, please. And if we could go down to the bottom left. I'm looking at page 55 of the transcript, line 3.

Mr. Hofmann was asked: "So the mere fact that Allergan has offered discounts and rebates does not mean there's no nexus."

And Mr. Hofmann says: "The

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mere existence does not."

And so my question for you is, as a bright-line rule, do you agree with Mr. Hofmann that the mere existence of discounts and rebates does not mean there cannot be nexus?

A. In that -- in the case we're dealing with here first on Restasis, I think it is best obviously, as we said before, to ask Mr. Hofmann for the information.

However, I understand that we have not -- and I have not offered opinions related to discounts and rebates as a driver of the performance of Lumify, and so I'm focusing on the marketing efforts as the driver of the performance. And I think in the information, I think there could be an information gap between the two here because Lumify is an OTC product as opposed to Allergan's Restasis product was a prescription product where rebates, discounts, chargebacks have a different role

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compared to OTC. They also exist. It's just they're a different dynamic, and it would impact the market slightly differently, or the product slightly differently.

Q. Is there a bright line for how much market share is needed in order for commercial success to be objective indicia of nonobviousness?

A. For -- commercial success is of a patent. So I think the analysis, if you're dealing with marketplace success, one, there's not a bright-line test to start with of a number or a certain amount of market share regardless, and it's all related to the relevant market, which is kind of the phrase that is used often. But even if there is a certain level of market share, the analysis you have to look at is nexus, is it related to the patents getting that market share.

Q. Would you agree with me that the existence of other competitors in a marketplace generally makes it more difficult

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rather than less difficult for a product to be a commercial success?

MS. CIPRIANO: Objection. Incomplete hypothetical.

THE WITNESS: I don't think I'd agree with that. I think you have to understand the facts and circumstances of the case. I mean, you could have a situation where maybe there's a lot of products but they're three decades old and it's -- it's just -- I think you got to look at the facts and circumstances of each case to understand what you're dealing with in the competitive landscape for each case.

What I've analyzed here for Lumify is focused on a lack of nexus related to the challenged claims of the '245 patent and the challenged claims of the '600 patent as the marketplace performance of Lumify is driven by their significant marketing efforts as well as what was known in the prior art.

MR. O'QUINN: You can take this

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exhibit down.
BY MR. O'QUINN:
Q. Can we go back to Exhibit 1, your '245 declaration, and, again, you can use your hard copy.
I'd like to look at paragraph 26 of your declaration, and this is in the section discussing the prior art. Let me know when you're there.
A. I'm there.
Q. You cite here -- you say, "I understand from the Galanis declaration that the prior art to the challenged claims of the '245 Patent includes 0.03 percent weight by volume brimonidine in Example 1 of U.S. Patent No. 6,294,553 to Gil."
Do you see that?
A. I do.
Q. You then go on to say, "This example (0.03 percent weight by volume brimonidine) compared to the challenged claims of the '245 Patent (0.025 percent

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weight by volume brimonidine) demonstrates that it was known in the prior art that the administration of brimonidine in low concentrations was effective to reduce eye redness."
Do you see that?
A. I do.
Q. There's not a citation at the end of that sentence I just read, is there?
A. There is not in that, but the paragraph and all the references and support relate to the Galanis declaration as the following sentence does as well.
Q. So the fact that the Example 1 of Gil demonstrates that it was known in the prior art, that is not your independent opinion; that is fully reliant on Dr. Galanis' opinion?
A. That is based on my understanding from Dr. Galanis related to the analysis of what was known in the prior art.
Q. Did you review the Gil

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reference yourself? And I ask because I didn't see it in your materials considered.
A. I would have to -- I don't recall if we reviewed the Gil reference as opposed to reviewed Dr. Galanis' analysis and summary of the Gil reference, which is what we cite.
Q. But you yourself have not independently reviewed or analyzed the Gil reference at all, correct?
A. I have not. That would be more for a technical expert, which is why we rely on Dr. Galanis for that information.
Q. So if Dr. Galanis' opinions are incorrect, you would agree that paragraphs 26 and 27 are incorrect?
MS. CIPRIANO: Objection. Calls for a legal conclusion. Incomplete hypothetical.
THE WITNESS: I don't know that I would go that far. I think I'd want to understand when you say "incorrect" what that

