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Transcript of John Jarosz

Date: November 11, 2022
Case: Slayback Pharma LLC -v- Eye Therapies LLC (PTAB)

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WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

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1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 ----------
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD
4 ----------
5 SLAYBACK PHARMA LLC,
6 Petitioner,
7 v.
8 EYE THERAPIES, LLC,
9 Patent Owner.
10 ----------
11 Case IPR2022-00142
12 Patent 8,293,742
13 ----------
14 Deposition of JOHN JAROSZ
15 Conducted Remotely
16 Friday, November 11, 2022
17 9:06 a.m.
18
19
20 Job No.: 468949
21 Pages: 1-111
22 Reported by: Matthew Goldstein, RMR, CRR

2

1 Deposition of JOHN JAROSZ, conducted
2 remotely:
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9 Pursuant to Notice, before Matthew Goldstein,
10 RMR, CRR, Notary Public in and for the State of
11 Maryland.
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22

3

1 A P P E A R A N C E S
2 ON BEHALF OF THE PETITIONER, SLAYBACK PHARMA,
3 LLC:
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11 ON BEHALF OF THE PATENT OWNER, EYE THERAPIES,
12 LLC:
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14 FINNEGAN HENDERSON FARABOW GARRETT & DUNNER,
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16 901 New York Avenue, NW
17 Washington, D.C. 20001
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20 ALSO PRESENT:
21 EMILY DUNN - REMOTE TECHNICIAN
22 KYLAN BARRY - VIDEOGRAPHER

4

1 C O N T E N T S

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7 (Attached)

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5

1 THE REMOTE TECHNICIAN: Thank you to
2 everyone for attending this proceeding remotely
3 which we anticipate will run smoothly. And please
4 remember to speak slowly and do your best not to
5 talk over one another. And please be aware that
6 we are recording this proceeding for backup
7 purposes.
8 Any off-the-record discussions should be
9 had away from the computer. And please remember
10 to mute your mic for those conversations. Please
11 have your video enabled to help the reporter
12 identify who is speaking. If you are unable to
13 connect with video and are connecting via phone,
14 please identify yourself each time before
15 speaking.
16 I apologize in advance for any
17 technical-related interruptions.
18 Thank you.
19 THE VIDEOGRAPHER: Please stand by for
20 video.
21 Here begins Media No. 1 in the
22 videotaped deposition of John C. Jarosz, in the

6

1 matter of Slayback Pharma LLC versus Eye Therapies
2 LLC, Case No. IPR 2022-00142.
3 Today's date is November 11th, 2022.
4 The time on the video monitor is 9:06 a.m.
5 The remote videographer today is Kylan
6 Barry, representing Planet Depos.
7 All parties of this video deposition are
8 attending remotely.
9 Would counsel please voice identify
10 themselves and state whom they represent.
11 MR. FREDERICKSON: Robert Frederickson
12 from Goodwin Procter representing the petitioner,
13 Slayback Pharma LLC. Also on the line is
14 Christopher Cassella from Goodwin Procter, as
15 well.
16 MR. HASFORD: Justin Hasford of Finnegan
17 on behalf of patent owner.
18 THE VIDEOGRAPHER: The court reporter
19 today is Matthew Goldstein, representing Planet
20 Depos.
21 Would the reporter please swear in the
22 witness.

7

1 P R O C E E D I N G S
2 Whereupon,
3 JOHN JAROSZ,
4 being first duly sworn or affirmed to testify to
5 the truth, the whole truth, and nothing but the
6 truth, was examined and testified as follows:
7 EXAMINATION BY COUNSEL FOR THE PETITIONER
8 BY MR. FREDERICKSON:
9 Q. Thank you.
10 Good morning, Mr. Jarosz.
11 **A. Good morning.**
12 Q. Have you been deposed before?
13 **A. In other matters, yes.**
14 Q. Approximately how many times?
15 **A. Approximately 300 times over the years.**
16 Q. Have you been deposed remotely before?
17 **A. Yes.**
18 Q. Okay. So you're familiar with the new
19 normal in the remote deposition world. And I'm
20 sure you're familiar with the ground rules of the
21 deposition. But if you have any questions, please
22 let me know, about the process or the procedure.

8

1 **A. I'm not sure if there's a question, but**
2 **I think I understand the process.**
3 Q. Okay. Just because I'm not in the room
4 with you, can you let me know who else is present
5 in the room with you?
6 **A. Justin Hasford.**
7 Q. Anyone else?
8 **A. No.**
9 Q. I see you have a piece of paper in front
10 of you. I think we discussed off the record that
11 that's a copy of your declaration in this
12 proceeding; is that correct?
13 **A. Yes, except it's not one piece of paper.**
14 **It's a copy of my declaration and appendices.**
15 Q. Okay. Is there any notations or marking
16 in that document?
17 **A. You can see that I'm just looking at it**
18 **very quickly, but there do not appear to be any**
19 **notations.**
20 Q. Great.
21 And can you confirm that what you're
22 looking at is Exhibit 2024, the declaration of

9

1 John C. Jarosz?
2 **A. That appears to be the case, yes.**
3 (Jarosz Deposition Exhibit 2024 was
4 marked for identification and attached to the
5 transcript.)
6 BY MR. FREDERICKSON:
7 Q. You understand that during the course of
8 the deposition, particularly when we're on the
9 record, like the court reporter is transcribing
10 and I'm asking questions, you're not to
11 communicate by anyone through any means that
12 wouldn't be perceivable to me.
13 Do you understand that?
14 **A. Yes.**
15 Q. And if someone does try to communicate
16 with you via in the room that I can't see or via
17 any electronic messages, will you let me know?
18 **A. Yes.**
19 Q. Great.
20 When were you first retained to submit
21 an expert declaration in this matter?
22 **A. Our firm was first retained to do an**

10

1 **analysis on commercial success issues some number**
2 **of months ago. I've lost track of how many months**
3 **ago, but my best current estimate was that it was**
4 **six months ago, give or take two months. I could**
5 **be wrong, however.**
6 Q. Would you say that it could have been as
7 early as March 2022 and as late as July of 2022?
8 MR. HASFORD: Object to the extent it
9 mischaracterizes the witness' testimony.
10 THE WITNESS: March 2022 is six months
11 ago. It could have been more than that, in other
12 words, earlier than that in time.
13 BY MR. FREDERICKSON:
14 Q. If you look at the last page of your
15 declaration, page 66 of the text, you'll see that
16 it's dated August 26th, 2022.
17 Do you see that?
18 **A. Yes.**
19 Q. How much in advance of August 26th,
20 2022, were you retained to offer an expert
21 declaration in this matter?
22 **A. As I said a few moments ago, it was in**

11

1 **about March. It could have been earlier than**
2 **that. It might have been later than that.**
3 Q. Who wrote Exhibit 2024?
4 **A. I did in the sense that I was**
5 **supervising and responsible for everything in it.**
6 **I worked with a colleague or two of mine in doing**
7 **the prose of the report and the underlying**
8 **analysis.**
9 Q. Who are those colleagues?
10 **A. The one that comes to mind right now is**
11 **Yao Lu. I think also involved was Su Jin Kim.**
12 **And it's possible Jonas Blomberger was involved.**
13 Q. What was Yao Lu's role in drafting
14 Exhibit 2024?
15 **A. She had responsibility for undertaking**
16 **the analysis here. So her role was to**
17 **conceptualize and oversee all the analyses and**
18 **summaries of our conclusions.**
19 Q. What was Su Jin Kim's role in preparing
20 Exhibit 2024?
21 **A. She's less senior than Yao Lu is. And**
22 **she was involved in looking at much of the**

12

1 **underlying information assisting with the report**
2 **production and probably having more day-to-day**
3 **responsibility for the construction of the**
4 **appendices.**
5 Q. I might have written down his last name
6 wrong, but what was Jonas Bloomberg's role?
7 **A. Jonas Blomberger. His role was very**
8 **similar to Su Jin Kim's. I would probably use the**
9 **same words to the extent that he was involved.**
10 **And I'm right now not clear who spent more time,**
11 **whether it was Su Jin Kim or Jonas Blomberger.**
12 Q. Other than those three people that
13 you -- those three people, are they all employees
14 of Analysis Group?
15 **A. Yes.**
16 Q. Okay. Other than those three employees
17 of Analysis Group, did anyone else contribute to
18 the drafting of Exhibit 2024?
19 **A. Well, there were people that were**
20 **involved in constructing the appendices and doing**
21 **checks of the prose of the report. I don't think**
22 **those people were as intimately involved in**

13

1 **helping draft the prose of the report.**
2 Q. What about individuals not employed by
3 Analysis Group, were there any individuals that
4 contributed to the drafting of the declaration
5 other than employees of Analysis Group?
6 **A. I think there were people at Finnegan**
7 **Henderson who took a look at some drafts and**
8 **helped us with understanding if there was a**
9 **misunderstanding we had of any of the facts. It's**
10 **possible that one or more people at Bausch+Lomb**
11 **looked at it for similar reasons.**
12 Q. Other than attorneys employed by
13 Finnegan and individuals employed by Analysis
14 Group, did you speak with anyone else in the
15 preparation of your declaration?
16 **A. Yes.**
17 Q. Who did you speak with?
18 **A. Ms. Kristi McIntyre.**
19 Q. Who is Kristi McIntyre?
20 **A. She's in-house counsel at Bausch+Lomb.**
21 **I forget the precise entity. I don't know her**
22 **precise title.**

14

1 Q. And what was the subject matter of
2 those -- how many conversations did you have with
3 Kristi McIntyre?
4 **A. Something on the order of two or three.**
5 Q. How long were those conversations?
6 **A. I don't have a very sharp recollection**
7 **of those, but my best guess is something on the**
8 **order of half an hour to 45 minutes.**
9 Q. Each or in total?
10 **A. Each, although each one may have been**
11 **appreciably shorter than that.**
12 Q. What was the subject matter of those
13 conversations?
14 MR. HASFORD: And I'll just caution you
15 not to disclose any specific conversations that
16 you may have had with Kristi McIntyre.
17 THE WITNESS: The conversations were
18 oriented to understanding some of the underlying
19 facts and the underlying data.
20 BY MR. FREDERICKSON:
21 Q. What underlying facts did you seek to
22 further understand from Kristi McIntyre?

15

1 MR. HASFORD: Same caution.
2 THE WITNESS: I don't have anything in
3 particular in mind.
4 BY MR. FREDERICKSON:
5 Q. What about underlying data, what
6 underlying data did you seek further understanding
7 of?
8 MR. HASFORD: Same caution.
9 THE WITNESS: I think I can generally
10 say it was sought to understand the IRI data and
11 the difference between the point-of-sale and panel
12 data. In the process of doing that, we might have
13 had a conversation with somebody else at
14 Bausch+Lomb to understand those data.
15 BY MR. FREDERICKSON:
16 Q. Do you know who that was?
17 **A. Sitting here right now, I don't recall.**
18 **It's possible it was Mr. Ferris, but I'm not very**
19 **confident of that. But it's possible.**
20 Q. Sitting here today, do you have a
21 recollection of having a conversation with
22 Mr. Ferris?

16

1 **A. Not a very sharp recollection. I would**
2 **only say with medium confidence that I had a**
3 **conversation with him.**
4 Q. And just to make sure I have the name,
5 that was Kristi McIntyre? Is that the attorney
6 that you spoke with?
7 **A. Yes.**
8 Q. Other than Kristi McIntyre and possibly
9 John Ferris, did you speak with anyone else to
10 prepare your declaration?
11 **A. As I said a moment ago, there might have**
12 **been another person at Bausch+Lomb that we talked**
13 **to in the context of understanding the data. And**
14 **I'm not sure whether it was in the context of the**
15 **PTAB matter or the district court matter. So I'm**
16 **a little bit unclear -- or uncertain whether it**
17 **was specifically having to do with the PTAB**
18 **matter.**
19 Q. In the course of preparing your
20 declaration, did you speak with anyone employed by
21 Eye Therapies?
22 **A. I don't think so.**

17

1 Q. Have you reviewed any deposition
2 testimony from this matter?
3 **A. Yes.**
4 Q. What deposition testimony have you
5 reviewed?
6 **A. I reviewed the rough draft of**
7 **Mr. Ferris' deposition testimony.**
8 Q. Any other deposition testimony?
9 **A. If you give me one moment, I will try to**
10 **refresh my recollection by looking at Appendix 2.**
11 **I don't think so, although of course my**
12 **memory is not perfect.**
13 Q. In the course of preparing your
14 declaration for this matter, did you speak with
15 any of the other experts retained by Bausch and
16 Eye Therapies?
17 **A. Not to the best of my memory.**
18 Q. I understand you reviewed a declaration
19 from a Dr. Robert Noecker; is that correct?
20 **A. Yes.**
21 Q. Did you ever speak with Dr. Robert
22 Noecker?

18

1 **A. I don't believe so.**
2 Q. Have you reviewed any deposition
3 testimony from Dr. Noecker?
4 **A. I don't think so. I wasn't aware that**
5 **his deposition had been taken in this matter.**
6 Q. Have you reviewed the declaration of a
7 Dr. Robert Williams?
8 **A. I don't believe so, no.**
9 Q. Have you reviewed the declaration of a
10 Dr. Stephen Davies?
11 **A. I don't think so, but for that question**
12 **and the prior, let me look at my Appendix 2 to**
13 **refresh my memory.**
14 **I think the answer is no, I did not, to**
15 **the best of my memory.**
16 Q. In the course of forming your opinions
17 in your declaration, did you review the petition
18 for inter partes review that was filed by Slayback
19 in this matter?
20 **A. I have a vague memory of having done**
21 **that, but it doesn't appear to be identified in my**
22 **Appendix 2, which makes me think that I probably**

19

1 **did not, but I don't say that with great**
2 **certainty.**
3 Q. Did you review the declarations of a
4 Dr. Paul Laskar in forming your opinions in this
5 case?
6 **A. Not to the best of my memory.**
7 Q. Did you review the declaration of a
8 Dr. Neal Sher?
9 **A. Not to the best of my memory.**
10 Q. You referred to Appendix 2 a couple of
11 times to your declaration. What is Appendix 2?
12 **A. It is a listing of materials considered.**
13 Q. Is it a listing of materials that you
14 considered in the preparation of your declaration?
15 **A. Yes.**
16 Q. Are there any materials that you
17 considered in forming your opinions in this case
18 that you did not list in Appendix 2?
19 **A. I don't think so, although I've been**
20 **involved in this kind of work for many years.**
21 **There are things in my memory banks that I**
22 **impliedly or subconsciously might have relied**

20

1 **upon. But the things that are explicitly related**
2 **to this matter, we intended to identify entirely**
3 **in Appendix 2.**
4 Q. Why didn't you include the conversations
5 that you had with Kristi McIntyre in your
6 Appendix 2?
7 MR. HASFORD: Objection to the form of
8 the question.
9 THE WITNESS: I don't usually, and I
10 don't recall having relied on anything that I
11 learned from those conversations that impacted the
12 substance of my work or conclusions.
13 When I said "I don't usually," to be
14 more specific, I don't usually cite conversations
15 that I've had with counsel, whether internal or
16 external. It might be that they're covered by
17 privilege. In many instances like this, I didn't
18 rely on those conversations for the substance of
19 my work or opinions.
20 BY MR. FREDERICKSON:
21 Q. Did Kristi McIntyre provide you any
22 factual information that was relevant to your

21

1 opinions?
2 MR. HASFORD: Object to the form of the
3 question.
4 THE WITNESS: There's nothing
5 specifically that comes to mind.
6 BY MR. FREDERICKSON:
7 Q. Can we turn to paragraph 37 of your
8 declaration, Exhibit 2024.
9 **A. I'm there.**
10 Q. Paragraph 37, the first sentence reads,
11 "I understand that Lumify is a commercial
12 embodiment of certain claims of the '742 patent."
13 Do you see that?
14 **A. Yes.**
15 Q. Where did you receive that understanding
16 from?
17 **A. Probably Exhibit 2020 at paragraphs 226,**
18 **301, 311, and from patent owner's preliminary**
19 **response at 31 and 32. Now, I do have to say if**
20 **2020, Exhibit 2020, is the Noecker declaration, a**
21 **large number of the paragraph numbers are slightly**
22 **off in my final report versus his final**

22

1 **declaration.**
2 Q. And have you prepared any errata or
3 changes to those citations to update your
4 declaration?
5 **A. I have not. I could do that. We**
6 **learned that there was some discrepancy in what**
7 **was cited versus what was in the final**
8 **declaration, but I've not put together an errata.**
9 Q. Is that because when you were preparing
10 the declaration, your declaration, you had a draft
11 of Dr. Noecker's declaration?
12 **A. I think it's probably right that I had a**
13 **near final but not final draft, correct, when I**
14 **was writing my final declaration.**
15 Q. And the citations that may have been
16 miscited was because you were citing to paragraphs
17 in that draft that subsequently changed?
18 MR. HASFORD: Object to the form of the
19 question to the extent it mischaracterizes.
20 THE WITNESS: Would you mind asking that
21 again, please?
22

23

1 BY MR. FREDERICKSON:
2 Q. The reason there are miscitations to the
3 Noecker declaration is because you and your team
4 were citing a draft declaration and those
5 paragraph numbers changed by the time Dr. Noecker
6 submitted his final declaration; is that right?
7 MR. HASFORD: Same objections.
8 THE WITNESS: I think that's right, but
9 I don't have a perfect memory of what happened at
10 the very end.
11 BY MR. FREDERICKSON:
12 Q. Now, and I think you said this in your
13 declaration, you are not a medical doctor; is that
14 right?
15 **A. That's correct.**
16 Q. And you've been retained to offer
17 opinions related to the issues of commercial
18 success; is that right?
19 **A. I missed a little bit of what you said**
20 **before you said "commercial success."**
21 Q. You've been retained to offer opinions
22 in this matter on the topic of commercial success;

24

1 is that right?
2 **A. Our firm was retained to do an analysis**
3 **of commercial success issues, and I was asked to,**
4 **if necessary, provide my opinions on the**
5 **conclusions that we drew.**
6 Q. Are you offering opinions as --
7 independent opinions that the product Lumify is
8 embodied of certain claims of the '742 patent?
9 **A. No, I think that's a technical opinion.**
10 **And that's outside my area of expertise.**
11 Q. And for those technical opinions, are
12 you principally relying on the opinions of
13 Dr. Noecker?
14 **A. Yes.**
15 Q. In paragraph 37, you say, "I understand
16 that Lumify is a commercial embodiment of certain
17 claims of the '742 patent."
18 Do you see that?
19 **A. Yes.**
20 Q. When you say "certain claims," which
21 claims are you referring to?
22 **A. You'd have to ask Dr. Noecker.**

25

1 Q. If you go to paragraphs 38 and 39 of
2 your expert declaration, Exhibit 2024, you refer
3 to Claim 1 of the '742 patent.
4 Do you see that?
5 **A. Yes.**
6 Q. Other than Claim 1 of the '742 patent,
7 do you have an understanding if Lumify is a
8 commercial embodiment of any other claims?
9 **A. Again, you'd have to ask Dr. Noecker on**
10 **that. I believe it's a commercial embodiment of**
11 **more than just Claim 1, but I'm just going off my**
12 **memory of what's in the Noecker declaration.**
13 Q. When you formed your opinions and did
14 your analysis of commercial success, did you make
15 any effort to identify which specific claims are
16 embodied by Lumify as a commercial -- let me try
17 that again.
18 In forming your opinions and doing your
19 analysis in this case, did you undertake any
20 effort to determine which specific claims Lumify
21 is a commercial embodiment of?
22 MR. HASFORD: Object to the form.

26

1 THE WITNESS: No, I'm relying on
2 Dr. Noecker for that expertise. That's beyond my
3 area of expertise.
4 BY MR. FREDERICKSON:
5 Q. And was it relevant to any of your
6 opinions whether there were particular claims of
7 the '742 patent that Lumify was not a commercial
8 embodiment of?
9 MR. HASFORD: Object to the form of the
10 question.
11 THE WITNESS: I'm aware of what's in the
12 Noecker declaration.
13 BY MR. FREDERICKSON:
14 Q. Did it matter for purposes of your
15 opinions to have an understanding of which
16 specific claims Lumify is a commercial embodiment
17 of and which specific claims Lumify may not be a
18 commercial embodiment of?
19 MR. HASFORD: Object to form.
20 THE WITNESS: It's interesting to me,
21 but I'm not sure that it impacts the conclusions
22 that I drew. I'm relying on Dr. Noecker's opinion

27

1 that Lumify is a commercial embodiment of certain
2 claims of the '742 patent.
3 MR. FREDERICKSON: Can we take a look
4 at -- it's Exhibit 1001. It should be the '742
5 patent. We can put that on the screen.
6 (Jarosz Deposition Exhibit 1001 was
7 marked for identification and attached to the
8 transcript.)
9 MR. FREDERICKSON: And if we could
10 scroll to the last page where the claims are
11 listed.
12 It should be all the way at the end,
13 last page, 20 out of 20. We can go ahead and
14 maybe even zoom in a little bit just so the --
15 yeah, the claims are showed there. Perfect.
16 BY MR. FREDERICKSON:
17 Q. And, Mr. Jarosz, can you see on the
18 screen Exhibit 1001, the six claims of the '742
19 patent?
20 **A. Yes.**
21 Q. Do you see Claim 4, "The method of
22 Claim 3 wherein said composition is topically

28

1 administered within about 24 hours after a LASIK
2 surgery on said patient"?
3 Do you see Claim 4?
4 **A. Yes.**
5 Q. Did you undertake any analysis to
6 determine how the frequency with which Lumify is
7 prescribed or administered within 24 hours after
8 LASIK surgery?
9 MR. HASFORD: Object to the form.
10 THE WITNESS: No, I'm not aware that
11 there's data on that.
12 BY MR. FREDERICKSON:
13 Q. Did you look --
14 **A. I understand it to be the case that**
15 **under the law the composition is equivalent to the**
16 **advantages of the patent. And at least the first**
17 **claim is an independent claim.**
18 Q. My question was simply: Did you
19 undertake an analysis to determine the frequency
20 with which Lumify is administered to patients
21 within an amount 24 hours after LASIK surgery?
22 MR. HASFORD: Object to the form of the

29

1 question.
2 THE WITNESS: At the risk of repeating
3 myself, no, I didn't undertake that particular
4 analysis, and I'm not aware of whether there's
5 data that would help one answer that question.
6 BY MR. FREDERICKSON:
7 Q. Do you know how many people undergo
8 LASIK surgery on a monthly or yearly or quarterly
9 basis in the United States?
10 A. I don't. I may have seen that, a
11 representation to that effect at some time over
12 the last two decades, but I haven't committed that
13 to memory.
14 Q. And that's not something that you
15 considered in forming your opinions in this case?
16 A. You mean the rate at which LASIK surgery
17 is performed?
18 Q. Correct.
19 A. No.
20 Q. Do you know how many patients take eye
21 drops following LASIK surgery?
22 A. No, and I'm not aware that there are