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would mean or what is understood by Dr. Galanis that is not -- I don't know what "correct" or "incorrect" means from what you're saying in his declaration, but we have a reliance on Dr. Galanis related for the -- related to this information, which is a portion of our analysis coupled with all the marketing and efforts by Bausch that drive the marketplace performance of Lumify and are unrelated to the challenged claims.
BY MR. O'QUINN:
Q. If Dr. Galanis' analysis of the Gil reference, which you yourself did not perform, is incorrect, you have no other opinions as to whether the features of the challenged claims were known in the prior art, correct?
A. I don't think that's correct because I think we cite more than just the reference of Gil. Throughout the Galanis declaration, we do cite Laskar at times, too, and I think this is focused on the paragraph

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on efficacy. We're talking -- we talk about the other features, safety and tolerability. I want to -- I believe it's referencing the Alphagan prior art. So there's multiple things.

So if it's a focus on Gil, I don't know how that would impact. I'd need to understand the opinion on Galanis to understand if there is an impact even on our analysis.

Q. But sitting here today, you have not undertaken that analysis, correct?

A. No. Our analysis is relying on the Galanis declaration and information and the Laskar declaration for what was known in the prior art that drives the marketplace performance of Lumify coupled with the significant marketing efforts by Bausch for Lumify.

Q. Let's go to paragraph 32 of your declaration. You disagree with Mr. Jarosz in that Mr. Jarosz says that the

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marketing of Lumify is not the primary driver of Lumify's marketplace success, correct?

A. That is correct.

Q. So your opinion is that the marketing of Lumify is the primary driver of Lumify's marketplace success, correct?

A. No. I mean, I think I would read the whole report in its totality to take all the evidence of that, that marketing is a significant driver of the marketplace performance of Lumify coupled with the prior art that we were just talking about, but that this, again, goes to a single opinion is not the full answer, and it's the totality of the evidence that gets to the analysis that I've concluded.

Q. The second sentence of paragraph 32 reads, "However, the Jarosz Declaration claims that the marketing of Lumify 'is not the primary driver, to the exclusion of the benefits attributable to the claimed inventions, of the marketplace

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success experienced by Lumify.'"

And then you say, "I disagree," right?

A. I do disagree with that, yes.

Q. And so you're disagreeing with Mr. Jarosz' opinion that marketing is not the primary driver, right?

A. There's another clause that you read when you read the full thing, "to the exclusion of benefits attributed to the claimed invention," and I do have the opinion that the marketplace performance of Lumify is not driven by -- I'll use the words here -- the benefits attributed to the claimed invention. That is the full concept of the full sentence in order to -- that I'm disagreeing with.

Q. What is the primary driver, in your opinion, of Lumify's marketplace success?

MS. CIPRIANO: Objection. Scope.

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THE WITNESS: I think as laid out throughout the entire opinions in the declaration, the two main components that we've talked about most today are the prior art driving the marketplace performance as well as the marketing of Bausch for Lumify that drives the marketplace performance, and those are both two things that the PTAB agreed to in the prior '742 matter as well as significant drivers of the marketplace performance of Lumify in the prior '742 patent.

BY MR. O'QUINN:

Q. Is it your opinion that the claimed inventions of the '245 and '600 patents have no effect on the marketplace success experienced by Lumify?

A. I've done an analysis to look at what Mr. Jarosz has said are drivers of the marketplace performance, and I have analyzed and come to an opinion what are the drivers of the marketplace performance, which

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are not the challenged claims of the '600 patent or the challenged claims of the '245 patent, but rather what was known in the prior art coupled with the significant marketing that Bausch has put forth for Lumify.

Q. And so I just want to make sure I'm clear. You're saying the drivers are not the challenged claims.

Is it your position that the challenged claims and those features have no effect?

MS. CIPRIANO: Objection. Asked and answered.

THE WITNESS: I don't have that opinion directly. My opinion relates to what are -- what is affecting the sales, and what is affecting the sales is the -- of the marketplace performance of Lumify is the marketing in the -- what was known in the prior art as the drivers of the performance of the products.