30

1 data to answer that question.
2 Q. Do you know what the available market
3 for eye drops are to patients that -- following
4 LASIK surgery?
5 MR. HASFORD: Object to the form of the
6 question.
7 THE WITNESS: What do you mean by the
8 term "available market"?
9 BY MR. FREDERICKSON:
10 Q. Do you know what options patients have
11 for eye drops following LASIK surgery?
12 A. I don't. I'm not a clinician. As an
13 economist and one who has investigated this, I
14 would think some of the eye redness products that
15 I discuss in my report might be considered
16 options, but I certainly don't know that from the
17 perspective of a clinician or a scientist.
18 Q. And you didn't undertake that analysis
19 for purposes of forming your opinions in this
20 case?
21 A. That's correct.
22 Q. Do you have any data or analysis on the

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1 revenue associated with the use of Lumify
2 following LASIK surgery?
3 A. I don't believe I do, and I'm not aware
4 of any existing.
5 Q. Do you have any data or analysis of the
6 market share of the use of Lumify following LASIK
7 surgery?
8 A. I don't believe so, and I'm not aware of
9 the existence of any data on that.
10 Q. Do you have any data or analysis of the
11 number of units of Lumify that were sold for the
12 purposes of being administered following LASIK
13 surgery?
14 A. I don't believe so, and I'm not aware of
15 any data that would help answer that question.
16 Q. Do you have any data or analysis that
17 you conducted on the volume of Lumify sold
18 following LASIK surgery?
19 A. I don't believe so, and I'm not aware of
20 any data that would help resolve that issue.
21 Q. We can go back to Exhibit 1001 in that
22 same section. Claim 6 reads, "A method according

32

1 to Claim 3 wherein said ocular condition is
2 chronic red eye."
3 Do you see that?
4 A. Yes, I do.
5 Q. Do you have any data or conducted any
6 analysis of how many patients suffering from
7 chronic red eye take Lumify?
8 A. I don't believe so.
9 Q. Okay. Do you have any data or have you
10 conducted any analysis on the revenue associated
11 with Lumify used in the treatment of chronic red
12 eye?
13 A. I don't think so.
14 Q. Do you know what other eye drop products
15 are approved or used in the treatment of chronic
16 red eye?
17 A. Actually, I do not. I would expect that
18 some of the products that I've identified in my
19 declaration might be candidates for that, but I
20 don't know whether they meet your requirements.
21 Q. And you haven't done any analysis in
22 this matter to determine which of those products

33

1 are actually used for the treatment of chronic red
2 eye; is that right?
3 **A. I don't believe so. I'm not aware of**
4 **data existing that would help answer that**
5 **question.**
6 Q. Are you aware of any data or have you
7 conducted any analysis on the number of Lumify
8 units sold for the treatment of chronic red eye?
9 **A. No, I don't believe so.**
10 Q. And do you have any data or have you
11 conducted any analysis of the volume of Lumify
12 sold for the treatment of chronic red eye?
13 **A. No, I don't believe so.**
14 Q. Turn to paragraph 105 in your
15 declaration, Exhibit 2024.
16 **A. Did you say 5?**
17 Q. 105, sorry.
18 **A. I'm there. Thank you.**
19 Q. The second sentence of paragraph 105
20 starts, "I further understand that the attributes
21 of Lumify that differentiate it from other eye
22 redness relievers include..."

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1 Do you see that sentence?
2 **A. Yes, I do.**
3 Q. And there's a cite at the end of that
4 sentence to Exhibit 2020.
5 Do you see that?
6 **A. Yes.**
7 Q. And I can flip it up on the screen or if
8 you want to check your list of materials
9 considered, but can you just confirm for me that
10 you understand Exhibit 2020 to be the declaration
11 of Robert Noecker?
12 **A. Yes, I'm looking at my Appendix 2, and**
13 **that appears to be the case, yes.**
14 Q. And so is it fair to say that your
15 understanding of the attributes of Lumify that
16 differentiate it from other eye redness relievers
17 is -- that comes from Dr. Noecker?
18 **A. Yes, from a technical or scientific or**
19 **clinician perspective.**
20 Q. And then you listed the attributes that
21 Dr. Noecker has identified differentiate Lumify
22 from other eye redness relievers to include

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1 tolerability, safety, efficacy, and the lack of
2 tachyphylaxis; is that correct?
3 **A. Yes, it's the combination of those**
4 **things, I think.**
5 Q. Do you have any analysis or evidence
6 that one of the differentiators of Lumify from
7 other eye redness relievers is the pH of Lumify?
8 **A. You'd have to ask Dr. Noecker on that.**
9 **I believe that pH may go to the issue of**
10 **tolerability or safety or efficacy or lack of**
11 **tachyphylaxis.**
12 Q. What about for purposes of forming your
13 opinions in this case, did you consider the pH
14 specifically of Lumify to be a differentiator from
15 the other eye redness relievers?
16 MR. HASFORD: Object to the form of the
17 question.
18 THE WITNESS: I wonder if you could ask
19 that a little bit differently. I'm not quite sure
20 I'm following it.
21 BY MR. FREDERICKSON:
22 Q. In forming the opinions -- you've

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1 identified certain differentiators of Lumify as
2 compared to other eye redness relievers; correct?
3 **A. Yes, according to the opinion of**
4 **Dr. Noecker.**
5 Q. And Dr. Noecker provided you that
6 information; is that right?
7 **A. He provided it not just to me, but to**
8 **others who are reading his declaration, yes.**
9 Q. And was pH one of the differentiators
10 that you took into consideration when comparing
11 the attributes of Lumify versus the attributes of
12 other eye redness relievers in the market?
13 **A. We'd have to look at the Noecker**
14 **declaration to see the extent to which he**
15 **discussed the issue of whether pH is a**
16 **differentiator or even whether -- well, let me**
17 **just stop it at that.**
18 Q. What about you, though, when you were
19 looking at the market, did you consider pH to be a
20 differentiator?
21 MR. HASFORD: Object to the form of the
22 question.

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1 THE WITNESS: Again, I'm not a clinician
2 or a scientist. I was aware that there are issues
3 about pH levels. I don't recall seeing in the
4 consumer literature, meaning the marketing that
5 went to physicians and patients, that there was
6 explicit mention of pH levels, but I wouldn't
7 expect there to be.
8 BY MR. FREDERICKSON:
9 Q. Do you know what the pH of Lumify is?
10 A. I may have seen reference to that. I'm
11 sorry, I've not committed it to memory.
12 Q. Do you know what the pH of Advanced Eye
13 Relief is?
14 A. Sitting here right now, I don't. I may
15 have known it.
16 Q. Did you investigate the pH of Advanced
17 Eye Relief when forming your opinions in this
18 matter?
19 A. I don't recall undertaking a specific
20 investigation of that topic.
21 Q. Do you know what the pH of Clear Eyes
22 is?

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1 A. Sitting here right now, I do not. I may
2 have known it.
3 Q. Did you seek to understand what the pH
4 of Clear Eyes is when forming your opinions in
5 this matter?
6 A. I don't recall undertaking a specific
7 investigation of that. I may have seen
8 information on that and may have considered that,
9 but I don't recall doing a separate analysis of
10 that.
11 Q. Do you know what the pH of Rohto is?
12 A. Sitting here right now, I do not. I may
13 have seen reference to it.
14 Q. Do you know if you did an analysis to
15 determine what the pH of Rohto was as part of
16 forming your opinions in this matter?
17 A. I don't recall doing a specific analysis
18 of that topic.
19 Q. Do you know what the pH of Visine is?
20 A. Sitting here right now, I do not. I may
21 have known at one point.
22 Q. Okay. Did you do an analysis or

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1 assessment of what the pH of Visine is in forming
2 your opinions in this matter?
3 A. I don't recall doing that specific
4 analysis, no.
5 Q. The products that I identified, Advanced
6 Eye Relief, Clear Eyes, Rohto, and Visine, do you
7 know if any of those are administered to patients
8 following LASIK surgery?
9 A. Sitting here right now, I do not.
10 Q. And did you do an analysis to determine
11 whether and to what extent Advanced Eye Relief,
12 Clear Eyes, Rohto and Visine are prescribed or
13 used in patients following LASIK eye surgery?
14 A. I don't recall doing that analysis.
15 Q. Do you know whether Advanced Eye Relief,
16 Clear Eyes, Rohto or Visine are used in the
17 treatment of chronic red eye?
18 A. I do not.
19 Q. Did you do an analysis to determine
20 whether and to what extent Advanced Eye Relief,
21 Clear Eyes, Rohto, and Visine are used in the
22 treatment of chronic red eye?

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1 A. I don't recall doing that specific
2 analysis.
3 Q. If you can turn to paragraph 35 of your
4 declaration, Exhibit 2024. The first sentence of
5 paragraph 35 reads, "I understand that brimonidine
6 tartrate was first approved in 1996 for lowering
7 intraocular pressure in patients with open-angle
8 glaucoma or ocular hypertension."
9 Do you see that?
10 A. Yes.
11 Q. And so when forming your opinions in
12 this matter, you understood that brimonidine
13 tartrate was used in ocular conditions as early as
14 1996; correct?
15 MR. HASFORD: Object to the extent it
16 mischaracterizes.
17 THE WITNESS: It was approved for
18 treating certain ocular conditions in certain
19 patients.
20 BY MR. FREDERICKSON:
21 Q. Do you know whether and to what extent
22 brimonidine tartrate was used following that

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1 approval to treat ocular conditions such as
2 glaucoma and ocular hypertension?
3 **A. I don't think so other than knowing how**
4 **Lumify has been used since 2017.**
5 Q. Did you undertake any investigation of
6 the safety and tolerability of the use of
7 brimonidine tartrate following its approval in
8 1996 for open-angle glaucoma or ocular
9 hypertension treatment?
10 **A. No, that appears to be something that's**
11 **outside my area of expertise.**
12 Q. You understand that this proceeding,
13 it's an inter partes review that's pending before
14 the Patent Trial and Appeal Board?
15 **A. Yes.**
16 Q. And you understand that the issue -- one
17 of the issues that's before the Patent Trial and
18 Appeal Board is the obviousness of the challenge
19 claims of the '742 patent in view of certain prior
20 art references identified by the petitioner,
21 Slayback.
22 Is that your understanding?

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1 **A. I understand that there are issues about**
2 **obviousness.**
3 Q. In forming your opinions in this matter,
4 did you review any of the prior art references
5 that were identified by the petitioner?
6 **A. I don't recall doing that. Moreover,**
7 **it's outside my area of expertise.**
8 Q. Was it relevant in forming your opinions
9 to have an understanding of how low concentrations
10 of brimonidine have been described in the prior
11 art?
12 MR. HASFORD: Object to the form of the
13 question.
14 THE WITNESS: I'm not an expert at prior
15 art evaluations. I am curious about what has and
16 is happening in the marketplace.
17 BY MR. FREDERICKSON:
18 Q. Go to paragraph 59 of your declaration,
19 please.
20 **A. All right. I'm at 59.**
21 Q. Paragraph 59, you refer to Bausch+Lomb's
22 decision to license in Lumify from Eye Therapies

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1 in 2013; is that correct?
2 **A. Yes.**
3 Q. In this paragraph you cite to
4 Exhibit 2023, which you can confirm in your
5 Appendix 2 is the declaration of John Ferris; is
6 that right?
7 **A. Yes.**
8 Q. Other than the declaration of John
9 Ferris, did you have any other information,
10 whether through conversations or documents, about
11 Bausch+Lomb's license with Eye Therapies?
12 **A. It's possible, but I'm not remembering**
13 **anything specific. If I did speak with**
14 **Mr. Ferris, it's very possible that we spoke about**
15 **the Eye Therapies' license, but I cannot say that**
16 **with great certainty.**
17 Q. Do you have any specific memory sitting
18 here today of a conversation with Mr. Ferris about
19 the license between Bausch+Lomb and Eye Therapies?
20 **A. No, I cannot.**
21 Q. Other than Mr. Ferris, is there anyone
22 else who you may have spoken to surrounding the