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BY MR. O'QUINN:

Q. If we look at paragraph 33, you say, "Generally, the pharmaceutical industry dedicates a significant amount of financial and human resources to marketing and promotion."

Do you see that?

A. I do. This is what I was referring to earlier when I was testifying.

Q. And you say, "Companies such as Bausch of profit maximizing entities."

Do you see that?

A. I do.

Q. How do you define "profit maximizing entities" in that context?

A. I mean, I think every company would define it differently, but, look, these are companies that have obligations to their shareholders and to their investors if they're public, if they're private, whatever it may be, to return a profit on what they're doing with the business. So the goal is to run the business in a way that tries to maximize profits. I feel like that's what every business should aim to do.

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Q. So would you agree then that profit maximizing entities are making business decisions with the goal of earning a return on their product portfolio?

A. I think that's a fair assumption that that would be. There may be situations that that's not the case, but I don't -- I mean, there's other reasons for selling certain products sometimes -- in the pharmaceutical industry to be specific, that you want to sell a portfolio of products even though you know one is losing money but to maintain relationships with customers. So there's lots of facts and circumstances, but generally I would think companies are trying to earn profits.

Q. You identify here elsewhere in paragraph 33 some of, quote, many forms of marketing to promote Lumify, and you name

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direct-to-consumer advertising, detailing to eye care professionals, and sampling, among others, correct?

A. That is correct.

Q. And I think you address this later in your declaration, but you did review the declaration of Mr. John Ferris of Bausch & Lomb in the course of forming your opinions, correct?

A. I did, yes.

Q. And you saw where Mr. Ferris testified under oath that the sales force is no longer dedicated -- there is no longer a dedicated sales force to Lumify, correct?

A. I saw his testimony -- or in the declaration his testimony relating to that, and I think I rebut that later in the declaration, yes.

Q. And your rebuttal is chiefly around the idea that the surveys of eye care professionals still mentioned sales force detail as a source of information; is that

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fair?

A. That's one component of it, but the idea -- the more informative information related to that is that it is a more recent happening that they may not be detailing anymore, but the analysis that Mr. Jarosz is taking is from 2018 to 2024, and we're maybe dealing with a portion of 2024 where there's not detailing, but all the portion up to that there was detailing, and Mr. Jarosz stated that in his prior deposition in 2022.

Q. You mention sampling here, correct?

A. Yes, there is sampling.

Q. Sampling can only impact the marketplace performance of a product if the product is good enough to make the consumer who has the sample go out and buy it, right?

A. I mean, sampling is a form of marketing that drives people to purchase products. The concept of sampling is for them to drive -- to go purchase the product.

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And what we see here is there was not a lot of sampling. As we were just talking about, they were detailing for that long portion of the beginning period the eye care professionals. They were also doing a lot of DTC, but then they significantly ramped up their free samples that they were giving away of Lumify to try to attract new customers for Lumify or even to give to returning customers if there are.

Q. But if you were to try a free sample of Lumify and not like it, the provision of that sample does not help with the marketplace performance of Lumify, right?

A. If you do not go back to purchase, it would not; but I think we understand the efficacy of it is due to the low-dose brimonidine that's known in the prior art. So the sampling, coupled with what was known in the prior art, that low-dose brimonidine will help with the reduction in redness, is driving people to purchase the product, which are not the challenged claims of the '245 patent or the '600 patent.

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Q. And that answer is premised on the assumption, as we discussed before, that Dr. Galanis is correct about what was known in the prior art, right?

A. There's a portion of that. We talked about how it depends on what is known from your hypothetical that something is not right in Dr. Galanis', but I have an understanding from Dr. Galanis and what was put forth in his declaration.

Q. And Dr. Laskar talks about Alphagan in his declaration, and you cited that portion in your opinions, correct?

A. We could double-check that. That sounds right. I know he focuses on the pH levels in his declaration.

Q. Would a free sample of Allergan, Allergan's Alphagan, lead someone to buy Lumify?

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A. I would not think so. I would think the Bausch being out there on the social media, finding followers, and giving away free samples of the Lumify and teaming up with different marketing campaigns is what is driving people to buy Lumify.

Q. I asked that because you testified a minute ago that -- you said what was known in the prior art, that low-dose brimonidine will help with the reduction in redness.