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1 circumstances that Bausch+Lomb entered into that
2 license agreement with Eye Therapies?
3 **A. It's possible I had discussions with**
4 **counsel about that, but I don't have a clear**
5 **memory of that.**
6 Q. Did counsel provide you any factual
7 information about the facts and circumstances
8 surrounding Bausch+Lomb's decision to enter into a
9 license agreement with Eye Therapies?
10 MR. HASFORD: I caution you don't
11 disclose any specific communications you may have
12 had with counsel.
13 THE WITNESS: There's nothing
14 specifically that I recall sitting here now that
15 meets your requirements.
16 BY MR. FREDERICKSON:
17 Q. Have you seen the actual license
18 agreement between Bausch+Lomb and Eye Therapies?
19 **A. I don't believe I have.**
20 Q. Did you ask to see it?
21 **A. I just don't remember.**
22 Q. Would you have wanted to see it? You're

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1 offering -- let me put it this way: You're
2 offering some opinions about an agreement between
3 Bausch+Lomb and Eye Therapies. Would you have
4 wanted to see that agreement?
5 MR. HASFORD: Objection; argumentative.
6 THE WITNESS: I certainly didn't view it
7 as necessary to see. I'm generally interested in
8 information like this, but I had representations
9 from Mr. Ferris that were sufficient for my
10 purposes.
11 BY MR. FREDERICKSON:
12 Q. One of the representations from
13 Mr. Ferris that was sufficient was that
14 Bausch+Lomb has paid Eye Therapies nearly
15 $42 million to date under that agreement; is that
16 right?
17 **A. Yes.**
18 Q. And do you know what form those payments
19 took?
20 **A. I'm sorry, could you ask that -- I just**
21 **lost a few words that you said.**
22 Q. Do you know what forms those payments

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1 took?
2 **A. Do you mean was it a check or a wire**
3 **transfer? Is that what you're asking?**
4 Q. Were they upfront, milestone, or royalty
5 payments?
6 **A. We'd have to look at the Ferris**
7 **declaration. My best memory is that it's a**
8 **combination of upfront or milestone payments and a**
9 **running royalty, but I don't say that with great**
10 **certainty. We can look at his declaration.**
11 Q. Sure.
12 MR. FREDERICKSON: If we can pull up
13 Exhibit 2023.
14 (Jarosz Deposition Exhibit 2023 was
15 marked for identification and attached to the
16 transcript.)
17 MR. FREDERICKSON: If you could go to
18 paragraph 21.
19 THE REMOTE TECHNICIAN: Stand by.
20 MR. HASFORD: And for the record, I
21 handed Mr. Jarosz a hard copy of this for his ease
22 of review. It's a little easier for him to see it

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1 here in hard copy than up on the screen.
2 MR. FREDERICKSON: Yeah, that's fine
3 with me. And I assume it goes without saying, but
4 I'll say it anyway, no markups or anything on the
5 documents or anything, I presume?
6 MR. HASFORD: Not to my knowledge.
7 MR. FREDERICKSON: Good.
8 BY MR. FREDERICKSON:
9 Q. Okay. Mr. Jarosz, so you have a copy of
10 Exhibit 2023 in front of you?
11 **A. Yes, I do.**
12 Q. And that's the declaration of John
13 Ferris; correct?
14 **A. Yes.**
15 Q. And paragraph 21, which you cited,
16 identifies that Bausch has partnered with patent
17 owner, Eye Therapies, and has paid substantial
18 milestones and royalties, nearly 42 million U.S.
19 dollars at the time of this writing to patent
20 owner.
21 Do you see that?
22 **A. Yes. You didn't read it perfectly, but**

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1 **I see what sentence you're referring to.**
2 Q. But at least according to Mr. Ferris,
3 the form of the payments that Bausch has made to
4 Eye Therapies are in the form of milestones and
5 royalties; correct?
6 **A. Yes. And I assume by royalties, he**
7 **meant running royalties.**
8 Q. Do you know if Bausch agreed to make an
9 upfront payment to Eye Therapies when it entered
10 into the agreement in 2013?
11 **A. I don't recall. I wouldn't be surprised**
12 **because most licenses that are structured like**
13 **this have upfront and milestones, but I cannot say**
14 **that with certainty with regard to this particular**
15 **license.**
16 Q. Right. So you have no information one
17 way or the other if Bausch agreed to pay an
18 upfront fee when upon entering into that agreement
19 with Eye Therapies; right?
20 MR. HASFORD: Object to the extent it
21 mischaracterizes.
22 THE WITNESS: I don't know if

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1 Mr. Ferris -- well, I don't know for sure. I'm
2 also not certain of its significance.
3 BY MR. FREDERICKSON:
4 Q. And you haven't seen the actual license
5 agreement itself; right?
6 **A. I believe that's correct, yes.**
7 Q. Do you know how much of the 42 million
8 are royalty payments versus milestones?
9 **A. Sitting here right now, I do not.**
10 Q. Do you know what the events were, if
11 any, that triggered the milestone payments?
12 **A. I may have heard what those events are,**
13 **but I have not committed them to memory.**
14 Q. Can you tell me what you understand
15 those events to be that triggered the milestone
16 payments?
17 MR. HASFORD: Object to the extent it
18 mischaracterizes the witness' testimony.
19 THE WITNESS: Again, I don't have any
20 memory of what those events are.
21 BY MR. FREDERICKSON:
22 Q. Do you know what the royalty rate is of

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1 the agreement between Bausch and Eye Therapies?
2 **A. Sitting here right now, I do not. I may**
3 **have heard that, but I don't remember it.**
4 Q. The royalty payments in that agreement
5 between Bausch and Eye Therapies, do you know if
6 they were a percentage based on net sales or a per
7 unit royalty?
8 **A. I don't know for sure. My expectation**
9 **and perhaps my vague memory is that they were**
10 **revenues that -- based on revenues, that's**
11 **typically the case, but I can't say that with**
12 **certainty here.**
13 Q. Turn to paragraph 61 of your
14 declaration, please.
15 **A. All right. I'm there.**
16 Q. The last sentence you write, "Line
17 extensions for Lumify are also in development,
18 with Bausch+Lomb stating in early 2022 that
19 Phase 3 clinical trials were scheduled to begin in
20 the second half of 2022."
21 Do you see that?
22 **A. Yes.**

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1 Q. Do you know specifically what line
2 extensions for Lumify are in development?
3 **A. No, but they could be identified on**
4 **slide 24 of Exhibit 2068.**
5 Q. And I'll give you a chance take a look
6 at that. Let me ask a foundational question.
7 What is a line extension?
8 **A. Application of a therapy to treat other**
9 **conditions beyond those for which approval has**
10 **been given. That's true in a pharmaceutical**
11 **context. In a non-pharmaceutical context, it is**
12 **enhancing a product so it can be used in more**
13 **settings than originally anticipated.**
14 Q. When you referred to line extensions in
15 paragraph 61, were you referring to line
16 extensions in a pharmaceutical setting or a
17 non-pharmaceutical setting?
18 **A. Pharmaceutical.**
19 MR. FREDERICKSON: Let's go to -- if we
20 can pull up Exhibit 2068 and we can look at slide
21 24.
22 (Jarosz Deposition Exhibit 2068 was

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1 marked for identification and attached to the
2 transcript.)
3 MR. FREDERICKSON: Or maybe one more. I
4 think they might have cited the -- yeah, the page.
5 BY MR. FREDERICKSON:
6 Q. So can you see Exhibit 2068 on your
7 screen, Mr. Jarosz?
8 **A. Yes, I can.**
9 Q. And is this the slide that you were
10 referring to in paragraph 61 of your declaration?
11 **A. I think so, although the precise slide**
12 **number is not shown on the screen. There's a**
13 **designation in the bottom right on the screen I'm**
14 **looking at that this meeting is being recorded,**
15 **and that might cut off what the slide number is.**
16 Q. Sure.
17 MR. FREDERICKSON: Can we scroll down a
18 little bit just so we can make sure we're looking
19 at the right thing.
20 BY MR. FREDERICKSON:
21 Q. Can you see the 24 at the bottom there?
22 **A. No, I can't.**

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1 MR. FREDERICKSON: Keep scrolling down,
2 and maybe it will get higher.
3 THE WITNESS: There. I see it now.
4 BY MR. FREDERICKSON:
5 Q. And so you cited in your reference to
6 line extensions in paragraph 61 of your
7 declaration, Exhibit 2068 at slide 24; is that
8 right?
9 **A. Yes.**
10 Q. And you recognize this page that has a
11 table that says "Vision care" on the top to be the
12 page and slide you're referring to?
13 **A. Yes.**
14 Q. Page 24 of Exhibit 2068 does not
15 identify what specific line extension studies are
16 being conducted by Bausch; is that right?
17 **A. That appears to be the case, yes.**
18 Q. So do you know what specific line
19 extension studies Bausch is conducting?
20 **A. I do not.**
21 Q. Okay. Do you know if Bausch is looking
22 to study Lumify -- let me rephrase that.

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1 Do you know if Bausch is pursuing a line
2 extension for Lumify for patients following LASIK
3 surgery?
4 **A. I do not.**
5 Q. Do you know if Bausch is pursuing a line
6 extension for the use of Lumify to treat chronic
7 red eye?
8 **A. I do not.**
9 Q. Do you know if any of the line
10 extensions that Bausch has identified in this
11 slide relate to uses that are covered by the
12 challenged claims of the '742 patent?
13 **A. I do not.**
14 Q. Let's take a look at paragraph 69 of
15 your declaration, please.
16 MR. HASFORD: Actually, you know what,
17 it looks like we've been going for an hour. If
18 this is a good time to take a break, why don't we
19 do that here.
20 MR. FREDERICKSON: Yeah, that's fine
21 with me.
22 THE VIDEOGRAPHER: We are going off the

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1 record at 10 a.m.
2 (Recess from the record.)
3 THE VIDEOGRAPHER: We are going back on
4 the record at 10:11 a.m.
5 BY MR. FREDERICKSON:
6 Q. Okay. Welcome back, Mr. Jarosz.
7 Can you turn to paragraph 69 of your
8 declaration?
9 **A. All right. I'm there.**
10 Q. Okay. Paragraph 69 of your declaration
11 you identify two sets of IRI data for the, quote,
12 redness reliever category that Bausch+Lomb uses in
13 the normal course of business; is that right?
14 **A. Yes.**
15 Q. One set of data is referred to as the
16 IRI point-of-sale or POS data; correct?
17 **A. Yes.**
18 Q. And another set of data is the IRI panel
19 data; is that correct?
20 **A. Yes.**
21 Q. Prior to your work in this matter, had
22 you previous -- do you have previous experience

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1 with either the IRI point-of-sale or IRI panel
2 data?
3 **A. Probably I've been involved in lots of**
4 **matters for lots of years. It's very likely, but**
5 **I can't point you to particular instances right**
6 **now.**
7 Q. Do you have any specific recollection of
8 the prior matters within the last five or so years
9 where you've used or relied on IRI point-of-sale
10 or IRI panel data?
11 **A. Nothing comes to mind within the last**
12 **five years, but I've been involved in many**
13 **matters, even in the last five years. So it's**
14 **very possible there have been some.**
15 Q. Did you ask for the IRI point-of-sale or
16 IRI panel data when you were performing your work
17 in this case?
18 **A. I don't think I specifically asked for**
19 **those data. I recall asking for information on**
20 **units and dollars and market shares. And I think**
21 **it was offered up that the IRI data would be the**
22 **most useful in that dimension, but I don't recall**