If that were the case, Alphagan samples would help drive sales of Lumify. Isn't that what Dr. Laskar is arguing?

MS. CIPRIANO: Objection to the extent it misstates the record, calls for speculation, outside the scope.

THE WITNESS: One, I would have to look to see. I'm not -- Alphagan was not an OTC product, so I don't know that it's available -- how easily available it is to give away at fitness centers or things like

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that as opposed to needing to be provided by a doctor, which is where Lumify started; but Lumify has ramped up -- or Bausch has ramped up their promotion that they can just be out at various events to give samples of Lumify because it is an OTC product. So a sample of Alphagan, to me, would be trying to drive a purchase of Alphagan, not a purchase of another product.

BY MR. O'QUINN:

Q. Can marketing and promotion make a bad product good?

A. Can you describe that a little better of what you're getting at there?

Q. Can marketing and promotion alone make a product which a user would normally not buy a positive experience that they will buy?

MS. CIPRIANO: Objection. Incomplete hypothetical.

THE WITNESS: I mean, I think what marketing and sampling does is allows

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users to get the product and then purchase the product because of the marketing that was there, and, as we talked about, what was known in the prior art of the low dose of brimonidine being effective.

So just because, to your point, a bad product, can it make a -- can it make -- can marketing make a bad product good or however you phrased that, the idea is to understand the marketing behind the product and also that it's not related to the challenged claims of the '600 patent or the challenged claims of the '245 patent, which is the focus of my opinions.

BY MR. O'QUINN:

Q. It's your opinion that the marketing that Bausch & Lomb did for Lumify is unrelated to the claimed features of the '600 patent and the '245 patent?

MS. CIPRIANO: Objection to the extent it misstates the declaration.

THE WITNESS: The marketing for

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Lumify is, one, aggressive marketing that is driving the performance, and it is based on features that were known in the prior art.

BY MR. O'QUINN:

Q. What level of marketing makes it aggressive?

A. I was actually using "aggressive" because that was the word you used earlier today. It is significant marketing, I think is how we refer to it in the declaration, and that they have done more marketing -- there's a lot more marketing for Lumify than I have seen for a lot of other products.

Q. What are some examples of the other products that you're referring to?

A. I've analyzed a numerous amount of products in a situation related to eye care. We talked about Combigan earlier. That didn't have the level of marketing that this did. But, again, all products are different. This is just a lot of marketing,

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and it's very unique marketing. I haven't seen -- what Bausch has done for Lumify is different than what I have seen in a lot of products with their very significant presence in social media, in the TikTok challenges, and things that they have done. I just haven't seen that in other products.

Q. How many products have you testified on that are over-the-counter products?

A. In my testimony, I don't -- the ones we talked about earlier today were not over-the-counter products. We have analyzed a handful of over-the-counter products throughout my time at Gleason. The majority of products are prescription based, but we have done a significant amount of over-the-counter products as well over time. None that I had testified to, though.

Q. Well, I guess in that answer at one point you said "a handful of over-the-counter products" and then "a

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significant amount of over-the-counter products." How many is it?

A. I was using subjective terms. I would say we've probably analyzed at least ten or more over-the-counter products over time. It is not a significant focus of the part of the business, whereas I think more so there are more in prescription-based products. Also a decent amount of medical devices but ...

Q. And you've been at Gleason since 2011; is that right?

A. 2007, I believe.

Q. Sorry. How many of over-the-counter products that you've analyzed since you've been at Gleason were before TikTok became a social media platform?

A. I'm not totally familiar because I don't know -- I don't know when TikTok became a social media platform, so it's -- I mean, on average, I said it's about ten. I've been at Gleason for 18 years.

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Call it one every two years. So, I mean, you could probably judge, if I'm averaging throughout time, but I -- and I don't have -- I've never cataloged or taken a look at that as a group of analyses that we performed.

Q. A moment ago you used the term "significant marketing," and you said that's how you referred to it in your declaration.

What is the definition of "significant"?

A. I think, again, it's an analysis of what has been done in looking at all the evidence and the amount of times that Bausch touts what they have done marketing-wise trying to drive products. It's a big important -- we cite a lot of their earnings call transcripts. It's an accumulation of evidence that we have seen that we've determined we would state that that is significant amount of marketing. And, again, I think the PTAB in the '742 has agreed that marketing was a driver of the

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performance of Lumify.

MR. O'QUINN: Let me tell you where I'm at right now. I think I have probably maybe 30 to 40 minutes remaining. We've been on another hour. I don't know if you would like to take a lunch break now of 30 minutes or so and then we finish up or if you would just like to take a short break and power through. I'm open to whatever you would prefer.

THE WITNESS: I'm fine if we want to do a ten-minute break and then finish up and then we could all have lunch afterwards. I'm okay with that process.

MR. O'QUINN: All right. So why don't we take a ten-minute break now.

THE WITNESS: Okay. Thank you.

THE VIDEOGRAPHER: Off the record at 12:21.

(Brief recess.)

THE VIDEOGRAPHER: On the record at 12:32.

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BY MR. O'QUINN:

Q. Mr. Masztak, does marketing, advertising, and promotion become significant at a particular dollar amount?

A. I don't think necessarily. I think it has to be analyzed in the context and understanding the market and what is happening. There's not -- similar to what we talked about on -- I think you referred to sales, is there a specific dollar amount. There's not a specific dollar amount. It's an analysis of the evidence to understand what is driving the product.

Q. And does marketing, advertising, and promotion become significant at a particular percentage of net revenue, for example?

A. And how are we referring to net revenue in general there?

Q. Let's do the same as how we referred to net sales earlier, gross revenue minus discounts, rebates, returns,

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chargebacks.
A. Okay. There's -- I mean, there's not a specific dollar amount. There's not a specific percentage. It's an analysis of what's happening in the market, what types of promotions, and what it is that we have gotten to the opinion that it is driving the marketplace performance of Lumify.
Q. Looking at your declaration, I'd like to look at paragraph 40, please. Let me know when you're there.
A. I'm there.
Q. This paragraph is discussing the Lumify Eye Illuminations products, correct?
A. Yes, it is.
Q. And is it your opinion that advertising and promotion that Bausch & Lomb spent on the Lumify Eye Illuminations products helped drive the marketplace performance of Lumify eye drops?

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A. So in that I think it is driving a portion of that and my -- more the point that I'm pointing out is Dr. -- or Mr. Jarosz didn't acknowledge that and mention the high level of promotion that was done on the Eye Illumination products for the couple years there, and they are all labeled and branded "Lumify" that is helping and put in the beauty aisle next to Lumify and trying to drive it as a suite of products. I can't remember the words Mr. Ferris used when he was describing it in his deposition, though.
Q. Did you review the testimony from the preliminary injunction hearing in this case in forming your opinions?
A. There were certain transcripts I did review in conjunction with the preliminary injunction case.
Q. I didn't see those in your materials considered. You may have reviewed some deposition transcripts. Did you review the actual transcript of the hearing in

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District Court?
A. Sorry. No. I was referring to the deposition transcripts.
Q. Understood.
Would it surprise you to learn that counsel for Dr. Reddy's told the district judge on the record in those proceedings that, quote, Bausch's ecosystem claim for the LEI beauty products is unsupported?
MS. CIPRIANO: Objection. Relevance. Foundation.
THE WITNESS: I don't know what that's in reference to or what the statement was, so I don't have an opinion on that.
BY MR. O'QUINN:
Q. Did you review or hear of testimony from Dr. Reddy's damages expert in those proceedings that, quote, one would have thought if you're going to launch this franchise, these LEI products, and you thought a lot of the sales were going to be

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generated by Lumify users, that there would be some sort of documentation backing that up?
A. I have not reviewed that testimony in conjunction with my opinions. What I have put forth when I'm discussing the LEI products relates to documents and information from Bausch related to that.
Q. But is it your opinion that the Lumify Eye Illuminations branded products are driving sales of Lumify eye drops?
A. What I am addressing is that Mr. Jarosz has failed to account for that that is potentially helping the Lumify product sales in that all these products are labeled "Lumify"; they are all marketed and included in the same aisle; and it's something that should be considered in a complete analysis.
Q. I guess my confusion is just that Dr. Reddy's has argued the opposite in these same District Court proceedings between

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these same parties on these same patents, and so it's odd that that is a fault of Mr. Jarosz when your client has already taken that position; would you agree?