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1 **specifically asking for IRI data.**
2 Q. What other information, if any, did you
3 ask for other than units, dollars, and market
4 share?
5 **A. Maybe volumes, as well. And I should**
6 **revise a previous answer. I don't think I**
7 **explicitly asked for market share data. I asked,**
8 **I think, for information that would allow me to**
9 **calculate shares of the redness reliever business.**
10 Q. Other than in units, dollars, volumes
11 and information that would allow you to calculate
12 share for the redness reliever business, did you
13 ask for any other market or economic-related
14 information?
15 **A. Nothing else comes to mind this very**
16 **moment.**
17 Q. When you asked for information that
18 would allow you to calculate market share, did you
19 identify who you believe the relevant market
20 participants to be?
21 **A. I don't think so. I think I understood**
22 **that Bausch+Lomb has a sense of who its**

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1 **competitors were in the redness relief business**
2 **and had IRI data associated with that. So I did**
3 **not do a separate market definition analysis.**
4 Q. So for purposes of the opinions you
5 formed in this case, you relied on the market that
6 Bausch+Lomb uses for its internal purposes?
7 **A. I don't know if they use the term**
8 **"market," but I relied on information as to what**
9 **it viewed its primary or perhaps its entire**
10 **competition to be in the redness relief business.**
11 Q. In paragraph 69 of your declaration, you
12 include a number of citations to Exhibit 2023,
13 which is the declaration of John Ferris; correct?
14 **A. Yes.**
15 Q. Okay. Other than the declaration of
16 John Ferris, what, if anything, did you do to gain
17 a further understanding of the IRI point-of-sale
18 and IRI panel data?
19 MR. HASFORD: Object to the form of the
20 question.
21 THE WITNESS: As I mentioned earlier, I
22 may have had a conversation with Mr. Ferris and I

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1 have a vague memory of having had a conversation
2 with somebody else at Bausch+Lomb, who is the
3 keeper of the IRI data. But I can't say that with
4 certainty, nor can I identify the name of that
5 person.
6 BY MR. FREDERICKSON:
7 Q. Can you tell me anything that you
8 remember from that conversation with the person
9 who you identified as potentially the keeper of
10 the IRI data?
11 **A. I think what I learned from that**
12 **conversation is what's summarized in my report.**
13 **And I think we may have made a request for data**
14 **consistent with that conversation, including data**
15 **from 2018 forward.**
16 Q. Did you receive that data?
17 **A. I believe so, through the discovery**
18 **process.**
19 Q. What do you mean "through the discovery
20 process"?
21 **A. Well, we received it, I think, from**
22 **counsel, and we identified that in the various**

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1 **appendices that we have that summarize the data.**
2 **I think at its core, the data are from**
3 **Exhibit 2058. Let me just confirm that. And**
4 **2057. So those are the data that we received, I**
5 **don't think, directly from Bausch+Lomb, but from**
6 **counsel. That's -- when I said "discovery." I**
7 **don't know if that's quite the right term in this**
8 **setting, but counsel facilitated us getting 2057**
9 **and 2058.**
10 Q. The conversation -- 2057 -- Exhibits
11 2057 and 2058, did you have access to those before
12 or after your conversations with John Ferris or
13 the keeper of the IRI data?
14 **A. I think after. I think we talked**
15 **generally about what data were available and then**
16 **were provided those data.**
17 Q. Other than your conversations with
18 Mr. Ferris, the keeper of the IRI data, and your
19 review of Mr. Ferris' declaration, what, if
20 anything, did you do to determine how IRI collects
21 and compiles the POS and panel data?
22 **A. I have a general understanding of what**

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1 **IRI is and what it does. I understand it from**
2 **having been involved in other matters in the past**
3 **that I think involved IRI data and just generally**
4 **reading about the data service. Those are the**
5 **things that come to mind right now. It's possible**
6 **we visited their website and sought to understand**
7 **how they collect their data. I don't remember**
8 **that specifically.**
9 Q. Do you know, did you or did you not go
10 to the IRI website to see how they collected their
11 data?
12 **A. I don't think that I did. It's possible**
13 **that someone on my team did, but I don't have a**
14 **very sharp recollection of that.**
15 Q. And sitting here today, can you identify
16 for me any other matters that you've worked on
17 that involve IRI data?
18 MR. HASFORD: I'll just caution you to
19 not disclose anything where you're under an
20 obligation of confidentiality.
21 THE WITNESS: I remember, without going
22 into any details, looking at IRI data with regard

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1 to a Scientific Atlanta matter that I had. There
2 are likely others, but I'd have to go and look at
3 my files.
4 BY MR. FREDERICKSON:
5 Q. When was that Scientific Atlanta matter?
6 **A. Scientific Atlanta matter was more than**
7 **five years ago, maybe more than ten years ago.**
8 **There are probably other matters, however, which**
9 **I've looked at IRI data.**
10 Q. Was that Scientific Atlanta matter
11 before or after it was acquired by Cisco?
12 **A. I think before, but I can't say that**
13 **with certainty.**
14 Q. So in your declaration, you principally
15 rely on the IRI POS data; is that correct?
16 **A. As opposed to the panel data, yes, I did**
17 **look at the panel data. But for most of the**
18 **appendices, they rely on the point-of-sale data.**
19 Q. Now, the IRI point-of-sales data, that
20 excludes information from sales that are made
21 through online channels; is that right?
22 **A. It does not include online exclusive**

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1 **sales, that is purchases made online and shipped**
2 **to the customer.**
3 Q. That would be, like, for example,
4 Amazon?
5 **A. I think that's probably a good example.**
6 Q. I also saw some place that Costco might
7 have been excluded from the IRI point-of-sale
8 data. Is that consistent with your understanding?
9 **A. That is consistent with my memory, yes.**
10 Q. Do you know why Costco is excluded from
11 the IRI point-of-sale data?
12 **A. I don't. I may have known, but I don't**
13 **recall it now.**
14 Q. Do you know what percentage of Lumify's
15 sales go through channels that are not included in
16 the IRI point-of-sales data?
17 **A. I do not. But if you see the -- if you**
18 **compare sales as reported in the panel data versus**
19 **the point-of-sale data, there are some**
20 **differences, but not substantial. I think it's 10**
21 **or 20 percent, but I'm just going on my memory**
22 **right now.**

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1 Q. The panel data, that's based on
2 projections from a National Consumer Panel; is
3 that correct?
4 **A. That's one basis, yes.**
5 Q. Okay. And what does that mean, the
6 National Consumer Panel?
7 **A. A group of users across the country that**
8 **are available for being queried.**
9 Q. Do you know how that National Consumer
10 Panel was put together?
11 **A. I don't recall knowing that, no.**
12 Q. Do you know how many individuals are on
13 the National Consumer Panel?
14 **A. No, and I'm not sure that there's just a**
15 **fixed set on -- in one panel, but one could, I**
16 **guess, find out by either asking IRI or perhaps**
17 **looking at their website.**
18 Q. And this National Consumer Panel, the
19 IRI folks will put questions to those panelists
20 about their purchasing behaviors. Is that how it
21 works?
22 **A. Generally, yes.**

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1 Q. And then from the request from -- from
2 the answers to those questions, IRI is able to
3 extrapolate those -- that data out to make
4 projections of what the overall marketplace looks
5 like; correct?
6 **A. I think that's roughly their intention,**
7 **yes.**
8 Q. Okay. Just going back to the online
9 exclusive sales, do you know how Lumify offers
10 coupons and discounts to its customers through
11 those channels?
12 **A. I'm not fully sure what your question**
13 **is.**
14 Q. Yeah, let me fix it.
15 Do you know if Bausch's approach to
16 offering coupons and discounts to consumers of
17 Lumify varies depending on whether they're a
18 brick-and-mortar purchase or an online exclusive
19 sale?
20 MR. HASFORD: Objection to form.
21 THE WITNESS: I don't.
22

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1 BY MR. FREDERICKSON:
2 Q. Paragraph 72 of your declaration,
3 Footnote 6, you write, "I understand that the
4 revenues and prices in the IRI POS data generally
5 reflect what consumers pay at the register (i.e.,
6 net of any promotions, discounts, and/or coupons
7 applied at the register)."
8 Do you see that?
9 **A. Yes.**
10 Q. And, again, you're citing the
11 declaration of John Ferris in support of that;
12 correct?
13 **A. Yes, I believe so.**
14 Q. Okay. What do you mean when you say
15 "generally reflect what consumers pay at the
16 register"?
17 **A. I might be using his terminology. There**
18 **may be exceptions to that. There may be rebates**
19 **that can be applied other than just at the**
20 **register, but I don't know that for sure. You had**
21 **best ask him that question.**
22 Q. Do you know what the exceptions are to

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1 the IRI POS data that would not be reflected in
2 those revenue numbers that IRI compiles?
3 MR. HASFORD: Object to the form.
4 THE WITNESS: I don't. I would just be
5 speculating as to what the answer might be.
6 BY MR. FREDERICKSON:
7 Q. Did you try to find that out?
8 **A. Not that I recall, no.**
9 Q. In conducting your analysis for this
10 matter, did you ask Bausch+Lomb for their internal
11 profit and loss statements for Lumify?
12 **A. I don't think so. I may have asked**
13 **whether there are internal profit and loss**
14 **statements and I likely learned that there are**
15 **not, but I could be wrong.**
16 Q. Do you know if Bausch+Lomb maintains a
17 profit and loss statement for Lumify?
18 **A. I don't know for sure, but I think the**
19 **answer is that it does not.**
20 Q. And what's your basis for thinking that
21 the answer is that Bausch+Lomb does not contain a
22 profit and loss statement?

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1 **A. A vague memory of the answer to my**
2 **inquiry.**
3 Q. A vague memory of what?
4 **A. Me asking counsel whether there are**
5 **Lumify profit and loss statements and --**
6 MR. HASFORD: I'll just caution you not
7 to disclose any specific communications with
8 counsel.
9 THE WITNESS: A vague memory of having
10 heard that those don't exist. That is not at all
11 uncommon for any therapy.
12 BY MR. FREDERICKSON:
13 Q. When you say "counsel," do you mean
14 outside counsel like Finnegan?
15 **A. Or inside counsel at Bausch+Lomb.**
16 Q. Is that Kristi McIntyre?
17 **A. That's the one that comes to mind.**
18 **That's the person that comes to mind right now.**
19 Q. Do you -- go ahead, sir.
20 **A. I don't recall if I had that**
21 **conversation. I might have. Again, I have a**
22 **vague memory of that.**

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1 Q. Okay. I'll just ask the question and
2 make sure I have my record.
3 Do you have a specific memory of a
4 conversation with Kristi McIntyre in which you
5 asked whether Bausch+Lomb maintains profit and
6 loss statements for Lumify?
7 MR. HASFORD: Same caution.
8 THE WITNESS: I don't have a very clear
9 memory of that, no.
10 BY MR. FREDERICKSON:
11 Q. Do you have a specific recollection of a
12 conversation that you had with outside counsel at
13 Finnegan where you inquired whether Bausch+Lomb
14 maintains a profit and loss statement for Lumify?
15 MR. HASFORD: Same caution.
16 THE WITNESS: The same answer. I don't
17 have a specific recollection of that.
18 BY MR. FREDERICKSON:
19 Q. What about Bausch's vision care segment
20 of its business, do you know if Bausch maintains a
21 profit and loss statement for the vision care
22 segment?