MS. CIPRIANO: Objection, foundation, and to the extent it misstates the record.

THE WITNESS: I'm not familiar with the full trial testimony and what is being said by you said their damages expert in that part of the trial, but it doesn't -- it sounds -- what I'm pointing out is there were call it $25 million, at least, of marketing, advertising, and promotion dollars that were for Eye Illumination that Mr. Jarosz did not address.

BY MR. O'QUINN:

Q. Were you aware that the full trial testimony from the preliminary injunction proceedings was evidence of record in these IPRs?

MS. CIPRIANO: Objection to the

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extent it misstates the record.

THE WITNESS: I'm not -- it is not part of the exhibits and listed in our appendix that we reviewed in conjunction with our opinions in this matter.

BY MR. O'QUINN:

Q. I'd like to go to paragraph 46 on page 35 of your report.

A. I'm there.

Q. The very last sentence on that page starts -- and we can go to -- flip the page as we go -- "Additionally, Bausch is forecasting an increase to the advertising and promotion of Lumify (the low-dose brimonidine drops and not the Eye Illuminations Products) in 2025 to approximately $36.5 million."

Do you see that?

A. I do.

Q. And that you cite there to Exhibit 2072, which is the Bausch & Lomb P&L statement, correct?

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A. That is correct, yes.

Q. And you reviewed that P&L statement in forming your opinions?

A. I did.

Q. And you reviewed Mr. Ferris' testimony throughout this case, correct?

A. When you say "throughout this case," I mean, I've seen his deposition, I think two of them. We can look at my appendix. But I've seen his deposition and declaration, yes.

Q. And were you aware from that testimony that Bausch is debuting another version of Lumify eye drops in 2025?

MS. CIPRIANO: Objection. Foundation.

THE WITNESS: I have not seen that in the evidence. If there's something in the record specifically that we want to look at, we can.

BY MR. O'QUINN:

Q. Mr. Ferris testified about

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Lumify Preservative Free in his testimony. Do you remember reviewing that portion of his testimony?

A. I remember hearing about Lumify Preservative Free, yes, which I didn't view that -- I didn't think that was an Eye Illumination product, but maybe that is. I just haven't -- I didn't see it linked like that.

Q. It's an eye drop, correct?

A. That was my understanding.

Q. And did you analyze whether the Lumify Preservative Free product would be covered by the challenged claims of the '245 or '600 patent?

MS. CIPRIANO: Objection. Outside the scope.

THE WITNESS: Mr. Jarosz hasn't asserted such because I don't think the sales of that have commenced in the amount of -- in the analysis that he put forth, and his analysis covers up to a point in 2024, and

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that's the analysis I'm rebutting, so the preservative-free Lumify would not have been included in that analysis.

BY MR. O'QUINN:

Q. I guess I'm speaking more about the sentence we just read from your declaration where you're pointing to the forecasted increase of marketing in 2025 for Lumify Drops, excluding Eye Illuminations, as a significant advertising expenditure by Bausch & Lomb, correct?

A. I was pointing that out because Mr. Jarosz' statement was that the advertising and promotion for Lumify Drops had been declining. So I was making a point to acknowledge that it is projected to increase. And even in the declining, they've always been right around 30 some million almost every year, 30 to 40 million, actually, almost every year.

Q. But there's nothing in your declaration about the fact that there is a

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Lumify Preservative Free product debuting in 2025 that could explain the increase in marketing?

A. There's nothing in the declaration that states that, and I don't think I've seen anything in the record, unless you could point me to it, that the P&L that they have developed the 36.5 relates to or how much relates to the preservative free. I have not seen that.

Q. You don't think sitting here today what percentage that is, right?

A. Nor did -- Mr. Jarosz didn't address it at all, so I was pointing out that there's an increase in Lumify, and I've not seen evidence that it even relates to Lumify Preservative Free at all or what portion.

Q. Go to paragraph 50, please.

A. I'm there.

Q. The last sentence of paragraph 50 reads, "Bausch may have recently reduced its detailing efforts for Lumify, but

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Mr. Ferris' testimony and statements in his Declaration are misleading in regards to the impact that marketing and promotion has had (and continues to have) on the marketplace performance of Lumify."

Do you see that?

A. I do.

Q. There's no citation at the end of that sentence, correct?

A. There's not.

Q. What is the basis for your statement that Mr. Ferris' testimony and declaration are misleading?

A. I think it's the preceding information where the statement Mr. Ferris is making is that detailing is no longer happening for Lumify Drops and the sales force have ceased. And what I'm pointing out is -- and I've described this earlier -- Mr. Jarosz is putting forth an opinion that from 2018 to 2024, discussing the marketplace performance of Lumify, and during that period

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the majority of the period they were detailing Lumify, and even the surveys are evidence that sales reps were visiting optometrists and ophthalmologists so to say recently when an analysis of commercial success is based on the historical analysis of the financial performance and what drove those sales.

Q. The sales of Lumify have grown on a year-by-year basis every single year that Lumify has been in the market in the U.S., right?

A. I believe that's accurate if we want to look at one of the exhibits, but I believe that's correct.

Q. I'd like to look at paragraph 77 from your report.

A. I'm there.

Q. You opine here that "the decision by a company to file an ANDA (and license in an ANDA) with respect to a reference listed drug merely reflects the

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normal course of business for generic pharmaceutical companies and does not necessarily reflect the success of the reference product."

Do you see that?

A. I do see it.

Q. In this particular case, Dr. Reddy's bought the ANDA for generic Lumify from Slayback; is that your understanding?

A. I believe that's accurate. I know it was described as a license in the article I think that we cited for that, but that Dr. Reddy's has the rights to the ANDA for Lumify.

Q. And did you review the press release by Dr. Reddy's upon gaining rights to Slayback's ANDA?

A. I know we reviewed a handful of articles. I don't know which specific one you're referring to.

Q. I, again, just didn't see it in your facts or, I mean, your materials considered which is why I was asking, but we can come back to that.

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Would Dr. Reddy's shareholders allow it, as a profit-generating entity, to invest in any project other than one that was forecasted to be successful?

MS. CIPRIANO: Objection. Calls for speculation. Outside the scope.

THE WITNESS: I don't know what Dr. Reddy's shareholders would demand of the board or of management, but part of Dr. Reddy's business is to try to work on products, and this is one that they decided to license from Slayback.

BY MR. O'QUINN:

Q. And you have no understanding of the reasons behind Dr. Reddy's decision to license from Slayback?

A. I am not aware of the decisions or I have not spoken to Dr. Reddy's about their reasoning behind that.

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Q. And you have no understanding of the financial terms underlying Dr. Reddy's license from Slayback, correct?

A. I have not seen that. That is correct.

MR. O'QUINN: Just for housekeeping, I'd like to introduce a couple of other exhibits. The first one in the folder has the file name "Exhibit 1198." It's towards the bottom of the folder.

(Exhibit 16 marked for identification.)

BY MR. O'QUINN:

Q. This is a declaration of John C. Jarosz from IPR 2022-142 which pertained to the '742 patent we've been discussing today.

You've reviewed this declaration as part of forming your opinions, correct, Mr. Masztak?

A. I have reviewed this declaration. I am the responding -- I'm responding to the declarations of Mr. Jarosz for the '245 patent and the '600 patent, though, not the '742 patent.

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Q. I understand. I just -- I know that several times today you've referred to what the board has already decided with respect to '742, and so I just want to make sure that in conjunction of your review of that you also reviewed this declaration, and the answer to that is yes, right?

A. I have reviewed this declaration, but I'm responding to the declaration -- the newer declarations that he has issued related to the '245 patent and the '600 patent.

Q. It's your opinion that the evidence that Mr. Jarosz is citing in the '245 and the '600 is essentially the same as the evidence that he cited in the '742, right?

A. There are similar arguments, yeah. I mean, the data has all been updated.

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He's updated numerous different paragraphs here and there, and he's removed certain things that were in the '742 that are not in the '245 and the '600, so I don't know that -- if it's -- it's not identical. I'm definitely aware of that. There's differences.