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1 **A. I do not know.**
2 Q. Did you ask for Bausch's profit and loss
3 statement for the vision care segment in forming
4 your opinions in this matter?
5 **A. Not that I recall.**
6 Q. Did you seek any internal documents from
7 Bausch+Lomb concerning the amount of money it
8 spent to market and promote Lumify since 2018?
9 **A. I'm not sure if this answers, but I had**
10 **discussions with counsel about that information.**
11 **And to the extent I have information, it's**
12 **summarized in my declaration.**
13 Q. Which counsel did you have discussions
14 with?
15 **A. Inside and/or outside counsel.**
16 Q. Do you have a specific memory of a
17 conversation that you had with Kristi McIntyre
18 about whether and how much Bausch has spent
19 marketing and promoting Lumify since 2018?
20 MR. HASFORD: Same caution.
21 THE WITNESS: I don't have a specific
22 memory of that. It's possible that Mr. Ferris

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1 addressed that topic, excuse me, in his
2 declaration. I don't recall, though, there being
3 a specific number. I'm not sure if one is easily
4 obtainable or not.
5 BY MR. FREDERICKSON:
6 Q. What about did you have -- do you have a
7 specific recollection of any conversations with
8 outside counsel at Finnegan in which you sought
9 internal financial information from Bausch
10 concerning how much it spent marketing and
11 promoting Lumify since 2018?
12 MR. HASFORD: Same caution.
13 THE WITNESS: I think we had
14 conversations about the topic and the result of
15 the conversations is what you see in the Ferris
16 declaration and what I've cited in my declaration.
17 BY MR. FREDERICKSON:
18 Q. Did you seek any information internally
19 from Bausch about how much it spent in research
20 and development expenditures relating to Lumify?
21 **A. I think I had conversations about that**
22 **topic. I have a memory of having a conversation**

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1 **about that.**
2 Q. Okay. And what do you mean?
3 **A. I remember --**
4 MR. HASFORD: Same caution.
5 THE WITNESS: -- asking whether such
6 data are -- exist and I recall hearing that the
7 data are not broken at that level. So it's
8 virtually impossible to produce that number.
9 BY MR. FREDERICKSON:
10 Q. Okay. So, as far as you understand, it
11 was virtually impossible for Bausch+Lomb to give a
12 specific number of the amount of money it spent on
13 research and development for Lumify?
14 MR. HASFORD: I'll just object to the
15 extent it mischaracterizes the testimony.
16 THE WITNESS: I -- my memory is that it
17 was represented that it would be very difficult,
18 perhaps impossible, to determine the precise R&D
19 dollars for Lumify. But, again, my memory is not
20 perfect.
21 BY MR. FREDERICKSON:
22 Q. If you'd look at paragraph 73 of your

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1 declaration.
2 **A. I'm there.**
3 Q. And towards the end of paragraph 73, you
4 report revenue figures for the second half of
5 2018, 2019, 2020, and the first half of 2021 and
6 the first half of 2022; correct, for Lumify?
7 **A. Yes.**
8 Q. Okay. Those revenue figures, those come
9 from the IRI point-of-sale data; is that right?
10 **A. Yes, I believe so.**
11 Q. That IRI point-of-sales data, that's a
12 third party making projections about what Lumify's
13 revenues are correct?
14 **A. Yes, but you see the confirmation that I**
15 **have in Footnote 8.**
16 Q. So you called it a confirmation, but
17 according to the IRI point-of-sale data, Lumify's
18 revenue was 120.3 million in 2021; correct?
19 **A. Yes.**
20 Q. And according to Bausch+Lomb's S-1
21 financial filing, it's -- Lumify's revenue was
22 reported for 2021 as being $108 million; correct?

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1 **A. Yes.**
2 Q. Okay. And the Lumify point-of-sales
3 data, that does not include sales through online
4 exclusive and Costco; correct?
5 **A. That's correct.**
6 Q. Okay. So there's a discrepancy between
7 what Bausch reports in its public filings with the
8 SEC and what you extrapolated from the IRI
9 point-of-sale data; correct?
10 MR. HASFORD: Objection to the extent it
11 mischaracterizes.
12 THE WITNESS: I didn't extrapolate
13 anything from the point-of-sale data. I reported
14 the point-of-sales data, and those numbers are
15 higher than what Bausch+Lomb reported in the S-1
16 filing, but not significantly higher.
17 BY MR. FREDERICKSON:
18 Q. So just to ask the question again, the
19 IRI point-of-sales revenue numbers are different
20 from the Bausch+Lomb S-1 financials for 2021;
21 correct?
22 **A. Yes.**

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1 Q. Did you undertake any analysis to
2 determine why there was a discrepancy between the
3 Bausch+Lomb reported numbers and the IRI reported
4 revenue numbers for Lumify?
5 MR. HASFORD: Object to the extent it
6 mischaracterizes.
7 THE WITNESS: I did not investigate why
8 there was a difference between the point-of-sales
9 numbers and the S-1 reported numbers for 2021.
10 BY MR. FREDERICKSON:
11 Q. According to the IRI point-of-sales
12 numbers for 2019, Lumify had annual revenues of
13 78.4 million; is that correct?
14 **A. Yes.**
15 MR. FREDERICKSON: If we take a look,
16 it's Exhibit 2045. We can put that on the screen.
17 (Jarosz Deposition Exhibit 2045 was
18 marked for identification and attached to the
19 transcript.)
20 BY MR. FREDERICKSON:
21 Q. Mr. Jarosz, can you see Exhibit 2045?
22 **A. I see an exhibit. I can't confirm that**

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1 **it's 2045.**
2 MR. FREDERICKSON: Can we scroll down so
3 Mr. Jarosz can see the footer at the bottom of it.
4 BY MR. FREDERICKSON:
5 Q. Can you see that?
6 **A. I'm sorry, the same box is sitting over**
7 **that. So I don't know if this is the document.**
8 **No, the box is still covering it. So --**
9 MR. FREDERICKSON: Let's make it really
10 big. Yeah.
11 THE WITNESS: Yes, I see now, 2045.
12 BY MR. FREDERICKSON:
13 Q. Okay. Exhibit 2045 is one of the
14 documents that you cited in your declaration; is
15 that correct?
16 **A. Yes.**
17 Q. And it's a document entitled -- let me
18 do it again.
19 Exhibit 2045 is a document entitled "IRI
20 Innovation Before the New Normal" dated May 2020;
21 is that right?
22 **A. Largely right. I identified it as "New**

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1 **Product Pacesetters: Innovation Before the New**
2 **Normal."**
3 Q. Fair enough.
4 IRI here is the same IRI that was the
5 source of the point-of-sale and panel data that is
6 cited in your declaration?
7 **A. I think that's right, yes.**
8 Q. And do you know what IRI New Product
9 Pacesetters, what that refers to?
10 **A. I'm just going off memory, but I think**
11 **it talks about some of the products that relate to**
12 **this data that did particularly well in the**
13 **marketplace.**
14 Q. Prior to your work in this case, were
15 you familiar with IRI's New Product Pacesetters
16 reports?
17 **A. Maybe, but I don't have a clear**
18 **recollection of that.**
19 Q. And do you understand that this
20 Exhibit 2045 relates to the financial information
21 for various products for the calendar year of
22 2019?

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1 **A. That sounds right.**
2 Q. So can we turn to page 18 of
3 Exhibit 2045. And you can see towards the
4 bottom -- we'll try to scroll it up so it's not
5 blocked.
6 You see Lumify on page 18 of
7 Exhibit 2045? It's No. 9?
8 **A. Yes.**
9 Q. And IRI in, it's Exhibit 2045, identify
10 the revenue for Lumify being $48.2 million.
11 Do you see that?
12 **A. Yes. I don't know what period this**
13 **covers, though. I probably need to look at the**
14 **whole page or more of the report. But, yes, I do**
15 **see that number.**
16 Q. Okay. I'd like you to assume -- and
17 I'll show it to you in a second, but let's assume
18 that the 48.2 million is for the calendar year
19 2019.
20 Is that okay?
21 **A. I don't know, because I don't know what**
22 **your question is going to be.**

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1 Q. Okay. But my question is going to be --
2 **A. At least certain period and certain**
3 **channels and certain products, I would like to**
4 **understand what is covered by that $48.2 million**
5 **number.**
6 Q. You cited this particular page in this
7 particular document in your declaration; correct?
8 **A. I think so. I don't recall citing the**
9 **48.2 number, but I think I cited Lumify as being**
10 **No. 9 on this list, but I'm just going off my**
11 **memory.**
12 Q. Do you know how this list was created?
13 **A. I don't remember, but it may say at the**
14 **top or in another page in this report.**
15 Q. When forming your opinions in citing
16 this particular list, did you seek to understand
17 what the different dollar numbers were that were
18 attributed to the various products that were
19 identified?
20 **A. Not that I recall.**
21 Q. Did you seek to identify or determine
22 why there would be discrepancies between the

80

1 48.2 million reported in this list and the revenue
2 numbers that you determined from the IRI data from
3 2019 of 78.4 million?
4 MR. HASFORD: Object to the extent it
5 mischaracterizes.
6 THE WITNESS: I don't know if there's a
7 discrepancy. Maybe you have something to show me
8 that 48.2 covers the year 2019.
9 BY MR. FREDERICKSON:
10 Q. You don't know one way or the other
11 whether 48.2 covers the year 2019; is that right?
12 **A. Or the whole year, that's correct, I do**
13 **not. Not sitting here right now, I don't.**
14 Q. Take a look at --
15 MR. FREDERICKSON: We can take that
16 down. Thank you.
17 BY MR. FREDERICKSON:
18 Q. We can look at paragraph 113 of your
19 declaration.
20 **A. Okay. I'm there.**
21 Q. Paragraph 113, you write, "According to
22 Mr. Ferris, the commercial strategy for Lumify

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1 since its launch consistently has centered on
2 Lumify's unique ability to reduce eye redness, and
3 all Lumify marketing, promotional, and sales
4 materials are consistent with the FDA-approved
5 indication for producing eye redness."
6 Do you see that?
7 **A. I do, yes.**
8 Q. Again, you're relying on Mr. Ferris'
9 declaration for that information; is that right?
10 **A. Yes, and what I've seen is consistent**
11 **with this. But as kind of the primary cite, it's**
12 **the declaration.**
13 Q. Did you endeavor to look at all Lumify
14 marketing, promotional, and sales materials when
15 forming your opinions in this case?
16 **A. I endeavored to look at the ones that**
17 **were easily obtainable by me, and I looked at**
18 **those. I did not make a specific investigation of**
19 **every single marketing, promotional, and sales set**
20 **of materials.**
21 Q. What did you do to identify the Lumify
22 marketing materials that you were going to look

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1 at?
2 **A. I think some of those were provided to**
3 **me by counsel. And I think we may have separately**
4 **done some Internet searches, including visiting**
5 **the Bausch+Lomb site and the Lumify segment of the**
6 **site.**
7 Q. Other than conducting Internet searches
8 and having promotional material provided to you by
9 counsel, what else, if anything, did you do to
10 determine whether all Lumify marketing,
11 promotional, and sales materials are consistent
12 with the FDA-approved indication for reducing eye
13 redness?
14 MR. HASFORD: Objection to the form of
15 the question to the extent it mischaracterizes.
16 THE WITNESS: Nothing else comes to mind
17 this moment.
18 I guess I should -- there is one other
19 thing that comes to mind. There are DTC ads on
20 TV, to the best of my memory, and I've seen those.
21 BY MR. FREDERICKSON:
22 Q. DTC stands for direct to consumer?

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1 **A. Yes.**
2 Q. And when you say you've seen those, have
3 you seen those because you are a person who
4 watches TV and those commercials happen to be on,
5 or did you see those for purposes of your opinions
6 in the case?
7 **A. The former.**
8 Q. To your knowledge, does any of the
9 marketing, promotional, and sales material for
10 Lumify refer to the pH of Lumify?
11 **A. I don't recall seeing specific mention**
12 **of the pH level. Again, I did not look at every**
13 **single promotional material.**
14 Q. To your knowledge, are you aware of any
15 marketing, promotional, and sales material that
16 refer to the use of Lumify following LASIK
17 surgery?
18 **A. I don't recall one way or the other on**
19 **that.**
20 Q. To your knowledge, are you aware of any
21 Lumify marketing, promotional and sales materials
22 regarding the use of Lumify to treat chronic red

84

1 eye?
2 **A. Same answer. I don't recall one way or**
3 **the other.**
4 Q. Do you know the total amount of money
5 that Bausch+Lomb has spent since 2018 marketing,
6 selling, and promoting Lumify?
7 MR. HASFORD: Object to form.
8 THE WITNESS: I don't think I do. If I
9 do, it's from the Ferris declaration.
10 BY MR. FREDERICKSON:
11 Q. Did you try to figure out or ask Bausch
12 how much it spent marketing, promoting, and
13 selling Lumify since 2018?
14 MR. HASFORD: Same objection.
15 THE WITNESS: I don't recall if I put
16 that request in.
17 BY MR. FREDERICKSON:
18 Q. Do you know if that information is
19 available within Bausch, its actual expenditures
20 in marketing, promoting, and selling Lumify since
21 2018?
22 **A. I don't know.**

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1 Q. Do you know how much money has been
2 spent by the manufacturers of Advanced Eye Relief
3 in the marketing, promotion, and selling of
4 Advanced Eye Relief?
5 **A. I don't think I do, no.**
6 Q. Do you know how much money has been
7 spent by the manufacturer of Clear Eyes in the
8 marketing, promotion, and selling of Clear Eyes?
9 **A. I don't think I do.**
10 Q. Do you know how much money has been
11 spent by the manufacturer of Rohto in the
12 marketing, promotion, and selling of Rohto?
13 **A. I don't think I do.**
14 Q. Do you know how much money has been
15 spent by the manufacturer of Visine in the
16 marketing, promotion, and selling of Visine?
17 **A. I don't think I do.**
18 Q. Do you know if IRI contains data sources
19 that contain and have information about how much
20 various suppliers of eye redness relieving agents
21 spent in marketing in periods of time?
22 **A. I don't think it collects those data,**

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1 **but I could be wrong on that.**
2 **I'd like to amend an earlier answer. To**
3 **the extent that I know how much Bausch+Lomb has**
4 **spent, it may have been in part discussed in the**
5 **Ferris declaration. There was a little bit of**
6 **discussion on that topic.**
7 Q. But the universe of the -- when you say
8 "declaration," you mean deposition, maybe?
9 **A. I meant deposition. I'm sorry, I**
10 **misspoke.**
11 Q. Okay. So the universe of the
12 information that you would have available to you
13 about how much Bausch+Lomb has spent marketing,
14 promoting, and selling Lumify comes from either
15 the Ferris declaration or the Ferris deposition;
16 is that right?
17 MR. HASFORD: Objection to the extent it
18 mischaracterizes.
19 THE WITNESS: I don't know. Those are
20 two likely sources. I may have seen the
21 information otherwise, but I just don't recall it
22 sitting right now.

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1 BY MR. FREDERICKSON:
2 Q. And any information about the amount of
3 money that Bausch+Lomb spent in the marketing,
4 promoting, and selling of Lumify from the Ferris
5 declaration -- I'll try that one again.
6 Any money that Bausch+Lomb spent in the
7 marketing, promotion, and selling of Lumify that
8 you learned of from the Ferris deposition, that
9 was after you submitted your declaration in this
10 case; correct?
11 **A. That's correct.**
12 Q. Go to paragraph 129 of your declaration,
13 please.
14 **A. I'm there.**
15 Q. The last sentence, it's on page 61,
16 reads, "Research on pharmaceutical promotion has
17 found that pharmaceutical promotion is primarily
18 informative with respect to choices among
19 differentiated drugs, but it is persuasive with
20 respect to undifferentiated drugs."
21 Do you see that?
22 **A. Yes, I do.**

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1 Q. You cite to Exhibit 2043; is that
2 correct?
3 **A. Yes.**
4 MR. FREDERICKSON: Let's go ahead and
5 pull up Exhibit 2043.
6 (Jarosz Deposition Exhibit 2043 was
7 marked for identification and attached to the
8 transcript.)
9 MR. FREDERICKSON: And if we can scroll
10 to the first sort of cover page, which is going to
11 be the second page.
12 BY MR. FREDERICKSON:
13 Q. This is a journal article in Management
14 Science entitled "Measuring the Informative and
15 Persuasive Roles of Detailing on Prescribing
16 Decisions."
17 Do you see that?
18 **A. Yes.**
19 Q. And feel free to take a look at your
20 Appendix 2, but can you confirm that this
21 Management Science article is, in fact,
22 Exhibit 2043 that you cited?

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1 **A. I think it is.**
2 MR. FREDERICKSON: And if we can scroll
3 into the first paragraph, which is an abstract
4 looking paragraph, there's a sentence that says,
5 "Using the data," maybe two-thirds of the way
6 down.
7 BY MR. FREDERICKSON:
8 Q. Can you see that?
9 **A. Yes.**
10 Q. And so Exhibit 2043 is a journal article
11 that's based on data for angiotensin-converting
12 enzyme inhibitors with diuretics in their use in
13 Canada; correct?
14 **A. Yes.**
15 Q. And the focus of this particular article
16 Exhibit 2043, that is measuring the informative
17 and persuasive roles of detailing on prescribing
18 decisions; is that correct?
19 **A. That's what's discussed in the abstract**
20 **here. The article itself might have more**
21 **information.**
22 Q. If we scroll up to the top, the title of

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1 the article refers to the roles of detailing;
2 correct?
3 **A. Yes.**
4 Q. And are you aware of any other
5 information in here, promotional or marketing,
6 other than detailing that's being discussed by the
7 authors?
8 **A. I'd have to look at the whole article,**
9 **but I expect that it's primarily oriented to**
10 **detailing.**
11 Q. Do you know if the authors looked at the
12 persuasive versus informative roles of
13 direct-to-consumer advertising?
14 **A. I don't recall without looking at the**
15 **article in detail.**
16 Q. And, again, the focus of Exhibit 2043
17 and the data that it's based on is the use of
18 angiotensin-converting enzyme inhibitors with
19 diuretics; correct?
20 **A. Yes.**
21 Q. Did you do any research into the
22 literature regarding the role of informative and

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1 persuasive advertising and promotion for beauty
2 products?
3 **A. I don't recall doing specific research**
4 **on that specific topic, but I have researched a**
5 **lot about -- over the years about informative and**
6 **persuasive advertising, but I don't recall doing**
7 **it specific to beauty products.**
8 Q. Would you agree that Lumify is a beauty
9 product?
10 MR. HASFORD: Object to the form.
11 THE WITNESS: I haven't characterized it
12 that way, perhaps others have. A term I might
13 feel more comfortable with is "cosmetic," but
14 maybe that's not even right.
15 BY MR. FREDERICKSON:
16 Q. Would you agree that Lumify is a
17 cosmetic product?
18 MR. HASFORD: Same objection.
19 THE WITNESS: That seems to make sense
20 to me. Whether people who are more experienced in
21 this business would agree with me, I don't know.
22 MR. FREDERICKSON: We can take that

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1 down. Thank you.
2 BY MR. FREDERICKSON:
3 Q. Turn to paragraph 100 of your
4 declaration.
5 **A. Did you say 100?**
6 Q. 100, yeah.
7 **A. Okay. I'm there.**
8 Q. Okay. In paragraph 100, you write,
9 "Third parties have recognized Lumify's
10 marketplace success, with companies such as
11 Nielsen and IRI highlighting Lumify's exceptional
12 performance."
13 Do you see that?
14 **A. Yes.**
15 Q. One of the documents you cite there is
16 Exhibit 2125; is that correct?
17 **A. Yes.**
18 MR. FREDERICKSON: Let's take a look at
19 Exhibit 2125.
20 (Jarosz Deposition Exhibit 2125 was
21 marked for identification and attached to the
22 transcript.)

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1 THE REMOTE TECHNICIAN: Stand by, my
2 apologies.
3 MR. FREDERICKSON: You put on -- I think
4 it's 2125, sorry.
5 THE REMOTE TECHNICIAN: My apologies,
6 stand by.
7 BY MR. FREDERICKSON:
8 Q. Okay. We put on the screen, Mr. Jarosz,
9 a press release entitled "Nielsen's BASES Names
10 Lumify Eye Drops to 2020 U.S. BASES Top 25
11 Breakthrough Innovations List."
12 Do you see that?
13 **A. Yes.**
14 Q. Do you recognize this press release to
15 be Exhibit 2125 cited in your declaration?
16 **A. Yes.**
17 MR. FREDERICKSON: If we can go to the
18 second page of Exhibit 2125. There's a paragraph
19 toward the bottom, we can move that up, that says,
20 "Since Bausch+Lomb first launched Lumify."
21 Can you see that?
22 **A. Yes.**

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1 Q. "Since Bausch+Lomb first launched Lumify
2 in 2018, these one-of-a-kind OTC eye drops that
3 contain low-dose brimonidine have become ingrained
4 in popular culture through an ongoing
5 surround-sound integrated consumer campaign
6 highlighting their ability to significantly reduce
7 redness to help eyes appear whiter, brighter and
8 more radiant for up to eight hours when used as
9 directed."
10 Do you see that?
11 **A. Yes.**
12 Q. Okay. Do you have an understanding of
13 what the ongoing surround-sound integrated
14 consumer campaign refers to?
15 **A. I don't. I could speculate, but I don't**
16 **know for sure what they have in mind.**
17 Q. Okay. What is your understanding of
18 what the ongoing surround-sound integrated
19 consumer campaign refers to?
20 **A. My best guess is what they're saying is**
21 **that there's a continuous campaign highlighting**
22 **Lumify, and the campaign has several tentacles to**

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1 **it.**
2 Q. Are you -- do you have actual knowledge
3 of what Bausch+Lomb actually did with respect to
4 this ongoing surround-sound integrated consumer
5 campaign?
6 **A. I don't think so. But just to be clear,**
7 **I think this is Nielsen's representation of what**
8 **the consumer campaign is. I don't think it's**
9 **Bausch+Lomb's representation, but I could be**
10 **wrong.**
11 Q. Right. So do you have an understanding
12 of what Nielsen would be referring to when it
13 refers to Bausch's ongoing surround-sound
14 integrated consumer campaign?
15 **A. Not specifically. I gave you my best**
16 **guess as to what they have in mind, but I don't**
17 **know if I'm right.**
18 MR. FREDERICKSON: Can we go to the next
19 page, which is page 3 of 5 at the top.
20 And maybe we can even -- you'll probably
21 need some context. So we can scroll to the bottom
22 of page 205.

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1 THE WITNESS: You are reminding me that
2 this is a Bausch+Lomb press release. So maybe I
3 was incorrect in saying this is Nielsen's
4 representation. It very well could be
5 Bausch+Lomb's representation, I apologize.
6 BY MR. FREDERICKSON:
7 Q. That's okay.
8 And so for the record again, do you have
9 an understanding of what Bausch+Lomb was referring
10 to in its press release about an ongoing
11 surround-sound integrated consumer campaign?
12 MR. HASFORD: Object to the extent it
13 mischaracterizes.
14 THE WITNESS: I don't know.
15 BY MR. FREDERICKSON:
16 Q. So at the bottom, there's a quote from a
17 Ben Macedo, BASES leader, North America.
18 Do you see that?
19 **A. Yes.**
20 Q. And you understand that Mr. Macedo,
21 BASES leader, North America, that's a Nielsen
22 employee?