Q. In the reply brief filed by petitioners that we looked at earlier today, there was a sentence saying, "Presenting essentially the same arguments from the '742 IPR, patent owner again fails to establish a nexus between the claims and patent owner's alleged secondary considerations."

Do you recall that?

A. I do recall that, yep.

Q. If we could look at the very last page of this document on the screen, PDF page 161, the last appendix in the '742 declaration for Mr. Jarosz is Appendix 27.

Do you see that?

A. I do see that.

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MR. O'QUINN: Okay. I'd like to introduce one more exhibit, and that is Exhibit 2229, please.

(Exhibit 17 marked for identification.)

BY MR. O'QUINN:

Q. And this is the declaration of Mr. Jarosz for the 467 IPR proceeding pertaining to the '245 patent, and this is one of the declarations you are responding to, right?

A. That is correct, yes, as well as the '600.

Q. Right. If we could go to page 179 of this document. This is an updated version of the same Appendix 27 we just looked at; would you agree?

A. It appears to be that way, yes. This goes through the end of 2023, and I believe the other one should be sometime in '22 if we want to go back to it and look.

Q. And if we could go to page 180 of this document now, the last page. There's an Appendix 28 in this declaration entitled "Lumify Advertising and Promotional Expense as a Share of Gross Net Revenue 2018 to 2024."

Do you see that?

A. I do see it.

Q. There was no appendix equivalent to this one in the '742 declaration by Mr. Jarosz; you would agree?

A. That was not in the '742 declaration that I recall.

Q. So this data here was not before the Patent Trial and Appeal Board during the 142 IPR proceeding for the '742 patent?

A. I --

MS. CIPRIANO: Objection. Calls for speculation.

THE WITNESS: Yeah, I don't know exactly what was put in front of them for review. This was not a part of the Jarosz declaration for the '742, though. This is -- he did include this for the '245 and the '600, and I think we were talking earlier he used the term "gross net revenue" which is not consistent with what you and I were talking about today as net sales, and there were other critiques and information I think I mention in my declaration about that.

BY MR. O'QUINN:

Q. Do you consider the nexus of Lumify's marketplace performance to the claims of the '245 patent on a claim-by-claim basis?

A. I believe it's -- it will be analyzed on a claim-by-claim basis. Mr. Jarosz doesn't really explicitly even say which claims he is dealing with in the '245 patent or the '600 patent. He references what the challenged claims are but that Lumify is an embodiment of certain claims, but it's not clear what he's referring to in that, but I do understand it would be dealt

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with on a claim-by-claim basis.

Q. But have you yourself performed an analysis of nexus on a claim-by-claim basis?

A. I have analyzed the drivers of the marketplace performance of Lumify as we refer to today related to marketing and the prior art as the primary components of what we've been dealing with in talking about today, but -- and that they are not the asserted or the challenged claims of the '245 patent or the challenged claims of the '600 patent.

Q. How did you prepare for today's deposition, Mr. Masztak?

A. I reviewed information for the case in preparation for the deposition and also met with counsel.

Q. Approximately how long did you meet with counsel?

A. Today's Friday. On Wednesday and Thursday. I think about an hour each day

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maybe.

Q. Did you review all of the documents cited in Appendix 1 of your declaration in preparation for the deposition?

A. During the course of the engagement, I or the team would have reviewed all of the documents. I reviewed a substantial portion of them in preparation for this deposition. I don't know that I would say I probably hit all of them, but I would have seen them in the process of doing the analysis and report or declarations.

MR. O'QUINN: Thank you very much, Mr. Masztak. I don't have any other questions for you today.

THE WITNESS: Thank you.

MS. CIPRIANO: I do not have any questions for Mr. Masztak.

THE VIDEOGRAPHER: Thank you. We're concluding the deposition at 12:56 p.m.

* * * * *

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C E R T I F I C A T I O N

I, Patricia R. Frank, a Registered Merit Reporter, Certified Realtime Reporter, and Notary Public in and for the Commonwealth of Pennsylvania, do hereby certify that I reported the deposition in the above-captioned matter; that said witness was duly sworn by me; that the foregoing is a true and correct transcript of the stenographic notes of testimony taken by me in the above-captioned matter.

I further certify that I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

_____

Patricia R. Frank, RMR #9764

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Dated: April 6, 2025

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