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1 **A. I would think at the time he gave this**
2 **quote he was a Nielsen employee, yes.**
3 Q. And at the bottom on the top of page 3,
4 the end of this paragraph, he states, "Bausch+Lomb
5 successfully married a novel formulation with a
6 fresh national marketing campaign that caught fire
7 in the popular culture and on social media,
8 spurring Lumify to capture the hearts of
9 consumers."
10 Do you see that?
11 **A. Yes.**
12 Q. Do you have any understanding of what
13 Mr. Macedo was referring to when he said that the
14 Bausch+Lomb national marketing campaign caught
15 fire in the popular culture?
16 **A. Not other than what I read right here.**
17 Q. Okay. Do you have an understanding of
18 what Mr. Macedo was referring to with respect to
19 what Bausch+Lomb's marketing campaign -- what
20 happened with it on social media?
21 **A. Not other than what I see here, no.**
22 Q. Do you know what Bausch+Lomb's marketing

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1 strategy for Lumify on social media was?
2 **A. I don't know exactly what your question**
3 **is, but I think it did advertising through social**
4 **media outlets.**
5 Q. And social media outlets include
6 platforms like Facebook, Twitter, TikTok, things
7 like that?
8 **A. That's a general definition of social**
9 **media platforms. Whether the campaign was on all**
10 **of those, I don't know.**
11 Q. Okay. Do you know what social media
12 platforms Bausch+Lomb marketed Lumify on?
13 **A. Sitting here right now, I do not. I may**
14 **have known, but I don't remember.**
15 Q. As part of your review of Bausch+Lomb's
16 marketing material, the websites, and the
17 information provided to you by counsel, did you
18 undertake any effort to identify Bausch+Lomb's
19 marketing presence on social media platforms?
20 **A. I did not. It's possible that people on**
21 **my team did, but I'm not aware of that.**
22 Q. And you have no knowledge one way or

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1 another whether any members of your team working
2 on this matter investigated Bausch+Lomb's
3 marketing content on any social media platform;
4 right?
5 **A. That's correct.**
6 MR. FREDERICKSON: We can take that
7 down. Thank you.
8 BY MR. FREDERICKSON:
9 Q. Let's take a look at paragraph 126 of
10 your declaration.
11 **A. Okay. I'm there.**
12 Q. The last sentence, which starts at the
13 bottom of page 59 and spills over into page 60,
14 reads, "Several beauty websites featured Lumify on
15 end-of-year awards lists based on its unique
16 formulation and lack of rebound redness, stating
17 that Lumify, quote, doesn't use the harmful
18 redness-correcting science of every other
19 over-the-counter eye drop - which means your eyes
20 aren't twice as red when they wear off, and,
21 quote, unlike other redness relief drops, [Lumify]
22 doesn't leave you with more redness later."

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1 Do you see that?
2 **A. Yes.**
3 Q. And then you cite three exhibits,
4 Exhibits 2101, Exhibit 2114, Exhibit 2144; is that
5 correct?
6 **A. Yes, that's right.**
7 Q. Okay. And those are websites that
8 support that sentence; correct?
9 **A. Probably, but let me know double-check.**
10 **Yes, that appears to be the case. And I**
11 **also see that I have used the term "beauty."**
12 Q. Okay. Those websites, how did you find
13 those?
14 **A. People on my team probably did some**
15 **searching around for mentions of Lumify and were**
16 **directed to those sites, but I could be wrong.**
17 Q. Do you know one way or the other if
18 those sites were identified based on searches from
19 your team or direction provided by others?
20 **A. My best guess is that it was searches by**
21 **our team, but I'm not ruling out the possibility**
22 **that someone directed our attention to those**

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1 **three.**
2 Q. I prefer you not to guess. So if you
3 don't know, you can just say, I don't know. But
4 do you know whether those three websites were
5 identified by searches from your team, or were you
6 or your team directed to them?
7 MR. HASFORD: Objection; asked and
8 answered.
9 THE WITNESS: I don't know for sure. My
10 best guess is that our team independently found
11 those, but I don't know for sure.
12 BY MR. FREDERICKSON:
13 Q. Okay. And what criteria did your team
14 use on whether it was going to include or exclude
15 websites found off of Internet searching in your
16 expert declaration?
17 **A. I don't know, but my best guess is we**
18 **searched on the term "Lumify."**
19 Q. And if there was a website that
20 mentioned Lumify, it was going to be included in
21 your declaration?
22 MR. HASFORD: Objection to the extent it

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1 mischaracterizes the witness' testimony.
2 THE WITNESS: Not necessarily. I think
3 probably people on my team looked at websites that
4 talk about Lumify and brought to my attention the
5 things that seemed most useful in our
6 investigation.
7 BY MR. FREDERICKSON:
8 Q. Was there a standard -- a reliability
9 standard that your team used as to whether it was
10 going to include a particular website in your
11 expert declaration?
12 MR. HASFORD: Objection to the form of
13 the question.
14 THE WITNESS: I don't know what you mean
15 by reliability standard.
16 BY MR. FREDERICKSON:
17 Q. Well, there's a lot of -- you can agree
18 there's a lot of information on the Internet;
19 correct?
20 **A. Yes.**
21 Q. Some of that information is less
22 reliable than other information; correct?

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1 **A. I've heard that, yes.**
2 Q. And not everything that a website
3 publishes or every list that a website creates is
4 a reliable list; correct?
5 **A. Probably -- correct.**
6 Q. Okay. And so what, if anything, did
7 your team do to determine whether the lists that
8 are cited in paragraph 126 of your report are
9 reliable?
10 **A. I'm sorry, the lists that are cited?**
11 Q. Yeah, the sentence reads, "Several
12 beauty websites featured Lumify on end-of-year
13 awards lists."
14 Do you see that?
15 **A. Thank you. You refreshed my memory.**
16 **I don't know. I don't know that we**
17 **separately sought to determine the reliability of**
18 **those lists, but we mentioned several lists, and**
19 **they seem to be consistent in reporting that**
20 **Lumify was successful and different from other**
21 **things that were available.**
22 Q. How many beauty websites with

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1 end-of-year awards lists did you or your team look
2 at in forming your opinions?
3 **A. I don't know.**
4 Q. Did you or your team come across any
5 beauty websites that contained end-of-year awards
6 lists that did not include Lumify?
7 **A. I don't know. The fact that we probably**
8 **searched on the term "Lumify" makes me think that**
9 **it's unlikely, but it's possible.**
10 MR. FREDERICKSON: Why don't we take
11 another break. I may be nearing the end of the
12 deposition.
13 MR. HASFORD: All right. Sounds good.
14 THE VIDEOGRAPHER: We are going off the
15 record at 11:07 a.m.
16 (Recess from the record.)
17 THE VIDEOGRAPHER: We are back on the
18 record at 11:18 a.m.
19 MR. FREDERICKSON: Mr. Jarosz, thank you
20 very much for your time. I have no further
21 questions.
22 THE WITNESS: Thank you very much.

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1 MR. HASFORD: I have a short amount of
2 redirect here.
3 EXAMINATION BY COUNSEL FOR THE PATENT OWNER
4 BY MR. HASFORD:
5 Q. Let's pull up the Ferris declaration,
6 which we looked at earlier. It's Exhibit 2023.
7 John, if you'd like to look at your hard
8 copy. If y'all want to pull it up on the screen,
9 that's fine, as well.
10 Do you recall Mr. Frederickson asking
11 you questions earlier today about the Ferris
12 declaration, Exhibit 2023?
13 **A. Yes.**
14 Q. Turn, if you would, to paragraph 7,
15 page 3.
16 **A. I'm there.**
17 Q. Are you familiar with IQVIA, spelled
18 I-Q-V-I-A?
19 **A. Yes.**
20 Q. What is IQVIA?
21 **A. They're an aggregator of data that**
22 **virtually every pharmaceutical firm relies upon.**

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1 **And they, in many dimensions, are thought of as**
2 **the gold standard for data on shipments and**
3 **prescriptions and volumes and revenues and prices**
4 **for a variety of therapies.**
5 Q. In your opinion, are IQVIA data
6 reputable?
7 **A. Absolutely.**
8 MR. FREDERICKSON: Objection; beyond the
9 scope.
10 Sorry, I'll need to lodge objections
11 too. Beyond the scope.
12 BY MR. HASFORD:
13 Q. Have you reviewed IQVIA data from
14 surveys of eye care professionals?
15 **A. Yes, I have.**
16 MR. FREDERICKSON: Objection.
17 BY MR. HASFORD:
18 Q. Based on IQVIA data, prior to Lumify,
19 approximately what percent of eye care
20 professionals recommended any redness relievers to
21 their patients?
22 MR. FREDERICKSON: Objection.

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1 THE WITNESS: Based on the data that I
2 looked at, less than 10 percent.
3 BY MR. HASFORD:
4 Q. Based on IQVIA data since the launch of
5 Lumify, approximately what percent of eye care
6 professionals are recommending redness relievers
7 to their patients?
8 MR. FREDERICKSON: Objection.
9 THE WITNESS: Approximately 50 percent.
10 It's sometimes a little bit lower, sometimes a
11 little bit higher, and it's changed slightly over
12 time, but roughly 50 percent.
13 BY MR. HASFORD:
14 Q. Approximately what percent of those
15 recommendations are for Lumify?
16 MR. FREDERICKSON: Objection.
17 THE WITNESS: Approximately 85 percent.
18 BY MR. HASFORD:
19 Q. You may put that document aside.
20 Are you aware that Lupin has filed an
21 ANDA seeking to market generic copies of Lumify?
22 **A. Yes.**

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1 MR. FREDERICKSON: Objection.
2 BY MR. HASFORD:
3 Q. How, if at all, does Lupin's filing of
4 an ANDA for a generic copy of Lumify relate to
5 your opinions on commercial success?
6 MR. FREDERICKSON: Objection; scope.
7 THE WITNESS: It's confirmatory of the
8 conclusions that I drew on reveal preferences;
9 that is, it's confirmation that another major
10 pharmaceutical company wants into this business.
11 Companies like Lupin and Slayback want into this
12 business typically because it's likely to be a
13 profitable and successful business.
14 MR. HASFORD: Nothing further from us at
15 this point.
16 MR. FREDERICKSON: I have no further
17 questions.
18 Thank you again, Mr. Jarosz.
19 THE WITNESS: Thank you very much.
20 THE VIDEOGRAPHER: This marks the end of
21 the deposition of John C. Jarosz.
22 We're going off the record at 11:21 a.m.

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1 A C K N O W L E D G E M E N T
2
3 STATE OF MARYLAND)
ss
4 COUNTY OF MONTGOMERY)
5
6 I, JOHN JAROSZ, hereby
7 certify, I have read the transcript of my
8 testimony taken under oath in my deposition of
9 November 11, 2022; that the transcript is a true,
10 complete and correct record of what was asked,
11 answered and said during this deposition, and that
12 the answers on the record as given by me are true
13 and correct.
14
15 _____
JOHN JAROSZ
16
17
18 Sworn and subscribed to before me
19 this ____ day of _____, 2022.
20
21 _____
Notary Public
22

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1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC
2 I, Matthew Goldstein, Certified Reporter
3 and Notary Public within and for the State of
4 Maryland do hereby certify:
5 That JOHN JAROSZ, the witness whose
6 deposition is hereinbefore set forth, was duly
7 sworn by me before the commencement of such
8 deposition and that such deposition was take
9 before me and is a true record of the testimony
10 given by such witness.
11 I further certify that the adverse
12 party, EYE THERAPIES, LLC, was represented by
13 counsel at the deposition.
14 I further certify that the deposition of
15 JOHN JAROSZ, occurred remotely, on Friday,
16 November, 11, 2022, commencing at 9:06 a.m. to
17 11:21 a.m.
18 I further certify that I am not related
19 to any of the parties to this action by blood or
20 marriage, I am not employed by or an attorney to
21 any of the parties to this action, and that I am
22 in no way interested, financially or otherwise, in

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1 the outcome of this matter.
2
3 IN WITNESS WHEREOF, I have hereunto set my hand
4 this 19th day of November, 2022.
5
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7
8 _____
9 NOTARY PUBLIC IN AND FOR THE MARYLAND
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